

Price control appeals under section 193 of the Communications Act 2003: CMA guidance

Response to consultation document

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1. Introduction

- 1.1 On 24 July 2017, the Competition and Markets Authority (CMA) opened a six-week consultation on draft guidance describing the procedure that the CMA will use when determining price control matter references under section 193 of the Communications Act 2003 (the Act), following the coming into force of amendments to the Act by the Digital Economy Act 2017 (DEA17).

Background

- 1.2 The Act gives Ofcom the power to impose various kinds of specific condition on communications providers, including conditions on operators that Ofcom has determined to have significant market power (SMP conditions).¹ The provisions of the Act relating to SMP conditions implement Articles 14 to 16 of the Framework Directive² and Articles 8 to 13 of the Access Directive.³ The Act sets out the various conditions that may be imposed as SMP conditions, including price controls.⁴
- 1.3 Sections 192 to 196 of the Act implement Article 4 of the Framework Directive and provide appellants with a right to appeal to the Competition Appeal Tribunal (CAT) against certain decisions of Ofcom, including those setting SMP conditions and setting price controls. Section 193 of the Act requires the CAT to refer any price control matter⁵ raised by the appeal to the CMA for determination. Section 193 of the Act requires the CAT to apply the CMA's determination when deciding the appeal,⁶ unless the CAT decides that the CMA's determination would fall to be set aside on an application for judicial review.⁷
- 1.4 Under section 193 of the Act, the determination of a price control reference is to be carried out on behalf of the CMA by a group, constituted for the purpose

¹ Section 45(2)(b) of the Act.

² Directive 2002/21/EC on the common regulatory framework for electronic communications networks and services ('the Framework Directive'). Under Article 14(2) of the Framework Directive an undertaking is deemed to have SMP if it enjoys 'a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers'.

³ Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities ('the Access Directive'). Article 13 of the Access Directive makes provision for price control obligations on undertakings designated as having SMP.

⁴ Which may be set in accordance with sections 87(9), 91 or 93(3) of the Act.

⁵ Pursuant to section 193(10), a 'price control matter' is defined as an imposition of any form of price control authorised by sections 87(9), 91 or 93(3) of the Act.

⁶ Section 193(6) of the Act.

⁷ Section 193(7) of the Act.

by the CMA Chair and consisting of at least three CMA panel members.⁸ At least one, but not more than three, member(s) of the group appointed to decide references under the Act must be drawn from the CMA's Specialist Communications Panel appointed for this purpose.⁹ The CMA's group is supported by a team of CMA specialist staff.

Changes made by the Digital Economy Act 2017

- 1.5 Section 87 of the DEA17 makes a number of amendments to the Act in order among other things to change the standard of review that the CAT applies in determining certain appeals.
- 1.6 The section 87 DEA17 amendments entered into force on 31 July 2017.¹⁰ As result of these amendments the CAT is required to determine certain appeals, including those against decisions of Ofcom imposing SMP conditions and setting price controls, by reference to the grounds of appeal set out in the Notice of Appeal and by applying the same principles as would be applied by a court on an application for judicial review;¹¹ and the CMA is required to make its determination on a section 193 price control matter reference having regard to judicial review principles.¹² Prior to the amendments entering into force, the CAT was required to decide appeals under section 192 of the Act on the merits and by reference to the grounds of appeal set out in the Notice of Appeal¹³ and the CMA has had regard to this standard when making its determination of price control matter references.
- 1.7 The requirement that the price control matter reference to the CMA must be determined in accordance with the CAT Rules, any directions given by the CAT and using such procedures as the CMA considers appropriate has remained.¹⁴
- 1.8 The section 87 DEA17 amendments also revise the decisions the CMA and CAT may take: in future, the action that the CAT may take following an appeal is to dismiss the appeal or quash the whole or part of the decision to which it relates and where it quashes the whole or part of that decision, remit the matter back to Ofcom with a direction to reconsider and make a new decision in accordance with its ruling.¹⁵

⁸ The group appointed to decide price control references under the Act constitutes a special reference group for the purpose of the application of the [CMA rules of procedure for merger, market and special reference groups](#) (CMA17).

⁹ Schedule 4, paragraph 38(1) and (4) to the Enterprise and Regulatory Reform Act 2013.

¹⁰ Digital Economy Act 2017 (Commencement No.1) Regulations 20017/765, Regulation 2.

¹¹ Section 194A(2) of the Act, when it enters into force.

¹² Sections 193(2) and 194A(2) of the Act, when the amendments enter into force.

¹³ Section 195(2) of the Act.

¹⁴ Ibid.

¹⁵ Section 194A(3)(a) and (b) of the Act.

Scope and purpose of the consultation

- 1.9 The Competition Commission, one of the CMA's predecessor bodies, published CC13 *Price control appeals under section 193 of the Communications Act 2003: Competition Commission Guidelines* (April 2011) in order to assist parties and their advisers involved in price control references under section 193 of the Act. This guidance was adopted unamended by the CMA board.
- 1.10 The CMA proposed to publish new guidance based on CC13 that describes the procedure that the CMA will use when determining price control references under section 193 of the Act, taking into account, as appropriate, the amendments made to the Act by section 87 of the DEA17.
- 1.11 The CMA therefore sought views in a consultation on draft *Price control appeals under section 193 of the Communications Act 2003: CMA guidance*.
- 1.12 We are asked consultees the following question:
- Do you have any comments on the draft guidance *Price control appeals under section 193 of the Communications Act 2003*?**
- 1.13 The consultation closed on 4 September 2017.
- 1.14 We received one response to the consultation from BT Group plc. A non-confidential version of its response is available on the consultation page.
- 1.15 This document summarises the key comments made by the respondent and our response. It then sets out the changes that we have made to the guidance, following the consultation. It also gives our reasons where we have not made changes following the respondent's comments.

2. Issues raised by the consultation and our response

- 2.1 As noted above at paragraph 1.14, the CMA received one response to the consultation.
- 2.2 The respondent provided comments in relation to changes to the CMA's standard of review in light of the DEA17, changes to the CMA's process, hearing and documents and changes to the CMA's approach to remedies in light of the DEA17.
- 2.3 Clarification of the CMA's approach to the recovery of its costs was welcomed, but nevertheless the respondent made some suggestions for further changes that in the respondent's view could further aid transparency and make parties better informed.
- 2.4 The respondent also provided some comments in relation to other matters set out in the CMA's draft revised guidance.

Standard of Review

- 2.5 Whilst noting that the DEA17 amends the standard of review such that the CMA must now apply the same principles as would be applied by a court on an application for judicial review, the respondent noted that the CMA must ensure that the merits of the case before it are duly taken into account pursuant to Article 4 of the Framework Directive. In this regard, the respondent suggested that it would be beneficial for the CMA to be explicit in its guidance that the standard of review will continue to comply with Article 4 of the Framework Directive.

CMA response

- 2.6 The CMA must make its determination by reference to the grounds of appeal and having regard to the same principles as would be applied by a court on an application for judicial review.¹⁶ The CMA notes that under Article 4 of the Framework Directive, member states must ensure that the merits of the case are duly taken into account in an appeal and has added some additional text to footnote 11 to make this clear.

¹⁶ Sections 193(2) and 194A(2) of the Act.

CMA process, hearings and documents

- 2.7 While noting that the precise time required at each stage of the appeal will likely depend on the facts and circumstances of each case, the respondent stated that if the reference is made on or around the same time as the defence, the CMA process may need to provide time for receipt of interveners pleadings before the appellant can complete its reply to Ofcom's defence and the intervention statement(s).
- 2.8 Subject to its point regarding the period of time allowed for the appellant's reply and its comments in relation to clarification hearings, the respondent agreed with the CMA's proposal to dispense with written core submissions.
- 2.9 The respondent noted that to the extent that clarification hearings provide parties with the opportunity to briefly present their case, identifying what they consider to be the kernel of the issues between them, and outline why, in simple terms, they consider Ofcom has erred (or not), such hearings will be valuable and should assist in the efficient analysis of the reference by the CMA. In this regard, the respondent suggested that there should be an assumption that clarification hearings to enable a better understanding of any technical or other key issues relating to the reference will normally be held as part of the Initial Stage of the process.

CMA response

- 2.10 The CMA acknowledges that the precise time required at each stage of the appeal will likely depend on the facts and circumstances of each case. In this regard, the CMA notes that paragraph 3.3 of its draft revised guidance states that the timetable provided is based on the assumption that on the date that the reference is received from the CAT, the CMA will have received Ofcom's defence in response to the appellant's Notice of Appeal. The CMA has added some text to paragraph 3.3 to clarify that it may allow the appellant(s) additional time in which to submit its reply to Ofcom's defence depending upon the circumstances. In this regard, the CMA notes that it has also included a footnote to Figure 2 indicating that the prescribed timeframe may be extended by up to two weeks, depending upon the circumstances.
- 2.11 The CMA has also added some text to paragraph 3.11(c) and Figure 2, as well as a new paragraph (paragraph 4.5) to clarify that the appellant will be provided with a reasonable opportunity to provide the Appeal Group with a reply to any intervention statements relevant to the reference.
- 2.12 The CMA considers that the need for a clarification hearing will depend on the facts and circumstances of each case and has accordingly decided not to

introduce an assumption that clarification hearings will normally be held as part of the Initial Stage of the process in order to maintain flexibility.

Remedies

2.13 The respondent noted that it does not consider that changes made by the DEA17 preclude the CMA from providing guidance or making recommendations as to the way in which errors by Ofcom specified in the draft determination might be remedied. While noting that remedies hearings may not always be necessary, the respondent stated that if the CMA is minded to make a ruling on the new decision that Ofcom should make in order to rectify an identified error, there should be an opportunity for the parties to make representations on this.

CMA response

2.14 The CMA notes that the nature of the error(s) identified in the CMA's draft determination may suggest how the error(s) should be corrected and that in that case the remedies issues would be largely related to the appropriate implementation of the correction.

2.15 To the extent that establishing that Ofcom had erred might not of itself establish what Ofcom should have done, the CMA notes that it is not precluded from suggesting in its determination how any errors Ofcom specified in the draft determination might be addressed. However, the CMA also notes that should the CMA's determination find that Ofcom has erred, the CAT is required to quash the whole or part of the decision to which it relates and where it quashes the whole or part of that decision, remit the matter back to Ofcom with a direction to reconsider and make a new decision in accordance with the CAT's ruling.¹⁷ Accordingly, the CMA considers that Ofcom will have discretion to provide the parties with an opportunity to make representations in order to rectify an identified error following remittal.

Costs

2.16 While welcoming the CMA's expansion of its guidance in relation to the recovery of its costs, the respondent suggested that it would be helpful for the CMA to provide further transparency by setting out how it will decide whether

¹⁷ Section 193A(3)(a) and (b) of the Act. Unless the CAT decides that the CMA's determination would fall to be set aside on an application for judicial review (section 193(7)).

it will seek to recover some or all of the costs that it has incurred, and the types of information it will disclose to parties during the consultation stage.

- 2.17 The respondent also noted that it considers that it would aid transparency (and be a guide for potential appellants) for the CMA to publish its reasoning for how it has arrived at its decisions and how its claim was quantified on its website. The respondent suggested that the CMA could do this by publishing a non-confidential version of its letter of explanation as sent to the parties setting out its claim the reasons for its decisions.
- 2.18 In addition, the respondent noted that given that recent price control reviews undertaken by the CMA have involved two appeals which have been heard together, it would be helpful for the guidance to address this point and to make it clear that the CMA will take reasonable steps to ensure that the costs of each reference can be identified.

CMA response

- 2.19 Paragraph 8.5 outlines the factors that the CMA will take into account when considering whether to recover some or all of its costs. The CMA has added some text to footnote 28 cross-referring to paragraph 8.5 to clarify this. The CMA will disclose the types of information used to reach its decision for recovering its costs from a party or parties to the appeal in the proportions specified in the Costs Order.
- 2.20 At paragraph 8.6 and footnote 15, the CMA has also added some text noting that it may publish non-confidential versions of the Costs Order and its accompanying reasons.
- 2.21 In addition, the CMA notes that at paragraph 8.4 it has clarified that where it has considered two or more references together, it will separately identify its costs incurred by work common to those references and by work specific to each.

Other matters

- 2.22 The respondent suggested that to ensure consistency the CMA should amend paragraph 2.6 to reflect the wording used in paragraph 3.10 in relation to the evidence that the CMA will rely on to answer the reference questions.
- 2.23 In addition, the respondent invited the CMA to consider whether it would be possible, and would fit within the legal framework, for the Costs Order to be made in a sufficiently timely manner that would allow any challenge to this to

be considered by the CAT on the judicial review basis at the final stage of the main proceedings, rather than as a completely new and separate appeal.

CMA response

- 2.24 The CMA agrees with the respondent and has therefore amended paragraph 2.6 to reflect the wording used in paragraph 3.10 to ensure consistency.
- 2.25 As a practical matter, the CMA is unlikely to be able to determine the total amount of its costs in an appeal until after the final determination has been submitted to the CAT. The CMA notes that any Costs Orders must be made as soon as reasonably practicable after the making of the determination of the reference.¹⁸ However, what is reasonably practicable will necessarily depend upon the circumstances of the case, especially in view of the strict timeframes for making a determination on the reference. It may be appropriate, in some circumstances, for the CMA to delay consulting on a draft Costs Order, as was the case in the recent Business Connectivity Market Review appeal, where the consultation was delayed until the CAT had handed down its judgment on the VULA CMA Costs Order.

¹⁸ And consider section 193A(5)(a) of the Act.