

Guide to price control appeals under section 193 of the Communications Act 2003: Competition Commission Guidelines

Summary note of responses

Introduction

This note summarizes the substantive responses to the consultation on the draft Guide to price control appeals under section 193 of the Communications Act 2003. Five respondents provided substantive comments on the draft while a further three endorsed the draft in general terms.

Use of evidence

The consultation responses raised two issues in regard to evidence:

- (a) the CC's willingness to take account of evidence which might provide new lines of arguments; and
- (b) the CC's ability to take into account evidence that was not available to Ofcom at the time of the making of its original decision.

Willingness to take new evidence

There are a number of comments in relation to the CC's willingness to assess additional evidence or see further evidence during the course of the determination.

Though respondents largely agreed that new evidence should be limited they noted the possibility that it might be necessary to provide new evidence and reasoning, particularly in response to the Defence and any Statements of Intervention, and this should not be unreasonably excluded.

Three respondents stressed the need for other parties to have the opportunity to challenge new evidence and arguments both on the basis of admissibility and factual accuracy. One respondent suggested that this challenge may be done by cross-references to other submissions which refuted or clarified that information. It said that this would be important to ensure that the CC had all the relevant and accurate information on which to base its decision.

Respondents endorsed the CC's current practice of providing transcripts of bilateral hearings to all parties, and enabling the other parties to provide comments on these transcripts. One respondent noted that, were there not an opportunity to comment, parties might be encouraged to bring new evidence or make factual allegations that, because they could not be challenged for accuracy or admissibility, could be made in a self-serving way.

Ability to take new evidence

Respondents noted the issues concerning whether the CC should assess new evidence that may not have been available to Ofcom at the time of its decision, in particular the need to maintain legal certainty. One respondent referred to the case of *BT v Ofcom & Hutchison 3G* [2011] EWCA Civ 245 which has since been decided. The Court of Appeal confirmed the Competition Appeal Tribunal's (CAT's) view that there was no statutory basis for restricting

the introduction of fresh evidence in the context of a Communications Act 2003 appeal and the common law test limiting new evidence does not apply to the CAT. The relevant rule is CAT Rule 22(2) which provides that the CAT may admit or exclude evidence whether or not that evidence was available to the respondent (Ofcom) when the disputed decision was taken. The Court of Appeal held that parties ought to be encouraged to present their case to Ofcom as fully as possible: there are questions of potential prejudice (costs and delay) to other parties in allowing the introduction of material that could reasonably have been placed before Ofcom. Further the admission of fresh evidence is not a right and it is for the party that wants to introduce the evidence to show good reason why it should be admitted. The question for the CAT would be whether in all the circumstances it considers that it is in the interests of justice for the evidence to be admitted.

Action

Willingness to take new evidence

The guidelines have been amended to clarify that parties may comment on the admissibility and *factual accuracy* of other parties' core submissions, hearing transcripts and responses to written questions. The CC considers it important to maintain control of the process, whilst obtaining valuable input on accuracy and ensuring that parties do not have an incentive to mislead.

Ability to take new evidence

No change to the guidelines. The CC's ability to receive further evidence is apparent as is the warning that this is seen as exceptional.

Further iterations/second core submission

Respondents expressed some concern that the CC was limiting the number of iterations/opportunities to make submissions. One party suggested that a second core submission would be an appropriate means to ensure that the parties' 'rights of defence' and ability to participate meaningfully in the CC reference process were protected, while ensuring that the CC was not submerged by constant additional submissions. It was suggested that this second core submission should be submitted a short period before the CC's provisional determination. The second core submission would in effect be an updated version of the original core submission, with the parties updating in track changes any developments or changes to their position resulting from the CC process (eg the bilateral may lead to clarifications on the facts, or a better understanding of the issues, or the appellant may decide that it is no longer relying on certain grounds of appeal).

Action

No change to the guidelines. In framing the guidelines the CC has been concerned to maintain a level of control over inter-party disputes whilst ensuring that it has sufficient information to conduct the analysis necessary for its determination. As set out above, in addition to being able to comment on the CC's thinking as set out in the provisional determination, parties will also have the opportunity to ensure the admissibility and accuracy of the arguments and evidence that the CC relies upon. A further submission would place pressures on the timetable and risk reopening matters of contention between the parties.

Hearings agenda/topics letters

Two respondents encouraged the CC to provide as much information as possible in the topics letters provided ahead of hearings. This includes a list of pre-prepared questions and as much information as possible as to the CC's views and concerns.

Action

No change to the guidelines. The guidelines provide for a pre-hearing letter and agenda to the parties. The current drafting provides that the CC will generally send parties an annotated hearing agenda to assist with their preparation. On this basis the CC may, depending on the circumstances of the case send a more detailed letter, including questions, if in the view of the CC this is necessary and/or helpful.

Working level bilaterals

One respondent suggested 'working level bilaterals' between each party and CC staff, where there would be greater scope for follow-up questions and discussions, more interaction, and more ability for the staff to ask questions. This would ideally happen both before and after the formal bilateral hearings, and would replace the need for written questions.

Action

No change to the guidelines. The current structure allows for staff meetings and written questions. Within this structure the CC may decide to hold staff 'hearings' if required and it retains the option of requesting clarification in writing, which is important given the detailed nature of some of the issues the CC is required to determine.

Super confidentiality

One respondent suggested that the reference to super confidentiality should be deleted as it encouraged more applications to be made and it was simpler to have one set of rules. Another agreed that such claims should be truly exceptional and substantiated.

Action

Paragraph 7.3 has been amended to emphasize the truly exceptional nature of such an arrangement.

Timing

A number of respondents expressed concern over the time allowed for submissions and responses. One respondent stated that two to four weeks may be insufficient time to provide core submissions. Given the likely number of appellants and interveners, providing comprehensive core submissions within a short period of time was likely to be counter-productive and parties should be given four to six weeks for core submissions.

Another argued that it was critical that the parties had sufficient time to review Ofcom's remodelling and understand what it meant in practice. Parties should, therefore, have two to three weeks after receiving Ofcom's remodelling to respond. This respondent also stated that two weeks was insufficient for the response to the remedies letter. The respondent stated that in the case of adjustments to price controls, it was difficult for the parties to comment until the exact monetary adjustment was quantified. It therefore considered that the

deadline should be two to three weeks after the later of (i) the CC issuing the remedies letter, or (ii) the CC or Ofcom having quantified what the exact monetary adjustment would be in pence per product in the case of adjustments to charge controls.

Action

The guidelines have been amended to emphasize that the CC needs to be fluid about timing during the remedies stage and that there is a difference between making points of principle and responding on points of detail in relation to modelling. Parties should be encouraged to make points of principle as soon as possible even where details are not yet available.

There is no change in relation to the time allowed for the core submission. The two- to four-week time frame is indicative. In stipulating a deadline the CC will have regard to the progress made ahead of a reference, the nature of the appeal, number of parties as well as the need to conduct the determination in a particular time frame.