

Dispute resolution under the new EU Directives

A statement by Oftel and the
Radiocommunications Agency

28 February 03

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Summary

S1 This document sets out how Oftel, and the Radiocommunications Agency (RA) will meet the new deadline for dispute resolution set out in Articles 20 and 21 of the new European Framework Directive. Under the new Directives, Oftel and RA are required to resolve disputes in four months.

S2 In competitive markets, disputes regularly arise between undertakings. Market forces lead to these being resolved either through commercial negotiation or by some form of arbitration. Alternatively, the undertakings decide not to do business with each other. No issues of consumer detriment or public policy arise in this situation. In telecommunications, however, the presence of operators with significant market power and the existence for public policy reasons of obligations on the generality of operators means that market mechanisms may not always work effectively and/or that there will be welfare loss from a failure to agree. Regulation is therefore needed to ensure that neither of these outcomes occur.

New deadline

S3 Oftel already has a duty to resolve a wide range of disputes and is currently bound by the duty in the Interconnection Directive to take steps to resolve disputes in six months. The new Directives reduce this deadline in relation to all classes of disputes under the new framework to four months. They also extend the scope of issues to include disputes about the use of radio spectrum. Meeting this target will be challenging for Oftel and RA and will require significant change in process and systems. It will also require behavioural change on the part of both complainants and the targets of complaints. These changes will be in addition to the significant steps that Oftel has already taken in the course of 2002 to improve the management of its compliance and investigation function.

More changes

S4 Under the current regime, Oftel has often been asked to make major decisions about access obligations when resolving a dispute. Under the new regime, Oftel will usually address such decisions via own initiative investigations or market reviews. Oftel will run such investigations and reviews promptly, but will not be bound by the statutory dispute resolution time limit.

Tighter submission requirements

S5 One unfortunate result of the existence of regulatory dispute resolution can be that complainants have an incentive to submit disputes without first establishing whether commercial negotiation is sufficient to resolve the issue. In these guidelines, Oftel has specified what it needs to see in terms of evidence and supporting arguments before accepting a case. This information includes clear evidence of commercial negotiation, clear statements by the complainant on their

preferred solution, information and background to a complaint and a clear assessment of the precise condition which the target of the complaint is alleged to be infringing. Oftel will refuse to consider referrals that fall significantly short of its published criteria. This will ensure that those complainants who have the strongest and most well developed cases are not penalised by Oftel staff resource being diverted into clarification of complaints which are less thoroughly prepared.

S6 Oftel recognises that a refusal to enter into discussions or tactics designed to stall negotiations can and have been employed by some operators. In such cases the complainant will need to show that it has taken reasonable steps to engage the other party in commercial negotiations. However, the onus is not entirely on the party seeking to enter into discussions/negotiations. Oftel will usually accept as a dispute, a complaint which suggests that one party has tactically refused to negotiate.

Establishing the scope of a dispute

S7 Oftel will be more rigorous in establishing the scope of a dispute and in ensuring that this scope does not change in the course of its investigation. Where negotiations have broken down Oftel will therefore expect complainants to be definite about the precise issues in dispute or the precise terms of a contract to which they object. When accepting a dispute, Oftel will publish a statement of the scope for that dispute and will not, except in special circumstances, broaden the scope during its investigation.

Alternative dispute resolution

S8 The Directives allow National Regulatory Authorities (NRAs) to refuse to determine disputes if Alternative Dispute Resolution (ADR) mechanisms are available. As a general rule, Oftel will decline to adjudicate disputes between operators which are not dominant and will encourage them to use some form of ADR. The one exception may be in cases when either a general condition or a specific obligation has been imposed on operators without SMP and the dispute refers directly to this condition or obligation.

Formal information gathering powers

S9 To meet the new deadlines Oftel will need to use its formal information gathering powers more frequently. As a general rule, therefore, Oftel will seek all the information that it needs to resolve the dispute, using its formal powers. Oftel has already implemented this change due to the benefits it offers under the current regime. Oftel's standard practice is – and continues to be - to send a draft of the information request and offer five working days for comment on the relevance of the information sought, other relevant data which may be available and the practicality in providing the information in the given timescale. The requests are amended or confirmed in the light of any such representations and Oftel will not normally agree to extend the deadline specified in the final request.

Transparency and consultation

S10 Oftel attaches great importance to maintaining transparency, to the extent that commercial confidentiality allows, in the course of its dispute resolution. To this end the current Competition Bulletin, which is published quarterly, will become a web-based document on which disputes are published as they are accepted and the outcome of cases published as they are concluded.

S11 Publication of the scope of the dispute will act as an invitation to any interested party to make representations and submit information and evidence - although no additions will be made to the list of parties directly involved in the dispute unless these parties can demonstrate that they have concluded commercial negotiations and are in dispute about exactly the same issues specified in the published scope. This process will partly replace the current period of 28 days consultation on the proposed solution to the dispute. Oftel will hold further consultation only where it intends to make a determination that directs the parties to enter into an agreement or fixes/alters terms and conditions of transactions. Such consultations will usually be for ten working days. Oftel will not normally consult where it concludes that existing arrangements should remain. Where public consultation is unnecessary, Oftel will always consult parties directly involved in a dispute.

Targets for other types of casework

S12 The specific proposals in the document relate only to disputes under Articles 20 and 21 of the Framework Directive. However, the document also deals with targets for Oftel's other responsibilities, including targets under the Competition Act 1998 (the CAct), own initiative investigations under the new Directives and consumer complaints on unfair contract terms. Oftel will set similarly tight targets under these jurisdictions, although these are for purposes of internal management and accountability, rather than having a statutory base.

Go live date April 2003

S13 It is Oftel's intention, where current legislation permits, to begin working with the new procedures with effect from 1 April 2003 to ensure that any 'teething troubles' are identified early and resolved before full implementation when the statutory obligation takes effect on midnight on 24 July 2003.

Table 1: Summary of changes on Oftel's dispute resolution procedures.

| Current | 1 April 2003 | 25 July 2003 |
|---|---|---|
| <ul style="list-style-type: none"> • No mandatory form for a request to resolve a dispute • Oftel rarely rejects a request to resolve a | <ul style="list-style-type: none"> • Mandatory format and content for a request to resolve a dispute • Oftel will adopt a tighter scrutiny of submissions | <ul style="list-style-type: none"> • Mandatory format and content for a request to resolve a dispute • Oftel will reject inadequate submissions |

| dispute | | |
|--|---|--|
| <ul style="list-style-type: none"> • Scope of dispute considered as part of the investigation | <ul style="list-style-type: none"> • Oftel will publish the scope of the dispute | <ul style="list-style-type: none"> • Oftel will publish the scope of the dispute and will only deviate from this scope in exceptional circumstances |
| <ul style="list-style-type: none"> • Issues of major access policy addressed via dispute resolution | <ul style="list-style-type: none"> • Issues of policy normally dealt with in market reviews or own initiative investigations | <ul style="list-style-type: none"> • Issues of policy normally dealt with in market reviews or own initiative investigations |
| <ul style="list-style-type: none"> • Current dispute procedures limited to interconnection | <ul style="list-style-type: none"> • Current dispute procedures limited to interconnection | <ul style="list-style-type: none"> • New dispute procedures cover all types of disputes including disputes about the use of spectrum |
| <ul style="list-style-type: none"> • No use of ADR | <ul style="list-style-type: none"> • No use of ADR | <ul style="list-style-type: none"> • Use of ADR for disputes between parties which are not dominant |
| <ul style="list-style-type: none"> • Informal approach to information gathering | <ul style="list-style-type: none"> • Normal practice to use formal powers | <ul style="list-style-type: none"> • Normal practice to use formal powers |
| <ul style="list-style-type: none"> • No time limit set for information gathering | <ul style="list-style-type: none"> • Move to make a decision on the best information available on a target date | <ul style="list-style-type: none"> • Move to make a decision on the best information available on a target date |
| <ul style="list-style-type: none"> • Competition bulletin published quarterly | <ul style="list-style-type: none"> • Competition bulletin a web based document updated as cases open and close | <ul style="list-style-type: none"> • Competition bulletin a web based document updated as cases open and close |
| <ul style="list-style-type: none"> • 28 day public consultation | <ul style="list-style-type: none"> • 10 day consultation only where a change to arrangements is required | <ul style="list-style-type: none"> • 10 day consultation only where a change to arrangements is required |
| <ul style="list-style-type: none"> • 6 month deadline for taking steps to resolve a dispute | <ul style="list-style-type: none"> • Statutory deadline of 6 months to resolve a dispute, however Oftel will aim to resolve interconnection disputes within 4 months | <ul style="list-style-type: none"> • 4 month deadline for resolution of dispute |

Spectrum Disputes

S.14 This is a new requirement for which new procedures need to be put in place. In the short period until Ofcom takes full responsibility for dispute resolution, RA will treat any dispute submission on an ad hoc basis, but is confident that its current procedures for interference resolution can be successfully extended to enable it to resolve disputes in accordance with the new requirements. RA will publish contact details where its stakeholders and customers can refer spectrum disputes.

S.15 In the meantime, RA, Oftel and Ofcom will continue to work together on developing long term arrangements for common handling and administration of cases within Ofcom.

Purpose of Guidelines

S.16 This publication indicates how Oftel intends to resolve disputes and to sets out the required content and form of requests for dispute resolution. This document is not binding but is intended to help businesses and their advisers to

understand the processes Oftel will be implementing and how best to present a case so Oftel can deal with it in an efficient manner.

These guidelines were published in draft for consultation on 4 November 2002. Oftel and RA are grateful for the generally supportive comments from respondents, as a result a number of refinements have been made to proposals, for example;

- Oftel will usually accept as a dispute, a complaint which suggests that one party has tactically refused to negotiate;
 - Oftel will aim to set out its reasoning for accepting, rejecting a dispute or refusing to deal with a dispute on the basis that ADR is a better mechanism within 15 working days after receipt of a dispute; and
 - publication of the scope of the dispute starts the clock ticking for the 4 month resolution deadline.
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Chapter 1

Introduction

1.1 During 2002 Oftel has improved its handling of disputes. Changes included a restructuring of senior management roles, faster internal approval procedures, the introduction of a virtual pool of case leaders and a new management office to handle the allocation of work and balance conflicts of resource and priorities. Oftel continues to improve its internal processes and current initiatives include an internal training programme developed specifically for investigative work as well as measures to bring about a greater focus on timeliness and quality.

1.2 Oftel is not complacent and is aware that there is scope for further improvements in the way it handles disputes but in order to introduce all possible improvements it needs the co-operation of complainants and respondents. The catalyst for this drive towards greater efficiency is the new EU Directives that impose an obligation to resolve disputes within four months. Oftel is determined to meet the new deadline, in advance of the introduction of the new Directives, and this document sets out the areas where Oftel needs the industry's co-operation.

The new EU Directives

1.3 The new EU Directives establish a new framework for the regulation of electronic communications networks, services and associated facilities throughout Europe. These Directives entered into force on 24 April 2002. Member States have 15 months in which to transpose the provisions into national legislation and to bring all regulation into line with the new Directives. The Directives must be implemented in all Member States at midnight on 24 July 2003, 15 months plus one day after entry into force.

1.4 The new package of Directives consists of:

- the Framework Directive (FD);
- the Authorisation Directive (AD);
- the Universal Service Directive (USD);
- the Directive on Privacy and Electronic Communications (PEC);
- the Access and Interconnection Directive (AID); and
- the Radio Spectrum Decision (RSD).

1.5 The FD sets the overall framework, including objectives and principles, which Oftel must take into account when making regulatory decisions. In addition, the FD sets out the principle that, in most cases, market reviews must be carried out before regulation is imposed and that regulation is only to be imposed where the market is not effectively competitive ie where at least one operator has Significant Market Power (SMP).

1.6 In addition to setting out the framework described above, the FD sets out the obligation on NRAs to resolve disputes within the shortest possible time frame and in any case within four months except in exceptional circumstances. The procedures for dispute resolution will apply across the electronic communications sector to the extent that its regulation falls within Oftel's or RA's current remits. A summary of all of the new Directives can be found on Oftel's web site at www.oftel.gov.uk.

1.7 Along with tighter timescales for dispute resolution, the new Directives will bring other challenges. Oftel expects the number of disputes dealt with under the new Directives to increase. The new Directives broaden the scope of dispute resolution beyond that of the current Interconnection Directive¹ and Oftel's current remit. This broadening of scope extends to cover certain types of disputes concerning rights to use radio spectrum and so RA has joined with Oftel in preparing this statement in anticipation of the move to Ofcom.

Oftel, RA, OFCOM and dispute resolution

1.8 In the long term, dispute resolution under the new Directives is a matter for Ofcom. The new Directives, however, need to be implemented before Ofcom is established by the Communications Bill (for details see <http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmbills/055/2003055.htm>.) The DTI has explained that it may be necessary to carry out the implementation of the new Directives through regulations made under the European Communities Act to bridge any gap between the 25 July 2003 and the Communications Bill being granted Royal Assent. In this interim period and in the period between Royal Assent and Ofcom taking on all its functions Oftel expects to run disputes according to the procedures discussed in this document.

1.9 Disputes referred to Oftel prior to 25 July 2003 remaining open when the new regime comes into effect on 25 July will continue to be progressed in accordance with Oftel's original 4 month completion target (i.e. Oftel's target for a dispute referred on 21 April will continue to be 21 August and the target clock will not be 'reset' to another four months on 25 July). In some circumstances, particularly where matters in dispute relate to the period post-24 July, it may be necessary for a complainant to confirm and re-submit a dispute on 25 July. Oftel will liaise with complainants on a case-by-case basis during the changeover to the new regime and will seek to contact all parties involved in dispute which may be open on 24 July to explain transitional arrangements and provide appropriate guidance on re-submitting a dispute where necessary. As far as possible, Oftel will maintain 'business as usual' in dispute and complaint handling during the change to the new regime.

1.10 RA believes that the majority of disputes referred to it will involve interference rather than Access issues. Although dispute resolution will have a direct statutory

¹ European Parliament and Council Directive 97/33/EC

obligation, interference resolution between authorised users is not directly specified in law but arises under wider obligations and expectations related to good spectrum management and licensing. However, RA currently operates to published targets for response to interference complaints by users which are more exacting in terms of timescales than those which will be set for dispute resolution. RA (and later Ofcom) will need to manage the relationship between handling interference complaints and other spectrum dispute cases.

1.11 This final statement replaces all other guidelines in so far as they relate to dispute resolution including:

- Oftel's use of public consultation - August 2001; and
 - Requesting the Director General of Telecommunications to resolve an interconnection dispute: guidance for the telecommunications industry - 9 November 2001.
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Chapter 2

The role of dispute resolution under the new Directives

Policy decisions and dispute resolution

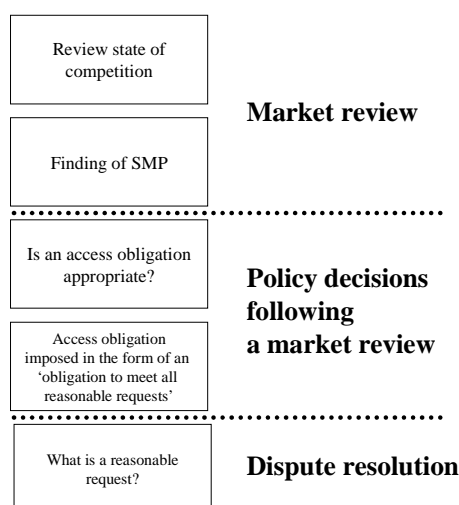
2.1 The structured process of market reviews and decisions about imposing or revoking obligations on SMP operators initiated by the new directives is clearly distinct from resolving disputes about how those obligations operate in practice.

2.2 In the past, Oftel has addressed key policy issues via dispute resolution, for example, the March 2001 Partial Private Circuits (PPC) Direction which set timescales on negotiations for the provision of PPCs, as a result of Oftel's policy initiative stemming from the Effective Competition Review of UK National Leased Lines and the direction establishing the FRIACO regime in [June 2000]. Clearly, in a 4 month timescale it will be impractical or even impossible to resolve such major new access policy issues via dispute resolution.

2.3 In the future, Oftel will normally address such disputes which raise requests for wholly new forms of access via market reviews or own initiative investigations. Dispute resolution procedures will, however, continue to be the appropriate mechanism for assessing and refining access obligations within the framework set by SMP obligations imposed following market reviews.

2.4 Oftel has recently published guidelines on imposing access obligations under the new EU Directives and set out examples of the imposition of generic obligations via market reviews and the role of dispute resolution in clarifying these obligations where necessary. The division of these roles is shown in Figure 1.

Figure 1: The division between policy decisions and dispute resolution for access obligations under the new regime



Dispute resolution and complaints about anti-competitive behaviour

2.5 Under the current regime, Oftel's investigations are generated:

- by a complaint about anti-competitive behaviour;
- by a request for Oftel to resolve a dispute under the current Interconnection Directive; and
- on Oftel's own initiative.

2.6 Oftel recently set out its strategy for addressing complaints (excluding interconnection disputes) about anti-competitive behaviour under the CAct in *Oftel's Competition Act Strategy, July 2002*. In this publication, Oftel confirmed its intention to continue with its new strategy after the new Directives are implemented.

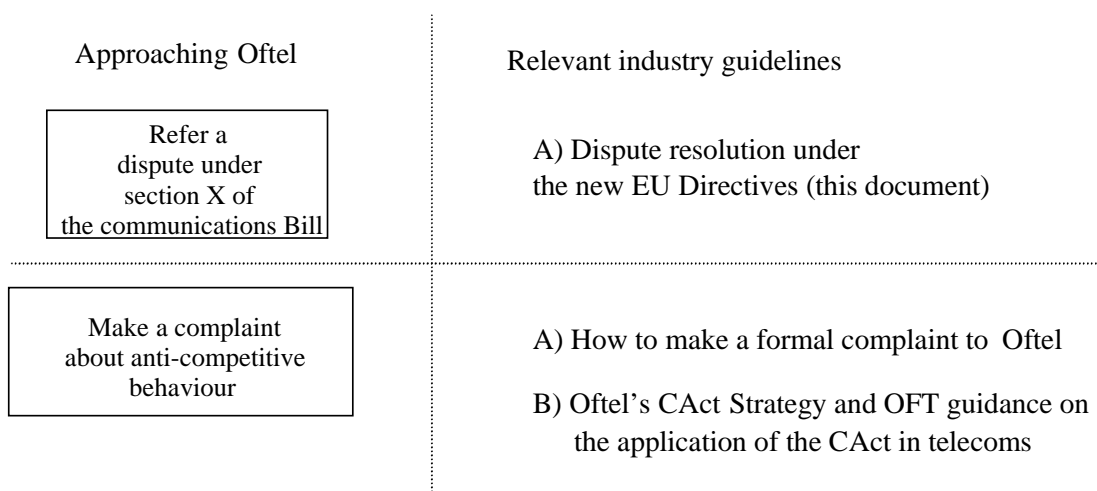
2.7 Under the new regime, disputes resolved by Oftel will not be limited to those issues dealing with interconnection but will include any dispute about regulatory obligations and/or any dispute between different providers of communications and/or associated facilities. In the communications industry, however, disputes between providers are often about the availability of access products (the new EU Directives give a wide definition of access and make it clear that interconnection products form a sub-set of access products) and the terms and conditions on which these products are available. Oftel will generally address these disputes under the procedures set out in this document.

2.8 The dispute resolution process is not an alternative process for matters correctly dealt with under CAct powers. Guidelines are available to assist stakeholders in submitting Competition Act complaints to Oftel. In particular, stakeholders should refer to the following guidance issued by the Office of Fair Trading:

- OFT notice 414: Assessment of Individual Agreements and Conduct;
- OFT notice 417: The Application in the Telecommunications Sector.

2.9 Oftel is happy to discuss the most appropriate way for stakeholders to make a submission, contact details can be found at the end of this document.

Figure 2: Guidelines on submitting disputes and complaints



2.10 The statement on Oftel's Competition Act strategy can be accessed on Oftel's website at http://www.oftel.gov.uk/publications/about_oftel/2002/cact0602.htm.

2.11 Oftel's guidelines on how to make a formal complaint can be accessed at the Oftel website on http://www.oftel.gov.uk/publications/ind_guidelines/foco0301.htm. Oftel intends to update this guideline during March 2003.

Spectrum disputes

2.12 As far as radio spectrum is concerned, disputes could arise from issues about access to radio spectrum based networks or services, or from interference to radio spectrum networks or services. The independent review of radio spectrum management by Professor Martin Cave recommended that RA should explore the scope for transferring more responsibility to operators for managing interference. In its response, the Government said that it favoured devolving interference management where practicable but also agreed with the review that a credible and impartial service responsible for monitoring and enforcement would continue to be needed.

2.13 As RA moves towards making greater use of market mechanisms, such as trading, and liberalisation of licence conditions allows more flexibility in how radio spectrum is used, disputes might be expected to arise more frequently. RA will decide on a case-by-case basis whether these would more appropriately be dealt with as an enforcement matter, for example if the interference arises as a result of breach of conditions in licences or exemption regulations.

Chapter 3

A step change for Oftel, RA and the industry

3.1 The move to a 4 month deadline for resolving disputes means that Oftel will cut its current targets by a third. Oftel must manage its resources efficiently in order to meet this challenge. This chapter sets out:

- why Oftel needs to adopt a more formal submission procedure for disputes and in particular, why the scope of disputes must be clear from the outset;
- how Oftel will change the way it requests information from stakeholders; and
- how and when Oftel will make use of Alternative Dispute Resolution procedures.

Concentrating on the most important issues

3.2 In contrast to some other European sector regulators and competition authorities, Oftel has deliberately set low barriers to referring a dispute. Until now, Oftel has not set any formal requirements for the amount of information and evidence complainants need to submit before Oftel will accept a dispute although it has published guidelines for stakeholders. There are clear advantages from the point of view of resource management and assigning any kind of priority status to key issues in putting clearer criteria in place, so long as these are not managed bureaucratically in a way that artificially restricts access to dispute resolution.

3.3 Once Oftel accepts a dispute it is obliged to assign resources to resolving it regardless of the dispute's relative importance. With a low requirement for collecting information and evidence to support a submission, operators have few incentives to be selective about which issues to refer to Oftel. In addition to encouraging trivial disputes, the absence of clearly laid-out submission requirements means that Oftel has to spend time at the start of each dispute resolution process collecting information, clarifying the scope of a dispute and, on occasion, verifying that a dispute actually exists.

3.4 The Communications Bill supports the objective of directing resources at those issues where genuine difficulties exist, by permitting Ofcom to seek to recover its costs from operators which abuse the right to bring a dispute by making frivolous or vexatious references. In addition, investigations involving disputes about radio spectrum are likely to be very resource intensive (e.g. involving technical compatibility tests or monitoring), and the Bill gives Ofcom the right to charge a fee for the work done in resolving a such disputes.

3.5 From 1 April 2003, before Oftel will accept a dispute, complainants will be required to submit clear information on all details of the dispute including:

- a full statement of the scope of the dispute;
- a description of the obligations to which the dispute relates, including a view on the relevant economic market;
- A business case demonstrating why a specific product is required - including forecast;
- full details of the preferred remedy; and
- documentary evidence of commercial negotiations on all issues covered by the scope of the dispute.

3.6 Full details of the required format and content of a dispute referral to Oftel are included in Annex A.

What is in dispute?

3.7 Submissions occasionally refer entire contracts as being the subject of a dispute, but without specifying which clauses are contentious. Oftel recognises that, when a large number of operators are involved, it can be difficult to specify the scope of the dispute with absolute precision. However, to ensure that Oftel can meet the new deadlines it will be in operators' interests to provide immediate clarity about the scope of the dispute. Oftel will not deal with disputes which make no attempt to provide this specificity.

3.8 The scope of disputes about access products is another problem area. It is often the case that commercial negotiations over access have fallen at the first stage but operators have nonetheless made a reference to Oftel covering not only the availability of the product but also the availability of related products, terms and conditions, pricing structures and service level agreements.

3.9 Under the new procedures, at the beginning of the resolution process Oftel intends to publish a statement on the scope of each dispute. Once this scope is established, apart from in special circumstances, Oftel will not alter it during the investigation. Any issues that have been included in the submission, but on which commercial negotiations have not taken place, or there has not been a reasonable attempt by one party to engage another in the negotiations, will not be included in the statement of scope and will not be addressed by Oftel.

Resolving disputes between operators which are not dominant

3.10 As discussed earlier, Oftel believes that the role of dispute resolution is to address problems that arise as the result of the particular nature of electronic communications, or are disputes involving an operator with market power. It follows that resolving issues that would (in the absence of a regulator) be resolved through normal commercial negotiations should not be a priority for Oftel. The most obvious cases in this category are disputes between providers where the parties are not dominant in the relevant market. The exception is where a regulatory obligation (eg a general obligation about number portability) has been

imposed on operators which are not dominant and the dispute refers directly to this obligation.

3.11 The Directives (and the Bill) make provision for NRAs to use ADR. As a general rule, Oftel considers that ADR should be used to resolve disputes between operators which are not dominant, even if there is a disparity in commercial size and bargaining power between the firms involved. In such cases, in the absence of SMP, there should nevertheless be an incentive for commercial sensible outcomes to emerge through a normal process of negotiation.

Alternative dispute resolution

3.12 The Directives allow Oftel to decline to resolve a dispute where alternative mechanisms exist. The success of ADR depends on the incentives of the parties involved to reach a solution but practical considerations such as the numbers of operators involved in a dispute also influences the suitability of ADR as a dispute resolution mechanism.

3.13 Oftel will assess the suitability of declining to resolve a dispute on a case by case basis but the following table gives an indication of the types of factors that Oftel will consider.

Table 2: Examples of factors influencing the decision to decline to resolve a dispute

| | ADR | Resolution by Oftel |
|--|------------|----------------------------|
| A large number of parties are involved | X | ✓ |
| One of the parties is dominant | X | ✓ |
| Both parties are dominant | ✓ | X |
| None of the parties are dominant | ✓ | X |
| Similar disputes are resolved in other industries without the intervention of the regulator | ✓ | X |
| There is insufficient evidence that attempts have been made to enter into commercial negotiation | ✓ | X |

3.14 As discussed above, Oftel considers that when a dispute exists between providers which are not dominant, regulatory intervention is inappropriate, and Oftel is likely to decline to resolve these types of disputes on the basis that ADR represents a better mechanism for resolution. Oftel is rarely, if ever, called on to resolve disputes between two providers who are dominant in the same market. This may reflect the nature of the markets within Oftel's remit but may also indicate that where the balance of market power is equal, parties are more likely to reach a resolution via commercial negotiation.

Figure 3: Where market power is equal, parties may be more likely to reach commercial agreement

| | | Complainant | |
|--------|--------|---|---|
| | | SMP | No SMP |
| Target | SMP | Likely to be suitable for resolution by ADR | Likely to be suitable for resolution by Oftel |
| | No SMP | Likely to be suitable for resolution by Oftel | Likely to be suitable for resolution by ADR |

3.15 A review of 50 cases in the last two years that have been referred to Oftel suggests that only about 10 per cent of these disputes would have been suitable candidates for ADR. Oftel considers it unlikely, therefore, that a dedicated panel set up by Oftel would be cost effective, particularly when there are a number of commercial organisations providing ADR services. Oftel is aware of a number of organisations, including the following, all of which provide dispute resolution services:

- the International Chamber of Commerce International Court of Arbitration;
- the London Court of International Arbitration; and
- the Centre for Effective Dispute Resolution.

3.16 These organisations have a great deal of experience in the provision of ADR services. They can provide ad hoc services or, where requested, are able to develop ADR schemes for specific industries. Even without an industry specific scheme, Oftel considers that the number of commercial organisations offering dispute resolution services means that alternative means for the resolution of disputes by Oftel is available.

3.17 Once a dispute has been refused on the basis that ADR is a better mechanism, Oftel will not revise its position for a period of 4 months. Oftel believes this is appropriate in order to minimise any incentives on parties to immediately refer a dispute back to the Director without allowing sufficient time for ADR to succeed.

3.18 Due to the fact that radio spectrum disputes are likely to be complex issues about interference or spectrum use compatibility, RA believes that disputes about radio spectrum, failure to comply with licence conditions or interference with services are not suited to ADR and therefore are more appropriately dealt with by RA (or later Ofcom).

The responsibility of the industry – information requests

3.19 Collecting the information needed to resolve a dispute is resource intensive. A common reason for delays in dispute resolution is that Oftel receives late or incomplete replies to its information requests. In the past Oftel has adopted an informal approach to collecting information, only relying on its formal powers as a last resort. In most cases, stakeholders appreciated and preferred this informal approach. When working to a 4 month deadline, however, there will be no slack time to allow for delays in collecting information.

3.20 It is not always productive to collect information using formal powers and it can be more efficient to collect general or background information on an informal basis. However, where specific critical information is required as part of a dispute resolution process, Oftel will use its formal powers to collect it.

3.21 Difficulties in collecting information are increasingly causing delays in Oftel's current dispute resolution processes. With immediate effect, therefore, it will be Oftel's usual practice, except in special circumstances, to issue requests for information under the Telecommunications Act 1984, or a telecommunications licence as a draft, allowing five working days for representations to be made on the relevance of the information requested and the practicality of providing the information by the specified deadline. Oftel will then generally confirm or amend the information request within two working days and would not expect to agree to an extension to the deadline. Likewise, Oftel is prepared to consider proposed modifications to the timing and nature of information requests under the Competition Act within the first five days from their issue.

3.22 The overall timescale for dispute resolution is to be set by legislation and will be challenging, and Oftel will in turn need to set challenging deadlines for responses to information requests. Operators that are routinely sent information requests should consider the need to put in place adequate mechanisms to ensure that they can meet their obligations to supply information by the statutory deadline.

Making decisions based on the best information available

3.23 The time available for collecting information is limited. In a 4 month dispute resolution period, Oftel must timetable its activities carefully. At the start of the process Oftel will normally set a limit on the time it will spend collecting information and give a target date by which it aims to proceed to make a decision based on the best information available.

Chapter 4

Consultation, procedures and targets for different types of cases

Competition Bulletin

4.1 Currently, Oftel publishes details of disputes and investigations in Oftel's quarterly Competition Bulletin, which gives details of new and closed cases during the relevant period. Oftel has received representations that the Competition Bulletin does not provide an adequate up to date picture of Oftel's work. When dispute resolution moves to the 4 month timeframe, a quarterly bulletin will be inadequate.

4.2 Under the new regime, Oftel will publish details of Compliance cases as they are opened and closed. This information will be published only on Oftel's web site and will replace the current Competition Bulletin. General information contained in the current quarterly bulletin will also be published on the web at regular intervals.

The clock

4.3 Oftel will aim to set out its reasoning for rejecting a dispute or refusing to deal with a dispute on the basis that ADR is a better mechanism within 15 working days after submission. Oftel will, however, ensure that it clarifies issues with complainants, where necessary, before reaching such a decision. If this process means that Oftel takes longer than 15 working days to reach a decision in an individual case, complainants will receive an explanation of why Oftel needed extra time.

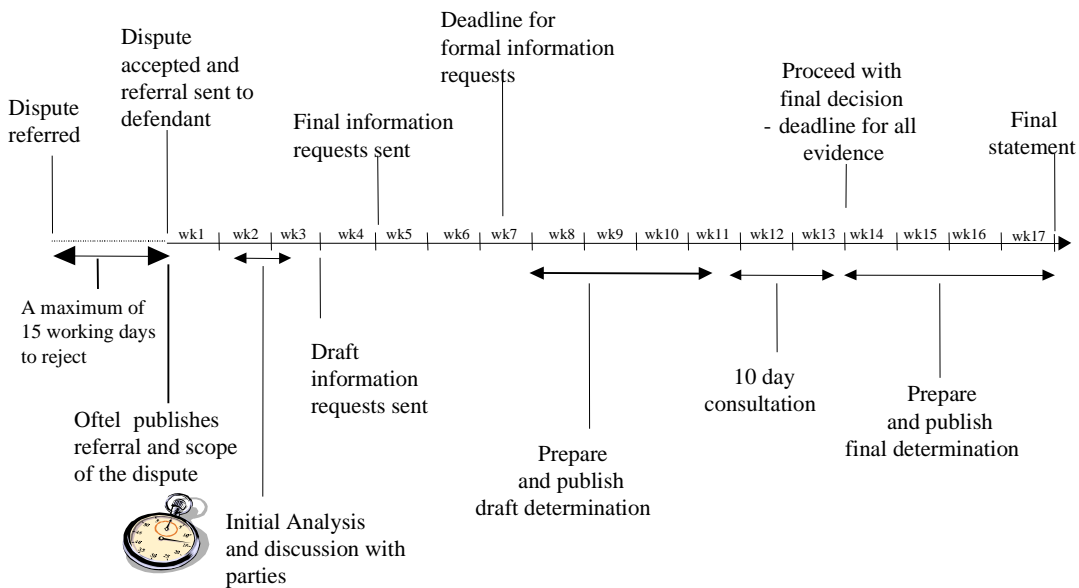
4.4 On the same basis, if disputes are accepted, Oftel will publish the scope of the dispute within 15 working days of the original submission.

4.5 The publication of the scope of the dispute starts the clock ticking for the 4 month resolution deadline. On publication, Oftel will invite stakeholders to express any interest in the dispute, submit evidence and make representations to Oftel within five working days of publication of the scope.

Consultation procedures

4.6 Oftel's current practice is to consult on draft determinations for a period of 28 days. Clearly, in a dispute resolution timeframe of four months, it is not possible to allow 25 per cent of the entire period for consultation. Nevertheless, where Oftel intends to direct the parties to enter into an agreement or fix or alter the terms and conditions of transactions Oftel will formally consult the parties involved in the dispute on its proposed resolution. Oftel will normally allow at least ten working days for this consultation but in special circumstances the time allowed could be shorter.

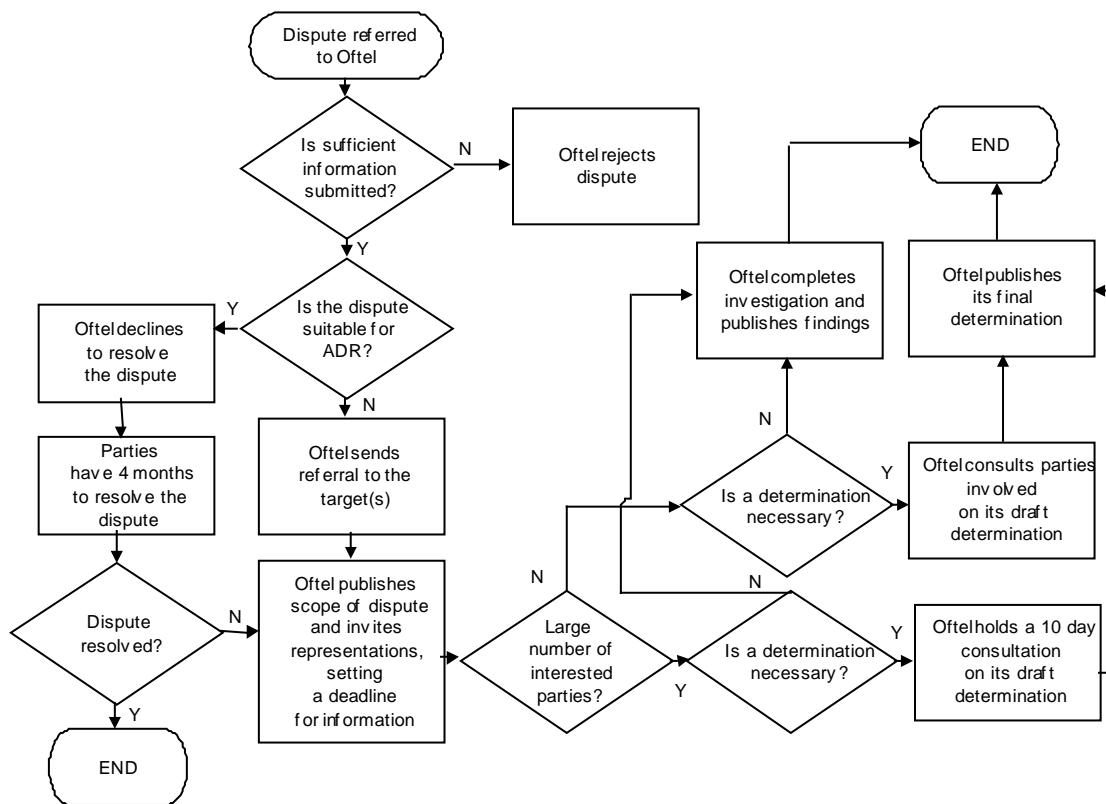
Figure 4: Typical timeline of a dispute resolution with consultation



4.7 Ofstel recognises that short consultation periods can cause difficulty for stakeholders, and will give as much advance warning as possible of consultations but as Figure 4 illustrates (bearing in mind that the 4 month deadline is a maximum and the target is 'the shortest possible time') longer periods of consultation will neither be feasible nor desirable under the new regime.

4.8 Where Ofstel's conclusion does not result in a change in the arrangements between the parties Ofstel will not hold a consultation on the conclusion of the dispute. As discussed above, Ofstel will start the dispute resolution process by publishing the scope of the dispute and inviting interested stakeholders to submit information and evidence. Only where the issue is of interest to a large number of stakeholders will Ofstel publish a draft determination for consultation among a wider audience. In all other cases, consultation will be limited to the parties directly involved in the dispute. Ofstel will, of course, publish final determinations and its findings in all cases

Figure 5: Summary of the new procedures



Targets for different types of casework

4.9 Disputes are only one type of investigation that Oftel carries out. In addition to disputes, Oftel also:

- investigates complaints about anti-competitive behaviour under the CAct;
- investigates consumer complaints about unfair contract terms; and
- runs own-initiative investigations where appropriate.

4.10 Oftel also investigates complaints about licence breaches under the Telecommunications Act 1984 when it is appropriate to do so (eg breaches of number portability obligations). Under the new regime, these types of investigations will be investigations into breaches of general conditions of entitlement (see *The general conditions of entitlement, Oftel, May 2002*), which are general conditions unrelated to concerns relating to dominance.

4.11 The 4 month deadline for disputes will be set when the new Directives are implemented in July 2003 although Oftel intends to work to this new deadline from

April 2003. Oftel also intends to improve on its targets for the completion of other types of cases. Targets for other types of casework are shown in Table 3.

Table 3: Oftel's targets for completion of different types of cases from April 2003

| | Type of complaint | Procedure | Timescale for resolution |
|---|--|---|--|
| 1 | Dispute | Dispute resolution under the new Directives | 4 Months |
| 2 | Complaints about anti-competitive behaviour | CAct investigation | 6 months where no infringement decision is made 12 months for infringement decision |
| 3 | N/A | Own initiative investigation under the new Directives | 6 Months |
| 4 | Consumer complaints about unfair contracts | Existing complaint procedures | 4 Months |
| 5 | Complaints about breaches of general or USO conditions | Existing complaint procedures | 4 Months |

4.12 Oftel will report the percentage of cases where it meets the above targets. In each case where Oftel exceeds the deadline it will make clear to the parties to the dispute the reasons for the slippage at the earliest opportunity and the likely date of resolution. It will also publish in the Competition Bulletin an explanation documenting the exceptional circumstances that caused the delay. .

Cross border disputes

4.13 Article 21 of the Framework Directive places obligations on European NRAs to co-operate with each other in the resolution of disputes which fall within the competencies of NRAs in more than one Member State. Any such dispute may be referred to any relevant NRA.

4.14 Oftel chairs the Independent Regulators' Group's Implementation Group for the new EU Directives and is currently involved in discussions with other NRAs about dispute resolution under the new EU Directives and about the resolution of cross border disputes.

4.15 For disputes about radio spectrum obligations between the UK and providers in other Member States, there are a number of factors to take into account. The UK has bilateral arrangements with some of its neighbours for trying to co-ordinate radio spectrum usage, but these do not always cover every type of use. In

particular these may only cover internationally harmonised public services rather than the very different arrangements for private networks in each Member State. There are also some arrangements for reaching multilateral agreement across borders under the provisions of the International Telecommunication Union (ITU) and European Conference of Postal and Telecommunication Administrations (CEPT) as well as some new proposals under the EU Radio Spectrum Decision.

4.16 Under the new Directives, cross-border disputes can be referred to Oftel or RA as appropriate (Ofcom in future) using the procedures set out in this document. Oftel or RA will co-ordinate the resolution of the dispute in co-operation with other European NRAs.

Annex A

Draft format for submitting a request to Oftel to resolve a dispute

Any request for resolution of a dispute should be submitted (clearly indicating details of whom Oftel should contact to discuss the submission) to:

Compliance Management Office
Oftel
50 Ludgate Hill
London
EC4M 7JJ

email: competition.complaints@oftel.gov.uk

If you need any further guidance as to how to submit a dispute to Oftel, please contact the Compliance Management Office on 020 7634 8833

A non confidential version of your submission will be sent to the parties named in your dispute. Therefore, any information that you deem to be business sensitive, must be excised in a separate non confidential version which is clearly marked and shall be passed onto the target of the complaint.

Section A

A summary of your dispute, not longer than two A4 pages.

Section B

- 1) A full statement of the scope of the dispute, including:
 - the parties to the dispute, including names and contact details and clearly identifying the legal entities which are party to the dispute;
 - a list of all the issues which are in dispute, evidence that all of these issues have been discussed between the parties and the nature of the disagreement on each issue;
 - full details of the relevant products or services.
 - Business plans of relevant product or service including forecasts, demonstrating how and when you intend to make use of the products or services requested; and
 - In the case of contractual disputes, a copy of the relevant version of the contract, clearly identifying the clauses that are subject to the dispute.

 - 2) A description of the obligations to which the dispute relates, including a view on the relevant economic market and whether an Operator, in the particular
-

market, has been designated as having SMP. You should explain why you consider that the relevant obligation is not being met, for example, if you make an allegation that a charge is not cost oriented you must set out your reasoning.

- 3) The remedies which you are seeking from resolution of the dispute (including an explanation as to why these remedies should be applied in resolving the dispute), for example:
- full details of a requested product or service;
 - the setting of a charge at a particular level including your justification of this level.

Section C

1. A description of any negotiations which have taken place between the parties
2. In the event that a party has refused to enter into negotiations, you must provide evidence to suggest that you have taken reasonable steps to engage the party in meaningful negotiations.
3. Details of the steps taken to resolve all of the issues which are in dispute
4. An explanation of why commercial agreement could not be reached:
5. Relevant documentary evidence of commercial negotiations, covering the whole period of negotiation, including correspondence, notes of meetings and telephone calls, and a chronological summary of the events
6. Details of any options or proposed solutions put forward by any party during negotiations, including what, if anything, was accepted, what was rejected and why.

Optional sections

You are encouraged to provide the following information where it is available.

Section D

Any relevant economic analysis
