



Dispute Resolution Guidelines

Ofcom's guidelines for the handling of regulatory
disputes

Guidelines

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Section 1

Scope of these Guidelines

What do these guidelines cover?

- 1.1 Sections 185-191 of the Communications Act 2003 (“2003 Act”), as amended by the The Electronic Communications and Wireless Telegraphy Regulations 2011 (SI 2011/1210) (the “Regulations”), set out Ofcom’s duties and powers in resolving regulatory disputes.
- 1.2 These guidelines explain how Ofcom handles regulatory disputes referred to it in accordance with section 185 of the 2003 Act. Broadly, this document sets out:
 - 1.2.1 the form and manner in which disputes should be referred to Ofcom;
 - 1.2.2 the information/evidence Ofcom requires in order to determine at the outset whether the statutory grounds for a referral are fulfilled and whether it is appropriate for Ofcom to handle the case;
 - 1.2.3 the kind of information Ofcom might expect the parties in dispute (“Parties”) to submit to Ofcom during the course of proceedings to enable Ofcom properly to determine the dispute; and
 - 1.2.4 the remedies available to Ofcom in any given case.

What is not in these guidelines?

- 1.3 Ofcom is also responsible for the following areas of dispute resolution and enforcement, which are not covered by these guidelines:
 - 1.3.1 Arrangements implemented in respect of enforcing future Online Copyright Infringements obligations;
 - 1.3.2 investigations relating to regulatory obligations;
 - 1.3.3 investigations relating to competition law;
 - 1.3.4 compliance with consumer protection provisions in Part 8 of the Enterprise Act 2002, including the Consumer Protection from Unfair Trading Regulations 2008 (the “CPRs”);
 - 1.3.5 compliance with regulatory conditions, where the complaint or concern is about consumer protection;
 - 1.3.6 potentially unfair terms in consumer contracts under the Unfair Terms in Consumer Contracts Regulations 1999 (the “UTCCRs”);
 - 1.3.7 compliance with the “persistent misuse provisions” of the 2003 Act (including silent calls);
 - 1.3.8 complaints about broadcast content; and
 - 1.3.9 protection of the radio spectrum from harmful interference.

- 1.4 Finally, these guidelines do not cover complaints from individual consumers. If you wish to make a complaint to Ofcom as a consumer, viewer or listener about a communications provider or a broadcaster, please visit our website for advice on how to make a complaint: <http://consumers.ofcom.org.uk/tell-us/>

Status and purpose of these guidelines

- 1.5 These Guidelines set out the form and manner in which dispute referrals should be made and the approach Ofcom is likely to take in resolving any disputes it accepts, taking into account that each referral will be assessed on its facts, case-by-case.
- 1.5.1 **Section 2** sets out Ofcom's dispute resolution duties and powers;
 - 1.5.2 **Section 3** sets out the statutory grounds for making a dispute referral to Ofcom and the manner and form that Parties' submissions should take in referring a dispute to Ofcom for resolution;
 - 1.5.3 **Section 4** sets out Ofcom's approach as to whether the dispute satisfies the statutory grounds for a dispute referral and, if so, how Ofcom decides whether it is appropriate to accept or reject it;
 - 1.5.4 **Section 5** sets out the approach Ofcom will take in resolving the dispute;
 - 1.5.5 **Section 6** provides the format for submitting a dispute.
 - 1.5.6 **Annex 1** provides further background to Pre-EPM Questionnaires; and
 - 1.5.7 **Annex 2** sets out Ofcom's main statutory duties and regulatory principles.
- 1.6 These guidelines are not a substitute for any regulation or law and are not legal advice.
- 1.7 These guidelines will be kept under review and amended as appropriate in the light of further experience and developing law and practice and any change to Ofcom's powers and responsibilities.
- 1.8 These guidelines set out Ofcom's general approach to dispute resolution in the areas covered by the guidelines. They do not have binding legal effect. Where we depart from the approach set out in these guidelines, we will explain why.

Section 2

Overview of Ofcom's dispute resolution function

Ofcom's specific duties relating to disputes under the 2003 Act

- 2.1 Ofcom's duties and powers in resolving regulatory disputes are set out in sections 185-191 of the 2003 Act as amended by the Regulations.
- 2.2 Ofcom's dispute resolution role is a regulatory function which must be exercised consistently with Ofcom's statutory duties and obligations as the sectoral regulator, in particular as set out in sections 3 and 4 of the 2003 Act. Ofcom's statutory duties and regulatory principles are set out at Annex 2.
- 2.3 There are two key procedural stages in Ofcom's assessment of any dispute submission:
 - 2.3.1 **Enquiry Phase:** During this phase (usually 15 working days) Ofcom considers (a) whether the statutory grounds for a dispute referral under the 2003 Act have been met, and (b) whether it is appropriate for Ofcom to handle the dispute. If Ofcom decides it is appropriate for it to handle the dispute, it will define the exact scope of the dispute and open formal proceedings.
 - 2.3.2 **Formal Proceedings:** During this phase, Ofcom will determine the dispute following consultation with, and taking account of any submissions from the Parties to the dispute (and any other interested parties that have a view on the dispute). Ofcom must determine the dispute within four months of its decision that it is appropriate for it to handle the dispute, except in exceptional circumstances.

Existence of a dispute and the statutory grounds for referral

- 2.4 Ofcom expects the Parties to a dispute to take reasonable endeavours to enter into good faith negotiations in order to resolve their differences themselves, before referring a dispute to Ofcom. In any event, Ofcom requires evidence from the Parties that they are in dispute. Ofcom will then decide on the basis of the information available to it whether in its view the dispute referral fulfils any of the statutory grounds for a dispute referral.
- 2.5 Ofcom has jurisdiction to resolve the following types of regulatory disputes under the 2003 Act:
 - 2.5.1 a dispute relating to the provision of network access (section 185(1) of the 2003 Act);
 - 2.5.2 a dispute relating to the entitlements to network access that a communications provider is required to provide by or under a condition imposed on him under section 45 of the 2003 Act (section 185(1A) of the 2003 Act); and

- 2.5.3 a dispute, which is not an ‘excluded dispute’¹, relating to rights or obligations conferred or imposed by or under a condition set under section 45 of the 2003 Act or any of the enactments relating to the management of the radio spectrum (section 185(2) of the 2003 Act).
- 2.6 Ofcom has the power to invite any one or more of the Parties to a dispute falling within section 185(1) of the 2003 Act to refer the dispute to it under section 185(3) of the 2003 Act.

Existence of alternative means

- 2.7 In accordance with section 186(2) of the 2003 Act, Ofcom must decide whether or not it is appropriate for it to handle the dispute.
- 2.8 In the case of a dispute falling within section 185(1A) or (2) of the 2003 Act, Ofcom will decide that it is appropriate for it to handle the dispute unless there are alternative means to resolve the dispute promptly and satisfactorily, in line with the Community requirements set out in section 4 of the 2003 Act.
- 2.9 In some cases, for example, Ofcom may consider that it would be appropriate to send the dispute for alternative dispute resolution (“ADR”). We would make this assessment on the particular facts of each individual case.
- 2.10 If the dispute is not resolved by alternative means before the end of the four months after the day of Ofcom’s decision not to accept the dispute, one or more of the Parties may refer the dispute back to Ofcom.
- 2.11 In the case of a dispute falling with section 185(1) of the 2003 Act, Ofcom has discretion whether to decide that it is appropriate for it to handle the dispute. In exercising that discretion, Ofcom may in particular take into account its priorities and available resources at the time (section 186(2A) of the 2003 Act).

Resolving disputes

- 2.12 Ofcom’s powers when resolving disputes are set out in section 190 of the 2003 Act.
- 2.13 Ofcom must resolve disputes within the four month statutory deadline, except in exceptional circumstances (section 188(5) of the 2003 Act).
- 2.14 In all cases Parties should have realistic expectations of the depth of analysis Ofcom is able to carry out within the four month statutory deadline. Whilst dispute resolution is a separate regulatory function to be used in parallel to Ofcom’s other regulatory powers, in the time available Ofcom is clearly not able to undertake the type of analysis it would normally carry out in exercising its *ex ante* regulatory powers or its powers under the Competition Act 1998.
- 2.15 Where necessary, Ofcom will consider exercising any of its regulatory powers listed in section 190(4) of the 2003 Act, or any other of its regulatory powers as the sectoral regulator, instead of or at the same time as resolving the dispute.

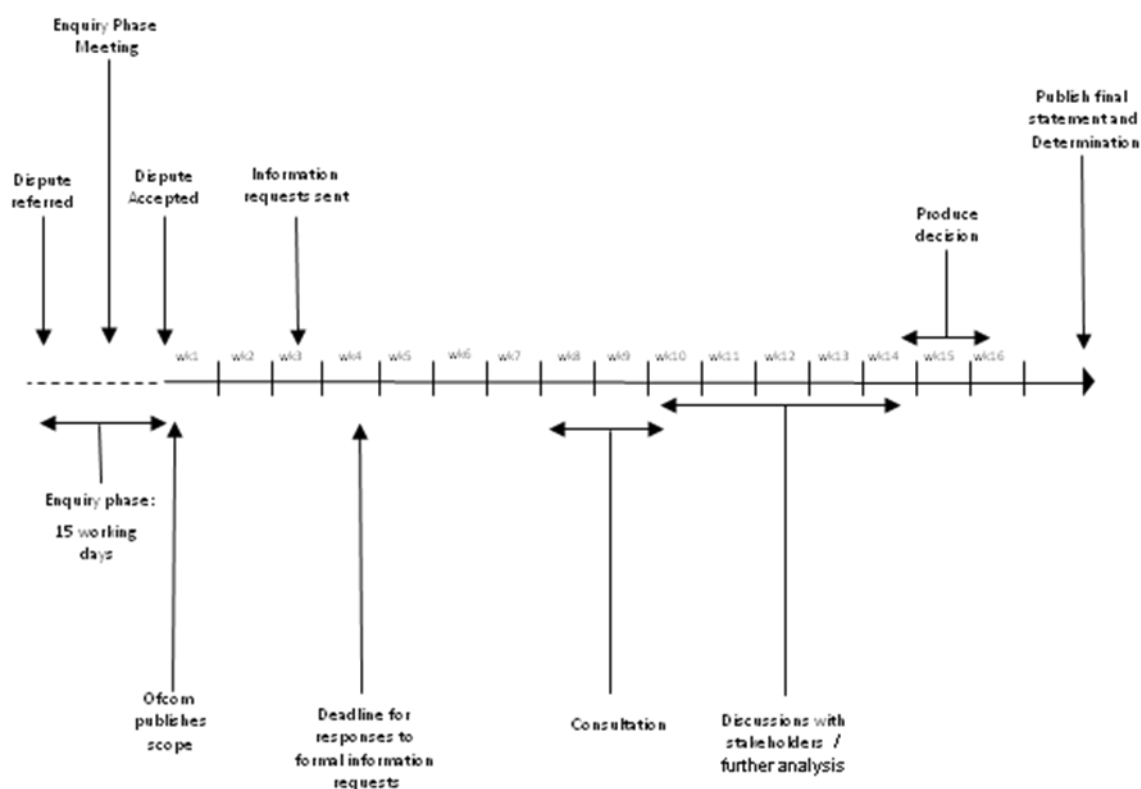
¹ Section 185(7) of the 2003 Act excludes disputes which are about obligations imposed on a communications provider by SMP apparatus conditions.

Information gathering

- 2.16 Ofcom has specific information gathering powers under section 191 of the 2003 Act. Ofcom may require such further information from any Party to the dispute or any third party who it appears to Ofcom may have relevant information.
- 2.17 In light of the tight statutory deadlines for resolving disputes, Ofcom may set challenging deadlines for the provision of such further information and Ofcom will not normally issue information requests in draft form (this represents a change from our previous practice). Sections 138-144 and section 404 of the 2003 Act apply in relation to failures to comply with Ofcom's requests for information according to section 191 of the 2003 Act.

Statutory Timeline

- 2.18 The figure below sets out the key stages in the typical four month timetable for the resolution of a dispute.



Contact with the case team during the enquiry phase and formal proceedings

- 2.19 A dispute is handled by a case team. The primary point of contact for Parties to disputes is the case leader. Ofcom will provide the name and contact details of the case leader to relevant Parties and will also publish these contact details in the Competition and Consumer Enforcement Bulletin entry announcing the commencement of the resolution of the matter.

Advice to Parties to disputes

2.20 Parties considering referring a dispute to Ofcom should initially consider the following:

- **Seek to resolve matters through commercial discussions:** As far as possible, Parties should seek to resolve the dispute themselves before asking Ofcom to intervene;
- **Speak to us first:** Ofcom is always prepared to discuss emerging issues, and consider matters prior to the submission of a dispute. Ofcom recognises the value of dispute prevention, as well as dispute resolution;
- **Consider any relevant previous decisions:** Please consider whether there are existing Ofcom decisions or rulings by the Competition Appeal Tribunal (“CAT”)² that provide an indication of the likely approach to be followed on particular issues. Previous Ofcom decisions are published on Ofcom’s Competition and Consumer Enforcement Bulletin (“CCEB”).³ The CCEB also gives details of any appeals against Ofcom decisions, which may help you in considering how to submit your case;
- **Read and apply these Guidelines:** Submissions which do not comply with the requirements set out in these Guidelines may not be accepted; and
- **Be prepared:** We are required by the 2003 Act to resolve disputes within four months, except in exceptional circumstances. This is a demanding timetable and Parties referring or otherwise involved in disputes need to be aware of the demands this places on them as well as on Ofcom. In most cases, Ofcom will not grant extensions to deadlines to respond to information requests or to consultation deadlines, and Parties need to commit to work with Ofcom in this process, and recognise that Ofcom will make decisions based on the evidence that it has received within the deadlines that it sets. If you submit a dispute, we will assume that you have considered and are prepared to meet this commitment.

² <http://www.catribunal.org.uk/>

³ http://www.ofcom.org.uk/bulletins/comp_bull_index/.

Section 3

Making a dispute referral to Ofcom

3.1 This section explains how Parties can submit a request for Ofcom to resolve a dispute and how we decide whether to accept such a referral for consideration as part of an Enquiry Phase.

Statutory grounds for referral

3.2 As set out in paragraph 2.5 above, Ofcom has the power to resolve the following types of regulatory disputes under the 2003 Act:

3.2.1 a dispute relating to the provision of network access (section 185(1) of the 2003 Act);

3.2.2 a dispute relating to the entitlements to network access that a communications provider is required to provide by or under a condition imposed on him under section 45 of the 2003 Act (section 185(1A) of the 2003 Act); and

3.2.3 a dispute, which is not an 'excluded dispute',⁴ relating to rights or obligations conferred or imposed by or under a condition set under section 45 of the 2003 Act or any of the enactments relating to the management of the radio spectrum (section 185(2) of the 2003 Act).

3.3 During the Enquiry Phase, Ofcom will consider whether or not the dispute in question falls within one of these types of regulatory disputes. This question is one which will need to be considered by Ofcom in all cases as a matter of substance, irrespective of the Parties' own views of the nature of the dispute.

3.4 It may sometimes be necessary for Ofcom to take a preliminary view on jurisdictional issues and then to reconsider them in more detail during the resolution of the dispute. This is particularly likely in cases where it is necessary for Ofcom to consider in detail the subject matter of the dispute in order to determine whether it falls within the scope of its dispute resolution powers and/or whether it is required to handle the dispute or has discretion whether or not to do so.

3.5 In contrast, some disputes referred to Ofcom may be clearly outside the scope of Ofcom's dispute resolution powers. For example, if a dispute concerns a broadcasting matter (such as, for example, ensuring adherence to the broadcasting codes by broadcasters as required by their licence conditions) falling within Part 3 of the 2003 Act and does not relate to the provision of network access, Ofcom may conclude that it is not a dispute referred under section 185 and it therefore has no jurisdiction to resolve it under Chapter 3 of Part 2 of the 2003 Act.

3.6 In order to provide more guidance to Parties considering a dispute reference, Ofcom sets out below how Ofcom would be likely to consider dispute references under sections 185(1), 185(1A) and 185(2) of the 2003 Act.

⁴ Section 185(7) of the 2003 Act excludes disputes about obligations imposed on a communications provider by SMP apparatus conditions.

Section 185(1) disputes

- 3.7 Where a party refers a dispute to Ofcom under section 185(1) of the 2003 Act, the first question that Ofcom will consider is whether, in the light of the Party's submission, the dispute relates to the provision of network access within the meaning of section 151(3) of the 2003 Act.⁵
- 3.8 Secondly, Ofcom will consider whether the dispute relating to provision of network access is a dispute as between relevant parties (as specified in paragraphs (a) to (c) of section 185(1) of the 2003 Act), namely:
- 3.8.1 a dispute between different communications providers;
 - 3.8.2 a dispute between a communications provider and a person who makes associated facilities available; and
 - 3.8.3 a dispute between different persons making such facilities available.

Section 185(1A) disputes

- 3.9 Where a party refers a dispute to Ofcom under section 185(1A) of the 2003 Act, Ofcom will consider:
- 3.9.1 whether the dispute is a dispute between a communications provider and a person who is identified or is a member of a class identified, in a condition imposed on the communications provider under section 45 of the 2003 Act; and
 - 3.9.2 the dispute relates to entitlements to network access that the communications provider is required to provide to that person by or under that condition.

Section 185(2) disputes

- 3.10 Where a Party refers a dispute to Ofcom under section 185(2) of the 2003 Act, the first question Ofcom will consider is whether the dispute relates to rights or obligations conferred or imposed by or under a condition set under section 45 of the 2003 Act (such as general conditions, significant market power ('SMP') conditions, etc.) or any of the enactments relating to the management of the radio spectrum.
- 3.11 Secondly, Ofcom will consider whether the dispute relating to such rights or obligations is a dispute between different communications providers.
- 3.12 Thirdly, Ofcom will consider whether the dispute is an "excluded dispute" according to section 185(7) of the 2003 Act, namely whether the dispute is about obligations imposed on a communications provider by SMP apparatus conditions.
- 3.13 We will work with Parties to ensure that they understand the requirements set out in these guidelines for submitting a dispute referral. If a submission does not meet our requirements, we can provide some guidance to help Parties identify what else they need to do before Ofcom will consider accepting a submission.

⁵ Section 185(8) of the 2003 Act clarifies that the disputes that relate to the provision of network access include disputes as to terms or conditions on which access is, or may be, provided in a particular case.

Submission requirements

- 3.14 We expect stakeholders to make adequate, well reasoned submissions supported by evidence.
- 3.15 Ofcom will only open an Enquiry Phase where the information provided by the party referring the dispute is sufficient to enable Ofcom at the outset to determine whether the dispute satisfies the statutory conditions for a referral and whether or not it is appropriate for Ofcom to decide to handle it.
- 3.16 We expect dispute submissions to meet minimum requirements before we take any further action. These include having the facts of the case, details of the issues in dispute and the remedies sought. We would also like to see evidence of the submitting Party having made genuine efforts to enter into good faith negotiations.
- 3.17 Parties are reminded that if they do not refer disputes in the manner set out in these guidelines (Section 185(4) of the 2003 Act), Ofcom is not obliged to accept the dispute (Section 186 (1) of the 2003 Act). A full list of submission requirements, together with contact details for where to send a dispute submission, is at section 6.

Ofcom's handling of the submission

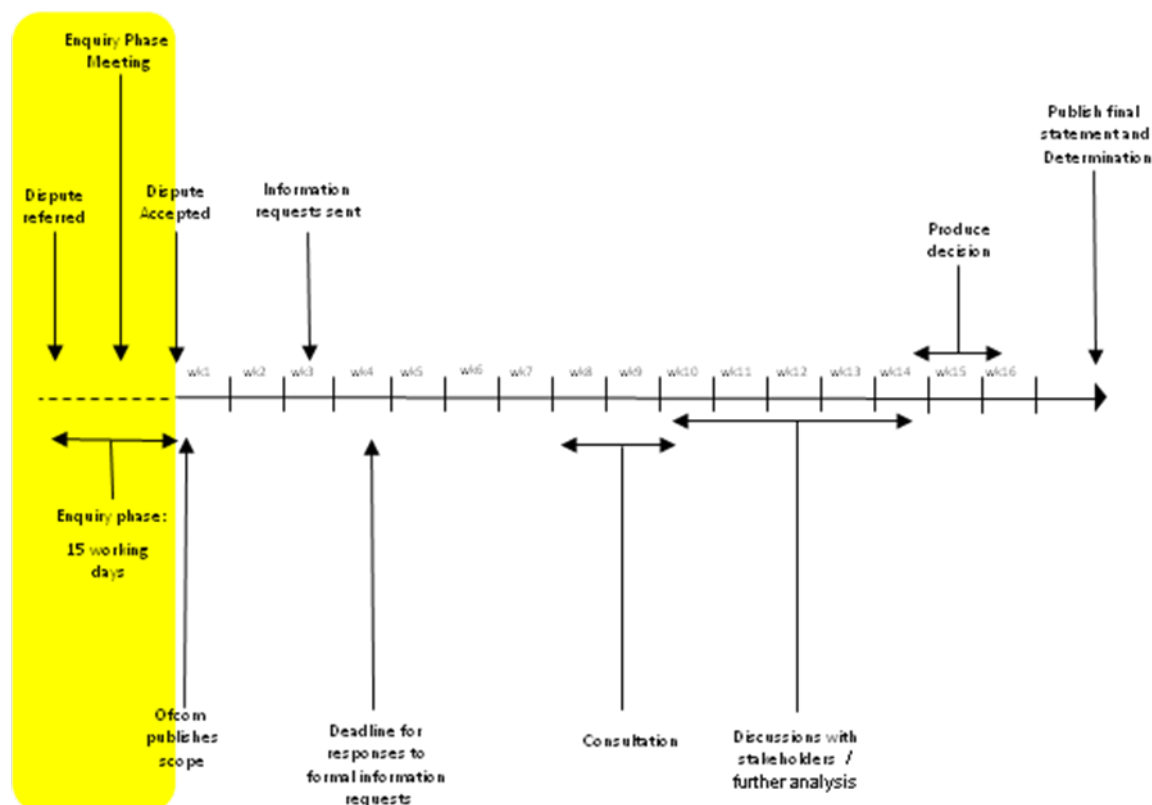
- 3.18 All submissions are handled initially by the Competition Group's Investigations Programme Manager. The Investigations Programme Manager responds to queries and provides advice on the process of submitting a dispute and should generally be the first port of call for a potential disputant.
- 3.19 Upon receipt, the Investigations Programme Manager will confirm receipt of the submission within one working day.
- 3.20 The Investigations Programme Manager will then assess whether the submission contains the requisite documentation and information.⁶ Confirmation of whether or not the submission satisfies these requirements will be provided by them within two working days of receipt of the submission.
- 3.21 Where the Investigations Programme Manager has confirmed that the requisite documentation and information was contained in the submission, the submission will be accepted for consideration by Ofcom as part of an Enquiry Phase.
- 3.22 Where the Investigations Programme Manager has confirmed that a submission did not contain the requisite documentation and information, it will not be accepted for further consideration by Ofcom. In such circumstances, the Investigations Programme Manager will advise the Party of the specific reasons.
- 3.23 The next section explains how Ofcom handles submissions during its Enquiry Phase in order to decide whether it is appropriate for Ofcom to handle a dispute.

⁶ Sections A – E, and where appropriate F, of the section 185(4) format for submitting a dispute referral, plus a signed declaration by an officer of the company.

Section 4

The Enquiry Phase

- 4.1 This section describes the Enquiry Phase process and the assessment Ofcom makes at the outset about whether the statutory grounds for a dispute referral are met and whether it is appropriate for Ofcom to accept the dispute.



Purpose of the Enquiry Phase

- 4.2 Once Ofcom is satisfied that it has been provided with sufficient information to consider the referral submission, including non-confidential versions of submissions, Ofcom will allocate the matter a case number and open an enquiry. The Enquiry Phase involves Ofcom considering whether or not it is appropriate for Ofcom to handle the dispute and will normally last no more than 15 working days.
- 4.3 Ofcom may itself decide to extend the Enquiry Phase beyond 15 working days (or, in some cases, may do so at the request of the Party referring the dispute). Where Ofcom needs more than 15 working days to decide whether it is appropriate to accept the dispute, it will inform the Parties of this fact.
- 4.4 During the Enquiry Phase, Ofcom will decide:
- 4.4.1 whether the Parties are in dispute and whether the submitted dispute satisfies any of the statutory grounds for referral (section 185 of the 2003 Act);
 - 4.4.2 whether it is appropriate for Ofcom to handle the dispute or whether there are alternative means available for resolving the dispute; and

- 4.4.3 the scope of the dispute to be determined.
- 4.5 During the Enquiry Phase, we do not publish details of enquiries, or comment publicly on enquiries. Note that in the interests of transparency, as part of publishing a final determination, Ofcom may also publish non-confidential versions of both the dispute submission and the other Party's comments on it (as well as any non-confidential versions of comments on the consultation on Ofcom's provisional conclusions). This represents a change from our previous practice.

Evidence that the Parties are in dispute

- 4.6 Submissions must include evidence which shows that the Parties are in dispute. Ofcom would also expect to see evidence that the Parties have made reasonable endeavours to enter into good faith negotiations in order to seek to resolve their differences before referring the matter to Ofcom.
- 4.7 Ofcom recognises that some companies may refuse to enter into negotiations, use delaying or stalling tactics in on-going negotiations or otherwise obstruct the proper course of commercial negotiation. In accordance with section 190(6A) and 190(6B), Ofcom may take the behaviour of the Parties, including whether any attempt has been made to resolve the dispute, into account in considering whether to require a Party to make payments to the other Party or to Ofcom in respect of costs and expenses incurred in consequence of the reference of the dispute to Ofcom and Ofcom's dealing with the dispute.

Are the statutory grounds for a dispute referral fulfilled?

- 4.8 If Ofcom considers that the Parties are indeed in dispute, Ofcom will consider whether the dispute has been properly referred according to section 185 of the 2003 Act.

Is it appropriate for Ofcom to handle the dispute or are there alternative means for resolution?

- 4.9 Having established that the dispute has been properly referred according to section 185, Ofcom must decide whether or not it is appropriate for it to handle the dispute.

Disputes referred under section 185(1A) or section 185(2) of the 2003 Act

- 4.10 In the case of disputes properly referred to Ofcom under section 185(1A) or 185(2) of the 2003 Act, section 186 of the 2003 Act provides that Ofcom may only refuse to handle a dispute if:
- 4.10.1 alternative means exist to resolve the dispute; and
 - 4.10.2 resolution of the dispute by those means would be consistent with Ofcom's Community requirements set out in section 4 of the 2003 Act; and
 - 4.10.3 those means are likely to lead to a prompt and satisfactory resolution of the dispute.

Existence of Alternative Means

- 4.11 Ofcom will consider on a case-by-case basis whether alternative means are available to resolve the dispute promptly and satisfactorily, in line with its statutory duties and obligations.
- 4.12 An example of alternative means would be alternative dispute resolution (“ADR”), for example arbitration or mediation. There are a number of institutions and organisations currently offering a wide range of ADR services, such as the Centre for Effective Dispute Resolution⁷ and the Chartered Institute of Arbitrators,⁸ etc.⁹ In addition, Ofcom notes that the communications industry has taken its own initiative by establishing the Communications Providers’ ADR Service.¹⁰ In some cases, this may help industry to resolve disputes without the need for intervention by Ofcom.
- 4.13 Alternative means of resolving disputes such as ADR can offer a number of advantages, for example in terms of cost and time to the Parties. However, Ofcom recognises that the success of ADR for dispute resolution often depends on the motives and incentives of the Parties involved to reach a commercial solution. Certain circumstances may have a bearing on the effectiveness of ADR. For example, where one of the Parties has already been found by Ofcom to be in a position of SMP in the relevant market such that there is an imbalance in negotiating power between the Parties, this could in turn limit the effectiveness of ADR.

Referring disputes back to Ofcom where alternative means have failed

- 4.14 Where Ofcom has initially decided that it is not appropriate for it to handle the dispute on the basis that alternative means exist, but where the dispute has not been resolved by alternative means before the end of the four months after the date of Ofcom’s decision, the dispute may be referred back to Ofcom by one or more of the Parties to the dispute.
- 4.15 Any referral back should include details of the steps that the Parties have taken to try and resolve the dispute by alternative means, information on why resolution has not been achieved by these alternative means and a clear statement of the matters that remain in dispute. It should also include confirmation of whether the information included in the original dispute remains relevant.
- 4.16 In such circumstances, Ofcom’s four month timetable for resolving the dispute will begin from the day the dispute is referred back to Ofcom, subject to any clarification Ofcom may need from the Parties about the nature of the dispute, e.g., where the scope of the dispute has changed.

Network access disputes referred under section 185(1) of the 2003 Act

- 4.17 In the case of disputes properly referred to Ofcom under section 185(1) of the 2003 Act, section 186(2A) of the 2003 Act provides that in deciding whether or not it is

⁷ <http://www.cedr.co.uk/>

⁸ <http://www.arbitrators.org/index.asp>

⁹ These serve as examples only as Ofcom has not taken a view that one institution’s services is preferable over another; nor is it possible for Ofcom to suggest that they would be generally suitable in all cases of disputes referred to Ofcom. They illustrate that several types of ADR are generally available to resolve disputes.

¹⁰ <http://www.communications-adr.com/index.asp>

appropriate for Ofcom to handle a dispute, it may in particular take into account its priorities and available resources.

4.18 Ofcom is therefore not under a statutory obligation to decide that it is appropriate for it to handle a dispute referred under section 185(1) of the 2003 Act. This is a change to the position in the 2003 Act prior to the changes made by the Regulations.

4.19 Our decision whether or not to handle a dispute referred under section 185(1) of the 2003 Act will involve an assessment against our priorities and available resources at the time the dispute is referred to us. Among the factors that we will consider in this context will be our existing administrative priority criteria as set out in our draft enforcement guidelines of 2006.¹¹ Our administrative priority framework is illustrative, rather than exhaustive, and we will consider other factors where appropriate. A decision by Ofcom not to resolve a dispute does not imply any view by Ofcom about the merits of that dispute. The relevant factors as they are likely to refer to disputes include the following:

- the risk to the interests of citizens or consumers as a result of the dispute (and whether that risk is immediate or not and whether it is direct or indirect);
- the resources required to resolve a dispute, given the need to do justice to the interests of all parties likely to be affected by the dispute (for example: citizens and consumers; the Parties in dispute; and third parties). Particular issues may arise where there are specific policy or specialist skills that are required to undertake a dispute;
- whether the issue that has been identified relates directly to Ofcom's broader strategic goals or priorities (including those within Ofcom's Annual Plan);
- whether the matters in dispute are on-going; and
- whether there are other alternative regulatory actions (for example, planned market reviews) that are likely to achieve the same ends, or deal with the same issues, as the dispute. This could include, for example, whether other agencies may be better placed to consider the subject matter of the dispute.

4.20 If we decide to exercise our discretion to resolve disputes referred under section 185(1) of the 2003 Act, we will resolve the dispute following our processes as set out in these guidelines.

4.21 Our powers to resolve disputes referred to us under section 185(1) of the 2003 Act are the same as those for other disputes as set out in section 190(2) of the 2003 Act. These are considered in more detail below. However, in relation to a dispute referred to us under section 185(1), we are additionally required to exercise those powers in the way that seem to us to be most appropriate for the purpose of securing efficiency, sustainable competition, efficient investment and innovation, and the greatest possible benefit for the end-users of public electronic communications services (see section 190(2A) of the 2003 Act).

¹¹ Available on Ofcom's website at

<http://stakeholders.ofcom.org.uk/binaries/consultations/enforcement/summary/enforcement.pdf>

Enquiry Phase Meeting and the clarification of facts and issues

- 4.22 Submissions will often require points of clarification and involve Ofcom raising these with the Parties. Any information gathering during this phase is likely to be limited to assisting Ofcom to understand the dispute.
- 4.23 The first step in this process of clarification is that we will send the non-confidential version of the submission including the list of facts and issues to the other party to the dispute. In doing so, we will invite that Party to comment on the submission. In the interests of transparency, we will then provide these comments to the Party submitting the dispute referral (this represents a change from our previous practice). Where comments are confidential, we will ask for a non-confidential version that can be shared with the other Party to the dispute. We will require Parties to justify any claims of commercial confidentiality, and will not entertain blanket claims.
- 4.24 Following the initial exchange of non-confidential documents, where appropriate we will normally expect all Parties to attend a joint Enquiry Phase Meeting (“EPM”) held by Ofcom. This represents a change from our previous practice. The EPM is intended to be an informal meeting, attended by commercial and regulatory affairs representatives of the Parties. The purpose of the meeting will be to enable us to confirm the facts agreed by the Parties, the facts that remain in dispute and to help clarify issues so as to inform our decision of what is in and out of scope, should we decide that it is appropriate for us to handle the dispute.
- 4.25 The EPM may also assist in identifying what further evidence may be needed in order to resolve the dispute.
- 4.26 At the EPM, Ofcom will outline the process and timetable for the dispute should it be accepted for resolution by Ofcom.
- 4.27 In preparation for an EPM, all Parties to the dispute will normally be expected to complete a pre-EPM Questionnaire prior to the meeting. Inevitably due to the limited time of the enquiry phase this will require an immediate turnaround, with Parties using best endeavours to complete the forms within the period specified by Ofcom. Examples of the types of pre-EPM questions are set out at Annex 1. The responses to the pre-EPM Questionnaire will then be shared by Ofcom with the Parties and will provide the focus for the EPM.
- 4.28 Prior to each EPM, we will provide an agenda setting out the specific areas to be covered and why. The agenda will be based on the submissions from the Parties and their responses to the pre-EPM questionnaire. It will therefore vary on a case-by-case basis.
- 4.29 The EPM will be arranged to be held at Ofcom’s premises (with facilities for remote access provided for Parties unable to attend in person). In relation to the date of the EPM, we will need Parties to be flexible and while we will endeavour to find a date and time that is best for all Parties, Ofcom will need to reserve the right to fix the EPM for a specific time and date that will allow it to complete the enquiry within 15 working days.
- 4.30 Where a dispute involves several Parties (for example, multiple Parties submitting a dispute), we will assess the feasibility of an EPM on a case-by-case basis in discussion with the Parties, including whether Parties wish to appoint a representative to attend the EPM.

- 4.31 Following an EPM, we will aim to provide a short summary of the EPM to the Parties.
- 4.32 We expect the EPM to be an integral part of our normal procedures during the Enquiry Phase. However, we recognise that in some circumstances, submissions and responses to pre-EPM Questions could lead us to conclude that an EPM may not be necessary. In such circumstances, we will advise Parties of this decision.
- 4.33 Ofcom would normally expect the process of issuing pre-EPM Questionnaires through to holding an EPM to take around five working days. Ofcom acknowledges that this will necessitate the full cooperation of all Parties, in particular as it is unlikely that it will be possible to grant any extensions of time for completion of the pre-EPM questionnaires and Parties may need to adjust their schedules so that they can attend the EPM meeting.

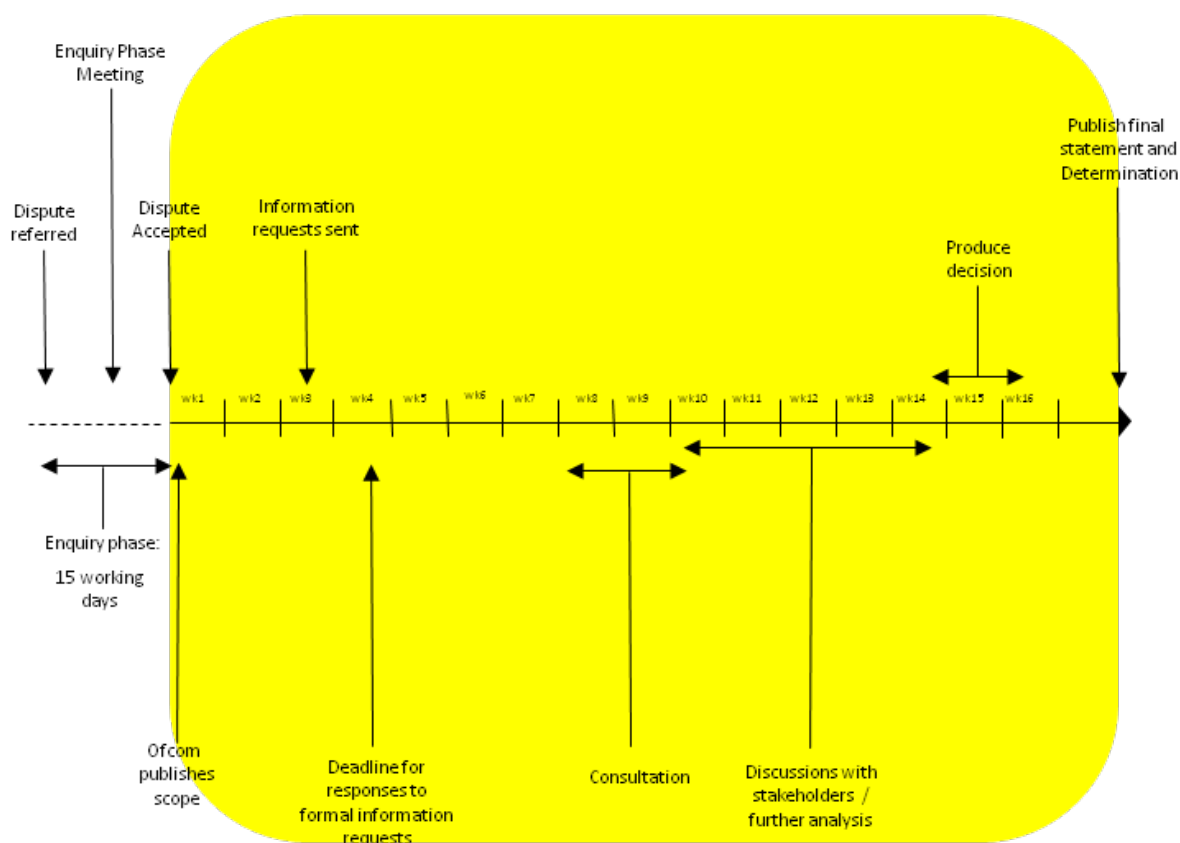
Notifying the Parties of Ofcom's decision to accept or reject a dispute for resolution

- 4.34 As soon as reasonably practicable after Ofcom has decided whether or not it is appropriate for it to handle the dispute, it will inform the Parties to the dispute of its decision and the reasons for it.
- 4.35 In the event that Ofcom does consider it appropriate for it to handle the dispute, Ofcom will subsequently publish this fact and the scope of the dispute in the Competition and Consumer Enforcement Bulletin. This is discussed in more detail in the next section, which sets out how Ofcom resolves a dispute.

Section 5

Resolving a dispute

- 5.1 This section provides guidance on Ofcom’s approach once it has decided that it is appropriate for it to handle a dispute and so has accepted a dispute for resolution.



Publication of acceptance of dispute and its scope

- 5.2 Once we have decided that it is appropriate for us to handle a dispute, we will publish our decision in the Competition and Consumer Enforcement Bulletin (“CCEB”) section of our website at http://www.ofcom.org.uk/bulletins/comp_bull_index/, setting out the names of the Parties to the dispute and the scope of the dispute.
- 5.3 Defining and publishing the scope of the referred dispute ensures there is clarity from the outset of precisely what issues Ofcom is required to resolve during the course of the dispute. Ofcom’s experience in dealing with disputes shows that, in order to resolve a dispute within the four month statutory time limit, it is essential to define the scope as precisely as possible. The scope will therefore confirm those matters in scope and where appropriate, also those out of scope.
- 5.4 Ofcom will base its decision on the scope on the basis of the exchange of information provided during the Enquiry Phase, in particular, concerning the submission and subsequent comments from the Parties (including their submissions as to the appropriate scope), as clarified by the EPM.

- 5.5 We do not propose to publicly consult on the scope of the dispute once it is published in the CCEB. This represents a change from our previous practice.
- 5.6 Ofcom may update CCEB entries during the formal proceedings phase of the dispute. Stakeholders who want to keep up to date with ongoing disputes can subscribe to email notification of changes to the Competition and Consumer Enforcement Bulletin.¹²

Considering related disputes together and making representations without bringing a separate dispute

- 5.7 An Ofcom dispute determination binds only the Parties to that dispute. Where more than one dispute is brought by separate stakeholders which (a) meet the statutory grounds for referral, and (b) raise substantially the same issues as one another, following publication of Ofcom's decision to accept the dispute the relevant stakeholders have the opportunity to ask for their disputes to be considered together. Ofcom may also itself decide that two disputes should be considered together.
- 5.8 Considering disputes which concern the same issues together can offer certain administrative advantages. However, this has to be balanced against the impact on the Parties and on Ofcom's ability to meet its duty to resolve the dispute within 4 months.
- 5.9 Accordingly, such requests will be considered by Ofcom on a case-by-case basis. However, all will be required to meet certain key criteria:
- 5.9.1 that the requesting Party has included confirmation that it agrees to the dispute proceeding based on the facts, issues and scope of the existing dispute;
 - 5.9.2 that the requesting Party has included confirmation that it agrees that Ofcom should not be required to repeat procedural steps,¹³ and
 - 5.9.3 that the requesting Party provides evidence that it is in dispute and all the information required in section 6.
- 5.10 Where such submissions include comments that are confidential, we will ask for a non-confidential version that can be shared with the other Party to the dispute. We will require stakeholders to justify any claims of commercial confidentiality, and will not entertain blanket claims.
- 5.11 For submissions meeting these key criteria, we will then make an initial assessment of the issues raised by the new submission. Where we agree that there is sufficient similarity of issues raised to those already being considered as part of an existing dispute, and believe there is good reason to consider that new submission with an existing dispute, we will then:
- a) forward the non-confidential version of the submission to the Parties to the existing dispute, advising them of the request to consider the subsequent dispute with the existing dispute; and

¹² http://www.ofcom.org.uk/static/subscribe/comp_bull.htm

¹³ For example, Enquiry Phase Meetings, information gathering exercises or public consultations.

- b) seek the views of the Parties to the existing dispute. We will ask for responses, with any supporting reasoning, to be provided to us with 3 working days.
- 5.12 Following representations from the Parties to the existing dispute we will then undertake our assessment of whether it is appropriate:
 - 5.12.1 for us to accept the dispute for resolution; and if so,
 - 5.12.2 to consider the new dispute alongside the existing dispute.
- 5.13 This is likely to be an accelerated process, given the issues in dispute and the scope should already be established and the requesting Party has confirmed its agreement to Ofcom proceeding on the basis of these.
- 5.14 Where we believe it is appropriate to consider a new dispute alongside an existing dispute, revisions to timetables and procedures will need to be raised with all Parties on a case-by-case basis.
- 5.15 Where we do not believe it is appropriate to consider a new dispute alongside an existing dispute, that requesting Party's submission will be handled as a separate dispute submission and be subject to its own Enquiry Phase, in order for Ofcom to establish the facts and issues in dispute.
- 5.16 Where we receive a dispute that does not include a request that it be heard alongside an existing dispute, but on first appearance it seems to us that there are good reasons for it to be considered alongside an existing dispute, we will raise this with the submitting Party and follow the above procedure as appropriate.
- 5.17 Stakeholders that do not wish to bring their own separate disputes, but are interested in the outcome of particular dispute, will have the opportunity (a) to subscribe to email notification of changes to the Competition and Consumer Enforcement Bulletin, and (b) to respond to Ofcom's provisional conclusions for the resolution of a dispute (see paragraphs 5.33 to 5.40 below).

Information requests

- 5.18 In order to assist Ofcom to resolve a dispute, Ofcom may request information from the Parties or any other person who it appears to Ofcom may have relevant information, using its powers set out in section 191 of the 2003 Act.
- 5.19 Section 191 specifies that a person required to provide information under this section: "must provide it in such manner and within such reasonable period as may be specified by OFCOM". Accurate information provided in a timely manner is critical to the efficient resolution of disputes. To date, and in line with our policy statement on information gathering,¹⁴ Ofcom has sent out draft information requests under section 191 and has allowed recipients time to comment before sending out finalised requests. This practice has been intended to allow for more focussed information requests, in particular for Parties to inform Ofcom of the type of information that may not be available. However, this practice has delayed the obtaining of information.
- 5.20 Given the tight timescales involved in resolving disputes, in order to help avoid delays Ofcom's general practice in disputes will be not to consult on a draft

¹⁴ http://stakeholders.ofcom.org.uk/consultations/info_gathering/statement/

information request. If Parties do not have all the information sought in the request they should advise Ofcom of this in their response to that request.

- 5.21 Ofcom's general practice is that information sought under a formal information request should be provided to Ofcom within 5-10 working days (depending on the complexity of the request). This will remain the case. In general, due to the constraints of needing to resolve the dispute within four months, Ofcom will not give extensions for further time to provide the requested information. Where information is confidential, we may ask for a non-confidential version and we will require stakeholders to justify any claims of commercial confidentiality. We will not entertain blanket claims that everything is confidential.

Resolving the dispute / cross border disputes

- 5.22 Ofcom will consider each dispute on a case-by-case basis according to its specific facts, the submissions made by the Parties and any other submissions received, any applicable regulatory obligations and Ofcom's regulatory principles and statutory duties.
- 5.23 Where Ofcom considers that a dispute referred under section 185(1A) or section 185(2) of the 2003 Act relates partly to a matter falling within the jurisdiction of the NRA(s) of other Member States (i.e. because it relates to activities carried on by one or more parties in more than one Member State), Ofcom must coordinate its work with those NRA(s) (see section 189 of the 2003 Act).
- 5.24 Ofcom may also consult the Body of European Regulators for Electronic Communications ("BEREC") in order to ensure a consistent resolution of the dispute, and may ask BEREC for an opinion as to the action to be taken to resolve the dispute. Where Ofcom (or another NRA) requests an opinion from BEREC in relation to the dispute, Ofcom must take account of BEREC's opinion when it resolves the dispute.
- 5.25 In such circumstances the four month deadline to resolve the dispute will not be applied but instead the deadline will be such period as agreed between Ofcom and the other NRAs involved in resolving the dispute.

Remedies

- 5.26 Parties are encouraged to set out the remedies which they consider to be appropriate to resolve the dispute in their dispute submissions. These should be in line with Ofcom's powers under section 190(2) of the 2003 Act, and Ofcom's statutory duties and regulatory principles. However Ofcom, as the sectoral regulator, is not limited to the remedies proposed by the Parties in resolving a dispute. Ofcom will consider on a case-by-case basis what remedy is appropriate to resolve the dispute. Other than in relation to spectrum disputes,¹⁵ Ofcom's main power in resolving a dispute is to do one or more of the following:
- to make a declaration setting out the rights and obligations of the Parties to the dispute;

¹⁵ In the case of a dispute relating to rights and obligations conferred or imposed by or under the enactments relating to the management of the radio spectrum, Ofcom's main power (Section 190(3) of the 2003 Act) to make a determination for resolving the dispute is limited to making a declaration setting out the rights and obligations of the Parties to the dispute.

- to give a direction fixing the terms or conditions of transactions between the Parties to the dispute;
 - to give a direction imposing an obligation, enforceable by the Parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom; and
 - for the purpose of giving effect to a determination by Ofcom of the proper amount of a charge in respect of which amounts have been paid by one of the Parties of the dispute to the other, to give a direction, enforceable by the Party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment.
- 5.27 Ofcom's main power in a spectrum dispute is to make a declaration setting out the rights and obligations of the Parties to the dispute.
- 5.28 In accordance with section 190(2A) of the 2003 Act, in the case of a dispute falling within section 185(1) and which Ofcom has decided to handle, Ofcom must exercise its powers under section 190(2) in the way that seems to it most appropriate for the purpose of securing:
- 5.28.1 efficiency;
 - 5.28.2 sustainable competition;
 - 5.28.3 efficient investment and innovation; and
 - 5.28.4 the greatest possible benefit for the end-users of public electronic communications services.
- 5.29 In light of this new requirement, we will expect Parties to disputes to which this provision applies, to explain to us in their submissions how they consider their proposed outcome would be appropriate for securing these objectives.
- 5.30 In the case of a dispute falling within section 185(1A) or 185(2) of the 2003 Act that has been referred back to Ofcom following an attempt at resolution by alternative means, Ofcom may, in making its determination, take account of decisions already made by others in the course of an attempt to resolve the dispute by alternative means¹⁶. However, as Ofcom will always recognise the "without prejudice" nature of such negotiations, Ofcom will approach each dispute referred back afresh, so that no Party is at a disadvantage in making a genuine attempt to settle the dispute by alternative means. In any event, Ofcom would only take account of such decisions if it would be consistent with Ofcom's regulatory principles and statutory duties, as set out in sections 3 and 4 of the 2003 Act.
- 5.31 Where appropriate, Ofcom will also consider exercising any of its regulatory powers listed in section 190(4) of the 2003 Act, or any other of its regulatory powers as the sectoral regulator.
- 5.32 For the avoidance of doubt, where a dispute is referred to (or referred back to) Ofcom, the reference does not prevent any affected person from bringing or continuing legal proceedings before the courts in accordance with section 104 of the 2003 Act.

¹⁶ Section 190(5) of the 2003 Act.

Consultation on Ofcom's provisional conclusions: new form for consultation with the Parties

- 5.33 The statutory dispute resolution process is a short one, in which disputes must be resolved in four months or less, except in exceptional circumstances. As an exception from the usual position, Article 6 of the Framework Directive¹⁷ expressly provides that Ofcom is under no obligation to consult on a draft dispute determination.
- 5.34 However, to date we have chosen to consult stakeholders on draft determinations, publishing a full draft of our proposed determination for comment. Our experience of this practice has been that we have not been in a position to consult on such a draft until relatively late into the four month process, resulting in a significant concentration of work both for us and for stakeholders in the last month of that process.
- 5.35 We remain of the view that it is desirable to provide stakeholders with an opportunity to comment on our provisional views and reasoning, before making a final dispute determination.
- 5.36 We therefore intend to introduce a simpler consultation process, which we will normally apply in the course of resolving disputes. Instead of publishing a full draft determination, by circa week 8 of the dispute Ofcom will publish a shorter document setting out for comment the main elements of Ofcom's provisional reasoning and assessment in relation to the matters in dispute (the "Dispute Consultation"). Where we are aware that a provisional view is unlikely to be provided around week 8, we will inform the Parties to the dispute of this and the revised target date for publication of the consultation document.
- 5.37 This form of document is intended to be much shorter than previous draft determinations have tended to be.
- 5.38 In most cases, we would expect to publish the Dispute Consultation on our website. An exception to this would be where a Party to the dispute is able to show that publication would seriously prejudice its interests. Ofcom will consider whether or not any such claim by a Party or Parties is well founded and whether disclosure of information may facilitate the carrying out of its functions (including Section 188(8) of the 2003 Act).
- 5.39 Although the Parties are generally invited to indicate whether and, if so, on what grounds they consider specific information in a submission to Ofcom to be confidential, Ofcom will not normally invite further comment from the relevant Party once it has expressed its view on Parties' confidentiality markings in disputes. For the avoidance of doubt, Ofcom does not regard submissions on legal or regulatory policy to be confidential and any such submissions will normally be disclosed publicly. Further, Ofcom will sometimes be required to publish/disclose information marked as confidential in order to meet legal obligations.
- 5.40 In order to manage the process as effectively as possible, and in light of our intention to publish a Dispute Consultation earlier in our process than is currently typically the case for the publication of a draft determination, we will where possible and appropriate consider whether to allow stakeholders a period beyond the usual 10

¹⁷ See Article 6 of the Framework Directive (Directive 2002/21/EC)

working days, up to a possible 15 working days, to comment on the Dispute Consultation¹⁸.

Final determination

- 5.41 In accordance with section 188(7)(a) of the 2003 Act, Ofcom will send a copy of its final determination, together with a full explanatory statement, to every Party to the dispute. The final determination is binding on the Parties and is enforceable in court between the Parties.
- 5.42 In addition, Ofcom will normally publish a non-confidential version of the final determination on its website in the Competition and Consumer Enforcement Bulletin. Ofcom considers that the publication of final determinations is generally in the public interest and in line with Ofcom's regulatory duties.¹⁹
- 5.43 Prior to publishing a final determination, Ofcom may provide embargoed extracts of the final determination to the Parties, allowing them an appropriate amount of time to make any checks concerning confidentiality or factual errors.
- 5.44 Stakeholders should note that when publishing a final determination, Ofcom may also publish non-confidential versions of both the dispute submission and any other Party's comments on it, as well as any non-confidential submissions received in response to the Dispute Consultation. This represents a change from our previous practice.

Statutory time limit / exceptional circumstances

- 5.45 As noted above, Ofcom has a statutory duty under section 188(5) of the 2003 Act to resolve disputes within four months after the day:
- 5.45.1 it issues a decision that it is appropriate for it to handle the dispute; or
 - 5.45.2 the dispute is referred back to Ofcom in accordance with section 186(6) of the 2003 Act,
- unless Ofcom concludes that there are exceptional circumstances, or where the court orders the handling of the dispute by Ofcom to be stayed or sisted in accordance with section 187(3) of the 2003 Act.
- 5.46 If appropriate, Ofcom will on a case-by-case basis consider whether there are exceptional circumstances, including in light of any representations which have been made to it. We consider that exceptional circumstances should be construed narrowly on the facts of each particular case.
- 5.47 Where Ofcom does find that exceptional circumstances exist, such that it will not resolve a dispute within four months, Ofcom will nevertheless seek to resolve the dispute as soon as practicable after the four month deadline has elapsed.

¹⁸ Parties should note that Ofcom may nevertheless shorten the 10 working day timetable, as appropriate in individual cases.

¹⁹ Ofcom will have regard to its duties regarding commercial confidentiality under sections 26 and 393 of the 2003 Act before publishing or disclosing information.

Costs and expenses in dealing with disputes – new provisions

- 5.48 Ofcom's powers relating to costs have been amended by the Regulations.
- 5.49 Previously, Ofcom only had powers to:
- 5.49.1 require one Party to make payments to another in respect of costs and expenses incurred as a result of the dispute reference;²⁰ or to require a Party to the dispute to make payments to Ofcom in respect of costs and expenses incurred by Ofcom in dealing with the dispute²¹ where:
 - a) the dispute related to the rights and obligations of the Parties to the dispute under the enactments relating to the management of the radio spectrum; or
 - b) it appeared to Ofcom that the dispute reference by that Party was frivolous or vexatious or that that Party has otherwise abused the right of reference conferred by Chapter 3 of Part 2 of the 2003 Act.
- 5.50 As amended by the Regulations, section 190 of the 2003 Act now provides that Ofcom may require a Party to make payments in respect of costs to the other Party to the dispute, provided that Ofcom first considers:
- 5.50.1 the Party's conduct before and after the reference of the dispute to Ofcom, including in particular whether any attempt has been made to resolve the dispute; and
 - 5.50.2 whether Ofcom has made a decision in the Party's favour (either in whole or in part) in relation to the dispute.
- 5.51 In addition, Ofcom may require a Party to a dispute to make payments to Ofcom in respect of Ofcom's costs and expenses incurred in dealing with the dispute, provided that either:
- 5.51.1 the dispute relates to the rights and obligations of the parties to the dispute under spectrum legislation; or
 - 5.51.2 in the case of non-spectrum disputes, Ofcom has first considered the factors set out at paragraphs 5.50.1 and 5.50.2 above.
- 5.52 In its statement of 15 April 2011 accompanying the Regulations²², the Department for Culture, Media and Sport ("DCMS") (which took over responsibility for implementing the changes to the EU Framework from BIS), explained that the changes in relation to costs are intended to encourage the use of alternative mechanisms for resolving disputes²³. DCMS also made clear that Ofcom would only normally recover such costs from disputing Parties, where appropriate, in cases where alternative mechanisms, where available, had not been pursued, and that this power to require payment of costs should not impact on the ability of undertakings to seek resolution of disputes through Ofcom.

²⁰ Section 190(6)(a) of the 2003 Act.

²¹ Section 190(6)(b) of the 2003 Act.

²² See

http://www.dcms.gov.uk/images/publications/FWR_implementation_Government_response.doc

²³ See paragraph 92.

- 5.53 We share the Government's desire to see greater use of alternative dispute resolution in appropriate cases, and agree that costs requirements should not act to discourage Parties from referring genuine regulatory disputes for resolution where alternative dispute resolution may not be appropriate.
- 5.54 However, it is our view that hitherto some Parties may have considered Ofcom as their first port of call and may not have fully explored all possible alternative mechanisms for resolving disputes such as ADR. Whilst we accept that ADR may not be an appropriate mechanism for resolving all types of regulatory disputes (for example some disputes involving multiple Parties), we would like to see more attempts to resolve matters in this way.
- 5.55 Ofcom will issue further guidance in due course setting out the types of disputes in which we might seek recovery of our costs and the methodology we will use to calculate them.

Section 6

Section 185(4) format for submitting a dispute referral to Ofcom

6.1 Submissions should be made to:

Investigations Programme Manager, Competition Group
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
e-mail: competition.complaints@ofcom.org.uk
Telephone: 020 7783 4100

6.2 If you need any further guidance on how to make a submission to Ofcom, please contact the Competition Group's Investigations Programme Manager.

6.3 On receipt, Ofcom will send a non confidential version of the dispute submission to the Parties named in the dispute submission. If the dispute submission contains confidential information, you must provide a separate non-confidential version which can be copied to the other Parties, as well as explaining why you believe the information to be confidential.

6.4 In the event that Ofcom accepts the dispute submission, Ofcom will normally publish details of the dispute, including the business names of the Parties in Ofcom's Competition and Consumer Enforcement Bulletin on its website. Where publishing a final determination, Ofcom may also publish the non-confidential version of the dispute submission.

6.5 Parties referring a dispute must ensure that the information provided is specific and relevant and does not go beyond what is needed to resolve the dispute. The submission of unnecessary or irrelevant information or evidence could delay the opening of the Enquiry Phase. In certain exceptional cases however, in particular with respect to smaller companies or individuals, Ofcom may, taking into account all the circumstances, consider relaxing some of these conditions.

Contents of a submission

6.6 Parties are reminded that if they do not refer disputes in the manner set out in these guidelines (Section 185(4) of the 2003 Act), Ofcom is not obliged to accept the dispute (Section 186(1) of the 2003 Act).

6.7 Supporting evidence may be provided in suitable electronic formats (advice on this can be provided by the Investigations Programme Manager). However, we will require a hard copy of the main body of the submission, with a signed declaration by an officer of the company.

6.8 A submission should contain the following information:

Section A: Preliminary information

6.9 Please provide:

- business name, address, telephone number, and email address and, if relevant, the contact details of an individual who can discuss the detail of the dispute;
- a brief explanation of the nature of the Party's business (e.g. network operator, internet service provider etc) and its scale (local, national, international - approximate turnover is helpful);
- details of the other Party(s) in dispute (nature of the Party's business; contact details);
- details of the relationship between the Parties to the dispute;
- a summary of the dispute including the legal basis according to which the dispute is being referred (i.e. section 185(1), section 185(2)²⁴) and an explanation (with evidence) of how the relevant conditions are fulfilled;
- a concise explanation of the commercial context to the dispute;
- full details of any *ex ante* regulatory condition or other regulatory condition applying to any Party to the dispute and whether and, if so, how such conditions apply in this case; and
- a proposed remedy or remedies for resolution of the dispute.

Section B: The issues in dispute

6.10 Please provide a clear and precise delineation of the scope of the dispute, including:

- full details of the relevant products or services;
- a list of all the issues which are in dispute; and
- a clear and comprehensive explanation of the commercial context to the dispute, including all relevant background and evidence.

6.11 Full details of any justification given (including relevant evidence) for the conduct or action leading to the dispute.

- If the dispute relates to a request for a new access product or service: business plans of relevant product or service including forecasts, demonstrating how and when it is intended to make use of the products or services requested.
- If the dispute concerns a variation or amendment to existing agreed terms between the Parties: a copy of the relevant version of the contract or terms, clearly identifying the clauses that are subject to the dispute.
- If the dispute relates to *ex ante* conditions or other regulatory conditions applying to any party to the dispute: a full description of the relevant regulatory conditions to which it relates, including a view on the relevant economic market and whether any communications provider in that market has been designated as having SMP. Parties should explain why they consider that the relevant obligation is not being met. For example, if a Party is alleging that a charge is not

²⁴ Or section 22 of Schedule 18 of the 2003 Act.

cost oriented, that Party must set out its reasoning. Parties should also explain whether there have been any significant market changes in the relevant market or markets since any such regulatory condition was imposed.

Section C: History of commercial negotiations

6.12 Please provide a description of any negotiations which have taken place between the Parties or, in the event that a Party has refused to enter into negotiations, evidence of the submitting Party having taken reasonable endeavours to enter into good faith negotiations.

6.13 Ofcom would expect to see:

- details of the steps taken (or the reasonable endeavours to enter into good faith negotiations) to resolve all of the issues which are in dispute;
- an explanation of why commercial agreement could not be reached;
- 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; and
- 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.

6.14 We are aware that in negotiations, Parties may make without prejudice offers in an attempt to settle disputes. We do not wish to dissuade Parties from actively seeking to resolve disputes in this way, and whilst we will wish to see details of such offers where that may be relevant to determining whether meaningful negotiations have taken place, the existence or content of such offers will not be treated as relevant information or determine our resolution of a dispute.

Section D: Ofcom's Statutory and Community Duties

6.15 For all submissions, Ofcom expects the following information:

- identification and applicability of any of Ofcom's regulatory principles and statutory duties (as set out in sections 3 and 4 of the 2003 Act), which the referring party considers is relevant in this case; and
- where relevant, a clear explanation of how the subject matter of the dispute may relate to broader regulatory issues or policies (where, for example, the matter in dispute is also subject to an SMP finding).
- In relation to disputes falling within section 185(1), identification and application of the additional regulatory principles and statutory duties referred to in section 190(2A).

Section E: Proposed Remedy

6.16 Please include details, with reasons, of the appropriate remedy for the dispute, for example:

- full details, including an accurate technical description, of a requested product or service; and
 - the specific level at which the relevant charge should be set.
- 6.17 For each suggested remedy or outcome, Parties must also give a full justification and explain how that remedy:
- a) falls within section 190 of the 2003 Act, and
 - b) would be consistent with Ofcom's statutory duties, as set out in sections 3 and 4 of the 2003 Act, as well as Ofcom's regulatory principles (see Annex 2).

Section F: Supporting information and evidence

- 6.18 Where relevant and available, Ofcom expects the Parties to provide the following specific information and evidence:
- copies of the relevant contract or terms which are the subject of the dispute (see Section B);
 - business plans relating to the relevant product or service (see Section B);
 - all relevant documentary evidence of commercial negotiations between the Parties relating to the disputed matter or matters (see Section C);
 - relevant details about the provision of the product or service in question;
 - a full chronology of all the relevant facts;
 - detailed and specific cost/price information for the provision of the relevant product or service, as well as cost/price trends (where available). In all cases, costs/price information and data must, in view of the strict statutory timetable for resolving disputes, be presented in a usable format, including, where relevant, a fully executable model;
 - full and complete benchmarking data. This could be on an international, industry or other basis. In the alternative, explain why no such data is available or relevant; and
 - all relevant previous decisions, determinations, rulings by courts/tribunals, guidance, opinions/recommendations and policy statements at the UK or EC level.
- 6.19 Where you consider that information which falls into one of the above categories is either not relevant, or that information is not available, please explain why this is the case.
- 6.20 In all cases, Ofcom expects the Parties to provide information and evidence that is focused and appropriately tailored to the relevant issues in dispute.
- 6.21 In all cases, Ofcom expects the Parties to provide non-confidential versions of such information and evidence.

Declaration by an officer of the company:

6.22 Before making this submission to Ofcom, to the best of my knowledge and belief, [company name] has sought to resolve this dispute through commercial negotiation. All information and evidence provided in referring this dispute to Ofcom is, to the best of my knowledge and belief, true and accurate.

6.23 Signed:

6.24 Position in the company:

6.25 Date:

Acknowledgement of submissions

6.26 We will acknowledge receipt of a submission within one working day.

6.27 This does not necessarily mean that we think the submission meets the requirements set out above. As set out in section 3, if a submission does not meet the requirements set out above, we will advise you on what else may be needed before we will consider the submission to be complete.

Annex 1

Guidance on pre-EPM questionnaires

- A1.1 In the interests of transparency and good regulatory practice, we will publish all non-confidential consultation responses in full in our competition and consumer enforcement bulletin on our website, www.ofcom.org.uk.
- A1.2 The underlying aims of an Enquiry Phase Meeting (“EPM”) are to:
- 1.2.1 Improve the transparency of the Enquiry Phase (i.e. exchange of submissions);
 - 1.2.2 Better limit the parameters of the issues in dispute (i.e. excluding areas of agreement in respect of factual evidence, regulatory principle);
 - 1.2.3 Test the possibility of alternative means of resolution;
 - 1.2.4 Confirm applicable regulatory statements;
 - 1.2.5 Engage with Parties on proposed timetables; and
 - 1.2.6 Should a dispute be accepted, inform decisions on scope and information required.
- A1.3 The purpose of the EPM is not for Ofcom to opine on the merits of the submissions or make any judgement as to factual evidence.

Questions for a pre-EPM Questionnaire

- A1.4 The following provides examples of what might be requested by a pre-EPM Questionnaire:
- A party’s view on the product/service that is the subject of the dispute;
 - A party’s view on the date range relevant to the dispute;
 - A party’s view on the amount that is in dispute and how it is broken down/calculated;
 - A party’s view on any relevant exclusions from the dispute;
 - A party’s provision of a timeline of relevant commercial events;
 - A party’s provision of a timeline of relevant regulatory events/statements (precedent);
 - A party’s view on the preferred remedy;
 - A party’s view on why there are no alternative means.

Annex 2

Ofcom's statutory duties and regulatory principles

Sections 3 and 4 of the 2003 Act

- A2.1 Ofcom's principal duty in carrying out its functions, as set out in section 3(1) of the 2003 Act, is:
- (a) to further the interests of citizens in relation to communications matters; and
 - (b) to further the interests of consumers in relevant markets, where appropriate, by promoting competition.
- A2.2 Further, as set out in section 3(2) of the 2003 Act, Ofcom is required to secure each of the following:
- a) the optimal use for wireless telegraphy of the electro-magnetic spectrum;
 - b) the availability throughout the United Kingdom of a wide range of electronic communications services;
 - c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;
 - d) the maintenance of a sufficient plurality of providers of different television and radio services;
 - e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services;
 - f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both:
 - (i) unfair treatment in programmes included in such services; and
 - (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.
- A2.3 Section 3(3) of the 2003 Act require Ofcom to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles appearing to Ofcom to represent the best regulatory practice.
- A2.4 Section 3(4) of the 2003 Act requires Ofcom to have regard to such of the following as appear to Ofcom to be relevant in the circumstances:
- a) the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom;

- b) the desirability of promoting competition in relevant markets;
- c) the desirability of promoting and facilitating the development and use of effective forms of self-regulation;
- d) the desirability of encouraging investment and innovation in relevant markets;
- e) the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom;
- f) the different needs and interests, so far as the use of the electro-magnetic spectrum for wireless telegraphy is concerned, of all persons who may wish to make use of it;
- g) the need to secure that the application in the case of television and radio services of standards falling within sections 3(2)(e) and (f) of the 2003 Act is in the manner that best guarantees an appropriate level of freedom of expression;
- h) the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection;
- i) the needs of persons with disabilities, of the elderly and of those on low incomes;
- j) the desirability of preventing crime and disorder;
- k) the opinions of consumers in relevant markets and of members of the public generally;
- l) the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and in urban areas;
- m) the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in sections 3(1) and 3(2) of the 2003 Act is reasonably practicable.

A2.5 Section 3(5) of the 2003 Act requires Ofcom, when performing its duty to further the interest of consumers, to have regard in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.

A2.6 Section 4 of the 2003 Act requires that where Ofcom is carrying out functions for the purpose of fulfilling its "Community obligations" (additional duties imposed by European legislation), which includes regulatory dispute resolution,²⁵ it must act in accordance with the six Community requirements which give effect, among other things, to the requirements of Article 8 of the Framework Directive. In summary, those requirements are:

- to promote competition in communications markets;

²⁵ The Community obligations are set out at section 4 of the 2003 Act. Ofcom is required to act in accordance with the Community obligations where it is carrying out its functions under Chapter 1 of Part 2 of the 2003 Act, which amongst other areas covers regulatory disputes.

- to secure that Ofcom contributes to the development of the European internal market;
- to promote the interests of all European Union citizens;
- to act in a manner which, so far as practicable, is technology-neutral; and
- to encourage, to the extent Ofcom considers it appropriate, the provision of network access and service interoperability for the purposes of securing efficiency and sustainable competition in communications markets and the maximum benefit for the customers of communications network and services providers; and
- to encourage such compliance with certain international standards as is necessary for facilitating service interoperability and securing freedom of choice for the customers of communications providers.

Ofcom's regulatory principles

A2.7 Ofcom has established a set of regulatory principles, which provide a clear statement of Ofcom's approach to regulating communications markets. These principles are consistent with Ofcom's duty under the 2003 Act to have regard to regulatory principles of transparency, accountability, proportionality, consistency and the targeting of regulation only at cases where action is needed, and to other principles Ofcom considers represent best regulatory practice.

A2.8 Ofcom's regulatory principles are:

- Ofcom will regulate with a clearly articulated and publicly reviewed annual plan, with stated policy objectives;
- Ofcom will intervene where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve;
- Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required;
- Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome;
- Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives;
- Ofcom will research markets constantly and will aim to remain at the forefront of technological understanding; and
- Ofcom will consult widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation upon a market.

Ofcom's principles of pricing and cost recovery

A2.9 Many disputes concern issues surrounding charges for goods or services. Where appropriate, Ofcom will also consider the application of each of the six principles of

pricing and cost recovery as an appropriate basis for assessing different options which is fair and reasonable as between the disputing Parties. These are:

- Cost causation;
- Cost minimisation;
- Effective competition;
- Reciprocity;
- Distribution of benefits; and
- Practicability.