BT Response to Ofcom's Consultation – Draft Enforcement Guidelines

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Submitted by George Ritchie – BT Legal
BT Centre, 81 Newgate Street, London, EC1A 7AJ.
george.ritchie@bt.com

BT's Response to Ofcom's Consultation "Draft Enforcement Guidelines".

1. Introduction

Ofcom's consultation is very timely, given the legislative changes that took effect last year, the growing body of jurisprudence that has developed at the Competition Appeal Tribunal since the 2006 draft guidelines were issued and the economic pressure on both Ofcom and those it regulates to act efficiently. Generally, we consider the current draft to be an improvement on the 2006 version. Separating out Ofcom's guidance on its compliance processes from its guidance on dispute resolution helps give clarity of the different nature of these two functions. We welcome, also, the recognition, in Section 7, that there is overlap between regulatory enforcement and competition law enforcement and the proposal to allow parties being investigated for regulatory non-compliance an oral hearing.

There are however four key issues that we urge Ofcom to address, and which we believe are appropriate enhancements that should be incorporated as part of Ofcom's guidance on the enforcement regime. These are:

- The interface between enforcement proceedings and dispute resolution (where a dispute involves or is based upon potential compliance issues);
- A way of working that can help to achieve pragmatic forward looking solutions to potential regulatory compliance issues at the enquiry phase;
- Where behaviour might potentially amount to a breach of competition law or of regulatory obligations (typically SMP obligations), an explanation of Ofcom's approach to determining whether to use its regulatory or competition law jurisdiction; and
- In cases where Ofcom is considering the imposition of a fine, in addition to the welcome new right to an oral hearing, we consider that the party being investigated should be given full access to the file in the same way as happens in competition law investigations.

Finally, we have a number of other suggestions which are intended to aid clarity, to assist processes to run smoothly or to flag points where we feel the 2006 draft guidance wording was preferable to the current draft. We trust Ofcom will find these suggestions helpful and that it will adopt the suggested changes.

2. Enforcement proceedings and dispute resolution

BT welcomes the fact that in the last few months Ofcom has separated out its guidances from one composite document to produce a suite of guidances focussed on particular subjects, and in particular the fact that Ofcom has removed "dispute resolution" processes from a document entitled "Draft Enforcement Guidelines". We believe that this separation will help to emphasise that, conceptually, dispute resolution, which is concerned with achieving a fair outcome between the parties in relation to commercial disagreements, is distinct from investigation of whether or not individuals have or have not complied with the legal obligations that have been imposed on them.

We recognise, however that cases such as BT's appeal of Ofcom's decision in relation to the PPCs dispute have raised issues about the overlap between the two processes. We note also that in

paragraph 6.11 of its Dispute Resolution Guidelines Ofcom refers to the possibility that a dispute may raise issues of compliance with obligations such as cost orientation obligations. We do not, however, see in the draft enforcement guidelines any reference to processes for determining compliance in the context of a dispute.

BT understands that where a dispute between two parties about how those two parties will contract and do business with each other on a current and or forward looking basis is referred to it and accepted it is necessary for Ofcom to consider whether the course of dealing imposed or proposed by both or either party is compliant with those parties' respective regulatory obligations. However, BT remains extremely concerned that both Ofcom and the UK's Competition Appeal Tribunal have misinterpreted and misapplied both the UK's domestic legislation and the European Common Regulatory Framework, to allow the UK's dispute resolution process to be used to make findings of historic regulatory non-compliance and make directions for repayments that go well beyond compensation (of the type allowed for regulatory and competition law non-compliance) and without allowing the target the same or similar rights of defence as would be available in either a competition law or regulatory enforcement compliance investigation.

Having made that point, we do not consider that this is the place to rehearse further the issues that are due to be aired in BT's appeal of the Competition Appeal Tribunal's PPCs dispute decision. Suffice it to say, it is evident from these guidelines that Ofcom's enforcement processes are clearly designed to incorporate a system of checks and balances which provide safeguards for "targets" under investigation and which ensure that the rights of defence of a target can be properly exercised. This is vitally important given the potential consequences – both in terms of quantum and brand/reputation – of a finding of infringement.

We do, therefore, remain concerned by the prospect that as a result of the requirement for disputes to be resolved expeditiously in accordance with the dispute resolution processes, the rights of a defence of a target risk being impugned. Accordingly, we consider that it is clearly preferable for compliance issues to be addressed in accordance with Ofcom's enforcement processes as set out in this draft guidance. We suggest, therefore, that, at the very least (and without prejudice to our submissions in the PPC appeal), it would be appropriate for Ofcom to include in this guidance a statement that where potential non-compliance is alleged in the course of a dispute, Ofcom will consider whether it is more appropriate to address that issue as a compliance investigation, and if not, how it will ensure that the safeguards built into the enforcement regime will be maintained in the course of the resolution of the dispute.

3. Enquiry phase discussions.

Enforcement of regulatory obligations sometimes involves *ex post* policing of obligations in ways which are very similar to competition law. That is, after an obligation has come into effect, allegations are made that the regulated target's behaviour amounts to a breach of clearly understood obligations. In these circumstances, it may well be evident that any investigation will be concerned both with remedying the ongoing breach and with determining appropriate sanctions for the previous breach. In these circumstances, the process as set out in section 5 is apt for enabling Ofcom to determine whether or not to open an investigation. Ofcom should however be aware that in such circumstances, any potential target will frame its dealings with Ofcom in ways designed to

ensure that it maximises its rights of defence and that it will be unwilling to engage in dialogue that could in any way be used against it a later stage in the proceedings.

On other occasions, however, Ofcom's intervention may be at a very early stage (i.e. at the instant when novel behaviour (which Ofcom considers may be non-compliant) first starts). In such circumstances the proceedings are far more in the nature of *ex ante* intervention. In these circumstances, Ofcom's concern may primarily be about how to get the target to stop or to modify its behaviour before harm occurs. In such cases, provided that the matter can be expeditiously resolved, fines may be a wholly inappropriate sanction. BT is aware of such cases having arisen in the past which have proved capable of resolution without the need for formal action.

Under the current regime, it may be hard for a potential target, if advised by Ofcom that it is contemplating taking enforcement action, to know whether the case is one where Ofcom may have an initial view that, if the breach is proved, a fine might be appropriate, or whether it is one where Ofcom merely wants to straighten things out for the future. In these circumstances the potential target may err on the side of caution with the consequence that chances for early resolution of an issue may be lost. This may be inefficient and lead to an unnecessarily heavy-handed – or adversarial – approach to regulation when a simpler, more straightforward approach may achieve the same goals more quickly and efficiently.

The current draft of section 5 is focussed purely on the process to establish whether or not a breach may have occurred and if so whether action should be taken. We believe that it would help to avoid the risks identified above if Ofcom articulated, in the course of the enquiry phase, whether the issue is one that might be capable of resolution on an informal basis if the target is willing to give commitments, or if it made it clear that that it would offer an opportunity for parties to discuss on a "without prejudice" basis the giving of commitments as an alternative to enforcement action.

If Ofcom agrees with our proposal, we would be happy to discuss with Ofcom how the details of this could be written into the guidance.

4. Right to access to the file in a regulatory investigation.

BT welcomes the proposal (as set out in paragraph 7.4) to provide the target of a regulatory investigation with the opportunity to make oral representations in all cases where Ofcom is minded to impose a financial penalty, thereby aligning the regulatory compliance process with competition law processes. As Ofcom has the power to impose fines of up to 10% of turnover if regulatory non-compliance is found, we believe that it is essential that Ofcom properly and thoroughly investigate compliance issues, with an appropriate respect for the parties' rights of defence built into the process and accordingly that, should Ofcom fail to respect a party's rights of defence, it risks its determination (and any fine imposed) being overturned on appeal.

To that end, we believe that the draft enforcement guidelines should also make provision for the target to have a right of access to the case file in all regulatory enforcement cases where Ofcom is empowered to impose a fine. In competition law, the right of access to file is a fundamental right set out in the EU Charter of Fundamental Rights (Article 42) and is a corollary of the principle of respect for the rights of defence as a part of the Rule of Law. It is expressly acknowledged in the regulations implementing the competition prohibitions (Articles 101 and 102 Treaty of the Functioning of the

EU), and we believe that it must similarly be respected in the context of regulatory enforcement where Ofcom has the power to impose fines of a penal nature for regulatory non-compliance, whether that non-compliance has already ceased or is ongoing.

In the competition law enforcement context, the EU courts have made it abundantly clear that the right of access to the case file means that the target should be given the opportunity to examine all the documents in the investigation file which may be relevant for its defence, save where the business secrets of other undertakings are involved (Case 85/76 Hoffman-La Roche v Commission [1979] and others). This right has been described as a 'procedural safeguard intended to protect the rights of the defence' and more precisely 'an essential precondition of the effective exercise of the right to be heard'. A "target" faced with a potential punitive regulatory sanction, which is designed to be a deterrent, should equally have the right to see all material which may in fact prove to be exculpatory as well as the inculpatory evidence.

In the light of this precedent, we believe that it would be unsafe for Ofcom to assume that a regulatory enforcement process which did not allow for such disclosure, but which resulted in the imposition of a penal sanction would be compatible with the ECHR regime.

There is one further reason, allied to the points already made about the changes made in May 2011 to the Communications Act 2003 regulatory enforcement regime, why we believe that access to the case file should be given. In particular, the ability to impose fines of up to 10% of turnover for past breaches (even if rectified) means that there is considerable overlap between regulation and competition law. Indeed, as already stated above, there are a number of types of behaviour by a dominant party, for example involving discrimination or refusal to supply, which might be investigated under either competition law or the regulatory enforcement regime.

If Ofcom was required, when investigating such behaviour under competition law, to give access to the file, but had chosen not to do so when investigating the same behaviour as a potential regulatory breach, this would remove an essential check and balance from the regulatory regime, and indeed could have a distortive effect on Ofcom's decision making when deciding whether to use competition powers or regulatory powers.

5. Competition –v– Regulatory powers

In section 10 of the 2006 draft guidance (at paragraphs 10.4 to 10.10) Ofcom considered the overlaps between its Competition Act 1998 jurisdiction and its jurisdictions, under the Broadcasting Acts and the Communications Act 2003 as a sectoral regulator. In paragraphs 10.8 and 10.9 Ofcom committed to consider on each occasion which power to use and that it would state its decision in the opening Competition Bulletin entry and the reasons for it. In particular, it stated that:

> *"On each occasion before using its powers under the Communications Act for competition purposes, Ofcom will consider whether a more appropriate way of proceeding would be under the Competition Act, and will proceed under the Competition Act if considers that is more appropriate to do so"*[sic].

This section of the 206 draft guidance has been omitted from the current draft guidance. Now, more than ever, we consider that this is an important omission and accordingly we urge Ofcom to reinstate it.

As indicated above, we welcome the fact that in some areas (oral hearings, for example) Ofcom appears to be moving towards alignment of regulatory investigations processes with competition enforcement processes. We have also addressed the question of access to the file in section 4 above. However, other key distinctions remain, or may arise in the near future.

Our main concern is in relation to the appeals regime. If the Communications Act is amended so that the right of appeal against a regulatory decision is less than the full right of appeal that exists under the Competition Act, this will be a significant distinction that would be likely to put any decision to use regulatory powers rather than competition powers (or indeed vice versa) firmly in the spot light.

Similarly, in relation to the process by which any financial penalty is set, the processes under the regulatory regime and the competition regime are different. Ofcom has recently issued its guidance on financial penalties which clearly differs from the regime as set out in the OFT's guidance. In this regard see also our comments on paragraph 3.40 as set out in section 6(ii) below. Again, given that if it uses regulatory powers and finds an infringement Ofcom will have a broader discretion in the setting of a fine than under competition law (and that any fine will have deterrence as an objective), Ofcom should be required to articulate clearly the reasoning which has led it to conclude that the use of regulatory enforcement powers are more appropriate.

Accordingly, for both these reasons, we invite Ofcom to reinstate a commitment of the type previously offered in paragraphs 10.8, 10.9 and 10.10 of the 2006 draft guidance.

6. Other points on the current draft guidance.

(i) Paragraphs 2.18 to 2.20.

These paragraphs are a shorter version of paragraph 2.7 of the 2006 draft guidance. Whilst we agree with the principle of cutting down this section, the current draft omits the acknowledgement that was in the first bullet of paragraph 2.7 that Ofcom will have regard to decisions and guidances of other bodies such as the OFT and other sectoral regulators. We would welcome a short addition to the current paragraphs 2.18 to 2.20 that reaffirms Ofcom's intention to seek to ensure an appropriate degree of consistency with the OFT and with other regulators, which offers some degree of regulatory certainty.

(ii) Paragraph 3.40.

The first bullet to this paragraph provides that where Ofcom determines that a competition law prohibition has been infringed, in deciding upon the appropriate level of any penalty, Ofcom "*must have regard to the OFT's guidance"* on setting the amount of any penalty. The 2006 version (paragraph 3.25) provided that Ofcom *"will follow the fining guidelines published by the OFT"*. The introductory words to paragraph 3.40 also introduce the word *"may"* before the two bullets.

We suggest that the current wording has the potential to introduce inconsistency of approach between the OFT and Ofcom. If *"must have regard to"* means that in practice Ofcom's approach could to some extent diverge from the OFT approach, so that in circumstances where there is concurrent jurisdiction, different financial penalties might be imposed depending on which authority investigated, that would be inequitable and might, with time, lead to disputes as to which authority should assume jurisdiction for the investigation of an alleged breach. It would also undermine principles of legal certainty if there was the potential for different outcomes from different investigators.

We suggest that paragraph 3.40 should be redrafted as follows:

"If, following investigation, Ofcom determines that a prohibition has been infringed, Ofcom may:

- *impose a financial penalty on the infringing party of up to 10% of the undertaking's turnover in a relevant market; and/or*
- *issue directions requiring the subject of the investigation to bring the infringement to an end.*

In deciding upon the appropriate level of any penalty, Ofcom will follow the OFT's guidance on setting the amount of a penalty."

(iii) Paragraph 6.5.

In section 5, Ofcom sets out a process by which it will reach a decision on whether or not to open an investigation, and if so, what the scope of that investigation will be. The target will have an opportunity to respond and to make representations. It is clear from section 5 that the process involves a first look/first hear process which results in Ofcom making a decision as to whether or not to open the investigation.

That process is to be welcomed, both for the fact that it allows Ofcom to hear from interested parties, but also because it ends with a decision being made. It follows that if Ofcom makes a decision, then a right of appeal against the making of that decision will arise.

Paragraph 6.5, however, appears to apply only a more limited version of that approach in relation to changes to the scope of an investigation, referring only to the administrative priorities part of Section 5. We suggest that it would be more appropriate to apply all of the process set out in Section 5, not just the administrative priorities part. In particular, the target should be given details of the proposed extended scope of the investigation (whether it be an additional complaint, or information that has become available to Ofcom) and should be allowed to submit further representations. Having received those representations, Ofcom can then apply again the administrative priority framework and thereby reach a new decision on scope.

The importance of this is that a party may not object to the original scope of an investigation, but may wish to appeal against any decision to widen its scope.

We suggest that paragraph 6.5 be amended to read as follows:

> *"It may be appropriate to widen the scope of an investigation which is underway if we receive further complaints or if we become aware of new issues that might warrant investigation. If we are thinking of changing the scope of an investigation, we will apply the framework set out in section 5. We will advise the target of the additional complaint or of the new issues that have come to our attention, giving them the opportunity to make representations to us. We will then apply the administrative priority framework. When we decide to change the scope of an investigation we will inform the target of our decision and will update the case details on our website."*

(iv) Paragraphs 6.8 and 8.12.

We agree with Ofcom that investigations under the Competition Act are complex and that, in relation to timescales, it would not be appropriate to set specific timescales. Given that a Competition Act investigation will, by its very nature, be an *ex post* investigation rather than *ex ante* intervention, getting the right result is more important than achieving an outcome within a prescribed timeframe. Indeed, we would suggest that in some instances, the passage of time during an investigation can well assist the decision making process. It may, for example, help to show that there has been no harm on the market or, as with the previous investigation into BT's retail broadband pricing, that forecasts that looked unreasonable were in fact reasonable.

Having said that, we note that the current draft omits much of what was previously included in paragraphs 5.49 to 5.58. The thrust of those paragraphs was that there would either be some milestones set, or that there would be indications at six monthly intervals of what was expected next. Whilst formal setting of milestones may be inappropriate, it would be an aid to transparency if Ofcom were to consider providing, say, six monthly updates as to progress and what was expected next, with either an indication of the proposed timescale for the next milestone or confirmation that at least another six months would be needed for the investigation stage.

The current draft also refers to Ofcom periodically reviewing open investigations against its administrative priority criteria. The current draft provides no information of how frequently that will be, and whether or not any parties will be informed of the outcome of that review. We suggest that this should be a part of the six monthly review process.

(v) Paragraph 7.2.

This provides that *"in certain cases"* Ofcom may publish a reasoned case closure, if *"it would be helpful for all stakeholders to clarify our interpretation of a particular regulatory condition"*. Even in seemingly minor matters, information on Ofcom's rationale provides a source of useful regulatory guidance. We hope therefore that reasoned decisions, providing an explanation of Ofcom's rationale will be the norm rather than the exception.

(vi) Paragraphs 7.12 to 7.17: the compliance phase.

We are assuming that this is intended to be an explanation of how Ofcom may monitor a target's efforts to achieve and maintain compliance following a finding of infringement and the making of an enforcement order, rather than the process to be followed as an alternative to the making of an enforcement order (which is dealt with in paragraph 7.5). If our assumption is correct, we would like

to suggest the following amendments to the heading to paragraph 7.12 and to the following paragraphs to aid clarity:

> *"Monitoring compliance following a finding of breach*
>
> *7.12 Where Ofcom has concluded that a person has been contravening, or is contravening, a condition, and has taken enforcement action as set out in section 3 above, Ofcom may decide to "put the matter into compliance". The purpose of such a compliance phase is to enable Ofcom to ensure that the target does not repeat behaviour that Ofcom has found to breach regulatory rules, that it complies with any undertaking and commitments, and that it implements any remedies required by Ofcom (for example, paying affected customers compensation).*
>
> *7.13 The case will be moved from the "open" section of the Competition and Consumer Enforcement Bulletin on Ofcom's website to the section for cases in compliance. We will periodically publish details of significant developments."*

Then, delete the current draft paragraph 7.16 and renumber the current draft paragraphs 7.13 to 7.15 as 7.14 to 7.16.

(vii) Paragraph 9.10.

We believe that it would aid clarity to include a reminder here of the need for complainants to provide detailed evidence in support of their complaint. The need for this has been set out, for example, in the fifth bullet to paragraph 2.17, but if Section 9 is intended to be in the nature of a checklist, or a template, for complainants, we believe it would be sensible to repeat that advice here.

(viii) Section 9D: The relevant market.

The heading to section 9D states that:

> *"Complainants may refer to relevant sections of Ofcom's market reviews in support of a competition law complaint"*

Whilst we accept that at the very outset of an investigation, information in relation to market conditions that may previously have been found in a market review may be an indicator of whether any party may have a degree of market power, it would be inappropriate for Ofcom to rely on such an assessment, undertaken at a previous time for a different purpose. A market review is based largely on the markets as listed in the EU recommendation and for the purpose of ascertaining if there is a need to impose *ex ante* regulatory obligations. It is not a substitute for a proper competition law analysis of relevant markets in the light of the situation pertaining at the outset of an investigation and the concerns that may have been identified by a complainant.

We are, accordingly, keen to ensure that this reference does not gain a degree of prominence that is too great in the circumstances or which might suggest that Ofcom will be willing to "short-cut" the proper competition law market assessment processes. We therefore suggest that this sentences is

deleted from the heading to section 9D and replaced with a new paragraph to be inserted at the end of section 9D as follows:

> *"When preparing a submission, complainants may refer to relevant sections of any relevant Ofcom market reviews as an initial indicator of possible relevant markets or in support of their contentions as to the competitive conditions in the relevant market(s). If, however, it opens an investigation, Ofcom will undertake its own investigations to determine the relevant market(s) and the state of competition on them in the light of the matters being investigated."*

E N D