



Payment of costs and expenses in regulatory disputes

Guidance on Ofcom's approach

Guidelines

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Section 1

Summary

Purpose of this document

- 1.1 Ofcom's powers under the Communications Act 2003 ("the 2003 Act") relating to the recovery of costs and expenses arising from regulatory disputes were amended by the Electronic Communications and Wireless Telegraphy Regulations 2011 ("the Regulations").¹ Ofcom has revised powers under section 190 of the 2003 Act to recover the costs and expenses that it incurs itself in dealing with a dispute. It also has revised powers to require a party to a dispute to make payments to another party to the dispute in respect of costs and expenses which that other party has incurred.²
- 1.2 On 7 June 2011, following consultation, we issued revised guidelines for the handling of disputes ("Dispute Resolution Guidelines")³ in which we said that we would provide separate guidance regarding costs and expenses.
- 1.3 These guidelines set out Ofcom's approach to:
 - 1.3.1 recovering its own costs and expenses incurred when making a determination for resolving a dispute pursuant to sections 185-191 of the 2003 Act; and
 - 1.3.2 requiring payment of another party's costs and expenses incurred in connection with a dispute.
- 1.4 The approach set out in these guidelines applies only to disputes within the meaning of section 185(1), 185(1A) and 185(2) of the 2003 Act. It does not apply to disputes brought under the Postal Services Act 2011.
- 1.5 Section 2 of these guidelines explains the scope of Ofcom's revised powers, and the rationale for seeking cost recovery.
- 1.6 Section 3 of these guidelines sets out:
 - 1.6.1 the types of disputes in respect of which Ofcom may consider cost recovery;
 - 1.6.2 the factors that Ofcom will take into account when deciding whether to recover its own costs and expenses and/or require payment of another party's costs; and
 - 1.6.3 the methodology and process that will be used to calculate amounts to be recovered/paid.

¹ SI 2011/1210.

² In these guidelines, the term "dispute" or "regulatory dispute" means a dispute within the meaning of these sections unless expressly stated otherwise.

³ Dispute Resolution Guidelines (7 June 2011) (available on Ofcom's website at <http://stakeholders.ofcom.org.uk/binaries/consultations/dispute-resolution-guidelines/statement/guidelines.pdf>).

- 1.7 These guidelines will not have binding legal effect. However, where we depart from the approach set out in this guidance, we will explain why.

Summary of our proposed approach to costs in disputes

- 1.8 In general we expect the current practice, under which both Ofcom and the disputing parties bear their own costs, to continue for the majority of disputes that Ofcom resolves. It is not our intention routinely to recover Ofcom's costs of disputes or to require costs payments to be made as between disputing parties.
- 1.9 We will consider on a case-by-case basis whether it is appropriate for any party's costs to be paid by another party. However, it is not possible to identify in advance all cases in which we will decide that costs should be recovered, and Ofcom cannot fetter its discretion in this regard. The proposed approach, including the factors discussed in Section 3 of this document, should therefore be read as a general guide, and are subject to the specific facts and circumstances of each individual case.

Section 2

Introduction and background

Ofcom's powers relating to costs in disputes

2.1 Sections 185-191 of the 2003 Act, as amended by the Regulations, set out Ofcom's duties and powers in resolving regulatory disputes.

2.2 Section 190(6) of the 2003 Act provides that:

Where OFCOM make a determination for resolving a dispute, they may require a party to the dispute—

(a) to make payments to another party to the dispute in respect of costs and expenses incurred by that other party in consequence of the reference of the dispute to OFCOM, or in connection with it; and

(b) to make payments to OFCOM in respect of costs and expenses incurred by them in dealing with the dispute;

and may determine the amount of the costs and when the costs are to be paid.

2.3 Section 190(6A) of the 2003 Act provides that:

OFCOM may not, under subsection (6)(a), require a party to the dispute to make payments to another party unless OFCOM have considered:

(a) the conduct of the party before and after the reference to Ofcom (including, in particular, whether any attempt has been made to resolve the dispute), and

(b) whether OFCOM has made a decision in the party's favour in respect of the whole or a part of the dispute.

2.4 Section 190(6B) of the 2003 Act provides that:

OFCOM may not, under subsection (6)(b), require payments to be made to them by a party to the dispute unless:

(a) the dispute relates to the rights and obligations of the parties to the dispute under the enactments relating to the management of the radio spectrum; or

(b) they have considered the matter referred to in subsection (6A)(a) and (b).

2.5 Before the 2003 Act was amended by the Regulations, Ofcom could require a party to make payments to another party only where:

2.5.1 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

- 2.5.2 it appeared to Ofcom that the dispute reference by a party was frivolous or vexatious or that a party had abused the right of reference conferred by the 2003 Act.⁴
- 2.6 This restriction has now been removed. A restriction similar to that set out in paragraph 2.5.2 continues to apply to postal disputes referred to Ofcom and accepted for resolution under the Postal Services Act 2011. Such disputes are not affected by the matters set out in this document.

The rationale for cost recovery

- 2.7 Ofcom and other parties will inevitably incur costs and expenses when dealing with disputes, which may include direct costs/expenses (such as for the provision of external expert advice), and internal costs (such as time spent by employees in dealing with the dispute). Ofcom has seen an increase in the number of disputes referred to us for resolution in recent years. In addition, the complexity and level of resource required to resolve these disputes has also been increasing. This has implications not only for the costs arising from Ofcom's dispute resolution functions but also for the resources available for other discretionary activities.⁵
- 2.8 To date, Ofcom's dispute resolution function costs (excluding spectrum disputes) have been met by Ofcom's general funding and, therefore, indirectly by all those companies that pay Ofcom's administrative charges. We recognise that this situation may not always provide the right incentives for parties that are considering whether to refer disputes to Ofcom under the 2003 Act.
- 2.9 In its 15 April 2011 statement accompanying the Regulations,⁶ the Department for Culture, Media and Sport ("DCMS") explained the basis for its decision to revise Ofcom's powers to recover its own costs in disputes.
- 2.10 DCMS noted that the revised provisions were intended "...to encourage the use of alternative mechanisms for resolving disputes where appropriate, which can be both more cost effective and less bureaucratic than the current dispute resolution process".⁷ In the remainder of this document we refer to such alternative mechanisms, including arbitration, mediation and expert determination, collectively as "ADR".⁸
- 2.11 DCMS made clear that Ofcom would "...only normally recover costs and expenses from disputing parties, where appropriate, in cases where ADR, where available, had

⁴ Section 190(7) 2003 Act (now omitted). Ofcom never exercised the powers conferred by this section.

⁵ For example, the resources available to Ofcom to conduct investigations under the Competition Act 1998.

⁶ See *Implementing the revised EU Electronic Communications Framework: HMG response to its consultation on proposals and overall approach including its consultation on specific issues* (April 2011) ("DCMS Statement")

http://www.culture.gov.uk/images/publications/FWR_implementation_Governmentresponse.pdf

⁷ DCMS Statement, paragraph 92.

⁸ There are a number of institutions and organisations currently offering a wide range of ADR services, such as the Centre for Effective Dispute Resolution (see <http://www.cedr.com/>) and the Chartered Institute of Arbitrators (see <http://www.ciarb.org/>). These serve as examples only and Ofcom expresses no view as to whether any institution's services would be more suitable than another's or generally suitable in all cases of disputes referred to Ofcom. Reference to these institutions is included only to illustrate that several types of ADR are generally available to resolve disputes.

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.⁹

- 2.12 We share the Government's desire to see greater use of alternative means, such as commercial negotiation and ADR, to resolve disputes in appropriate cases. We also agree that provision for the recovery of costs and expenses should not operate in a manner that might unduly discourage parties from referring disputes for resolution.
- 2.13 As noted in the Dispute Resolution Guidelines, we consider that, to date, some parties may not have fully explored all possible alternative means of addressing the issues of disagreement before submitting a dispute to Ofcom for resolution. Whilst we accept that ADR may not be practical or appropriate as a means of dealing with all types of disputes, we would like to see more attempts to resolve matters in this way. In particular, we wish to incentivise parties (i) to consider whether issues in dispute might best be resolved via alternative means; (ii) to engage genuinely and constructively in commercial negotiations or ADR; and (iii) where disputes ultimately do fall to Ofcom for resolution, to behave in a manner that enables them to be handled as efficiently and economically as possible.

⁹ DCMS Statement, paragraph 93.

Section 3

Approach to costs in disputes

- 3.1 In this section, we set out:
- 3.1.1 the types of disputes for which Ofcom considers it may be appropriate to recover its own costs or require another party's costs to be paid;
 - 3.1.2 the factors that Ofcom will take into account in deciding whether to recover its own costs and expenses, and/or require another party's costs to be paid; and
 - 3.1.3 the methodology that will be used when calculating any relevant cost amounts.
- 3.2 As noted above, it is not possible to identify in advance all cases in which we will decide that costs should be recovered or paid. In principle, we may seek to recover our costs, or require another party's costs to be paid, in connection with any dispute that we handle. However, it is not our intention routinely to do so and in practice we expect to do so only occasionally.
- 3.3 We will make decisions on costs on a case-by-case basis, having regard to the specific characteristics and history of each dispute, and the factors discussed at paragraphs 3.8-3.26 below.

Types of disputes

- 3.4 The types of disputes that Ofcom may be asked to resolve pursuant to sections 185-191 of the 2003 Act can be divided, broadly, into two categories:
- 3.4.1 Disputes that fall within section 185(1A) or (2) of the 2003 Act, which Ofcom has a duty to handle unless it considers that the requirements of section 186(3) are met.¹⁰ Such disputes must relate to existing obligations imposed on undertakings under section 45 of the 2003 Act.
 - 3.4.2 Disputes that fall within section 185(1) of the 2003 Act, in relation to which Ofcom has a broader discretion to decide whether or not it is appropriate to handle them. In exercising that discretion, Ofcom may in particular take into account its priorities and available resources at the time (see section 186(2A) of the 2003 Act).
- 3.5 In both cases, Ofcom may seek to recover its own costs and/or require another party's costs to be paid.

¹⁰ Section 186(3) requires Ofcom to decide that it is appropriate for them to handle a dispute unless they consider that (i) there are alternative means available for resolving the dispute, (ii) a resolution of the dispute by those means would be consistent with the Community requirements set out in section 4 of the 2003 Act, and (iii) a prompt and satisfactory resolution of the dispute is likely if those alternative means are used for resolving it.

Factors relevant to the recovery of Ofcom's costs and requiring the payment of another party's costs

- 3.6 In accordance with section 190(6A) and 190(6B) of the 2003 Act, before requiring a party to a dispute either to pay Ofcom's costs, or another party's costs, we must consider:
- 3.6.1 the conduct of the parties before and after the reference of the dispute to Ofcom, including in particular whether any attempt has been made to resolve the dispute; and
 - 3.6.2 whether Ofcom's determination of the dispute (in whole or in part) supports or rejects the position advocated for by the party from whom costs are being recovered.
- 3.7 Paragraphs 3.8-3.26 below elaborate the factors to which Ofcom is likely to have regard when doing so. We may also take account of other factors where we consider it appropriate to do so.

Commitment to negotiations/ADR

- 3.8 Some companies may decline to attempt to resolve disputes using commercial negotiations or ADR, use delaying or stalling tactics in ongoing negotiations or otherwise obstruct the proper course of negotiations.¹¹ In the normal course of events, we expect parties: (i) to have attempted to resolve a dispute via commercial negotiations before referring it to Ofcom; (ii) to have considered whether a dispute could be resolved via ADR before referring it to Ofcom; and (iii) when engaging in negotiations or ADR, to have behaved reasonably, constructively and in a manner that demonstrates a genuine commitment to the resolution of the dispute.
- 3.9 Ofcom is more likely to require a party to pay Ofcom's costs and/or another party's costs, where that party failed properly to act in a manner consistent with the factors set out in paragraph 3.8 above. Ofcom will place particular weight on evidence (or lack thereof) of a genuine effort to resolve a dispute before referring it to Ofcom.
- 3.10 In assessing whether a party has unreasonably failed to engage in ADR/commercial negotiations, Ofcom will take into account any relevant factors which may include but are not limited to:
- 3.10.1 the nature of the dispute and merits of the case;
 - 3.10.2 whether any other settlement methods have been attempted;
 - 3.10.3 whether engaging in ADR/commercial negotiations would have led to prejudicial delay in resolution;
 - 3.10.4 whether ADR/commercial negotiations would have had a reasonable prospect of success; and
 - 3.10.5 whether the cost of engaging in ADR would have been disproportionately high.

¹¹ Dispute Resolution Guidelines, paragraph 4.7

- 3.11 Ofcom must decide whether it is appropriate for it to handle a dispute for resolution in accordance with section 186 of the 2003 Act. Where we decide that it is appropriate for us to handle a dispute (regardless of the subsection of section 185 of the 2003 Act under which that dispute has been referred), this does not necessarily mean that we have concluded that all parties to the dispute have demonstrated a genuine commitment to resolving the dispute before it is referred to Ofcom. It is within our discretion to accept for resolution disputes despite one or more parties not having shown the requisite level of commitment to negotiation – or having failed to consider ADR. In these circumstances we may inform those parties that their conduct may be relevant to the question of costs, should they be sought at the conclusion of the dispute resolution process.

Behaviour that increases costs and expenses

- 3.12 When deciding whether to require a party to pay Ofcom's costs and/or another party's costs, we will also consider whether that party's behaviour after the dispute was referred to Ofcom may have caused the costs and expenses incurred by Ofcom or other parties to increase.

Accuracy of information provided

- 3.13 Ofcom is more likely to require a party to pay Ofcom's costs and/or another party's costs where that party has provided inaccurate or incomplete information to:
- 3.13.1 another party in the context of commercial negotiations or ADR; and/or
 - 3.13.2 Ofcom when responding to either formal or informal requests for information made to that party after the reference of the dispute to Ofcom.
- 3.14 In having regard to this factor, Ofcom will consider the nature and extent of the inaccuracy or gap in the information provided, whether there is a reasonable explanation for this, and the impact of the inaccuracy or gap in information provided on Ofcom's deadlines and analysis, or on other parties to a dispute.

Compliance with Ofcom's deadlines

- 3.15 In deciding whether to require a party to pay Ofcom's costs and/or another party's costs, Ofcom may take into account any failure by that party to comply with deadlines set by Ofcom for making submissions or providing information.
- 3.16 In having regard to this factor, we will consider (i) the nature of the deadlines set; (ii) the duration of any delay in meeting a deadline; (iii) whether a party has previously made a reasoned request for extension to a deadline; and (iv) the impact of the delay on Ofcom or other parties to the dispute.

Other considerations

- 3.17 Other considerations may be relevant, for example, where a party makes multiple submissions that duplicate arguments or evidence, and where Ofcom or other parties are required to engage with and respond to each of these submissions individually. Similarly, Ofcom may also take into account whether a party has made unsolicited submissions at a late stage of the dispute resolution process. We will in particular consider this a relevant factor as to costs where we consider that:

- 3.17.1 it was not reasonable in all the circumstances for a party to make such late submissions; and
 - 3.17.2 where such submissions require significant consideration and assessment that could have been conducted earlier in the process had the submissions been made earlier.
- 3.18 In considering this factor, we will seek to strike an appropriate balance between allowing a party sufficient opportunity to make its arguments and produce evidence in support of those arguments, and our statutory requirement to dispose of disputes within no more than 4 months (except in exceptional circumstances).

The nature and value of the issues in dispute

- 3.19 In deciding whether it is appropriate to require that a party pays Ofcom's or another party's costs, we will consider in the round with other factors in this guidance the nature and value of the dispute.
- 3.20 In terms of the nature of the dispute, in light of its statutory duties, Ofcom may in particular consider the extent to which the dispute materially:
- 3.20.1 affects the interests of citizens in relation to communications markets;
 - 3.20.2 affects the interests of consumers in relevant markets;
 - 3.20.3 affects the promotion of competition; and/or
 - 3.20.4 raises issues that have been the subject of previous determinations by Ofcom.
- 3.21 Depending on the circumstances of any case, Ofcom may be more likely to consider it appropriate to require a party to pay another's (including Ofcom's) costs where the dispute affects mainly the parties to the dispute, and has limited wider effects on citizens, consumers and/or competition.
- 3.22 Ofcom will also have regard to the financial value of the matters in dispute. In particular, Ofcom may consider whether the combined costs incurred by Ofcom and other parties in connection with the dispute would be expected to exceed the value of any payment that might be ordered between the parties. Ofcom recognises that disputes of relatively small monetary value may raise important issues that have a material impact upon consumers, citizens and/or competition. Accordingly, we will take this into consideration alongside other relevant considerations.

Outcome of the dispute resolution process

- 3.23 When deciding whether to require a party to pay Ofcom's costs and/or another party's costs, Ofcom will also consider whether a party has "succeeded" in its claims in the sense that Ofcom has substantially accepted submissions made by a party and accordingly made a determination in their favour.
- 3.24 We would not generally expect to require a party to pay Ofcom's or another party's costs in relation to a dispute that has largely been resolved in that party's favour. When considering costs we will nevertheless take into account that party's behaviour prior to and during the dispute resolution process.

3.25 As above, this factor will be taken into account in the round with any other relevant factors. As a general rule, Ofcom would not typically expect to require a party to a dispute to pay anyone’s costs unless a number of the factors set out in this document that tend in favour of requiring such payments are present.

Summary

3.26 Table 1 below summarises a non-exhaustive list of factors that may be relevant in deciding whether to recover costs and expenses from hypothetical Party A.

Table 1: Summary of potentially relevant factors

Relevant factor	Consideration
Commitment to negotiations/ADR	Has Party A's behaviour caused the failure of commercial negotiations/ADR?
	Does this behaviour by Party A indicate a clear absence of genuine effort to resolve a dispute?
	Is the behaviour by Party A that has caused the failure of negotiations/ADR unreasonable?
Conduct that increases costs expenses	Has Party A provided inaccurate information? Has the provision of this information caused delay or increased cost to Ofcom or other parties?
	Has Party A failed, without reasonable excuse, to comply with deadlines set by Ofcom? If so, has it caused delay or increased cost to Ofcom or other parties?
	Has Party A supplied multiple, duplicative submissions. If so, has this caused delay or increased cost to Ofcom or other parties?
<i>Additional relevant considerations if the above factors indicate that costs and expenses should be sought</i>	
Nature and value of issues in dispute	Does the dispute referred by Party A raise issues that materially affect the interests of: (i) citizens in relation to communications markets; (ii) consumers in relevant markets; or (iii) promoting competition, or otherwise affect matters related to Ofcom's statutory duties? For example, is the dispute likely to have a direct impact on wider industry or services to consumers?
	Are the combined costs incurred by Ofcom and other parties in connection with the dispute referred by Party A likely to have exceeded the value of any payment that might be ordered between the parties?
	Does the dispute raised by Party A raise points which have previously been determined by Ofcom?
Outcome of the dispute resolution process	Has Ofcom made a determination in favour of Party A?

Methodology and process for calculating costs and expenses to be recovered

- 3.27 As set out above, Ofcom is required to take into account a party's conduct both before and after the reference of the dispute to Ofcom. Accordingly, we cannot decide whether recovery of costs and expenses may be appropriate until after the resolution of a dispute (i.e. after a final determination has been made).
- 3.28 Where two or more parties are in similar positions, we may decide to apportion costs between them as appropriate.

Ofcom's costs and expenses

- 3.29 We will apply the factors set out above in deciding whether it is appropriate for Ofcom to require a party to pay Ofcom's costs and expenses incurred in resolving a dispute. In cases where we come to a provisional view that one or more parties should pay Ofcom's expenses, we will follow the process set out below.
- 3.30 We will notify all parties that we are minded to recover Ofcom's costs and expenses from a party to a dispute as soon as possible and usually within 2 weeks after issuing a final determination. When we do so, we will generally:
- 3.30.1 set out the reasons for our provisional view;
 - 3.30.2 without undertaking a detailed cost assessment, indicate an estimate of the costs and expenses Ofcom has incurred in resolving the dispute in question that we propose to recover and details of the nature of those costs (including whether these are external or internal and, where we seek to recover internal costs, details of the level of Ofcom colleagues involved and hours they spent working on the dispute). We will ensure that this will have regard to the nature and value of the issues in dispute, and whether Ofcom's determination represents a "win" or "loss" for the party (i.e. does Ofcom's determination of the dispute materially support or reject the position for which that party advocated); and
 - 3.30.3 if we are seeking to recover those costs from more than one party, indicate our view of the appropriate split between each party in light of the factors set out above as they apply to each individual party.
- 3.31 All parties will then have the opportunity to provide comments in response to our provisional view.
- 3.32 Having considered the responses received, we will then issue our final decision, identifying any changes from our provisional position, which we would normally expect to publish in our online Competition and Consumer Enforcement Bulletin.
- 3.33 We will then give the party (or parties) subject to the costs order an appropriate period of typically up to 2 weeks following the issue of our final statement to agree the level of Ofcom's costs to be paid. If agreement can be reached then the decision as to the level of costs payable will become final and the party (or parties) will have a further 14 days to make full payment.
- 3.34 Where agreement cannot be reached, then at the expense of the party (or parties) subject to the costs order, Ofcom will refer its costs to be assessed by an independent third party costs assessor (to be chosen at the sole discretion of Ofcom

if agreement on the appointment cannot be reached). Such costs may include any costs Ofcom incurs in putting together its costs assessment for the third party assessment. The assessor will be asked to assess and make a recommendation to Ofcom as to the reasonable and proportionate amount of costs to be recovered from the paying party (including whether the party paying the costs should also pay the costs of the third party assessment) in line with the principles of assessment on the standard basis as provided for under Part 44 of the Civil Procedure Rules. Ofcom will make the final decision as to the costs to be paid, taking account of the recommendation of the costs assessor. Ofcom would not in general expect to depart from the recommendation of the costs assessor unless there are good grounds to do so and in any case where Ofcom decided to depart from the costs assessor's recommendations, Ofcom would normally provide the paying party with the opportunity to make representations before taking the final decision.

Other parties' costs and expenses

- 3.35 If a party considers that another party should pay its costs of the dispute, it should make a reasoned submission to Ofcom, which we would normally expect to receive within 2 weeks of the publication of the final dispute determination. This submission should include the grounds upon which the request is made, and an estimate of the costs that party seeks to recover, together with a description of the nature of those costs.
- 3.36 Where a party requests that another party pay its costs, we would normally provide the request for costs to the proposed paying party to allow them an opportunity to respond to the request. Requesting parties should therefore indicate to us whether they consider any part of their request to be confidential and should prepare a non-confidential version that we can provide to the proposed paying party.
- 3.37 Having considered the submission and any response, we will consider whether it is appropriate for Ofcom to require a party to pay the costs and expenses of one or more of the parties to a dispute. We will communicate our decision in a final statement, which we would normally expect to publish in our online Consumer and Competition Enforcement Bulletin. We will reach a decision as soon as possible and usually within 6 weeks after receiving a costs submission from a party.
- 3.38 We would then expect parties in the first instance to seek to agree the level of those costs. We may at our discretion set a timetable for the parties to reach agreement. If such agreement is not forthcoming after the specified date then the party who is to have its costs paid by another party shall submit to us a detailed breakdown of the costs which they are seeking. We will not ourselves seek to assess the appropriate level of other parties' costs and expenses but will instead have them assessed by an independent third party costs assessor (to be chosen at the sole discretion of Ofcom if agreement on the appointment cannot be reached). The costs of the third party costs assessor will initially be paid by the party seeking their costs. The assessor will be asked to assess and make a recommendation to Ofcom as to the reasonable and proportionate amount of costs to be recovered from the paying party on the same basis as set out in paragraph 3.34. Ofcom will make the final decision as to the costs to be paid, taking account of the recommendation of the costs assessor. As stated at paragraph 3.34, Ofcom would not in general expect to depart from the recommendation of the costs assessor unless there are good grounds to do so and in any case where Ofcom decided to depart from the costs assessor's recommendations, Ofcom would normally provide the paying party with the opportunity to make representations before taking the final decision.

Calculation of the amount of costs to be recovered

- 3.39 In determining the amount of costs to be recovered from a party or parties, we will consider in all the circumstances what is reasonable and proportionate.
- 3.40 Where Ofcom seeks to recover its own costs, it will not necessarily seek to recover all the costs of the dispute and may seek to recover only a proportion of its costs taking into account the circumstances of the case. Similarly, in some cases we may decide that it is appropriate only to order a party to pay a proportion of another party's costs, for example costs incurred after a given date or pertaining to a specific step taken prior to or during the resolution of the dispute.