

**Dispute resolution guidelines:
Ofcom's guidelines for the
handling of regulatory
disputes**

UKCTA Response to Ofcom Consultation

Submitted to Ofcom: 14th February 2011

UKCTA is a trade association promoting the interests of competitive fixed-line telecommunications companies competing against BT, as well as each other, in the residential and business markets. Its role is to develop and promote the interests of its members to Ofcom and the Government. Details of membership of UKCTA can be found at www.ukcta.com.

Dispute resolution is a key regulatory tool which UKCTA members rely upon for the resolution of disputes regarding the availability of required product features and the enforcement of compliant product pricing.

UKCTA members' primary objective is that disputes are resolved with sound decision making. In addition decisions ought to be dealt with efficiently to allow disputes to be concluded in a timely manner.

We understand Ofcom's changes to the guidelines are intended to improve both the efficiency and transparency of the process. We welcome such proposals.

Comments on guidelines

The enquiry period

Ofcom intends to strengthen the enquiry phase of the dispute resolution process in an attempt to identify and dismiss disputes from the "formal" phase if they fail to meet relevant criteria. The expanded enquiry phase is outside the formal 4 month dispute resolution target so actually could have the effect of lengthening the total time taken to resolve a dispute. That said, UKCTA is not totally adverse to the proposal in principle.

Ofcom states that the standard enquiry phase will be limited to 15 working days. Despite not entirely understanding the legal status of the enquiry phase we are not adverse to its existence provided it is demonstrated that it leads to more efficient resource deployment (by weeding out non qualifying disputes or leading to last minute commercial agreement), and timely dispute resolution. There have been examples whereby Ofcom has extended the enquiry period time and time again, considerably delaying the commencement of the dispute resolution phase. We propose that Ofcom provide greater transparency regarding the enquiry period and associated timescales. Ofcom already publishes a six monthly report on its investigation activities, we propose that Ofcom adds within this report detail about the length of the enquiry phase.

Ofcom proposes to formalise further the enquiry phase, with a face to face meeting including all parties to the dispute to discuss the detail of the disputed matters. This seems a good idea provided, as Ofcom proposes, parties are compelled to make representatives available to attend. A number of disputes in recent times have involved a number of CPs who each have negotiated individually but then joined together in submitting a dispute. Whether the EPM can work in such situations would need further clarity. Certainly it will not be an easy matter to organise such a

meeting; gathering potentially a large number of parties together in a relatively short period of time and then reaching agreement on scope, facts in dispute etc.

Ofcom proposes a questionnaire to assist with the EPM. Where such a questionnaire seeks clarification or expansion of issues found in the dispute reference we welcome this. The questionnaire should not duplicate submissions already found in the dispute referral documentation or request any unnecessary information. UKCTA notes that Ofcom's proposed questionnaire at Annex 4 sets out questions that are typically answered currently in a dispute submission. It could be that Ofcom envisage the purpose of the questionnaire primarily to seek written representation from the other party to the dispute and clarification / confirmation of the situation?

The dispute process

Ofcom proposes to bypass the draft information request stage proceeding straight to a formal request. We do not support this proposal and suggest it would benefit from further consideration. We question whether the draft request really does have a material impact upon Ofcom's four month timeline for resolving a dispute. We consider it a greater risk that Ofcom requests information that cannot be gathered in the time or that would be disproportionate to gather. Without giving recipients the opportunity to comment on a draft request Ofcom may only discover that the request is not fit for purpose after the deadline for responding to the request, which poses a far greater risk to Ofcom's dispute resolution timeline. We note that Ofcom states that "in most cases Ofcom will not grant extensions to deadlines to respond to information requests". We suggest that Ofcom retains the practice of issuing a draft information request but perhaps considers a more informal mechanism for consulting upon it.

Ofcom proposes to increase transparency of the process to the dispute parties. We can see real benefit in Ofcom's proposal of sharing the non-confidential submissions of the disputing parties. This provides genuine transparency of the proceedings and allows the parties to fully understand each others representations without unnecessary delay or awaiting summarising by Ofcom. Ofcom proposals to publish a copy of the dispute referral to the wider public should however be limited to a redacted version of the dispute. Ofcom should recognise that what may be non confidential in the context of a bilateral dispute may be confidential in the context of a wider audience. With respect to Ofcom's requirements for dispute content (in Section 7) it may be appropriate to include only appropriate material in section B (the issues in dispute), Section D (Ofcom's statutory and community duties) and Section E (Proposed remedy) in a publicly available version. We would typically regard information set out in Section C (History of commercial negotiations) and Section F (Supporting information and evidence) to contain confidential business data which should not be disclosed outside the disputing parties and Ofcom. Ofcom could alter the description of the format for submitting the dispute referral to make clear that certain sections may be published at some stage to avoid delay when publication is necessary.

Ofcom plans to continue with consultation on a draft decision. We agree that it is very important for Ofcom to consult on its provisional conclusions (not only with the disputing parties but also with the wider stakeholders). This is essential to allow a wider range of stakeholders the opportunity to put forward their views / data on the dispute matter. Ofcom proposes to publish a shorter draft proposal earlier on in the dispute period than is currently the case. While we welcome the opportunity that this might give for greater consultation with Ofcom on its emerging thinking prior to its final decision, we consider that it is important to understand in more detail what such a draft decision may, or may not, contain. We propose that there should be further engagement on this proposal so that we can understand how stakeholders will be able to comment fully with potentially less data available. Ofcom proposes to make a draft decision available for consultation very early on in the dispute process, it is not clear if this is as Ofcom will be more influenced by responses to the consultation and therefore is offering a “greener” decision for consultation. If this is the case we would appreciate clarity on how Ofcom manage the process should a material change in the final direction be warranted.

Forward look

The existing guidelines have been published in draft format for a considerable period. Following the adoption of revised guidelines at the end of this consultation we request that Ofcom reviews the success of the changes after a reasonable period of implementation (perhaps 2 years).