



**Statement following
consultation on Dispute Resolution**
Incorporating Ofcom's guidelines for the handling of
regulatory disputes

Statement

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Section 1

Executive Summary

- 1.1 Ofcom has a duty to resolve certain disputes in the communications sector where those disputes fulfil the criteria set out in section 185 of the Communications Act 2003 (the “2003 Act”).
- 1.2 In its consultation of 17 December 2010 (the “December consultation”), Ofcom proposed revisions to its guidance on these regulatory disputes, previously published in 2004.¹ Stakeholders were invited to comment on these guidelines by 11 February 2011.
- 1.3 This statement follows the December consultation, and sets out our response to the stakeholder comments received during the consultation together with an indication of whether, or not, we have accepted respondents’ suggestions in the final guidelines which can be found as a separate annex to this statement. Non-confidential versions of the stakeholder responses can be found on our website at the following link <http://stakeholders.ofcom.org.uk/consultations/dispute-resolution-guidelines/?showResponses=true>.
- 1.4 Regulatory dispute proceedings often involve complex issues and are usually highly contentious between the relevant parties. We have experienced a significant increase in the number of regulatory disputes referred to Ofcom in the past few years. Since the 2003 Act came into force, we have built up considerable experience of resolving disputes. Given that regulatory disputes must be resolved within four months², they can be highly resource intensive for both Ofcom and the disputing parties (the “Parties”). We considered it appropriate to review our processes in light of (i) our experiences, (ii) the increasing number of disputes being submitted to us, and (iii) the need to be ever increasingly efficient, especially in the context of constraints on resources following the Government’s comprehensive spending review in October 2010.
- 1.5 Previous guidance on regulatory dispute resolution dates from 2004. We published draft guidelines for consultation in 2006³, which until now remained the most up-to-date statement on the way we handle regulatory disputes referred to us.
- 1.6 Since we consulted, the Government has completed a consultation on the implementation of revisions to the European Framework on Electronic Communications set out in the Better Regulation Directive⁴ which made proposals, inter alia, to change Ofcom’s dispute resolution powers.

¹ Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives, published July 2004

www.ofcom.org.uk/bulletins/eu_directives/guidelines.pdf;

² Except in exceptional circumstances (section 188(5) of the 2003 Act)

³ <http://www.ofcom.org.uk/consult/condocs/enforcement/enforcement.pdf>

⁴ Directive 2009/140/EC

- 1.7 On 15 April 2011 the Department for Culture, Media and Sport issued a statement setting out the Government's position⁵. That document set out changes that will be made to the dispute resolution provisions of the 2003 Act.
- 1.8 On 4 May 2011 the Secretary of State made The Electronic Communications and Wireless Telegraphy Regulations 2011 (SI 2011/1210) (the "Regulations"). The Regulations (amongst other things) implement the Better Regulation Directive. The Regulations came into force on 26 May 2011 and this statement incorporates the changes they make to the dispute resolution provisions in the 2003 Act.
- 1.9 In summary, the main changes are:
 - 1.9.1 the replacement of the duty on Ofcom to resolve network access disputes with a discretionary power for Ofcom to intervene in such disputes;
 - 1.9.2 as a result of the above change, Ofcom's mandatory duty to resolve disputes now relates only to existing obligations imposed on communications providers;
 - 1.9.3 the expansion of the category of persons able to refer certain disputes to Ofcom for resolution;
 - 1.9.4 a new requirement for National Regulatory Authorities ("NRAs") involved in cross-border disputes to co-ordinate their activities and a power for Ofcom to seek an opinion from the Body of European Regulators for Electronic Communications ("BEREC"); and
 - 1.9.5 the introduction of a discretionary power allowing Ofcom to recover its costs in resolving disputes from disputing parties.
- 1.10 In addition, as a result of revisions to the Authorisation Directive⁶, the Government has increased to the level of fine that Ofcom can impose for failure to comply with an information gathering request. This has been increased from £50,000 to £2million.
- 1.11 These changes, which took effect from 26 May 2011 will apply to all disputes referred to Ofcom for resolution where the enquiry phase begins after that date.

What is in the new guidelines?

- 1.12 *The guidelines annexed to this statement set out:*
 - 1.12.1 Ofcom's duties and powers in resolving regulatory disputes which fall within the provisions of sections 185-191 of the 2003 Act, as amended by the Regulations;
 - 1.12.2 Ofcom's process for handling and resolving such disputes in the future; and
 - 1.12.3 practical guidance for stakeholders who are involved in referring a dispute to Ofcom, or who are otherwise involved in a dispute which has been referred to Ofcom.

⁵ Available on the Department for Culture, Media and Sport's website at <http://www.culture.gov.uk/publications/8048.aspx>

⁶ Directive 2002/20/EC

- 1.13 In addition to the changes contained in the Regulations, the new guidelines annexed to this document contain important changes to the form and timing of key processes involved in dispute resolution. In particular:
- 1.13.1 involvement of Parties at an early stage, including a meeting (if appropriate) prior to accepting or rejecting a dispute, in order to clarify the key issues that are in and out of the scope of a potential dispute;
 - 1.13.2 increased transparency of the issues in dispute by seeking clarity and agreement on facts/issues which are and are not agreed, as well as the disclosure of all Parties' submissions (save those aspects that are commercially confidential) to the other Parties to a dispute; and
 - 1.13.3 no consultation on draft information requests.
- 1.14 There are also changes to the manner in which we consult on our provisional findings. The 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 Directive expressly provides that Ofcom is under no obligation to consult on a draft dispute determination. 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 in the last month of that process.
- 1.15 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. In light of our experience to date, we have replaced the draft determination with a shorter paper setting out for comment Ofcom's provisional reasoning and assessment in relation to the matters in dispute. We will aim to publish this as early as possible, in order where possible and appropriate to consider whether to allow stakeholders a period, beyond the usual 10 working days, up to a possible 15 working days, to respond, as well as greater time for Ofcom to engage with stakeholders on their responses.
- 1.16 We believe the changes set out above at paragraphs 1.12 to 1.15 will simplify the dispute resolution process, provide greater transparency in our handling and resolution of regulatory disputes, and make them more efficient and effective for both the Parties concerned and Ofcom.
- 1.17 Section 1 of the guidelines also sets out other areas of Ofcom's dispute resolution and enforcement functions, which are not covered by these guidelines.

Next steps

- 1.18 The guidelines contained in this document take effect from the date of this statement and apply to all disputes accepted for resolution from this date.
- 1.19 We will update the guidelines from time-to-time to reflect further changes in our duties, powers and procedures.
- 1.20 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 2

Comments on Ofcom's Proposals

Note: The shaded paragraphs of this section reflect the wording and paragraph numbers contained in the consultation document of 17 December 2010.

Enquiry Phase

Proposal to exchange non-confidential documents

5.5 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)

Comments from respondents

- 2.1 Respondents generally supported Ofcom's proposal. Comments noted that it provides Parties with greater clarity of the issues in dispute and avoids delays or errors created by a need for Ofcom to summarise responses. Going further, it was suggested that this proposal was a basic requirement and likely to improve Ofcom's ability to make decisions.
- 2.2 However, a number of respondents raised concerns about the handling of confidential information. In particular, that Ofcom ensures that confidentiality is respected. A respondent suggested that to help ensure this, both the applicant and the other Party should be required to supply non-confidential versions of their submissions at the same time as the confidential version.
- 2.3 Some respondents suggested the establishment of 'confidentiality rings', noting that this occurs for CAT appeals. A respondent suggests these may help avoid a situation where it is not possible to fully join an issue on points of detail until the appellate stage whilst another respondent adds that it would allow professional advisers to access some or all confidential material submitted by the other Party to the dispute.
- 2.4 It was also suggested that Ofcom should not review any documents supplied by Parties that are marked as 'without prejudice'. A concern raised was that reviewing such documentation would risk influencing the approach of the case team, even if it is not relied upon. It was further suggested that Ofcom's approach is inconsistent with civil litigation (where such correspondence is inadmissible in court).

Ofcom's view.

- 2.5 We remain of the view (and most respondents agree) that this proposal should be implemented, as it supports a more efficient and transparent approach to considering dispute submissions.
- 2.6 In terms of the treatment of confidential information, we consider that the existing requirement for submissions to include a non-confidential version should be retained. In addition to this, we will require that at the time comments on these submissions are provided by the other Party(s), non-confidential versions are also provided. This, we believe, will help ensure that the views of all Parties to the dispute are exchanged expediently, avoiding any need for Ofcom to intervene in order to redact or summarise documents.

- 2.7 As regards confidentiality rings, we do not consider that Ofcom has the legal powers to set up and more importantly enforce such rings. Ofcom does not have the same sanctions available to it that a court does. A confidentiality ring is only likely to serve any useful purpose if supported by an appropriate and effective enforcement mechanism.
- 2.8 In any event however, we do not think that confidentiality rings should be necessary: the purpose of an Enquiry Phase is to establish (a) whether the Parties are in dispute and whether the submitted dispute satisfies any of the statutory grounds for referral; (b) whether it is appropriate for Ofcom to handle the dispute; and (c) the scope of the dispute to be determined. As set out in our December consultation and this statement, we aim to do this within 15 working days. It is not clear how confidentiality rings would significantly assist substantively, and their establishment would be likely to have an impact on timescales and the resources of Parties involved. We believe that this would create a disproportionate delay and addition burden on the Parties.
- 2.9 As regards “without prejudice” correspondence, we note first that we would encourage Parties to seek to settle matters in dispute between themselves before referring disputes to Ofcom. We would not therefore wish to discourage Parties from entering into without prejudice offers to settle matters. If a Party wishes to submit “without prejudice” correspondence to Ofcom, it would be preferable for both parties to that correspondence to have agreed to its submission to Ofcom before it is submitted. In any event that is not achievable and a Party nevertheless wishes to submit such correspondence, we should clarify that we would not rely on the content of such correspondence in reaching any conclusions on the substance of the matters in dispute; at most, “without prejudice” correspondence might indicate a lack of agreement and so form part of the evidence that the parties are in dispute in the first place.

Proposal to hold an EPM

5.19 Following the initial exchange of non-confidential documents, we will normally expect all Parties to attend a joint Enquiry Phase Meeting (“EPM”) held by Ofcom

Comments from respondents

- 2.10 Respondents broadly supported this proposal, noting that it would provide an opportunity to run through the issues, address arguments made in response to the dispute submission and clarify the scope of the dispute. Comments also suggested that this would result in an efficient process, increase transparency of Ofcom’s approach and could also lead to settlement without the need to move to a formal dispute resolution.
- 2.11 However, a number of responses raised issues of practicality, in particular:
- 2.11.1 that there may be an imbalance in the Parties’ knowledge or experience of the dispute process and Ofcom’s powers and duties;
 - 2.11.2 the meeting risks opening up issues wider than the purpose of the EPM;
 - 2.11.3 it is not clear that where Parties have fundamentally divergent approaches, an EPM will provide any further insight about the scope of a dispute;
 - 2.11.4 introduction of the EPM could result in additional significant delays;

- 2.11.5 at the time of the EPM, Parties may not be able to confirm exactly what information can be delivered and when it can be delivered by;
- 2.11.6 an EPM may only work if parties are compelled to attend;
- 2.11.7 it is not clear how the process will work with multi-Party disputes; and
- 2.11.8 it is not clear how an EPM can be informal, in particular because confirmatory statements would need to be on record.

Ofcom's view

- 2.12 As previously stated, the purpose of the EPM is to help confirm facts that are agreed and facts which are in dispute, and to help inform our decision on the scope (should we subsequently decide it is appropriate for us to handle the dispute).
- 2.13 In addition, and as noted by respondents, the EPM may help inform our decision on whether it is appropriate for us to handle the dispute. For example, there may be arguments of 'exceptional circumstances' as to timing raised by a Party in response to a submission and this may be included as part of the clarification of facts and issues at an EPM.
- 2.14 As noted in the December consultation, whilst we expect the EPM to be an integral part of our normal procedures, we recognise that submissions and responses to the pre-EPM questionnaire could lead us to conclude that an EPM may not be appropriate. This is a decision that would have to be made on a case-by-case basis.
- 2.15 Regardless, EPMs are not intended to be a resource intensive process and Parties should not be adversely affected by the process, irrespective of their size or experience.
- 2.16 Equally, we do not intend for EPMs to cause significant delays. Where we believe that despite reasonable endeavours by the Parties, such delays would be caused by an EPM, we will factor this into our case-by-case decision of whether or not it is appropriate to proceed with the meeting.
- 2.17 Similarly, where an EPM is appropriate, it is likely that submissions from the Parties, in particular responses to the pre-EPM questionnaire, will determine to a large extent what may be usefully covered. Influencing factors may include the degree to which Parties are relying on different evidence, have different understandings of particular technical or commercial arrangements, or adopt opposing, intransigent positions on the issues in dispute. Where we consider an EPM appropriate, the topics for discussion will most likely vary on a case-by-case basis and for this reason, prior to each EPM, we will provide an agenda setting out the specific areas to be covered and why.
- 2.18 We intend that the EPM will assist in defining what further evidence may be needed in order to resolve the dispute. However, we recognise that this may not always be clear at this early stage and the EPM is not intended to confirm at the outset precisely what information will formally be required of Parties should a dispute follow the enquiry phase. Our approach to formal requests for information is further discussed in paragraphs 2.31 to 2.37 below.
- 2.19 To help ensure transparency, we also intend to provide a short summary of the EPM to the Parties.

- 2.20 Where a dispute is submitted jointly by multiple Parties, and/or a Party submitting a dispute cites more than one other Party with which it is in dispute, we will assess the feasibility of an EPM on a case-by-case basis, in discussion with the Parties involved. For example, Parties may choose to appoint a commercial or regulatory affairs representative to attend an EPM (much as Parties have on occasion appointed a representative with suitable authority to act on their behalf during a dispute).
- 2.21 Finally, whilst we expect the EPM to be an integral part of our normal procedures, we recognise that we cannot require Parties to attend, and we will need to be flexible as to the use, nature and scope of EPMs in individual cases.

Proposal to issue pre-EPM questionnaires

5.20 In preparation for an EPM, all Parties to the dispute will 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 completing the forms within the period specified by Ofcom

Comments from respondents

- 2.22 Responses to this proposal mostly raised concerns over this raising issues of duplication of effort. Whilst there was some recognition that a pre-EPM questionnaire could seek clarification of issues, respondents broadly felt that it risked requesting unnecessary information and/or information already provided by Parties.
- 2.23 It was also noted that Parties should be provided with sufficient time in order to respond to any pre-EPM questionnaires.

Ofcom's view

- 2.24 This proposal is to assist Ofcom in its clarification of facts and issues raised. It is not intended as a means of seeking wider information and/or to replace any part of information gathering that would be required should a dispute be accepted for resolution.
- 2.25 As such, we will base any questions on the submissions of the Parties, limited to points of clarification for the purposes of helping us to ascertain whether or not it is appropriate for to accept a dispute for resolution (and if so, its scope). As stated above, answers will help determine whether an EPM is appropriate and the areas for discussion should an EPM take place.
- 2.26 Whilst we would anticipate that a pre-EPM questionnaire would normally form part of our processes, as with the EPM itself, in some circumstances we may conclude from the submissions and comments from Parties are sufficiently clear and a pre-EPM questionnaire may not be appropriate.
- 2.27 For these reasons, it is essential that Parties use best endeavours to answer pre-EPM questionnaires to the best of their ability, provide key evidence where relied upon. Equally, we accept that responses are only expected to be as detailed as the time given for responses reasonably permits.

Resolving a dispute

Proposal to not consult on the scope

6.4 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, as clarified by the EPM.

6.5 We do not propose to consult on the scope of the dispute. Parties will have an opportunity at the EPM to put forward any views they might have as to scope.

Comments from respondents

2.28 Respondents considered that by not inviting comments on a scope, Ofcom would risk a lack of transparency, raising problems of an incorrectly defined scope.

Ofcom's view

2.29 We agree that Parties to the dispute should have sufficient opportunity to comment on the scope, given its importance in confirming the matters being considered for determination. Our proposals intended that such an opportunity would be afforded by (a) ensuring that Parties could comment on submissions, (b) the addition of a pre-EPM questionnaire and (c) holding an EPM.

2.30 We consider that taken together, these elements of the process will afford Parties adequate opportunity to comment on the scope of disputes. Accordingly, and as set out in our December consultation, we do not intend to thereafter publicly consult further on the scope. However, should Parties to the dispute believe there are fundamental errors in the published scope and make representations to Ofcom on this basis, we will take such submissions into account as appropriate.

Proposal to not formally consult on draft information requests

6.12 in order to help avoid unnecessary delays Ofcom proposes that its general practice in disputes will be not to formally consult on a draft information request.

Comments from respondents

2.31 Some responses agreed that this proposal would result in a more efficient process and may help avoid unnecessary delays in the obtaining of information. A large number of other respondents raised concerns with the proposal. These can be broadly categorised as the proposal losing the following perceived benefits of a formal, draft information request:

- 1.1.1 enabling clarifications by Parties where the requests are unclear;
- 1.1.2 enabling Parties to advise Ofcom where information is already available elsewhere, or where better alternatives may exist;
- 1.1.3 allowing Parties to advise Ofcom where information sought does not exist or is not in their possession; and

- 1.1.4 providing an opportunity for Parties to advise on the time and resources that will be required to identify and provide requested information.
- 2.32 Various respondents noted that these factors assist Ofcom to more accurately target its information gathering in a proportionate manner.
- 2.33 Respondents have commented that if Ofcom does not consult on the content of information requests, Parties may be exposed to a disproportionate commitment of their own resources and/or, to sanctions where they are not able to meet the requests. It was also noted in some responses that the proposal may also lead to “fishing” requests being issued by Ofcom.

Ofcom’s views

- 2.34 It is in Ofcom’s interests to ensure that requests for information are accurate and proportionate, as this helps the expedient and efficient resolution of a dispute. We therefore agree that it is essential to ensure that any information requests are appropriately tailored to the needs of the dispute and the ability of Parties to respond.
- 2.35 However, we are equally aware that procedurally, formal drafts of information requests can unnecessarily delay issuing and responding to the final requests, particularly where a formal draft request repeats discussions already held with the Parties and requires a formal response.
- 2.36 In order to meet Ofcom’s aim to act in an efficient manner, but still ensure that information requests are proportionate and appropriate, as part of our ongoing dialogue with Parties we will discuss our views on our requirements for information from them, and use this informal dialogue so as to provide an opportunity for the Parties to comment on proposals prior to the issue of any formal requests for information.
- 2.37 We believe that this not only offers a more efficient approach, but also greater flexibility in discussions with Parties leading up to a formal request for information. We remain of the view however, that information requests should not first be issued in draft form, for the reasons set out above.

Proposal to replace a draft determination with a shorter document, at an earlier stage

6.23 Instead of publishing a full draft determination, Ofcom proposes by circa week 8 of the dispute to 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

Comments from respondents

- 2.38 There was broad support for the principle of consulting earlier on Ofcom’s provisional views, including that it could offer a more efficient procedure, improve transparency by providing earlier visibility of the key issues and is more likely to allow Parties to alert Ofcom to errors of fact or reasoning at an earlier stage.
- 2.39 One respondent also noted that the current process has resulted “*in situations where parties either engage in a blow by blow critique of Ofcom’s reasoning or parties make very few comments because they regard the die as effectively being cast, and instead prepare for what they see as an inevitable appeal*”.

- 2.40 However, respondents raised three areas of concern with the proposal:
- 2.40.1 whether Ofcom would be able to reach a provisional view in the proposed timescales;
 - 2.40.2 whether Ofcom can provide sufficient detail to Parties in order that they can comment fully on Ofcom's reasoning; and
 - 2.40.3 whether Ofcom requires as much time after consultation as was proposed.
- 2.41 In addition, respondents offered a number of suggestions, including:
- 2.41.1 semi-formal hearings (as Ofcom did with its review of Mobile Termination Rates) or informal meetings (as Ofcom currently does) after consultation;
 - 2.41.2 publishing provisional views piecemeal on an issue-by-issue basis rather than in one go;
 - 2.41.3 Ofcom to provide a later, more detailed consultation in addition to the earlier consultation on provisional views;
 - 2.41.4 Ofcom to provide Parties with an advanced copy of the final determination in order to check for factual accuracy and/or the inadvertent disclosure of confidential material.

Ofcom's views

- 2.42 Our own experience of resolving disputes is that following analysis of information provided by Parties, we should in most cases be able to move relatively quickly to a position of forming a provisional view on the dispute. Rather than developing this provisional view into a full determination in draft (which we would normally aim to produce by around week 12), we believe that we can instead produce a shorter document setting out this provisional view and reasoning at around week eight of the dispute process.
- 2.43 However, we recognise that this cannot be guaranteed in all cases, and therefore, the eight week point should be considered a target rather than an absolute. Where we are aware that the deadline for producing a provisional view is likely to change, we will inform the Parties to the dispute of this and the revised target date.
- 2.44 In respect of the level of detail provided to Parties, we will seek to ensure that sufficient detail is provided in our provisional view to allow Parties to comment in an informed manner.
- 2.45 Following consultation, Ofcom would have a maximum of around five weeks in order to take on board any comments or views provided, including more detailed comments from the Parties, undertake any further analysis and then produce final determination, including a non-confidential version for publication. We do not consider five weeks an excessive period in which to achieve this. Whilst we are under no obligation to consult on a draft dispute determination (see paragraph 5.33 of the guidelines), we consider offering Parties an opportunity to comment on our proposals is an important part in the dispute process to ensure transparency. We have to balance this with our statutory duty to resolve disputes within four months or less, except in exceptional circumstances.

- 2.46 We consider that our proposal to consult earlier on Ofcom's provisional views strikes this balance in an appropriate manner, and will provide Parties to the dispute with sufficient detail to understand how we have reached a provisional view, and in sufficient time for Parties to raise with us any significant errors of fact or reasoning which they consider we have made and should address before Ofcom proceeds to make a final determination.
- 2.47 On specific suggestions provided by respondents:
- 2.47.1 Meetings with the Parties following consultation will in most cases be a useful step in ensuring Ofcom has considered all relevant facts and arguments, as well as supporting an aim of greater transparency for the Parties to the dispute. The exact format of these may need to vary on a case-by-case basis and will therefore be raised with Parties as part of the on-going dialogue during a dispute.
- 2.47.2 Publishing views on a piecemeal basis is likely to create an extra burden on the resources of both Ofcom and Parties to the dispute, as each view will need to be published and responded to separately. Moreover, we believe this burden to be unreasonable when Ofcom is required to resolve a dispute within four months. For this reason, we consider the suggestion impractical.
- 2.47.3 Similarly, producing a later, more detailed consultation in addition to the earlier consultation on provisional views is likely to place an unreasonable burden on both Ofcom and the Parties, and we consider the suggestion is in any event likely to be impractical in the context of the duty to resolve the dispute within four months.
- 2.47.4 We believe that providing Parties with advanced copies of the final determination would unnecessarily delay its publication. However, we 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.
- 2.48 A respondent also asked how Ofcom would manage the process, should the early consultation result in a material change in the final direction. In some circumstances, it may be necessary for Ofcom to re-consult on proposals (this is no different to our previous practice). This would need to be considered on a case-by-case basis and where amendments to procedure and timescales are required we will raise these with Parties in good time.

Proposal to publish dispute submissions and comments

6.30 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

Comments from respondents

- 2.49 Most respondents supported this proposal, although in many cases this was subject to Ofcom's appropriate handling of any confidential material provided by the Parties.
- 2.50 Issues raised concerning confidential material were that:

- 2.50.1 Parties may disagree with each other, or with Ofcom over whether specific material is confidential; and
- 2.50.2 where Parties agree that information is not confidential between them, they may still consider it confidential in terms of disclosure to a wider audience.
- 2.51 Some respondents went on to suggest that should Ofcom publish confidential material in error, it could not only have a detrimental effect on the commercial interests of a Party, but in addition expose individual employees of Ofcom to criminal proceedings pursuant to section 393 of the Communications Act 2003.
- 2.52 More generally, one respondent suggested that the proposal is likely to make Parties more guarded and may discourage the submission of disputes at all.
- 2.53 Several respondents offered suggestions in connection with the proposal:
 - 2.53.1 Ofcom alters the standard format for submitting a dispute referral, separating it into confidential and non-confidential sections (with only the non-confidential sections being published); and
 - 2.53.2 Ofcom publishes submissions at the start of a dispute, as it would assist third parties to form a view on whether to submit their own dispute for consolidation and respond to consultations and/or information requests.

Ofcom's views

- 2.54 Whilst separating submissions into confidential and non-confidential sections could in theory speed up Ofcom's ability to process and publish submissions, it creates an incentive for Parties to submit very little information in non-confidential sections of a pro-forma and/or include non-confidential arguments or facts in confidential sections. Also, it does not remove the risk of Parties subsequently having opposing views on whether specific information provided is confidential.
- 2.55 The alternative, which is Ofcom's current practice, is to require Parties to provide separate, non-confidential versions of submissions. This ensures that we have documentation that can immediately be passed between the Parties. In terms of publishing these non-confidential submissions, we recognise that the same problem concerning confidentiality exists, namely that Parties may not share the same view of whether particular information would be considered as confidential.
- 2.56 To date, in producing non-confidential versions of both our draft and final determinations we have undertaken our own confidentiality checks, where necessary checking the confidential nature of information with the Parties. Whilst this can be a resource-intensive exercise, we recognise our responsibility to work with Parties in helping ensure only non-confidential information is made publically available. Accordingly, we will continue with this procedure before publishing any submissions provided by Parties. However, we also note that Parties consistently request more transparency in Ofcom's processes. We consider that our proposals go towards achieving greater transparency, but they will only work if Parties engage with them in a constructive manner. We therefore expect Parties to consider requests for confidentiality carefully, and to limit and target these only to those aspects of their submissions which really contain confidential information. We do not expect to receive blanket claims that an entire submission is confidential, except in exceptional circumstances.

- 2.57 In terms of timing, publishing submissions prior to a final determination risks delaying work on resolving a dispute. Further, we do not consider it a necessary step, as it is not clear to us that:
- 2.57.1 third parties require this in deciding whether to submit their own dispute. Information already published by Ofcom (i.e. details of the dispute in Ofcom's CCEB updates) should be sufficient to bring the existence of a dispute to the attention of any CPs that consider themselves in dispute over similar matters. If a CP has already considered itself in dispute, Ofcom has established procedures for that CP to raise this with Ofcom, either formally or informally. Risking the progress of an existing dispute in order to publish full submissions would therefore seem a disproportionate activity;
 - 2.57.2 stakeholders that are not party to a dispute require this in order to be able to respond to a consultation, given that Ofcom would be including its reasoning when publishing its provisional views;
 - 2.57.3 third parties require this in order to respond to information requests. In particular, as Ofcom would separately take steps to ensure that information requests are proportionate and appropriate (see paragraphs 2.34 to 2.37 above).
- 2.58 In respect of the view that the proposal is likely to make Parties more guarded and may discourage the submission of disputes, it is not clear to us why this would occur, given that it is a procedure Ofcom has to date adopted in publishing draft and final determinations and to our knowledge it has not resulted in CPs withholding dispute referrals that would otherwise have been submitted to Ofcom.

Other issues raised in responses to the consultation

- 2.59 The following discusses various issues raised by respondents that are not directly commenting on proposals, but concern other areas of the dispute resolution process set out in the December consultation.

Extensions to the four-month period

- 2.60 One respondent suggested that Ofcom could offer guidance on what might constitute "exceptional circumstances" and how long an extension might last for in these cases.

Ofcom's view

- 2.61 The very nature of "exceptional circumstances" is that they are exceptional. Each case is assessed on its individual merits, both on whether exceptional circumstances exist, and where we consider that is the case, the potential impact on timescales this creates. We therefore consider that it would be extremely difficult to provide general guidance that could offer any certainty to stakeholders.
- 2.62 However, where we conclude that exceptional circumstances exist, we will inform Parties of this and use best endeavours to advise Parties of both the impact on timescales (where known) and our next steps in light of the individual circumstances.

Alternative Dispute Resolution (“ADR”)

- 2.63 Several respondents raised concerns in respect of the potential application of ADR, with some comments conflicting with others:
- 2.63.1 ADR is ineffective and inefficient, as it is non-binding and likely to take longer than four months;
 - 2.63.2 arbitration is an inappropriate method of ADR, as rather than an alternative route for resolution involving the Parties agreeing a solution, it requires them to accept a third party’s binding decision;
 - 2.63.3 where an arbitrator has delivered an ADR decision, it is not clear what the conditions would be for Ofcom to later overturn that decision should a dispute subsequently be referred back to Ofcom by a Party;
 - 2.63.4 ADR is inappropriate for disputes concerning compliance with SMP conditions;
 - 2.63.5 it is incorrect for Ofcom to assert that ADR may not work if one Party has SMP, as there have been examples (e.g. concerning Mobile Termination Rates) where this has not been true; and
 - 2.63.6 ADR is unlikely to be appropriate for disputes concerning the repayment of money, as repayment of money is not an option under ADR, and only a regulatory option under section 190(d) of the 2003 Act.
- 2.64 One respondent also suggested that a referring Party should be required to include an explanation of why it considers that ADR procedures are unlikely to prove adequate to resolve the issues between the Parties.

Ofcom’s views

- 2.65 We consider that suitable alternative means for resolving disputes can be available in some cases, and should be pursued where possible. To date, of 52 disputes properly referred to us for resolution, we have declined to handle six on the basis that alternative means exist. Of these six, one dispute was referred back to Ofcom for resolution, which in turn was subsequently settled between the Parties⁷.
- 2.66 However, we would only decline to handle a properly referred dispute under section 186 of the 2003 Act where we are satisfied that the alternative means identified are available to resolve the dispute promptly and satisfactorily. We will continue to consider this on a case-by-case basis. Where Parties have provided views on the suitability of alternative means in relation to a particular dispute, these will be included as part of our consideration.
- 2.67 In respect of the suitability of alternative means where one Party has SMP, we agree that a Party having SMP does not automatically suggest that ADR would not work. Paragraph 4.13 of our guidelines reflects this view.

⁷ See: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01057/

The 15 working day period for the Enquiry Phase

- 2.68 Respondents raise four points concerning the duration of the Enquiry Phase:
- 2.68.1 Ofcom should resist extending the 15-day period. Extending beyond this period is incompatible with the four month requirements of the Framework Directive;
 - 2.68.2 Ofcom should consider extending the 15-day period in order to (a) ensure successful delivery of the Enquiry Phase and (b) help the smooth progress of any subsequent dispute;
 - 2.68.3 Ofcom should provide guidance on the type of circumstances where the EPM will be extended, for example applying the same 'exceptional circumstances' basis as used when extending the four month dispute process; and
 - 2.68.4 in the interests of transparency, Ofcom should provide information on the duration of Enquiry Phases when publishing its six monthly report on its investigation activities.

Ofcom's views

- 2.69 In line with our proposals and existing practice, we intend that an Enquiry Phase should last no more than 15 working days. As a general rule, this would only be extended where additional time is necessary in order to allow Ofcom to decide whether or not it is appropriate to accept the dispute. Extensions would normally therefore be restricted to circumstances where we require further clarification of facts or issues for this purpose.
- 2.70 It would not be appropriate to claim 'exceptional circumstances', as these are provided for in the legislation specifically in relation to the timing of a dispute determination where Ofcom has already decided that it is appropriate for it to handle a dispute, or is a dispute referred back to Ofcom following ADR. Regardless, for reasons already discussed in paragraph 2.61 above, offering guidance on what might constitute 'exceptional circumstances' would in any event in our view be impractical.
- 2.71 We will explore the extent to which publishing statistics concerning the duration of Enquiry Phases could genuinely benefit stakeholders, and where appropriate, whether this is something that we should consider doing in future.

Requirements for accepting a dispute

- 2.72 Some respondents have suggested that the proposals raise unnecessary conditions for CPs to satisfy before Ofcom would accept a dispute.
- 2.73 In particular, concerns are that the proposals suggest that a dispute process is not initiated at a point where it is clear that a submission satisfies the statutory requirements for Ofcom to accept it for resolution.
- 2.74 Further, it was suggested that Ofcom should immediately accept a dispute for resolution where it is demonstrable that where a dispute submission falls within Ofcom's remit, and where one or both Parties has tried to enter into good faith negotiations without success. On this point, a number of respondents noted that it

can be difficult to demonstrate that negotiations have been exhausted, particularly where one Party is unwilling to cooperative.

- 2.75 Finally, some respondents have requested that in line with findings of the CAT that sections 185(1) and 185(2) of the 2003 Act are mutually exclusive, Ofcom confirms that where appropriate, a dispute does not fall within s185(1).

Ofcom's views

- 2.76 Our view is that the Enquiry Phase process is integral to our ability to establish whether it is appropriate for us to accept a dispute for resolution and, where we decide it is appropriate for us to handle a dispute, to our ability efficiently and effectively to resolve a dispute within four months.
- 2.77 Where Ofcom considers it appropriate to accept a dispute, we will specify which provision of section 185 of the Act is engaged.

Content of dispute submissions

- 2.78 Some detailed comments and suggestions were provided by respondents in respect of Ofcom's guidance on the content of submissions. In summary, these are:
- 2.78.1 that Ofcom should require that a dispute submission is required to contain the designated information, or if not that a Party provides good reason why it does not;
- 2.78.2 that a submission sets out what the submitting Party believes the other Party to the dispute is seeking as an outcome to negotiations (excluding any offers made on a "without prejudice" basis, which should remain undisclosed);
- 2.78.3 that a submission should include the value of the issues in dispute; and
- 2.78.4 that submissions should not be required to include hard copies of publically available documents (it being an unnecessary, inefficient and environmentally unfriendly requirement).

Ofcom's views

- 2.79 We expect Parties to provide sufficient information for Ofcom to determine whether the dispute satisfies the statutory conditions for a referral and whether or not it is appropriate for Ofcom to handle it. In the interests of expediency and efficiency, we would also expect Parties to provide this at the outset.
- 2.80 As a minimum, we would therefore expect submissions to include having the facts of the case and details of the issues in dispute, the remedies sought and evidence that commercial negotiations have been entered into in good faith by the submitting Party.
- 2.81 However, we note that some Parties may be unfamiliar with these requirements, or have sound, practical reasons for not being able to satisfy all the criteria stipulated in our guidance on submitting a dispute referral. As set out in our guidelines, 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. Such advice will be provided on a case-by-case basis, factoring in the specific circumstances of the submitting Party.

- 2.82 We note that submissions providing the value of the issues in dispute would offer helpful context. However, this information is not a relevant factor in deciding whether it is appropriate for Ofcom to accept a dispute for resolution and we therefore have not made this a requirement for submissions.
- 2.83 We agree that providing hard copies of publically available material is an unnecessary burden on Parties and therefore agree that this should not be a requirement, so long as submissions provide references to electronic versions of the relevant documentation on which they rely.

Ofcom's remit

- 2.84 Responses included comments concerning the appropriateness of Ofcom using its dispute resolution powers:
- 2.84.1 for significant new policy decisions, suggesting that prior to determining a dispute Ofcom should use the process set out in Section 105 of the 2003 Act; and
- 2.84.2 for disputes that include allegations of non-compliance with *ex ante* obligations, prior to Ofcom determining a dispute Ofcom should seek to determine compliance in a regulatory dispute investigation.

Ofcom's views

- 2.85 The issue of whether the possibility of a compliance investigation excludes Ofcom's dispute jurisdiction has already been clearly resolved in June 2010 by the Competition Appeal Tribunal in BT's appeal of Ofcom's partial private circuits dispute determination.⁸ The Tribunal confirmed that there is substantial potential parallel jurisdiction between compliance investigation and disputes and the fact that the issues raised in a dispute could also be dealt with as a compliance complaint does not prevent them being considered as a dispute (see paragraph 104). This was re-confirmed on 22 March 2011, when the Competition Appeal Tribunal handed down its judgment.⁹
- 2.86 As noted by the Competition Appeal Tribunal, Ofcom's ability to decline to determine a dispute that has been referred to it under the dispute resolution process is very limited. Section 186(3) of the 2003 Act sets out that Ofcom has to decide that the dispute is appropriate for it to handle unless there are alternative means for resolving the dispute that are likely to offer a prompt and satisfactory resolution of the dispute. This position remains valid for disputes referred to us under section 185(1A) or section 185(2) of the 2003 Act.
- 2.87 We also note that section 105 of the 2003 Act has been removed as a result of changes made to the 2003 Act by the Regulations.

Other guidelines

⁸ Preliminary judgment of 11 June 2010 in Case 1146/3/3/09 BT v Ofcom (Partial Private Circuits) [\[2010\] CAT 15](#)

⁹ Judgment of 22 March 2011 in case 1146/3/3/09 BT v Ofcom (Partial Private Circuits) [\[2011\] CAT 5](#)

- 2.88 In the December consultation, we advised that we intend to publish further and updated guidance for the handling of areas including investigations relating to regulatory obligations and competition law by May 2011.
- 2.89 Respondents suggested these guidelines are not published until changes as a result of implementing the European Framework on Electronic Communications¹⁰ are known. Given the impact this may have on how Ofcom handles disputes, it was further suggested that Ofcom similarly delays publication of its Dispute Resolution Guidelines.

Ofcom's views

- 2.90 We intend to consult on revised guidance for handling investigations relating to regulatory obligations and competition law shortly. We have updated these guidelines to take account of the changes to the 2003 Act made as a result of changes to the European Framework.

Remedies

- 2.91 Responses included some specific points on the application of remedies when Ofcom resolves a dispute:
- 2.91.1 that remedies should be limited to the scope of the dispute as agreed by the Parties and Ofcom at the outset;
 - 2.91.2 that Ofcom should clarify how it will consider retrospective payments;
 - 2.91.3 to ensure the effectiveness of any determination, Ofcom sets clear requirements in its determinations and is prepared to enforce breaches of directions, obligations or terms of trading that it has imposed pursuant to section 190(2) of the Act.

Ofcom's view

- 2.92 We agree that remedies should be directly relevant to the published scope.
- 2.93 Our consideration of a requirement of a Party to make a payment of sums by way of adjustment of an underpayment or overpayment ("retrospective payments") is, as with all remedies, on a case-by-case basis. We do not consider it is practical to provide general guidance on what may, or may not, result in a determination requiring retrospective payments; however we will provide full reasoning in our final determinations.
- 2.94 When Ofcom resolves disputes it must do so in a manner which is consistent with both Ofcom's general duties in section 3 of the 2003 Act and (pursuant to section 4(1)(c) of the 2003 Act) the six Community requirements set out in section 4 of the 2003 Act. These requirements are directly relevant to considering the impact (and therefore, effectiveness) of any remedies. Accordingly, our reasoning included with a final determination includes our assessment of any remedies against these requirements.

¹⁰ See Department for Business Innovation & Skills consultation "*Implementing the revised EU Electronic Communications Framework*", Sept 2010 <http://www.bis.gov.uk/Consultations/revised-eu-electronic-communications-framework>

Reference to relevant legal precedents

- 2.95 Responses suggested that:
- 2.96 Ofcom guidance makes specific reference to paragraphs 175-189 of the TRD core issues judgment [2008] CAT 12 and paragraph 2 of [2008] CAT 19;
- 2.97 Ofcom raises any particular concerns of precedent as early as possible.

Ofcom's view

- 2.98 We agree that it is appropriate for us to refer to any relevant legal precedent as part of our reasoning when resolving a dispute. However, this will inevitably vary according to the specific circumstances of a dispute. Further, the sources for potentially relevant case law, decisions, etc, are subject to constant evolution and development. Accordingly, it is impractical to provide a definitive list as part of our general guidance for the handling and resolution of regulatory disputes.

Consolidating disputes

- 2.99 Two specific points were raised by respondents:
 - 2.99.1 the guidelines would benefit from clarification on Ofcom's approach to its consolidation of separate dispute submissions; and
 - 2.99.2 Ofcom should consider a cut-off date by which other parties may join a dispute.

Ofcom's views

- 2.100 Where a Party refers a submission to us and requests that it joins an existing dispute, this immediately raises issues for the Parties to the existing dispute and for us:
 - 2.100.1 it creates an additional administrative burden in terms of the increased level of relevant information and arguments to consider;
 - 2.100.2 it therefore creates an additional pressure on the timescales for resolving the existing dispute.
- 2.101 If a new Party subsequently joins a dispute, the same issues are then also raised for that new Party. Further, where a new Party is joining an existing dispute after the point that Ofcom has confirmed that existing dispute has been accepted for resolution, it raises questions over whether activities already completed (most notably seeking comments on submissions, clarifying facts and issuing requests for information) will have to be repeated in light of the new Party's submission.
- 2.102 Four questions for new Parties to therefore consider are:
 - 2.102.1 do they have the resources available to deal with the addition;
 - 2.102.2 do they accept to committing these resources;
 - 2.102.3 do they accept that we will be proceeding on the basis of the existing facts, issues and scope based on submissions from the existing Parties; and

- 2.102.4 do they accept that the addition creates a risk to the timetable for resolving the dispute?
- 2.103 Accordingly, we intend to handle requests by new Parties to join an existing dispute as follows:
- 2.103.1 the initial handling of the submission will follow our standard procedures (see section 3 of the guidelines);
- 2.103.2 if accepted for consideration by Ofcom as part of an Enquiry Phase, we will then make an initial assessment of the issues raised by the new submission, in light of the request by the submitting Party to join an existing dispute;
- 2.103.3 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 join that new submission to an existing dispute (for example, in comparison with accepting as a separate dispute, joining it offers significant overall efficiency gains for the Parties to the dispute), we will:
- a) require confirmation from the new Party that it agrees to the dispute proceeding on the basis of existing facts and issues, and scope as already set;
 - b) require confirmation from the new Party that it agrees that the dispute should not be required to repeat procedural steps¹¹ solely in order to accommodate the joining of the requesting Party. Where such consent is provided we will then;
- 2.103.4 forward a non-confidential version of the submission to the Parties to the existing dispute, advising them of the request to join the existing dispute, and
- 2.103.5 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.
- 2.104 We will then undertake our assessment of whether it is appropriate for us to accept the dispute for resolution and if so, whether it is appropriate to join the new dispute to the existing dispute.
- 2.105 This is likely to be an accelerated process, given the issues in dispute and the scope should already be established. Revisions to timetables and procedures will need to be raised with all Parties on a case-by-case basis.
- 2.106 Where we receive a dispute that does not request to join an existing dispute, but would on first appearance have good reason to be joined to an existing dispute, we will raise this with the submitting Party. Should that Party subsequently request that it joins an existing dispute, we will follow the same procedure as set out in paragraphs 2.103 to 2.104 above.

Reviewing Ofcom's guidelines

¹¹ For example, Enquiry Phase Meetings, information gathering exercises or public consultations.

2.107 Some respondents suggested that Ofcom periodically reviews its Dispute Resolution Guidelines (suggesting every two years).

Ofcom's view

2.108 Whilst we agree that our guidelines should be reviewed, it may be impractical and/or inefficient to commit to a review every two years. Instead, we intend to conduct reviews from time-to-time, in response to significant influences, whether internal (such as in light of wider internal reviews or reorganisation) or external factors (such as legislative changes or changes to industry practice) that are likely to significantly impact the way we handle disputes.

Ofcom's internal governance

2.109 One respondent suggested clarification of how internal governance applies to decisions made in dispute resolution.

Ofcom's view

2.110 We consider that we have provided sufficient transparency of our processes and procedures for stakeholders wishing to refer a dispute submission to Ofcom.

Cost recovery

2.111 Some comments were provided in respect of our proposals concerning cost recovery:

2.111.1 it would be wrong for Ofcom to use the threat of costs as a means of discouraging parties from bringing genuine disputes;

2.111.2 where it has the power to charge for its administrative costs, Ofcom should impose a fee for any disputes referred to it for resolution, in order to disincentivise speculative disputes and to incentivise Parties to settle by other means;

2.111.3 for disputes where a Party has continued to fail to negotiate, and where Ofcom's subsequent resolution of that dispute is not wholly in that Party's favour, that Party should be at risk of a costs order being made against it;

2.111.4 Ofcom should be more willing to make costs orders against Parties who try unsuccessfully to refer disputes back after ADR.

Ofcom's views

2.112 The revisions to the 2003 Act as a result of changes to the European Framework have also amended our powers in relation to cost recovery.

2.113 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.