

*Response of Everything Everywhere to Ofcom's consultation on its
Guidelines for the handling of regulatory disputes*

Everything Everywhere is the UK's leading communications company. It provides services to more than 30 million customers through its mobile, fixed line and WiFi businesses under the Orange and T-Mobile brands.

Everything Everywhere welcomes the opportunity to respond to the proposals that Ofcom is considering for changes to the way in which it handles regulatory disputes. As Ofcom is aware EE has a real interest in this area and in making Ofcom's decision making more robust, consistent and definitive.

The consultation does not contain explicit questions to be answered by respondents, so we have summarised, in the points below, the changes outlined in the consultation and have provided our views on the material points.

- **Following the provision of the non-confidential submission to the other party and receipt of comments from that party, Ofcom will provide those comments to the party submitting the referral**

Everything Everywhere fully supports this proposed measure and indeed Ofcom's failure to provide both parties each other's submissions forms part of our appeal in the 0845/0870 case¹. We have advocated to Ofcom for some time that it is appropriate for the party who has referred the dispute to Ofcom to see the response of the other party to the initial dispute referral. At the very least, it enables the complainant to understand the bases on which the other party is responding to the dispute. Ideally the negotiation process which has preceded the dispute referral will have revealed the arguments of both parties. However, in practice that does not necessarily occur as the documentation in the 080 and 0845 appeals graphically illustrates.

- **There will be an Enquiry Phase Meeting ("EPM") during the enquiry phase. This will be attended by the commercial and regulatory representatives of all parties.**

We broadly support this proposal although we note that Ofcom may need to manage such meetings with care, particularly where understanding and consideration of the issues in dispute requires reference to confidential information; or there is a difference in the size or experience of the parties to

¹ Case 1168/3/3/10 Everything Everywhere v Ofcom, pending before the CAT.

the dispute which means that one party is less familiar than the other with the dispute process and Ofcom's powers and duties.

- **There will be a pre-EPM questionnaire that will need to be completed prior to the meeting. The responses to those questions will provide the focus for the EPM.**

We are not opposed to this proposal. However, we believe that the pre-EPM questionnaire should not be a simple pro-forma. That is, it should be tailored by Ofcom based on Ofcom's understanding of the matters in dispute. It should only seek information where that information has not already been provided and should not seek any irrelevant information. The length of time required to respond to any such questionnaire will depend on the number of questions and the information requested. Ofcom should factor in sufficient time to allow the disputing parties to provide complete responses.

- **Ofcom will no longer consult on the scope of the dispute. Parties will need to put forward views as to scope at the EPM.**

Everything Everywhere is opposed to this proposal as it does not necessarily agree that in relation to previous disputes Ofcom has sought to define the scope of the dispute in a manner which will lead to resolution of all of the issues in dispute between the parties. Again the non-geographic numbering appeals before the CAT provide a graphic illustration of this. Disagreements over the scope of the dispute are raised directly in the main 08 termination charges appeals (joined cases 1151/3/3/10, 1168/3/3/10 and 1169/3/3/10). The issue is also relevant to BT's appeal against Ofcom's decision to accept the second 080 termination charges appeal (case 1171/3/3/11).

It is also critical that Ofcom's definition of the scope of a dispute is as clear and as well understood as possible. It is not sufficient for the engagement on that important step to be limited to the EPM or for parties to be limited to making submissions only during the EPM. That is at a later stage and may be too late, e.g. for third parties considering intervening in the dispute. We are concerned that this proposal, if given effect, may lead to there being more appeals in future where parties seek to argue that Ofcom has incorrectly defined the scope of the dispute.

- **S191 notices (information requests) will no longer be issued in draft form. If parties do not have all the information sought in the request they will simply need to advise Ofcom of this in their response to the notice.**

Everything Everywhere is opposed to this proposal. The visibility of a draft information request allows a party to assist Ofcom to more accurately target its information



gathering and to more immediately advise Ofcom when information sought does not exist. In turn, that assistance and direction may allow Ofcom to re-formulate its request to ask for different information but which may fulfil, or almost fulfil, the same purpose.

Furthermore, we would be even more concerned at the precedent that this might set which might then be translated to section 135 and section 136 information requests. The discussion associated with the implementation of the changes to the EU Framework indicates that an extension of Ofcom's powers to gather information is being considered, including the ability to explicitly request the provision of information which does not already exist. In that circumstance the inclusion of a draft request in the process will be even more crucial.

- Instead of publishing a full draft determination, Ofcom will publish a shorter document at about week 8 in the process, setting out the main elements of Ofcom's provisional reasoning and assessment.

An early indication from Ofcom as to how its thinking is developing when resolving disputes accompanied by an opportunity to comment on that thinking would significantly improve the transparency of the current process. Ofcom's publication in week 8 should serve to give the parties visibility of Ofcom's view on the key issues, provided sufficient information is provided and the provisional reasoning is clear.

- When publishing a final determination, Ofcom may also publish non-confidential versions of both the dispute submission and any comments on it.

Everything Everywhere considers that increased transparency will be beneficial to the dispute process and we are generally supportive of this proposal, provided legitimate concerns as to confidentiality are properly taken into account.

It may not be appropriate in all disputes to publish all information and submissions provided by the parties. For example, the evidence of commercial negotiations between the parties annexed to the initial dispute submission would usually contain a great deal of confidential information and this should not be made public by Ofcom. The same may be true for the summary of those negotiations contained in the dispute submission. It may be appropriate, therefore, for Ofcom to specify that only certain sections of the initial dispute submission will be published. A general rule that the entire dispute submission will be made public may lead to the unintended consequence of disputing parties including less detail in their submissions making Ofcom's job of resolving the dispute more difficult. A pragmatic solution may be to publish only the summary of the issues in dispute, the applicable legal and regulatory framework and how the disputing party believes Ofcom



should resolve the dispute. In any event, the form of the non-confidential version of any submissions should be agreed by the party who made that submission prior to publication.

- **Relevant legal precedents**

In the section headed “**Advice to parties to disputes**” at §31.7 of the consultation, Ofcom refers obliquely to any existing rulings by the Competition Appeal Tribunal which may provide an indication of the approach likely to be followed. We are surprised not to see any reference to the existing case law, in particular the judgments of the CAT in the blended termination rate dispute appeals (the ‘TRD appeals’²). We suggest it would be helpful to all concerned if Ofcom’s guidance were to make specific reference to paragraphs 175-189 of the TRD core issues judgment [2008] CAT 12 and paragraph 2 of [2008] CAT 19 in which the guidance in the earlier judgment was summarised.

² T-Mobile and others v Ofcom, Cases 1089-1092/3/3/07.