



Statement following
consultation on payment of costs
and expenses in regulatory
disputes

Statement

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Section 1

Introduction

- 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(6) of the 2003 Act to recover the costs and expenses that it incurs itself in dealing with the 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 On 29 October 2012, we published⁴ a consultation (the "Consultation") setting out Ofcom's proposed 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 Stakeholders were invited to comment by 10 December 2012.
- 1.5 In this statement, we set out our response to the stakeholder comments received following the Consultation and we explain the changes we have made to the final guidance (the "Guidelines") in light of stakeholder comments. We are today publishing the Guidelines as a separate document. Non-confidential versions of the stakeholder responses can be found on our website at the following [link](#).
- 1.6 The Guidelines published today take effect from the date of this statement and apply in respect of disputes that fall within section 185(1), (1A) and (2) of the 2003 Act.
- 1.7 The Guidelines will be kept under review and may be amended, as appropriate, in light of further experience and to reflect further changes in our duties, powers and procedures.

¹ SI 2011/1210.

² In this document, 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>).

⁴ Available on Ofcom's website at: <http://stakeholders.ofcom.org.uk/binaries/consultations/payment-costs/summary/main.pdf>

Section 2

Comments on Ofcom's proposed approach to costs in disputes

2.1 Ofcom received responses to the Consultation from the following stakeholders:

- BT
- Everything Everywhere Limited ("EE")
- Federation of Communication Services ("FCS")
- ITV plc (confidential response)
- Starcomm Limited ("Starcomm")
- The Number UK Limited ("TNUK")
- UK Competitive Telecommunication Association ("UKCTA")
- Verizon Enterprise Solutions ("Verizon")
- Virgin Media

2.2 We discuss in this section the main issues raised in stakeholders' responses and our response to stakeholders' comments. We also explain the changes that we have made to the final Guidelines following our further consideration and in light of stakeholders' comments. We are today publishing the Guidelines as a separate document. It should be noted that, unless otherwise stated, the section and paragraph numbers referred to in the remainder of this document reflect the wording and paragraph numbers contained in the Consultation.

General comments on Ofcom's proposed approach

Comments from respondents

2.3 The majority of stakeholders welcomed our statement that, 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.

2.4 A number of respondents noted that it was important for parties not to be deterred from bringing genuine disputes and expressed concern that the possibility of cost recovery could have an unwarranted disincentive effect. TNUK suggested this may particularly be the case in relation to smaller communications providers ("CPs") and argues that this risks having a detrimental impact on their businesses.⁵

2.5 EE argued that *"it will prima facie remain appropriate for Ofcom to only require a party to bear the costs of another party or Ofcom where the [sic] an attempted dispute reference is not within the legislation, the dispute reference has been*

⁵ Page 3, TNUK's response to the Consultation

frivolous or vexatious or where a party has abused the right of reference in some way.⁶

Ofcom's position

- 2.6 We explained the rationale for cost recovery in Section 2 of the Consultation. In line with the 15 April 2011 statement accompanying the Regulations by the Department for Culture, Media and Sport ("DCMS"),⁷ we noted that, in particular, we wish to incentivise parties (i) to consider actively whether the issues in dispute might be best resolved via alternative means; (ii) to engage genuinely and constructively in commercial negotiations or alternative dispute resolution ("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.⁸
- 2.7 Under our revised approach we will consider the factors referred to by EE (see paragraph 2.5 above), but will also be looking to be satisfied that alternative mechanisms for resolving the dispute have been considered and where appropriate, used by the parties.
- 2.8 We agree that provision for the recovery of costs and expenses should not operate in a manner that might unduly discourage parties from referring disputes to Ofcom for resolution. As noted at paragraph 3.2 of the Consultation, it is not our intention routinely to recover Ofcom's costs of disputes or to require costs payments to disputing parties. 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 outlined in the Guidelines that we consider are likely to be relevant.

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

Commitment to negotiations/ADR

Comments from respondents

- 2.9 A number of respondents commented on our proposal that we would be more likely to require a party to pay Ofcom's costs and/or another party's costs where there is evidence of a lack of a genuine commitment on the part of that party to attempt to resolve the dispute through commercial negotiations or ADR before referring it to Ofcom (paragraphs 3.8 and 3.9 of the Consultation).
- 2.10 EE agreed that it is fair and appropriate for Ofcom to consider as a relevant factor "*whether or not a party has declined to resolve a dispute using commercial negotiations, has used delaying or stalling tactics in ongoing negotiations or otherwise obstructed the course of negotiations*".⁹ However, EE argued that as Ofcom's Dispute Resolution Guidelines require the disputing party to explain the efforts it has made to seek to resolve the dispute through commercial negotiations before Ofcom accepts the dispute for resolution, Ofcom should clarify in the

⁶ Page 3, EE's response to the Consultation

⁷ 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) http://www.culture.gov.uk/images/publications/FWR_implementation_Governmentresponse.pdf

⁸ We have repeated these three points in the Guidelines, however we have removed the word "actively" in (i). See paragraph 2.13 in the Guidelines.

⁹ Page 4, EE's response to the Consultation

Guidelines “*that it would only be in highly exceptional circumstances (e.g. if the contents of the dispute referral were found to be untrue) that a costs award would be made against the referring party on the basis of lack of commitment to negotiations*”.¹⁰

- 2.11 A number of respondents argued that many disputes are not suitable for resolution through ADR and that ADR was often not a realistic alternative to resolution by Ofcom. For example, UKCTA argued that “*many disputes which occur in the telecoms industry are simply not amenable to ADR due to the nature of the issues in dispute, the intertwining of the dispute with Ofcom regulatory decisions, power imbalances between the parties, and/or the fact that they often involve multilateral relationships with the outcome having the potential to impact other industry stakeholders not involved in the dispute*”.¹¹
- 2.12 Some respondents suggested that formal ADR routes (such as mediation or arbitration) may be more time consuming and/or costly than the Ofcom dispute resolution process, which must be completed within 4 months (except in exceptional circumstances).
- 2.13 Several stakeholders argued that Ofcom should be able to address the issue of disputes that are referred which are more suited to resolution by alternative means, including ADR, when Ofcom exercises its powers under section 186 of the 2003 Act to decide whether or not it is appropriate to handle a dispute.
- 2.14 EE argued that Ofcom has power to decline to hear a dispute until the possibility of ADR has been exhausted and that where Ofcom has exercised its discretion to accept a dispute, it was not clear that there would be many (if any) cases where it would be appropriate for Ofcom to award costs against the referring party for failure to engage in ADR.¹² Virgin Media argued that parties would have a legitimate expectation that, should Ofcom proceed with a dispute, they will have already met the relevant criterion and that this factor therefore appeared to be redundant.¹³
- 2.15 BT argued that the Guidelines should make clear that Ofcom will only consider awarding costs where a party has acted unreasonably in refusing to pursue ADR.¹⁴ BT supports its arguments by reference to statements made in a Court of Appeal judgment relating to costs of civil proceedings at the High Court.¹⁵

Ofcom’s position

- 2.16 In the Consultation we noted that DCMS made clear in its 15 April 2011 statement that Ofcom would “*...only normally recover costs and expenses from disputing parties, where appropriate, in cases where ADR, where available, had 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.¹⁶

¹⁰ Page 4, EE’s response to the Consultation

¹¹ Page 2, UKCTA’s response to the Consultation

¹² Page 3-4, EE’s response to the Consultation

¹³ Page 2, Virgin Media’s response to the Consultation

¹⁴ Page 2, BT’s response to the Consultation

¹⁵ *Swain Mason v Mills & Reeve* [2012] EWCA Civ 498, paragraphs 76-77, in particular Davis LJ’s statement: “*The fundamental question remains as to whether it had been shown by the unsuccessful party...that the successful party...had acted unreasonably in refusing to agree to a mediation*”.

¹⁶ DCMS Statement, paragraph 93.

- 2.17 We also stated in the Consultation that whilst 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 agree that provision for the recovery of costs and expenses should not operate in a manner that might unduly discourage parties from referring disputes to Ofcom for resolution.
- 2.18 As noted in our Dispute Resolution Guidelines, we consider that, to date, some parties may have considered Ofcom as their first port of call and 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 (for example some disputes involving multiple parties or where there is an imbalance in the negotiating power between the parties), we would like to see evidence that parties have considered whether a dispute could be resolved through ADR before referring it to Ofcom.
- 2.19 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 which subsection of section 185 of the 2003 Act that dispute has been referred under), 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. For example, there may be cases where a party appears to have been reluctant to negotiate or engage in ADR, but having regard to all the circumstances of the case and our statutory duties, we have decided it is nevertheless appropriate for us to accept the dispute for resolution. In these circumstances, as set out in the Guidelines, we may inform that party that its conduct may be relevant to the question of costs, should they be sought at the conclusion of the dispute resolution process.
- 2.20 As we noted in the Consultation, Ofcom is more likely to require a party to pay Ofcom's or another party's costs where there is evidence that party has not demonstrated a genuine commitment to resolving a dispute before referring it to Ofcom. In other words, Ofcom is more likely to require a party to pay costs if it has unreasonably refused to consider engaging in ADR and/or commercial negotiations or has engaged in unreasonable or uncooperative conduct during an ADR/commercial negotiations process which is inconsistent with a genuine effort to resolve the dispute prior to referring it to Ofcom. Ofcom will consider these and any related factors on the basis of the available evidence in the circumstances of an individual case.

Behaviour that increases costs and expenses

Comments from respondents

- 2.21 EE commented that Ofcom should only take into account the provision by a party of inaccurate or incomplete information to Ofcom as a relevant factor where Ofcom considers the inaccuracy or omission to be either deliberate or negligent.¹⁷
- 2.22 EE argued that failure by a party to meet a deadline should only be considered a factor supporting the award of Ofcom's or a party's costs where that delay has been the cause of the relevant costs being incurred.¹⁸

¹⁷ Page 4, EE's response to the Consultation

- 2.23 EE also suggested that our proposed guidelines regarding other considerations (namely multiple or late submissions) that we may take into account in this category, are unclear. EE argued that a party's right to present alternative arguments and advance their case as they best see fit is important and exists before the courts. It argued that this may involve the need to make submissions to Ofcom only at a "late" stage of the dispute. EE considered that this is an important part of "an effective right of dispute referral" and therefore did not wish the guidelines to be interpreted in a way that would limit this.¹⁹
- 2.24 BT raised concerns about the supply of information between the parties during negotiations and later with Ofcom during the dispute resolution process. BT commented that there should be a test of reasonableness applied in both cases. In terms of the former, BT submitted that non-disclosure of commercially sensitive information during negotiations should not be used to justify a costs order against BT. With respect to Ofcom's information requirements during the dispute process, BT submitted that they should be proportionate and reasonable both in terms of what information is requested and the deadlines set, in the context of the overall 4 month time limit for the process.²⁰

Ofcom's position

- 2.25 We will consider behaviour that appears to have increased costs and expenses in the round with the other relevant factors set out in the Guidelines to determine whether, and what costs should be recovered by Ofcom or paid by a party to one or more other parties.
- 2.26 We do not consider that the provision of inaccurate or incomplete information should necessarily only be a relevant factor when it is the result of negligence or a deliberate act or omission by a party. We do, however, believe that it is appropriate to consider the context and impact when a party has provided inaccurate or incomplete information. We will, as set out in the Guidelines, 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 the information provided.
- 2.27 We consider that significant delays or increased costs and expenses caused by submissions that duplicate arguments or evidence may well be very relevant to the question of costs, particularly given the tight statutory timeframe for dealing with disputes.
- 2.28 With respect to late unsolicited submissions, in the Guidelines we have made it clear that we will in particular consider this a relevant factor as to costs where we consider that:
- 2.28.1 it was not reasonable in all the circumstances for a party to make such late submissions; and
 - 2.28.2 where such submissions require significant consideration and assessment that could have been conducted earlier in the process had the submissions been made earlier.

¹⁸ Page 4, EE's response to the Consultation

¹⁹ Page 5, EE's response to the Consultation

²⁰ Page 3, BT's response to the Consultation

- 2.29 In considering this factor, we will 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

Comments from respondents

- 2.30 A number of respondents commented on our proposal that we would be more likely to require a party to pay Ofcom's costs and/or another party's costs where a dispute is primarily commercial in nature and does not raise any issues that materially affect the interests of citizens in relation to communications markets, consumers in relevant markets or the promotion of competition (paragraph 3.18 of the Consultation) and where the value of the matters in dispute is less than £50,000 (paragraph 3.19 of the Consultation).
- 2.31 UKCTA and EE argued that whilst it may be the case that an individual dispute between two parties over a set period of time falls below the £50,000 threshold, Ofcom should also take account of the impact of the issue on other parties that may be similarly affected but have not entered yet into the dispute process and also the likelihood that the matters in dispute could reoccur.²¹ UKCTA considered that Ofcom's approach should not deter a party from referring a dispute as a result of being the first mover on an issue.
- 2.32 Virgin Media supported UKCTA's argument. In addition, Virgin Media suggested that any such consideration of financial value should relate to the potential value that a party may consider is in dispute at the outset of the process and not the amount eventually determined by Ofcom. Virgin Media also argued that it was unclear how we would assess whether a dispute that is of relatively small value may raise important issues that have a material impact on consumers (see paragraph 3.20 of the Consultation).²²
- 2.33 BT, EE and TNUK suggested that including a value threshold of £50,000 has the potential to act as a deterrent to disputes being brought by smaller CPs.²³
- 2.34 TNUK and Verizon disagreed with Ofcom's proposed position that it would be more likely to require costs to be paid in the event that a dispute is primarily commercial in nature. They both argued that in any event it was unclear what Ofcom meant by a 'primarily commercial' dispute and argued that most disputes between CPs may have some impact on competition and consumers.²⁴ TNUK also argued that disputes brought under section 185(1) of the Act are likely by their nature to be considered primarily commercial disputes, but that this does not make them less valid.
- 2.35 BT argued that the nature of the dispute, including whether or not it is a multi-party dispute, should be a relevant consideration for Ofcom to take into account when deciding whether to award costs. BT noted its status as supplier of regulated services to the industry and that it is therefore often involved in disputes with multiple parties on the same issue, which means that if costs are awarded in such cases, BT faces

²¹ Page 3, UKCTA's response to the Consultation; Page 5-6, EE's response to the Consultation

²² Page 4, Virgin Media's response to the Consultation

²³ Page 4, BT's response to the Consultation; page 5, EE's response to the Consultation; page 5, TNUK's response to the Consultation

²⁴ Page 4, TNUK's response to the Consultation; page 4, Verizon's response to the Consultation

the risk of paying costs for a large number of disputing CPs which could be very significant.²⁵

Ofcom's position

- 2.36 Having considered stakeholders' comments, we agree that there may be cases where a threshold of £50,000 may inadvertently deter parties from bringing a dispute that it would be appropriate for Ofcom to handle, for example where a dispute involves a smaller CP and is of material value to that CP, or involves an issue which is of general importance to industry, or raises considerations that may have a material effect on competition and the interests of consumers. In the final Guidelines we have therefore removed reference to the £50,000 threshold.
- 2.37 We have, however, retained the financial value of a dispute as a factor that we may take into account in our consideration, including where appropriate whether the costs Ofcom and other parties incur in connection with a dispute are greater than the expected value of any payment that might be ordered between the parties.
- 2.38 We have also decided that describing a dispute as "primarily commercial" may raise problems of interpretation, and so have removed reference to it in the Guidelines.

Outcome of the dispute resolution process

Comments from respondents

- 2.39 UKCTA and EE expressed the view that Ofcom should not award costs against any party where Ofcom has issued a determination in its favour.²⁶

Ofcom's position

- 2.40 As stated in the Consultation (see paragraph 3.6.2), the outcome of the dispute is one of the factors that Ofcom is obliged to consider under sections 190(6A) and 190(6B) of the 2003 Act.
- 2.41 We would not generally expect to require a party to pay costs in relation to a dispute which has materially been determined in that party's favour, unless there were particular reasons to do so. Such reasons might include a successful party having engaged in behaviour that has unreasonably delayed or frustrated the dispute resolution process

Methodology and process for calculating costs and expenses to be recovered

Comments from respondents

- 2.42 A number of respondents requested additional clarity as to:
- 2.42.1 the procedure that Ofcom will follow in deciding whether to require a party to pay Ofcom's costs or another party's costs; and
- 2.42.2 the nature of the costs that may be recovered and how the quantum of costs payable will be determined.

²⁵ Page 3, BT's response to the Consultation

²⁶ Page 3, UKCTA's response to the Consultation; page 6, EE's response to the Consultation

Ofcom's position

- 2.43 Having considered stakeholders' comments on these issues we have decided to make certain amendments to the Guidelines in order to clarify the procedure and methodology we intend to follow in deciding whether to require costs to be paid and how the level of costs to be recovered will be calculated. We explain these changes below and respond to specific comments raised by stakeholders.

The procedure for deciding whether to require the payment of costs in a dispute

Comments from respondents

- 2.44 UKCTA commented that Ofcom should consider costs separately from the substantive dispute itself, in order to ensure that the ability to charge costs does not influence the outcome of the dispute. UKCTA also considered that the costs decision should include a right of challenge without having to revert to the Competition Appeal Tribunal (the "CAT") or other judicial body.²⁷
- 2.45 BT suggested that we should consider suspending any order for costs until after either the two-month deadline for appealing to the CAT has passed or the CAT has delivered its judgment.²⁸
- 2.46 TNUK submitted that Ofcom should notify the parties that it is "minded to" recover its costs and expenses, and justify in reasonable detail in that notification why it believes costs should be paid. TNUK considered that the proposed subject of the costs order should have the right to provide representations to Ofcom about whether the costs order should be made, and be given two weeks to respond. If Ofcom disagreed with the response, it would then "*provide its high level estimate of its costs and expenses or require the party to provide an estimate of its costs, as appropriate*".²⁹
- 2.47 TNUK suggested that the "minded to" notification should also be published as "*Ofcom's decision and reasoning will be of vital importance to other stakeholders who may be considering bringing (or defending) a dispute*".³⁰

Ofcom's position

- 2.48 As stated in paragraph 3.24 of the Consultation, we cannot decide whether recovery of costs and expenses may be appropriate until after our final determination to resolve the dispute has been made. Such decisions will be appealable to the CAT in accordance with section 192 of the 2003 Act.
- 2.49 Having considered the responses to the Consultation, we have amended the Guidelines to provide greater clarity about the process that we intend to follow, which is set out at paragraphs 3.27 to 3.40 of the Guidelines.
- 2.50 We have amended paragraph 3.26.1 of the Consultation in the Guidelines to make clear that we will only provide a "minded to" indication in cases where we propose to seek cost recovery.

²⁷ Page 3, UKCTA's response to the Consultation

²⁸ Page 4, BT's response to the Consultation

²⁹ Page 7, TNUK's response to the Consultation

³⁰ Page 7, TNUK's response to the Consultation

- 2.51 Where we notify parties that Ofcom is minded to recover its costs, we will provide to the parties our provisional view for consultation. In the interests of administrative efficiency, we do not typically intend to publish these provisional views, nor seek comment from others who are not parties to the dispute. We will publish our final decision and our reasons will therefore be available to all interested parties.
- 2.52 Paragraphs 3.27 and 3.28 of the Consultation set out the proposed procedure in relation to awarding costs as between the parties to the dispute. We stated that we would give an indication to the parties to a dispute whether we consider one or more parties to that dispute should pay the costs and expenses of another party (or parties) to that dispute usually within 4 weeks after issuing a final determination. To allow the parties involved to have input into this process, we have amended the final Guidelines to state that we shall usually request reasoned submissions from the parties on this issue together with an estimate of the costs they are seeking to recover, which we would normally expect parties to provide to us within 2 weeks of issuing a final determination. We would normally provide the request for costs to the proposed paying party to allow them an opportunity to respond to the requesting party's submissions. We will communicate our decision in a final statement, which we would normally expect to publish in our online Competition and Consumer Enforcement Bulletin. We will reach a decision as soon as possible and usually within 6 weeks after receiving a costs submission from a party.
- 2.53 We do not consider it would be appropriate as a rule to delay costs orders until the two-month deadline for appealing to the CAT has passed or the CAT has delivered its judgment. We will decide the appropriate time to issue our costs determinations on a case-by-case basis, having considered any relevant representations made by the parties concerned.

The nature of costs that may be recovered and how quantum will be determined

Comments from respondents

- 2.54 Virgin Media submitted that indirect costs are likely to be unforeseeable by other parties, and that exposing parties to a potential liability for those unforeseen costs may be contrary to Ofcom's requirement under s3(3) of the 2003 Act to have regard to the principle of transparency of its regulatory activities. It also expressed concern that Ofcom intends to seek agreement to the level of costs it incurred in resolving a dispute by providing a high level estimate of the costs without providing a detailed cost estimate. Virgin Media suggested that "*it is vitally important that Ofcom provides clear guidance as to the nature of costs which will, as a matter of principle, be taken into account and how cost awards will be calculated*". Virgin Media also commented that any costs order must be proportionate to the dispute in question and argued that Ofcom should describe how value will be attributed to the factors considered.³¹ Similar views were expressed by UKCTA, BT, Verizon and EE.³²
- 2.55 Virgin Media argued that a party receiving a costs order should also receive "*a full breakdown of the costs they are being ordered to pay*" as this supports the principle of transparency and also allows that party to assess the reasonableness of the costs order.³³

³¹ Page 3, Virgin Media's response to the Consultation

³² Page 3, UKCTA's response to the Consultation; page 3, BT's response to the Consultation; page 5, Verizon's response to the Consultation; page 6, EE's response to the Consultation

³³ Page 3, Virgin Media's response to the Consultation

- 2.56 TNUK requested that Ofcom should clarify whether the level of costs that the paying party will be required to pay will vary according to Ofcom's assessment of the circumstances of the case and argued that there is merit in Ofcom varying the level of costs that would be payable according to the level of 'fault' of the paying party.³⁴

Ofcom's position

- 2.57 Having considered stakeholders' comments, we have clarified the types of costs and expenses that we consider parties (including Ofcom) may incur during the dispute resolution process (see paragraph 2.7 of the Guidelines).
- 2.58 We remain of the view that where Ofcom decides to seek recovery of its own costs, it would be appropriate for Ofcom to provide an estimate of its costs in order to seek to agree those costs. In the estimate of our costs and expenses (referred to in paragraph 3.26.2 of the Consultation) we will provide the parties with details of the nature of the costs and expenses claimed (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).
- 2.59 We agree that costs to be recovered should be reasonable and proportionate (in line with the principles of assessment on the standard basis under Part 44 of the CPR) but we do not consider that it is appropriate to set down percentage values that we would attribute to each factor since this will depend on the circumstances of any individual case.
- 2.60 We consider that our cost recovery powers permit us to tailor any decision to the circumstances of a particular case. In this regard, we will not necessarily seek to recover all the costs of a dispute in all disputes, and may instead seek to recover only a proportion of our costs. Similarly, we may only 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. We have included this clarification in the Guidelines.

Cap on costs

Comments from respondents

- 2.61 UKCTA and Virgin Media suggested that Ofcom should set a cap for the maximum amount able to be recovered.³⁵ Virgin Media suggested that including a cap would ensure that parties to a dispute would have a greater understanding as to the level of their exposure prior to bringing a dispute and would incentivise parties to minimise the level of their costs.³⁶

Ofcom's position

- 2.62 Ofcom does not consider that it is appropriate or necessary to include a cap on the level of costs which could be recovered. We consider that parties to a dispute already have an incentive to minimise the level of their costs in that in the majority of cases they are unlikely to be able to recover their costs from another party.

³⁴ Page 7, TNUK's response to the Consultation

³⁵ Page 3, UKCTA's response to the Consultation

³⁶ Page 3, Virgin Media's response to the Consultation

- 2.63 Where we are minded to require the payment of costs we will consider the appropriate amount of costs to be payable on a case-by-case basis and ensure that the amount of costs recoverable is reasonable and proportionate to the circumstances of the case.

Costs Assessor

Comments from respondents

- 2.64 BT argued that where Ofcom instructs an independent costs assessor to determine the appropriate level of Ofcom's costs (see paragraph 3.26.6 of the Consultation), the choice of costs assessor should not be made solely at our discretion and that agreement should be sought regarding the choice of costs assessor.³⁷

Ofcom's position

- 2.65 When appointing a costs assessor we will seek to agree the choice of costs assessor with the party subject to any costs order (and also with the receiving party in cases where we order that another party should pay its costs). However, in cases where agreement cannot be reached, we reserve the right to make the appointment for purposes of administrative efficiency. As set out in the Consultation, the appointed costs assessor would be independent both of Ofcom and the party in question.
- 2.66 In the final Guidelines, we have clarified the role of the independent costs assessor (see paragraphs 3.34 and 3.38 of the Guidelines).
- 2.67 Where we decide that it is appropriate for a party to pay Ofcom's costs or another party's costs and agreement on the amount of costs to be paid cannot be reached, we may instruct an independent costs assessor to consider the reasonable and proportionate amount of costs to be recovered from the paying party and to provide Ofcom with a recommendation to this effect. Ofcom will, in all cases, make the final decision taking account of these recommendations and will provide reasons for its decision. 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. As noted at paragraph 2.48 above, a party which is subject to a costs order has the right to appeal Ofcom's decision as to costs to the CAT under section 192 of the 2003 Act.

Other issues raised in consultation

Use of Exceptional Circumstances

- 2.68 UKCTA and Verizon expressed concern about the potential for costs to spiral when exceptional circumstances exist and it is not possible to resolve the dispute within the 4 month statutory deadline.³⁸

Ofcom's position

- 2.69 Under section 188 of the 2003 Act Ofcom must resolve disputes within four months of the date of the decision to handle the dispute, except in exceptional

³⁷ Page 4, BT's response to the Consultation

³⁸ Page 4, UKCTA's response to the Consultation; page 5, Verizon's response to the Consultation

circumstances. In all cases we endeavour to resolve disputes as soon as it is practically possible. We may take into account the existence of exceptional circumstances and any related increase in costs, when deciding whether it is appropriate to require costs to be paid and/or the amount of those costs.

Ofcom's Administrative Charges

- 2.70 A number of respondents (UKCTA, BT and Virgin Media) commented that if future costs of dispute resolution are to be met, even partially, by disputing parties, there should be a reduction in the annual charges imposed on industry accordingly.³⁹

Ofcom's position

- 2.71 We note that this issue was raised by stakeholders in the Government consultation on granting us these new powers. The DCMS statement⁴⁰ following the consultation addressed this matter as follows:

"The Government also notes concerns that, if Ofcom sought to recover the costs it incurs in resolving a dispute from a party, this would have the potential to result in double recovery of administrative costs by Ofcom. The Government is of the view that this concern is unwarranted. Ofcom is not a profit-making corporation.

The statutory regime for administrative charging requires that an over-recovery of costs in any financial year will be returned to stakeholders in the following year (and the years following that in limited circumstances). This will be in the form of a reduction to the annual tariff for the regulatory sector to which the over-recovery of costs pertains. This is set out both in section 38(10) of the Communications Act 2003 and Ofcom's Statement of Charging Principles."

- 2.72 We consider that the Government's response addresses the comments made by stakeholders in this regard.

Other Stakeholder Comments

- 2.73 The FCS sought clarification of the position we will take in the event of disputes in which Ofcom itself is one of the parties to the dispute.⁴¹
- 2.74 TNUK argued that the guidance does not provide enough detail to indicate to stakeholders whether Ofcom will make a costs order in any particular case and asks that Ofcom provide in the final guidance case study examples.⁴²

Ofcom's position

- 2.75 The situation raised by FCS cannot arise as Ofcom cannot be a party to a dispute falling within sections 185 to 191 of the 2003 Act.

³⁹ Page 3, UKCTA's response to the Consultation; page 3, BT's response to the Consultation; page 4, Virgin Media's response to the Consultation

⁴⁰ 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"), paragraphs 110-111
http://www.culture.gov.uk/images/publications/FWR_implementation_Governmentresponse.pdf.

⁴¹ FCS's response to the Consultation

⁴² Page 5, TNUK's response to the Consultation

- 2.76 We have in the final Guidelines provided more detail about the factors relating to parties' behaviour, as well as amending the section dealing with the methodology for calculating costs and expenses. In our view this addresses TNUK's comments and we do not consider that it is necessary to also include hypothetical case study examples.
- 2.77 We would also normally intend to publish our final decisions on costs in our online Competition and Consumer Enforcement Bulletin and consider these published decisions will assist in providing stakeholders with guidance as to our approach to applying these Guidelines in practice.