

**Guidelines for the handling of
competition complaints, and
complaints and disputes about
breaches of conditions imposed under
the EU Directives**

July 2004

Contents

Section		Page
1	Summary	1
2	Complaints and disputes: Ofcom's powers and duties	5
3	Process for investigating complaints and disputes	8
Annex 1	Format for submitting a complaint to Ofcom	19
Annex 2	Format for submitting a request to Ofcom to resolve a dispute	23

Section 1

Summary

1. Ofcom, as sectoral regulator for the communications sector, has concurrent powers under the Competition Act 1998 ('the Competition Act') to deal with anti-competitive behaviour in broadcasting, spectrum and telecommunications. Ofcom also has the power to apply Article 81 and Article 82 of the EC Treaty in addition to the Chapter I and Chapter II prohibitions of the Competition Act.
2. Under the Communications Act 2003 ('the Communications Act') and the Broadcasting Acts, Ofcom has powers to investigate complaints about breaches of conditions imposed on providers and a duty to resolve disputes relating to conditions imposed under the EU Directives¹.
3. These guidelines set out Ofcom's processes and submission requirements for complaints about anti-competitive behaviour, breaches of certain *ex ante* conditions and disputes. In this document, 'dispute' means a matter that Ofcom may resolve by using its dispute resolution powers under section 190 of the Communications Act. These powers are limited in scope and do not cover all of the subject areas within Ofcom's remit. Issues that do not fall within Ofcom's dispute resolution powers may still be referred to Ofcom as a complaint.
4. These guidelines are intended to help businesses and their advisers to understand Ofcom's processes and how best to present a case so that Ofcom can deal with it in an efficient manner. These guidelines are not binding on Ofcom. However, where Ofcom departs from these guidelines it expects to give reasons for doing so.
5. Section 2 sets out Ofcom's powers and duties and discusses the difference between a complaint and a dispute. Section 3 sets out Ofcom's procedures for handling complaints and disputes.
6. Ofcom's required format for submitting complaints is set out in Annex 1. Ofcom's required format for submitting a request for Ofcom to resolve a dispute is set out in Annex 2.
7. Ofcom published these guidelines in draft on 6 February 2004 and invited comments from stakeholders by 19 March. Ofcom received a number of responses, which it has taken into account in finalising these guidelines.

What these guidelines do not cover

8. These guidelines do not cover complaints about television and radio programmes, EPG content or spectrum interference. They do not cover consumer complaints about communications providers, including complaints about unfair contract terms. Details of Ofcom's processes for dealing with other types of complaints are available from Ofcom's website (www.ofcom.org.uk) under 'Complain to Ofcom'.

¹ http://www.ofcom.org.uk/static/archive/oftel/ind_info/eu_directives/index.htm

9. Ofcom recently announced proposals to transfer handling of complaints about broadcast advertising content to a new system to be established under the umbrella of the Advertising Standards Authority (ASA).
10. Ofcom recently announced the establishment of a new independent office, the Telecommunications Adjudicator. The role of the adjudicator is to help accelerate the implementation and delivery of fit for purpose and appropriately industrialised products and processes for LLU. Where a dispute about LLU products and processes is submitted to Ofcom under section 185 of the Communications Act and the parties have not made use of the Adjudicator Scheme then Ofcom may consider that alternative opportunities to resolve the dispute have not been fully exhausted.

A summary of the guidelines

11. The key points of Ofcom’s procedures are summarised below:

Evidence is required before Ofcom will formally investigate a complaint or resolve a dispute

12. Investigations into allegations of anti-competitive behaviour impose significant costs on Ofcom, on the target of the complaint and often on other industry players who are required by Ofcom to provide evidence and information. A requirement to provide evidence to back up allegations will enable Ofcom to identify those complaints that raise real concerns about anti-competitive behaviour and allow Ofcom to target its resources on the most important issues.

Table 1: Summary of submission requirements for disputes and complaints

Type of investigation	Submission requirements
Disputes	<ul style="list-style-type: none"> • a clearly defined scope • evidence of failed commercial negotiation • a statement by an officer of the company, preferably the CEO, that best endeavours have been used to resolve the dispute through commercial negotiation
Complaints	<ul style="list-style-type: none"> • clear identification of the relevant <i>ex ante</i> obligation or abuse under the Competition Act • factual evidence supporting the allegation made • a statement by an officer of the company, preferably the CEO, that the information provided to Ofcom in the complaint submission is correct and complete

13. In these guidelines, Ofcom has deliberately sought to set a minimum standard that all submissions must meet before Ofcom will open an investigation. Ofcom will not accept a dispute without evidence of the failure of meaningful commercial negotiations. Ofcom will not accept a complaint without evidence to back up the allegation. Ofcom will require an officer, preferably the Chief Executive Officer, of the company making the submission to verify that the company has taken due care in checking that the evidence submitted is correct and complete and (in the case of a dispute) that best endeavours have been used to resolve the dispute through commercial negotiation.
14. Ofcom expects large, well resourced companies to make adequate submissions. Ofcom will reject inadequate submissions and will enforce the required submission standards. However, Ofcom will devote resources to assisting small businesses, new entrants or those companies without experience of bringing complaints to competition authorities or the legacy regulators that Ofcom replaced. Ofcom may agree to waive the submission requirements in very special circumstances e.g. when the complainant is an individual consumer.

Ofcom’s timescales for dealing with complaints and disputes

15. Once Ofcom has accepted a complaint or dispute it will work to resolve the issue as fast as possible. The deadlines below are the maximum deadlines that Ofcom will impose. If Ofcom exceeds these deadlines it will publish the reason for the delay.

Table 2: Summary of targets for different types of investigations

Type of investigation	Deadline
Disputes	Four months
Competition Act investigations	Six months where no grounds for action decision is made. Twelve months for an infringement decision.
Breaches of <i>ex ante</i> conditions	Four months for a closure statement or notification that a condition has been breached

Declining to resolve a dispute because alternatives to regulatory intervention exist

16. Ofcom will be reluctant to resolve a dispute unless one party is dominant and/or failure to agree would result in detriment to competition or consumers. In the absence of these circumstances, Ofcom may consider that alternative mechanisms for dispute resolution would be more appropriate, and may decline to resolve a dispute on that basis.

Ofcom will fix the scope of a dispute and check it understands complaints

17. Ofcom will not open a dispute until the scope of the dispute is clear. Once the scope is established, Ofcom does not expect to deviate from this scope.

Ofcom will check it understands complaints and will normally restrict the scope of an investigation to the complainant's original submission. However, where Ofcom uncovers indications of anti-competitive behaviour, it will not consider itself bound by the scope of a complaint.

Ofcom will use formal powers to collect information

18. Accurate information, provided in a timely manner, is critical to efficient investigations. Delays in the provision of information can have a significant impact on overall timescales and, in the case of an investigation into anti-competitive behaviour, can significantly disadvantage one or more of the parties involved. Ofcom will use its formal powers to collect the information it needs to pursue investigations and will take enforcement action against companies that fail to respond to formal requests for information.

Consulting on the outcome of disputes

19. Ofcom will only consult on the outcome of a dispute when the issue is of interest to a large number of stakeholders. In all other cases, consultation will be restricted to the parties involved in the dispute.

Section 2

Complaints and disputes: Ofcom's powers and duties

20. The *ex ante* conditions relevant for these guidelines are imposed under the Communications Act and/or Broadcasting Acts and include:
- general conditions imposed on communications providers²;
 - universal service conditions imposed on designated universal service providers;
 - Significant Market Power (SMP) conditions imposed following a market review³;
 - access conditions on providers of access control services⁴
 - access conditions on providers of electronic programme guides;
 - 'fair and effective competition' conditions in Broadcasting Act licenses and conditions imposed to ensure fair and effective competition in broadcasting; and
 - conditions relating to spectrum trading⁵.
21. Ofcom has a duty to resolve disputes where they result from the failure of commercial negotiation about a matter that falls within the scope of section 185 of the Communications Act. Ofcom also has the power to investigate allegations that a communications provider has committed certain offences under the Communications Act, e.g. persistent misuse of networks and services and improper use of public electronic communications networks.
22. Ofcom, as sectoral regulator for the communications sector, has concurrent powers under the Competition Act to deal with anti-competitive behaviour in broadcasting, spectrum and telecoms. The Competition Act has been amended as of 1 May 2004 in order to implement EC Regulation 1/2003 (the 'Modernisation Regulation') into UK law. The Modernisation Regulation means that Ofcom now has the power under the Act to apply Article 81 and Article 82 of the EC Treaty in full, in addition to the Chapter I and Chapter II prohibitions. It is Ofcom's general policy, where the option is available, to pursue Competition Act investigations under both the Competition Act and the EC Treaty (i.e. Ofcom's investigations will deal with both the Chapter I prohibition and Article 81 of the EC Treaty, and/or the Chapter II prohibition and Article 82 of the EC Treaty).

² The General Conditions of Entitlement

(http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/cond_final0703.pdf)

³ See, for example, *Review of the Wholesale Broadband Access Markets*, http://www.ofcom.org.uk/codes_guidelines/telecoms/netw_intercon_index/wholesalebroadbandreview/

⁴ *The future regulation of access control services*, Oftel, November 2003 http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/access1103.pdf

⁵ Details are set out in the Ofcom/RA consultation on spectrum trading, http://www.ofcom.org.uk/consultations/past/spec_trad/?a=87101 November 2003

Ofcom's approach to using the Competition Act

23. In some cases, Ofcom has a choice between pursuing an investigation under the Competition Act (and/or Articles 81 and 82 of the EC Treaty) and under sector-specific regulation. In its annual plan, Ofcom made clear that it wished to publish its strategy towards using the Competition Act in investigations, as Oftel had done previously. This section sets out this strategy.
24. Ofcom is committed to using the Competition Act where appropriate.
25. The Communications Act (section 317) prescribes the approach Ofcom must take in using the Broadcasting Act powers rather than the Competition Act in relation broadcasting matters:
 - (2) *Before exercising any of their Broadcasting Act powers for a competition purpose, Ofcom must consider whether a more appropriate way of proceeding in relation to some or all of the matters in question would be under the Competition Act 1998.*
 - (3) *If Ofcom decide that a more appropriate way of proceeding in relation to a matter would be under the Competition Act 1998, they are not, to the extent of that decision, to exercise their Broadcasting Act powers in relation to that matter.*
 - (4) *If Ofcom have decided to exercise any of their Broadcasting Act powers for a competition purpose, they must, on or before doing so, give a notification of their decision.*
26. Accordingly, Ofcom has established internal processes for considering whether to use the Broadcasting Act or the Competition Act in broadcasting investigations.
27. Although the Communications Act does not require Ofcom to do so, Ofcom has decided that it will adopt the same approach in relation to electronic communications networks and services as it is required to do in relation to broadcasting. On each occasion before using its powers under the Communications Act for competition purposes, Ofcom will consider whether a more appropriate way of proceeding would be under the Competition Act, and will proceed under the Competition Act if it is more appropriate to do so.
28. This procedure will be implemented for all cases opened after the publication of these final guidelines. The opening Competition Bulletin entry will state what legal instrument Ofcom is using and where Ofcom has decided to use the Broadcasting Act or Communications Act in preference to the Competition Act, Ofcom will state its reasons for doing so.

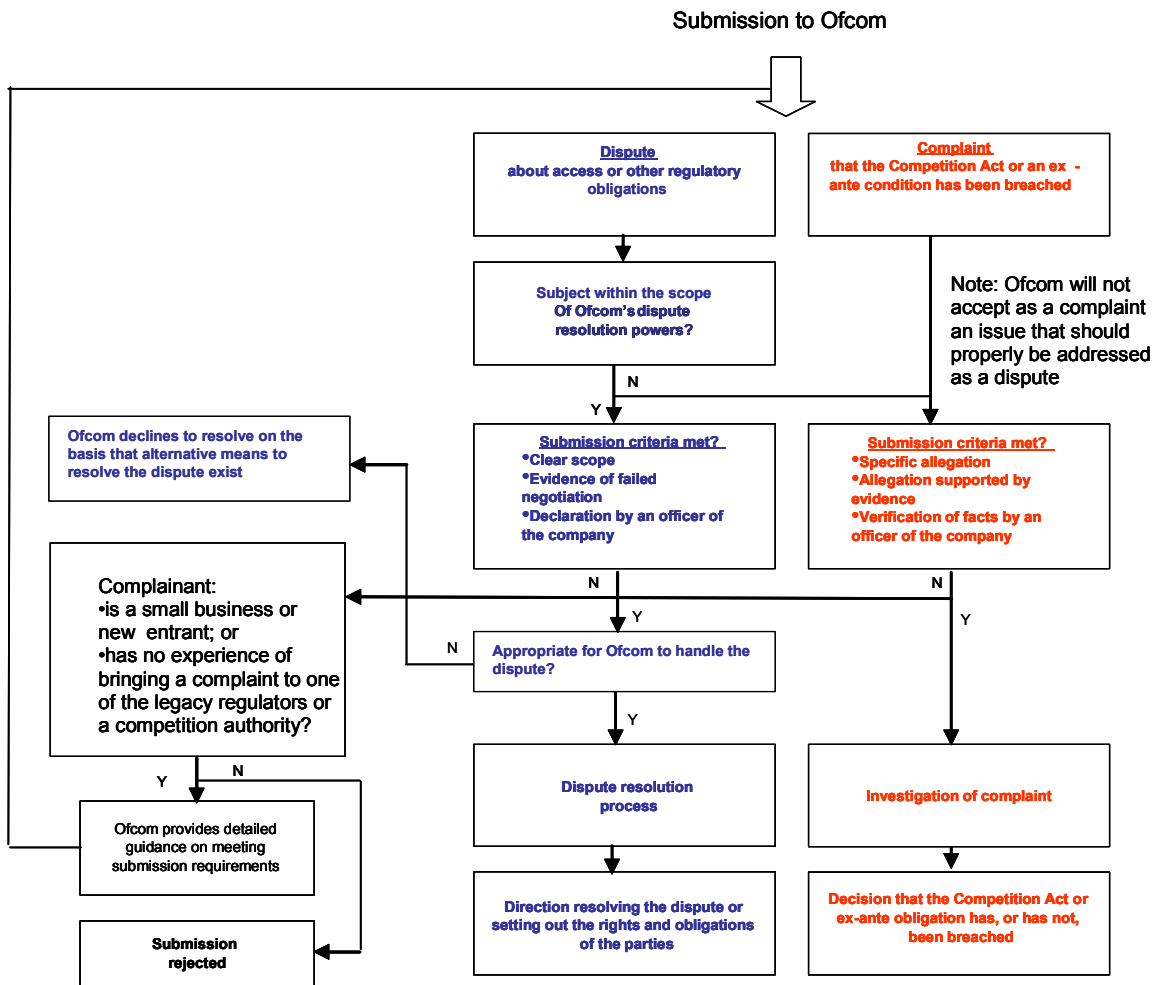
Complaints and disputes

29. There is a difference between a complaint and a dispute. A dispute is the failure of commercial negotiation about a matter that falls within the scope of section 185 of the Communications Act, i.e. the provision of network access and/or other regulatory conditions imposed by Ofcom. Ofcom's dispute

resolution powers are limited to resolving disputes about electronic communication networks and services and spectrum. Disputes about ‘fair and effective competition’ conditions imposed under the Broadcasting Act are not within the scope of Ofcom’s dispute resolution powers. On request, Ofcom will provide potential complainants with guidance on the difference between complaints and disputes. Contact details are given at the end of this document.

30. A complaint, for the purposes of these guidelines, is an allegation that the Competition Act (and/or Articles 81 and 82 of the EC Treaty), or a specific *ex ante* condition, has been breached.
31. There are some differences between the process for resolving disputes and the process for investigating complaints. These differences are discussed in more detail in section 3. The differences include, for example, the option for Ofcom to decline to resolve a dispute on the basis that alternatives (such as mediation or arbitration) would be an appropriate way for the dispute to be resolved. The type of evidence required in a request for a dispute resolution differs from that required for a complaint.

Figure 1: An overview of disputes and complaints



Section 3

Process for investigating complaints and disputes

32. This section sets out the standards that submissions are expected to meet and the procedures that Ofcom will follow during investigations.

Submission standards

33. Ofcom considers all submissions it receives. However, Ofcom expects submissions to contain a certain level of evidence before it will open an investigation.
34. This requirement will not be applied in a bureaucratic way. Ofcom will consider the circumstances surrounding each submission, but will decline to open an investigation in response to unsubstantiated allegations or inadequate submissions. The requirement to provide evidence to back up an allegation will enable Ofcom to identify complaints that raise real concerns about anti-competitive behaviour and to target its resources on the most important issues.
35. Ofcom acknowledges that smaller companies and new entrants may require assistance in formulating complaints. Ofcom will provide guidance to less experienced complainants. However, large, experienced stakeholders are expected to make adequate, well reasoned submissions and back up allegations of anti-competitive behaviour with evidence.
36. In some circumstances, such as a complaint from an individual consumer that appears to raise serious issues, Ofcom may waive the submission requirements. Ofcom will always be prepared to explain why it has waived the submission requirements.

Complaints

37. Complaints about anti-competitive behaviour often result in extensive, resource-intensive investigations which impose significant costs not only on Ofcom but also on the target of the complaint and often on other industry players who may be required by Ofcom to supply information.
38. Complaints must be specific. A general allegation that the Competition Act (and/or a breach of Articles 81 and 82 of the EC Treaty), or a broad set of *ex ante* conditions, has been breached is likely to be considered inadequate.
39. Allegations must be supported by specific, relevant evidence. For example, an allegation of predatory pricing or margin squeeze must be backed up by an analysis of costs and prices. Ofcom acknowledges that complainants have limited access to information on their competitors' costs. Where information about a target's costs is not available, the costs used to support an allegation could be based on a model or on the complainant's own costs or rate of return before and after, for example, a significant price drop. If, after

initial investigation, the factual evidence submitted by the complainant is incorrect, or based on a misunderstanding, Ofcom may close the investigation.

40. Ofcom acknowledges that, particularly in the case of Competition Act complaints, stakeholders may need assistance in formulating submissions. Ofcom will offer advice and guidance, particularly to smaller stakeholders. Contact details are given at the end of this document.
41. Stakeholders may also find it useful to refer to guidance published by the Office of Fair Trading, including such guidance as: *The Application of the Competition Act in the Telecommunications Sector* (OFT 417).
42. In summary, Ofcom will only accept a complaint where complainants:
 - clearly identify the relevant *ex ante* condition which they believe is being breached, or the alleged abuse under the Competition Act (and/or Articles 81 and 82 of the EC Treaty);
 - submit sufficient factual evidence to back up their allegations; and
 - submit a statement by an officer, preferably the CEO, of the company that due care has been taken to ensure that the evidence submitted is correct and complete.
43. Full details of the required format and content of a complaint submission are set out in Annex 1.

Disputes

44. Ofcom will only accept a dispute where complainants submit clear information on all details of the dispute including:
 - relevant *ex ante* conditions (e.g. a condition imposing the requirement to meet a request for access);
 - a clear statement of the scope of the dispute;
 - full details, with reasons, of a preferred remedy;
 - documentary evidence of commercial negotiations on all issues covered by the scope of the dispute; and
 - a statement by an officer, preferably the CEO, that the company has used its best endeavours to resolve the dispute through commercial negotiation.
45. Where the dispute relates to new network access products, the complainant must also provide a business case for introduction of the requested product, including demand forecasts. This information is required by Ofcom to assess whether or not a request for a new network access product is reasonable.
46. Ofcom recognises that companies may refuse to enter into negotiations or introduce unreasonable delay in an attempt to stall negotiations. In such cases, the party asking Ofcom to resolve a dispute should demonstrate that it has taken reasonable steps to engage the other party in commercial negotiations. Ofcom will usually accept, as an alternative to documentary evidence of commercial negotiations, evidence which suggests that one party has tactically refused to negotiate.

47. Full details of the required format and content of a request to Ofcom to resolve a dispute can be found in Annex 2.

Dispute resolution and commercial negotiation

48. Section 185 of the Communications Act only applies to matters which are in dispute, consequently Ofcom should only be asked to resolve a dispute between parties when all avenues of commercial negotiation have failed. Requests for the provision of access and requests for changes to terms and conditions (including prices) should be addressed by commercial negotiation between the relevant parties. Only where these negotiations fail should Ofcom be called on to resolve a dispute.
49. Ofcom will not accept complaints about issues that should properly be dealt with as a dispute and where an attempt has not been made to resolve the issue via commercial negotiation.

Disputes and *ex ante* access obligations

50. Ofcom may impose access conditions on providers of electronic communications networks found to hold SMP in certain markets. These conditions are imposed following a market review carried out under the EU Directives⁶ (transposed in the UK by the Communications Act). Ofcom will resolve access disputes in line with its obligations under the Communications Act and the EU Directives. This means that Ofcom must resolve disputes in line with *ex ante* conditions that have been imposed by Ofcom or the legacy regulators which it replaced.
51. The process for reviewing markets and imposing or revoking SMP conditions is distinct from the process for resolving disputes about how those conditions operate in practice⁷. Ofcom will not, therefore, impose rights or obligations in the context of a dispute about the provision of wholly new forms of access where access conditions have not been imposed by a market review or in areas where Ofcom has not carried out a review. However, Ofcom may decide that a dispute referral where Ofcom (or the legacy regulators) has not imposed an access obligation raises significant regulatory issues. In these circumstances, Ofcom may carry out a market review into whether an access obligation should be imposed before it resolves the dispute. However, Ofcom expects to follow this process only rarely.

Disputes about spectrum trading conditions

52. In November 2003, Ofcom issued a consultation document setting out proposals for the introduction of spectrum trading in the UK⁸. Ofcom will shortly publish a statement on spectrum trading, setting out the licence classes for which trading will be introduced in 2004 and Ofcom's plans for subsequent years. The November statement explained that Ofcom's

⁶ http://www.ofcom.org.uk/static/archive/oftel/ind_info/eu_directives/index.htm.

⁷ Article 20(3) of the Framework Directive requires that any obligations imposed on an undertaking by Ofcom in resolving a dispute must respect the provisions of the EC Directives.

⁸ Ofcom/RA consultation on spectrum trading, http://www.ofcom.org.uk/consultations/past/spec_trad/?a=87101 November 2003

standard dispute resolution procedures could potentially apply to disputes that may arise following a spectrum trade although in most cases Ofcom doubted that such a formal approach would be necessary. Ofcom continues to believe it unlikely that it will need to resort to formal dispute resolution procedures in relation to spectrum trades.

53. Nonetheless, should it ever prove necessary, Ofcom expects that the processes outlined in this document would be applicable to disputes about spectrum trades or changes of licence characteristics. In the event that certain technical aspects of a dispute about spectrum trading requires specific evidence or procedures Ofcom may depart from these guidelines and vary its procedures and/or require the parties to submit additional evidence. Ofcom will, of course, give reasons for these requirements. Ofcom intends to keep this position under review as spectrum trading and liberalisation are introduced and as it becomes clearer whether any disputes of this nature will arise.

Acknowledging and accepting submissions

54. Ofcom aims to acknowledge all submissions made to it within two working days.
55. Within fifteen working days of receiving a submission, Ofcom aims to tell the complainant whether it intends to open an investigation or accept a request to resolve a dispute. Ofcom uses this fifteen-day period to ensure that it fully understands the complaint and/or the scope of the dispute, and to reach a decision about whether it is appropriate to open an investigation into a complaint or accept a dispute for resolution.
56. The fifteen-day enquiry phase begins on the day a complete submission (including a non confidential version which can be sent to the target or the complaint or other party in dispute) is received in Ofcom's Competition and Market's Project Office. If a complainant decides to send a submission elsewhere in Ofcom (e.g. to the Chief Executive or a Board member) they are strongly encouraged to copy the submission to C&M's Project Office.
57. Ofcom will generally copy non confidential submissions for both dispute resolution and complaints to the target at the beginning of the enquiry stage. In the case of complaints, no response is required from the target. In the case of disputes, Ofcom will request initial views on the appropriate scope of the dispute.
58. In the event that a non confidential version of the submission is not included with the original submission (or a statement that the complaint or dispute as submitted can be regarded as non confidential), Ofcom's 15 day deadline will not begin until a non confidential version of the submission is made available.
59. If Ofcom finds, during the enquiry phase, that the evidence submitted by the complainant is incorrect, or based on a misunderstanding, Ofcom may decide not to open an investigation.
60. If Ofcom opens an investigation into a complaint or accepts a dispute for resolution, Ofcom will notify the complainant and target. If Ofcom considers

that it is not appropriate to open an investigation or accept a dispute submission, Ofcom will write to the complainant setting out its reasons.

61. Where Ofcom needs more than fifteen working days to decide whether it is appropriate to open an investigation, it will be prepared to explain why.

Clarity on scope

Disputes

62. At the start of an investigation, Ofcom will publish a statement setting out the scope of the dispute, and will not generally alter the scope during the investigation. Ofcom will allow five working days for interested parties to comment on the published scope of the dispute.
63. If the submission includes a request for Ofcom to consider issues on which commercial negotiations have not taken place, or where there has been no reasonable attempt to engage in negotiations, these issues will not be included in the statement of scope and will not be addressed by Ofcom.

Complaints

64. Ofcom does not set the scope of complaints in the same way as for disputes. At the start of an investigation, Ofcom will publish a statement setting out the subject of the investigation, often after checking with the complainant that it understands the complaint.
65. Generally, Ofcom will not widen the investigation beyond the original complaint and will require complainants to make new submissions on issues not covered by the original submission. However, where Ofcom's investigation reveals indications or reasonable suspicion of anti-competitive behaviour, Ofcom will not consider itself bound by the original statement setting out the subject of the investigation.

Disputes and ADR

66. The Communications Act states that Ofcom may decline to resolve a dispute where alternative mechanisms exist and represent an appropriate means of resolving the dispute. Ofcom will consider on a case-by-case basis whether alternative dispute resolution (ADR) is an option.
67. Ofcom acknowledges that the success of ADR depends on the incentives of the parties involved to reach a solution, and that practical considerations, such as the number of parties involved, must also be taken into account.
68. In competitive markets, disputes regularly arise between undertakings. These disputes are resolved either through commercial negotiation or by some form of arbitration. Alternatively, the undertakings decide not to do business with each other. No issues of consumer detriment or public policy arise in these situations.

69. In the communications sector, however, the presence of communications providers with SMP and the existence, for public policy reasons of conditions on all communications providers, mean that failure by stakeholders to agree may result in detriment to competition and ultimately to consumers. In such situations, regulatory intervention to resolve the dispute is appropriate.
70. However, where a dispute arises between parties without SMP, the case for regulatory intervention is not as strong. When Ofcom considers whether it is appropriate for Ofcom to resolve a dispute, Ofcom will therefore consider the market position of the parties. Where market power is unequal, there may be a disincentive on one party to reach a solution and regulatory intervention may be appropriate.
71. The following table gives an indication of the factors that Ofcom will consider before it declines to resolve a dispute on the basis that alternative mechanisms exist.

Table 3: Examples of factors influencing the decision to decline to resolve a dispute about regulatory obligations

	Alternative forms of dispute resolution	Resolution by Ofcom
A large number of parties are involved	x	✓
One of the parties is dominant in the relevant market	x	✓
Both parties are dominant in the same market	✓	x
None of the parties are dominant in the relevant market	✓	x
Similar disputes are resolved in other industries without the intervention of the regulator	✓	x
No welfare loss would result from a failure to agree	✓	x

Resolution of LLU disputes by the Telecoms Adjudicator

72. Ofcom recently announced the establishment of a new independent office, the Telecommunications Adjudicator. The role of the adjudicator is to help accelerate the implementation and delivery of fit for purpose and appropriately industrialised products and processes for LLU. By signing The Adjudication Scheme Agreement, communications providers (including BT) agree to operate according to the Adjudication Scheme. The Adjudication Scheme includes three sets of rules: the Adjudicator Appointment Rules; the Facilitation Rules; and the Dispute Resolution Rules.
73. Without fettering its discretion, in the case where a dispute about LLU products or processes is submitted to Ofcom under section 185 of the Communications Act, in considering whether to accept the dispute, Ofcom may begin with the presumption that if a dispute has not been discussed

under the Facilitation Rules or submitted to the Adjudicator under the Dispute Resolution Rules or has not been subject to another form of dispute resolution between the Parties, then opportunities to resolve the dispute may not have been exhausted.

Publishing details of investigations

74. Ofcom's investigations will be open and transparent. Unless there are confidentiality concerns or tactical considerations (such as the undesirability of alerting the target of an investigation), Ofcom will publish details of all investigations on its Competition Bulletin (www.ofcom.org.uk/bulletins) as they are opened and closed. Ofcom will publish updates relating to significant milestones such as the publication of draft decisions or major changes to timetables or procedural issues under the relevant entry for each investigation.
75. Stakeholders who want to be kept up to date with ongoing investigations can subscribe to e-mail notification of changes to the Competition Bulletin.

Allocating a case team

76. Complainants and parties to disputes can expect regular contact with the team working on the investigation and regular updates on the progress of investigations. Ofcom will provide the complainants with the name of, and contact details for, the investigation adviser considering the matter.

Information gathering

77. Ofcom relies on accurate information, provided in a timely manner, to carry out efficient investigations into complaints and disputes.
78. Delays in the provision of information can have a significant impact on overall timescales and, in the case of an investigation into anti-competitive behaviour, can significantly disadvantage one or more of the parties involved. Ofcom therefore expects stakeholders to respond to information requests to strict deadlines.
79. Ofcom will use its formal powers to collect the information it needs to pursue investigations and will take enforcement action against companies that fail to respond to formal requests for information. Ofcom intends to depart from this strategy only when the nature of the information required means that a formal request is inappropriate (e.g. where background information is required or information is required before a formal request can be issued or the information required is in answer to a very simple query).

Formal information requests

80. Where the timetable of the investigation allows and/or the information request is particularly complex, Ofcom will normally issue formal information requests in draft, allowing three working days for representations to be made on the relevance of the information requested and the practicality of providing the information by the specified deadline. After considering any comments, Ofcom will then confirm or amend the information request. Where an

information request is straightforward or the information is required quickly, Ofcom will not send a draft information request.

81. Once a final information request has been issued, Ofcom will not usually agree to an extension of the deadline and will be robust in enforcing the requirement to respond.
82. During Competition Act investigations, Ofcom will often issue information requests that seek to uncover whether or not a company had an anti-competitive intent in setting a certain strategy. It is inappropriate to issue such requests in draft. However, Ofcom will be prepared to consider representations about the timing and nature of information requests under the Competition Act within the first three days from issue. After this deadline, Ofcom will not generally agree to modify the request.
83. Ofcom intends to meet the statutory four-month target for resolving disputes, unless circumstances are exceptional, and will therefore set challenging deadlines for responses to information requests. Stakeholders routinely involved in disputes should consider the need to develop adequate mechanisms to ensure that they can meet their obligations to supply information.
84. Stakeholders should note that, when responding to formal information requests, a blanket marking of 'confidential' on all information supplied is unhelpful and time consuming for both Ofcom and the stakeholder. A statement that all information supplied is 'confidential' often obliges Ofcom to take a view on what is, and is not, genuinely confidential and the process of checking with the company concerned can be lengthy and time consuming.

Targets for different investigations

85. The four-month deadline for the resolution of disputes is set by the Communications Act. Ofcom has set similarly tight targets for other types of investigations although these are for the purpose of internal management and accountability rather than having a statutory basis.

Table 4: Summary of targets for different types of investigations

Type of investigation	Deadline
Disputes	As quickly as possible, up to a maximum of four months
Competition Act investigations	Six months where no grounds for action decision is made Twelve months for an infringement decision
Breaches of <i>ex ante</i> conditions	Four months for a closure statement or notification that a condition has been breached

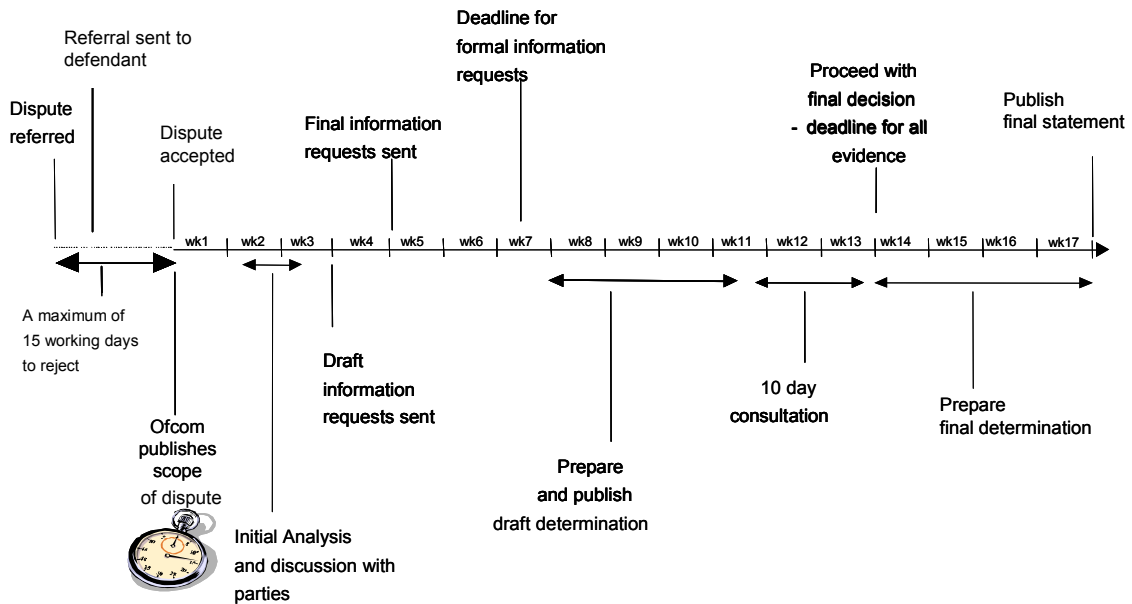
86. The deadlines set out above are the maximum time that Ofcom intends to take to complete an investigation. Ofcom will always seek to resolve issues in the shortest possible time. When it fails to meet its deadlines, Ofcom will publish reasons and will publish reports on its overall performance in meeting the targets set out above.

Reaching a decision

Consulting on the outcome of disputes

87. Where the outcome of a dispute is of interest to a number of stakeholders, Ofcom will formally consult on its proposals. Ofcom will normally allow ten working days for consultations on dispute resolution but in special circumstances it may allow less time. Ofcom will, of course, publish final determinations and reasons for its decisions in all cases. When the outcome of a dispute is only of interest to the parties involved, consultation will be limited to the parties and may be less formal in nature.

Figure 2: Typical timeline of a dispute resolution with consultation



88. Ofcom acknowledges that ten days is a challenging timetable and will give as much advance warning as possible of consultations. However, as Figure 2 illustrates, longer periods of consultation are neither feasible nor desirable.
89. As discussed above, Ofcom will start the dispute resolution process by publishing the scope of the dispute and inviting interested stakeholders to make themselves known to Ofcom and submit information and evidence.

Publishing the results of investigations

90. Ofcom's decisions on complaints result in a decision that the Competition Act or a specific *ex ante* condition has, or has not, been breached, rather than a direction of the arrangements that should apply between two parties to a dispute.

91. When Ofcom reaches a decision that there has been no breach, it will publish a 'no grounds for action' decision (under the Competition Act and/or Article 81 or 82 of the EC Treaty) or a case closure statement (under the Communications Act) giving its reasons for reaching a particular decision.
92. Where Ofcom reaches a decision that there has been a breach of a condition or the Competition Act, it must follow procedures set out in either the Competition Act or the Communications Act.

Requests for urgent action

Urgent cases under the Communications Act

93. Where Ofcom considers that a case is urgent, it may specify that any action to be taken by a person believed to be contravening an *ex ante* condition is taken sooner than would otherwise be the case.
94. Ofcom's discretion under the Communications Act to take urgent action applies only to alleged breaches of conditions relating to electronic communications networks and services, and does not extend to conditions imposed to ensure fair and effective competition in commercial television and radio broadcasting services.
95. As set out in section 98 of the Communications Act, Ofcom may consider a case as urgent where contravention of a condition has resulted in, or creates an immediate risk of:
 - a serious threat to the safety of the public, to public health or to national security;
 - serious economic or operational problems for communications providers or providers of associated facilities; or
 - serious economic or operational problems for users of electronic communications networks, electronic communications services or associated facilities.

Interim measures under the Competition Act

96. Ofcom has discretion under the Competition Act to impose interim measures, before it completes its full investigation, where it has reasonable suspicion that the provisions of the Competition Act are being infringed.
97. As set out in section 35 of the Competition Act, where Ofcom has started an investigation but not completed it, Ofcom may impose interim measures in order to:
 - prevent serious, irreparable damage to a particular person or category of person; or
 - protect the public interest.
98. In these circumstances, Ofcom may give such directions as it considers appropriate for that purpose i.e. of preventing serious, irreparable damage or protecting the public interest.

Making a request for Ofcom to pursue a case as an urgent case or to take interim measures

99. If a complainant believes that Ofcom should take urgent action to address its concerns, then it must clearly set out its full argument as soon as possible. A complainant is unlikely to be persuasive in its argument that a matter is a case for urgent action if it demonstrates a failure to act with urgency in bringing the full details of its complaint to Ofcom's attention.
100. Representations about recent changes in agreements or conduct are more likely to present grounds for urgent action than allegations about established behaviour or agreements.
101. Ofcom will assess any request for urgent action or interim measures against the relevant criteria set out at paragraphs 95 and 97 above. When considering an application for interim measures, for example, Ofcom must be satisfied that swift action is necessary to prevent serious, irreparable damage and/or to protect the public interest.
102. A request for urgent action must, in addition to providing evidence of a contravention of a condition, demonstrate that the matter deserves urgent attention. Complainants should provide compelling evidence that the alleged contravention or infringement justifies the commitment of significant resources in Ofcom pursuing the issue as a matter of urgency. Such evidence may include a financial assessment of the losses directly attributable to the alleged behaviour (although note that financial loss on the part of a person bringing the complaint may not, in itself, be sufficient to demonstrate grounds for Ofcom to act as a matter of urgency) relevant to total turnover of the complainant, details of other companies likely to be affected, and information about why the damage caused will be irreparable (for example if the results of the behaviour cannot be reversed because the number of consumers involved renders this impracticable or companies will exit a market with high barriers to entry).
103. Ofcom expects to be able to assess the case for urgent action on the merits of the facts brought to Ofcom's attention at the outset, and expects to provide the complainant with a decision about urgent action quickly. Complainants should note that repeated requests for Ofcom to reconsider a decision on urgent action can be counterproductive, as responding to these requests may divert resources away from the full investigation.

Annex 1

Format for submitting a complaint to Ofcom

Complaints should be submitted to:

Competition and Markets: Project Office
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
e-mail: competition.complaints@ofcom.org.uk
Telephone: 020 7783 4100

If you need any further guidance on how to submit a complaint to Ofcom, please contact C&M's Project Office.

Ofcom will send a non confidential version of your submission to the parties named in your complaint. If your submission contains confidential information, you should provide a separate non confidential version which can be copied to the target of the complaint.

Unless you specifically request Ofcom not to do so, Ofcom will disclose your business name to the target of the complaint. Ofcom recognises that there are some circumstances in which complainants prefer to remain anonymous (for example, where disclosure of the complainant may prejudice ongoing commercial relations with third parties), but that may hinder full explanation of the problem to the target of the complaint, thus limiting the effectiveness of the investigation.

Unless you specifically request Ofcom not to do so, in the event that Ofcom decides to investigate your complaint, Ofcom will publish details of the complaint, including your business name, on Ofcom's website.

A submission should contain the following information:

Section A - Preliminary information

- summary of complaint (background, undertakings concerned, products/services, key dates, alleged infringement, harm done, relief sought);
- business name, address, telephone/fax number, and/or e-mail address and, if relevant, the contact details of a person who can discuss the detail of a complaint;
- a brief explanation of the nature of your business and its scale (local, national, international, approximate turnover);
- details of the target(s) of the complaint;
- details of the relationship between the complainant and the undertaking complained of, such as whether the complainant is a customer or a competitor.

Section B - Legal basis for the complaint

Specify:

- Chapter I (anti-competitive agreements) and/or Chapter II (abuse of a dominant position) of the Competition Act (and/or Article 81 and/or Article 82 of the EC Treaty) and a clear explanation of why you believe the Competition Act, Article 81 and/or Article 82 of the EC Treaty are being breached; and/or
- applicable *ex ante* condition(s) which you consider is/are being breached by the target and a clear explanation of why you believe the condition(s) is/are being breached.

Section C - Details of the complaint

- an explanation of the reasons for the complaint;
- the products and/or services concerned by the complaint;
- details of the structure of supply and demand for the products/services concerned;
- relevant dates and incidents;
- details of any relevant contact with the target of the complaint;
- a chronology of events;
- how the complainant's business has been affected by the alleged activity;
- relief/remedy sought including details of the timing/urgency of the complaint and reasons;
- names of other industry members who can support the complaint.

Section D (required for complaints about anti-competitive behaviour)

Note: for breaches of *ex ante* conditions imposed following a market review, Section D is not required. In addition, complainants may reference relevant sections of Ofcom's market reviews in support of a Competition Act complaint.

The relevant markets

In order to carry out its investigation, Ofcom will have to obtain certain information from the complainants, the target and others, to enable it to analyse the relevant economic market(s).

Information about the markets involved is fundamental to any investigation of alleged anti-competitive behaviour. For example, in order to take action against an abuse of dominant position, it is necessary to establish the market(s) - if any - in which the dominant position exists, identify the firm(s) that hold that position and then assess the effect of the alleged abuse on competition.

Ofcom recognises that smaller firms may not have the resources available to enable them to provide a full analysis of the market, but the more information that can be provided at the start, the sooner Ofcom will be able to make a decision on the complaint.

The following is a non-exhaustive list of the type of questions which will have to be answered in an economic analysis of the market(s). Not all the questions will necessarily be relevant in every case (for example, in the case of a new market).

- What are the specific products/services that are the subject of the complaint?
- What is the complainant's understanding of the relevant market(s) in to which these products/services fall?
- Are there any close substitutes for the product or service? Are they interchangeable with other products/services? What are the actual and potential alternatives?
- How would customers react if the price of the products/services increased? Could and would they buy alternative products/services more cheaply or would they continue to purchase the more expensive products/services? Why?
- What are the characteristics and intended use of the relevant products/services? Do they have one or many applications?
- Who are the target customers? What features of the product or service are important to them?
- How easily could undertakings switch to supplying (or buying) an alternative product? If an existing supplier increased the price of the product/service, would another supplier provide the same or similar products more cheaply? What factors would be relevant in making the decision to start to supply the products/services more cheaply (for example, is production equipment dedicated or are costly special connections, maintenance, staff training etc required to supply substitute?)
- How quickly could there be an alternative source of supply (for example, would governmental authorisation materially delay supply)?
- Does the product/service under consideration share a common technology or common network facilities with any other?
- Could any other firms switch existing capacity to supply the product?
- What is the extent of the geographical market for the product or service (i.e. regional, or national)? Are there cross border sales of the product/service?
- Are there any legal or regulatory rules applying to the products/services in question and how does this affect their supply?

Competitive conditions in the relevant markets

Information should be provided on the state of competition in the relevant markets, including, for example, details of:

- the key market participants and their approximate market shares (by value and by volume);
- how market shares have changed in the last 2-5 years;
- the approximate total size of the market - in value and volume terms - and how it has changed in recent years;
- the manner in which firms in the market compete (for example, mainly on price or on quality/service);
- how competition is organised/takes place (for example, are there formal tendering processes? Are there long-term contracts?);
- the structure of supply and demand for the relevant products/services;
- the main customers of the products/service concerned;
- how prices differ between firms, what the price history of the market is (for example, upward or downward trends);
- the importance of economies of scale or of scope in the market;
- any significant first mover advantages;
- barriers to entry or exit;
- market entry and exit and any market consolidation in the last 3 years.

Section E Factual evidence supporting the allegation and verification by an officer of the company

(This section must contain details of the factual evidence available to support the allegation made. See paragraph 39 for further guidance).

Declaration by an officer of the company:

The information provided in this submission is correct and complete to the best of my knowledge and belief.

Signed:

Position in the Company:

Date:

Section F Other relevant information

Any supporting information should be provided with the complaint, including, for example:

- copies of any relevant documentation (for example, notes of telephone conversations, minutes of meetings, board papers etc) or communications (for example, emails) involving the target/complainant that provides evidence of the alleged anti-competitive activity;
- copies of any relevant industry reports/consumer surveys;
- details of any similar complaints/investigations/proceedings concerning the same or similar products/services (for example, an investigation by the European Commission).

Annex 2

Format for submitting a request to Ofcom to resolve a dispute

A request for resolution of a dispute should be submitted to:

Competition and Markets: Project Office
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
e-mail: competition.complaints@ofcom.org.uk
Telephone: 020 7783 4100

If you need any further guidance on how to submit a request for dispute resolution to Ofcom, please contact C&M's Project Office.

On receipt, Ofcom will send a non confidential version of your submission to the parties named in your dispute submission. If your submission contains confidential information, you should therefore provide a separate non confidential version which can be copied to the other parties.

In the event that Ofcom accepts your submission, Ofcom will publish details, including the business names of the parties, of the dispute on Ofcom's website.

Section A - Preliminary information

- A summary of your dispute, not longer than two A4 pages.
- Business name, address, telephone/fax number, and/or e-mail address and, if relevant, the contact details of a person who can discuss the detail of the dispute.
- A brief explanation of the nature of your business (e.g. Network Operator, ISP etc) and its scale (local, national, international - approximate turnover is helpful).
- Details of the other parties involved in the dispute.
- Details of the relationship between the parties to the dispute.

Section B - The issues in dispute

A full statement of the scope of the dispute, including:

- a list of all the issues which are in dispute;
- full details of the relevant products or services.

If the dispute relates to a request for a new access product:

- business plans of relevant product or service including forecasts, demonstrating how and when you intend to make use of the products or services requested.

In the case of disputes involving contracts:

- a copy of the relevant version of the contract, clearly identifying the clauses that are subject to the dispute.

A description of the *ex ante* conditions to which the dispute relates, including a view on the relevant economic market and whether any communications provider in that market has been designated as having SMP. You should explain why you consider that the relevant obligation is not being met, for example, if you make an allegation that a charge is not cost oriented you must set out your reasoning.

Details of the way in which you wish to see the dispute resolved, including an explanation as to why Ofcom should reach this outcome, for example:

- full details, including an accurate technical description, of a requested product or service;
- the setting of a charge at a particular level including your justification of this level.

Section C - History of commercial negotiations

A description of any negotiations which have taken place between the parties; or, in the event that a party has refused to enter into negotiations, evidence to suggest that you have taken reasonable steps to engage the party in meaningful negotiations.

Details of the steps taken to resolve all of the issues which are in dispute

An explanation of why commercial agreement could not be reached

Relevant documentary evidence of commercial negotiations, covering the whole period of negotiation, including correspondence, notes of meetings and telephone calls, and a chronological summary of the events

Details of any options or proposed solutions put forward by any party during negotiations, including what, if anything, was accepted, what was rejected and why

Declaration by an officer of the company:

Before making this submission to Ofcom, to the best of my knowledge and belief, [company name] has used its best endeavours to resolve this dispute through commercial negotiation.

Signed:

Position in the Company:

Date: