Ofcom's Consultation on Costs in Disputes

Response from BT

Introduction:

BT supports in principle any change that will encourage CPs to negotiate or to use Alternative Dispute Resolution procedures (ADR) rather than bring disputes to Ofcom. However, we are concerned that the current proposals from Ofcom may not have the desired effect. We strongly believe that awarding costs should not become the norm, and Ofcom's guidelines should be adjusted to ensure this does not happen. We also have a number of concerns which relate specifically to BT's unique position in the industry.

In other industries, there is a built-in check on companies bringing disputes against each other as they face the costs of commercial litigation. By contrast, the existence of a regulator in telecoms means this check and balance does not exist - there is little downside for one operator to bringing a case against another operator. This means extra care is needed to ensure the rules and guidance around disputes provide the right incentives.

Commitment to negotiations / ADR:

The proposals will primarily affect the BT business units that deal directly with other CPs, i.e. Openreach and BT Wholesale. Both of these units already have procedures in place to try to minimise formal disputes. For example, BT Wholesale has a well-established escalation procedure within the Standard Interconnect Agreement.

Similarly, Openreach already offers an efficient and effective way to escalate and resolve issues that arise when negotiating terms and conditions of supply with BT through the Contract Management Mechanism ("CMM"). The CMM was put in place as an undertaking following the 2005 Telecoms Strategic Review. In addition, Openreach contracts with CPs have existing escalation and dispute resolution mechanisms, in addition to the process under section 185 of the Communications Act. Although these mechanisms are not widely used by CPs in practice, they are readily available and may provide a means by which disagreements can be resolved without formal dispute resolution before Ofcom.

However, BT is concerned that greater consideration needs to be given as to how ADR would work in practice, given the specific requirements on Openreach not to discriminate unduly between CPs. Any negotiations, discussions or ADR entered into between Openreach and another CP would have to be against that background and could restrict the ability of Openreach to arrive at an agreed outcome with individual CPs without recourse to dispute resolution before Ofcom under section 185. The same issues arise for BT Wholesale when dealing with SMP products.

BT is also conscious that formal ADR routes (such as mediation and arbitration) can be more time consuming in practice than the process envisaged in sections 185-191 of the Act, which requires that Ofcom make their determination within four months. This would be particularly true in the case of disputes involving multiple parties (see further below).

In addition, many of the disputes in which BT is involved often touch upon the policy objectives and regulatory principles to which Ofcom is required to have regard under Article 20 and Article 8 of the Framework Directive. In those circumstances, ADR would not be an appropriate mechanism. Ofcom, by virtue of its duties established by sections 3 and 4 of the Communications Act, will often be better placed than a private arbitrator or mediator to resolve disputes.

No consideration is given in the Consultation as to what the position would be were parties to enter into ADR leading to an award favouring one of the parties which is nevertheless subsequently referred to Ofcom under its dispute resolution functions, essentially allowing for a "second bite at the cherry". In those circumstances, would Ofcom start its consideration of the dispute *de novo* or consider that the burden was on the party seeking to overturn the award to show that it was somehow flawed?

More generally, Ofcom should be aware that the High Court has recently held that a party was not unreasonable to refuse mediation and should not be penalised in costs on that basis (see the judgment of Mr Justice Akenhead in *ADS Aerospace Limited v EMS Global Tracking Limited* [2012] EWHC 2904). Similar issues were considered in the Court of Appeal in *Swain Mason v Mills & Reeve (a firm)* [2012] EWCA Civ 498, where Davis LJ stated as follows (at paragraphs 76 and 77):

> "In *Halsey*, the Court of Appeal was concerned to make clear that parties are not to be compelled to mediate. Further, as stated by the Court of Appeal at paragraph 16 of the judgment delivered by Dyson LJ: "mediation and other ADR processes do not offer a panacea and can have disadvantages as well as advantages; ***they are not appropriate for every case***." The Court of Appeal was also concerned to point out the relevance of the fact where a party reasonably believes that he has a strong case; otherwise there is scope for a claimant to use the threat of costs sanctions to extract a settlement even where the claim is without merit: "courts should be particularly astute to this danger" (at paragraph 18)...
>
> The fundamental question remains as to whether it had been shown by the unsuccessful party (the claimants) that the successful party (the defendant) had acted unreasonably in refusing to agree to a mediation." (emphasis added)

Any eventual guidelines adopted by Ofcom should therefore make it clear that Ofcom will only consider awarding costs where a party has acted unreasonably in refusing to pursue ADR.

Ofcom should also take account of the guidance offered by the Competition Appeal Tribunal regarding the meaning of a "dispute" for the purposes of section 185. In *BT v Ofcom (NCCN 1007)* [2011] CAT 15, the CAT stated that where a communications provider "has communicated its disagreement on a particular issue and has asked [another CP] to take certain action then, once [that other CP] refuses to take that action, there is a dispute between the CP and BT for the purposes of section 185" (see paragraph 32).

Information requirements should be reasonable

Ofcom states that a relevant factor in the decision to award costs may be the supply of information (a) between the parties during the negotiations, and (b) to Ofcom during its investigation of a

subsequent dispute. BT is concerned that the obligation to supply information should in both cases be subject to a test of reasonableness. In particular, it is normal commercial practice not to disclose business secrets to the counterparty during contract negotiations. Any non-disclosure in this regard should not be used as a justification for imposing an award of costs against BT. Also, Ofcom's requirements for information to investigate and resolve a dispute should be proportionate and consistent with a four-month overall process, both in terms of the information required and the deadlines set.

Costs should only be awarded in a minority of cases:

Ofcom does not provide sufficient clarity regarding how often it expects to recover its own costs or make *inter partes* awards. Paragraphs 1.9 and 3.2 of the Consultation state that Ofcom would not seek to recover its costs "generally" or "routinely". However, there is nothing in the Consultation that makes it explicit that this would be only in exceptional cases. We recommend that this should be strengthened by adding further detail about the circumstances in which Ofcom is likely to seek to recover its costs and the list of factors to be considered.

Moreover, Ofcom has a budget to carry out its dispute resolution functions under section 185, funded from charges levied on the industry (see section 38 of the Communications Act 1998). Ofcom refers to this feature of the legislative scheme as part of its rationale for the introduction of a costs recovery regime in paragraph 2.8 of the Consultation. If in practice Ofcom's future costs of dispute resolution are to be met (at least in part) by disputing parties, the annual levy imposed on industry should be reduced accordingly.

Multi-party disputes need more consideration:

Because of its status as supplier of regulated services to the industry, BT (through Openreach and BT Wholesale) is very often involved in disputes with multiple parties on the same issue. If costs are awarded in such cases, BT faces an inherent disadvantage when compared with other CPs. This could result in BT having to be more risk-averse in its decision-making since the risk of paying costs for large numbers of disputing CPs could be very significant. This is obvious in the case of *inter partes* costs, but also affects Ofcom's costs in investigating the arguments put by different CPs.

BT therefore considers that the nature of the dispute, including whether or not it is multi-party in nature, should be a relevant consideration for Ofcom to take into account when deciding whether to award costs.

Quantum of costs

BT is concerned that it is not fully clear from the Consultation what measure of costs Ofcom would seek to recover. In particular, BT considers that Ofcom should provide greater detail regarding the quantum of any costs incurred internally that it would seek to recover and the manner in which such costs are recorded within Ofcom.

In litigation before the CAT, the Tribunal has noted that it is "unusual for a regulator to claim internal legal costs for successfully defending an appeal" (see *National Grid v Gas and Electricity Markets*

Authority [2009] CAT 24 at [18]). However, more recently, the CAT has set out the basis on which it would be minded to award internal costs, which would involve assessing a realistic hourly rate based on the annual cost of the employee in question to Ofcom (see *BT and others v Ofcom (MCT)* [2012] CAT 30 at [39]).

In addition, paragraph 3.26.6 of the Consultation provides that where agreement cannot be reached as to amount of costs payable, Ofcom will refer its costs for assessment by a third party costs assessor chosen solely at Ofcom's discretion. BT considers that agreement should also be sought regarding the choice of the costs assessor.

Finally, paragraph 2.7 of the Consultation (under the heading "The rationale for cost recovery") states that Ofcom and other parties will incur "both direct and indirect costs". However, in the section dealing with the assessment of costs (paragraph 3.26), no reference is made to such "indirect costs", and no example of given regarding the nature of such costs. BT would welcome clarification from Ofcom that it would not seek to recover any costs incurred indirectly when dealing with disputes under section 185.

What happens to costs on appeal?

If Ofcom makes an order for costs in a dispute, but the losing party appeals to the CAT and succeeds in overturning Ofcom's decision, then any costs award made by Ofcom should be reversed (either in whole or in part). Ofcom should also consider suspending any order for costs until after either the two-month deadline has passed or the CAT has delivered its judgment.

***De minimis* thresholds**

Paragraph 3.19 of the Consultation states that Ofcom will have regard to the financial value of the matters in dispute and be more likely to award costs "where the financial value of the matters in dispute is less than £50,000". While Ofcom recognises (at paragraph 3.20) that disputes of relatively small value may raise important issues, this factor has the potential to act as a deterrent to disputes being brought my smaller CPs. Deterring CPs from bringing legitimate disputes would be in direct contradiction to the steer given by DCMS that any power of Ofcom to recover costs should not impact on the ability of CPs to seek resolution of disputes through Ofcom (referred to in paragraph 2.11 of the Consultation).