Payment of costs and expenses in regulatory disputes: Guidance on Ofcom's approach

EE response to Ofcom consultation dated 29 October 2012

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Ofcom's overall approach

EE strongly supports the statement in the proposed guidance that it is not Ofcom's intention to routinely recover Ofcom's proposed costs of disputes, nor to require costs payments to be made to disputing parties, and that Ofcom expects the current practice of each party and Ofcom bearing their own costs to continue for the majority of disputes (§1.9).

Whilst the new sections 190(6A) and 190(6B) of the *Communications Act* 2003 (**the Act**) give Ofcom a wider discretion to make costs awards than the previous section 190(7), it is important for Ofcom to bear in mind that it must also ensure compliance with its regulatory obligations under the European common regulatory framework (**CRF**). An effective right on the part of communications providers to refer disputes to Ofcom for resolution under Article 20 of the Framework Directive is a clear requirement of the CRF, and Ofcom must at all times ensure that its practices and procedures do not serve in any way to undermine or inappropriately limit this right.

Consistent with these rights, EE is of the view 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 an attempted dispute reference is not within the legislation, the dispute reference has been frivolous or vexatious or where a party has abused the right of reference in some way.

The rationale for cost recovery

EE appreciates that Ofcom incurs significant costs in resolving the disputes referred to it. Notwithstanding this, the full and effective fulfilment of Ofcom's dispute resolution function represents one of Ofcom's core duties under the Act and is key to the achievement of Ofcom's primary duty to promote the interests of consumers and competition.EE also notes that this work is in effect funded by communications providers, particularly the larger fixed and mobile operators. It is accordingly essential that Ofcom has at its disposal adequate resources to perform this function to the best of its abilities, at the same time as possessing sufficient resources to fulfil Ofcom's other statutory duties. If Ofcom is concerned that its funding is inadequate in this regard then that is a matter to be addressed in the context of Ofcom's internal budget allocations, and not in these guidelines.

That said, section 186 of the Act makes it clear and has always made it clear that Ofcom is at liberty to determine that it is not appropriate for it to handle a dispute where there are alternative means available for resolving the dispute.

As acknowledged in the consultation (§2.13), there are many cases in which alternative dispute resolution (**ADR**) does not represent a realistic alternative means to resolving a dispute before Ofcom. For example, Ofcom's Dispute Resolution Guidelines observe that ADR may be of limited effectiveness where one of the disputing parties is in a position of significant market power (**SMP**) or where there may otherwise be an imbalance in negotiating power between the parties (§4.13). ADR may also be inappropriate where there are many different parties to the dispute and/or where the dispute raises important matters of regulatory policy. However, where there is a genuine possibility of a successful ADR which will at a minimum be no less expeditious, cost efficient and effective

as dispute resolution before Ofcom, then Ofcom has clear powers to preserve its resources by declining to hear the dispute until the possibility of ADR has been exhausted.

Having exercised Ofcom's discretion to accept a dispute, it is not clear to EE that there will be many (if any) cases where it would then be appropriate for Ofcom to award costs against the referring party for failure to engage in ADR.

Proposed approach to costs in disputes

Commitment to negotiations/ADR

EE agrees that it seems to be fair and appropriate for Ofcom to consider 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 as one of the factors to be considered in a decision as to whether or not that party should pay the costs of the other party or Ofcom (§§3.8-3.9).

However, EE notes that Ofcom's Dispute Resolution Guidelines require the disputing party to set out in detail the efforts that it has gone to to seek to resolve the dispute by means of commercial negotiations and to attest to the fact that it has done so before Ofcom decides whether or not it is appropriate for Ofcom to accept the dispute (see §§2.4; 6.22-6.25). Given this, EE considers that Ofcom's guidelines should clarify 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.

EE's comments on ADR are set out above.

Behaviour that increases costs and expenses

EE agrees that whether or not a party has provided inaccurate or incomplete information to Ofcom should be one of the factors to be considered in a decision as to whether or not that party should pay the costs of the other party or Ofcom (§3.11). EE further supports Ofcom's proposal that this would be considered in the context of whether there was a "reasonable explanation" for the inaccuracy / omission (§3.12). In the fast paced and demanding market conditions in which UK communications providers operate and given the tight time-frames for resolving disputes before Ofcom, mistakes can happen. EE therefore considers that this factor should typically only be taken into consideration where Ofcom considers the inaccuracy or omission to be either deliberate or negligent.

It is fair and appropriate for Ofcom to expect parties to make every effort to comply with its deadlines, given the limited period of time available to Ofcom for resolving disputes. However, EE considers that a party's failure to do so should only be considered as a factor suggesting that the party should bear Ofcom's or another party's costs where the delay has been the *cause* of the relevant costs sought to be so recovered (cf §§3.14-3.15).

The proposed guidelines on multiple or late submissions (§3.16) are undesirably unclear. This factor should be not interpreted so as to inhibit the ability of a party to put alternative arguments before Ofcom when advancing its case in a dispute. Such a right exists before the courts and is therefore part and parcel of an effective right of dispute resolution before Ofcom. Of course, given in particular the limited time-frame available to Ofcom for resolving disputes, it remains open to Ofcom to limit the scope of the dispute that it will accept. Once that scope has been set, then EE believes that it is important that parties should be able to advance their case as best they see fit. Depending on the circumstances, this may involve the need to put on submissions only at a "late" stage of the dispute, for example where this is necessary to respond to the other party's response to the case. Again, EE sees this ability as an important part of an effective right of dispute referral and would not want the guidelines to be interpreted so as to unduly limit this ability.

The nature and value of the issues in dispute

An effective right to bring commercial interconnect and access disputes before the National Regulatory Authority is as much an integral part of the CRF as the right to bring disputes which may be of broader policy significance. EE is accordingly concerned that the wording in paragraphs §§3.17-3.18 goes too far in suggesting that Ofcom may be "likely" to require the referring party to bear costs where the dispute is primarily commercial in nature, rather than in simply indicating that this is a factor that Ofcom will take into consideration.

As noted above, in many cases ADR or dispute resolution before the courts will not be a viable option for the disputing party – e.g. in the case of an urgent commercial interconnect dispute raised by a small operator with limited resources against an SMP operator such as BT. It is important that operators in such cases are not unduly deterred from filing disputes with Ofcom by the risk of incurring the costs of BT and/or Ofcom in the event that they lose the dispute.

Similarly EE is concerned that the proposed reference in the guidelines to a threshold figure of £50,000 regarding the value of disputes under which it may be appropriate for Ofcom to make a costs award could act as an inappropriate barrier to small operators being able to effectively exercise their rights of dispute resolution.

Relevant to both points, EE notes that one of the reasons that Ofcom has put forward in its draft dispute determination proposing to uphold BT's current unilateral rights to change interconnect prices under its Standard Interconnect Agreement is the ability for CPs to raise disputes before Ofcom in the event that they are dissatisfied with those price changes. In many cases these disputes will be commercial in nature and may also be relatively low in value, depending on the products in dispute and size of the business of the purchasing CP. If these factors alone are to be considered by Ofcom as justification for a potential costs order against the disputing CP, then Ofcom will have potentially turned what is already a very high barrier to objecting to BT's charges into an insurmountable one in many cases.

Furthermore, while it may be the case that an individual dispute falls below the £50,000 threshold, Ofcom also needs to take account of the wider financial

impact of the issue on other parties that may be similarly affected, and also the likelihood that the matters in dispute could reoccur. When this is taken into consideration, the individual dispute(s) may have a far greater financial impact than a valuation based on the narrow dispute scope defined by Ofcom. It would be a highly inappropriate outcome if these guidelines were interpreted so as to deter a party from being the "first mover" in referring a matter to Ofcom for resolution.

Outcome of the dispute resolution process

We consider that Ofcom should not award costs against any party where Ofcom has issued the determination in its favour. This is consistent with the general rule that costs should follow the event. We consider that this factor should be determinative, and not merely be considered "in the round with any other relevant factors" (§3.22). We would also suggest that it may in some circumstances be appropriate if costs are ordered against a losing party but Ofcom's dispute decision is then overturned on appeal that these costs should be returned.

Methodology and process for calculating costs and expenses

In calculating costs and expenses, the guidelines should have regard to the decision of the Competition Appeal Tribunal in *BT v Ofcom* [2012] CAT 30. Specifically, they should have appropriate regard to the following passages of that decision:

> *"We would only add this as regards the costs of the Commission's internal solicitors, which it seeks to recover:*
>
> *(1) In principle, we consider that such costs should be recoverable by the Commission, although we quite accept the note of caution sounded by the Tribunal in National Grid v Gas and Electricity Markets Authority [2009] CAT 24.*
>
> *(2) We consider that a fair approach would involve (as regards each in-house lawyer whose costs are sought to be recovered) an assessment of:*
>
> *(i) A realistic hourly rate for the lawyer in question. This involves assessing:*
>
> *(a) the annual cost of that lawyer (taking account not merely the gross salary paid, but other costs, such as pension contributions, health insurance, etc); and*
>
> *(b) the annual number of hours that the lawyer is contractually obliged to work (again, taking account of not merely the number of hours per week that are expected, but holiday entitlement, etc);*
>
> *In this way, an average hourly rate can be obtained.*

(ii) The number of hours actually worked on the case.

(3) Recoverable costs will then be the hourly rate multiplied by the reasonable number of hours worked by the lawyer in question.

This is the order we would have made, had we reached a different conclusion on the issue of who is a "party" in post-determination proceedings."[1]

1 *BT v Ofcom* [2012] CAT 30, §§39-40