



Payment of costs and expenses in regulatory disputes

UKCTA Response to Ofcom

Submitted to Ofcom: 10th December 2012

UKCTA is a trade association promoting the interests of competitive fixed-line telecommunications companies competing against BT, as well as each other, in the residential and business markets. Its role is to develop and promote the interests of its members to Ofcom and the Government. Details of membership of UKCTA can be found at www.ukcta.com.

The ability to refer disputes to Ofcom is a vitally important element of the regulatory regime for UKCTA members who rely upon it for the resolution of a wide variety of disputes including those relating to the availability of required product features and the enforcement of compliant product pricing. An effective right to refer disputes to Ofcom for resolution is a clear requirement of the European Common Regulatory Framework 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.

A number of key regulatory decisions have been made by Ofcom as a result of the referral of disputes to Ofcom, which have had implications not only for the disputing parties but also for CPs more generally, particularly when regulated services provided by BT are in issue.

Parties can only bring disputes to Ofcom as a last resort, having exhausted all options and referral is not a decision taken lightly given the administrative and management costs involved in raising a dispute. Indeed, Ofcom's Dispute Resolution Guidelines require that a party raising a dispute attests to the fact that the party has first sought to resolve the dispute through commercial negotiation before referring the dispute to Ofcom. It is important for parties not to be deterred from bringing genuine disputes and we are concerned that the possibility of cost recovery could dissuade such action. Ofcom already seeks to refer potential disputes to ADR in appropriate circumstances and has introduced a more robust process for deciding whether to accept disputes. Indeed, Ofcom has the power to refuse to handle a dispute if it considers that there are alternative means to resolve it, including ADR. Working effectively, this process should flush out those disputes which are more suited to ADR, require further efforts by the parties to reach agreement or are vexatious.

Additionally, 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 they often involve multilateral relationships with the outcome having the potential to impact other industry stakeholders not involved in the dispute. Ofcom must also consider its statutory obligation to accept disputes and whether there is any evidence of the dispute process being abused or a need to reduce the number of disputes before determining whether it is appropriate to enable the recovery of costs and expenses.

Lastly, it should be kept in mind that the 4 month Ofcom dispute resolution process, which largely if not wholly takes place "on the papers", has been designed to be as effective and efficient as possible. In many cases, it is unclear whether ADR utilising an alternative dispute

resolution body (which is unlikely to ever be as well versed in the relevant dispute issues as Ofcom) would involve any cost savings over and above dispute resolution before Ofcom.

If Ofcom is minded to make changes in this area in respect of Ofcom's costs, this would only be justifiable where it was reflected in a commensurate reduction in the administrative fees which CPs pay to Ofcom. UKCTA would expect Ofcom to properly account for this revenue and off set it against the subsequent years' administrative change for all. Furthermore, notably absent from the consultation is any explanation of how Ofcom intends to calculate the cost award and indeed what types of costs will be included in any award. Ofcom has stated that it will provide a "high level estimate" of the level of costs. This is not satisfactory and clear guidance should be provided by Ofcom as to the cost calculation prior to any final decision. As we have noted Ofcom has a statutory duty to accept disputes and as such it is an integral part of Ofcom's functions.

The suggestion that Ofcom will be more likely to require a party to pay Ofcom's costs and/or another party's costs where the financial value of the matters in dispute is less than £50,000 begs the question of what tangible benefit CPs would actually see in respect of their administrative fees and what amount would be incurred in administering recovery of these costs. While 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 also needs to take account of the impact of the issue on other parties that may be similarly affected but haven't entered yet into the dispute process and also the likelihood that the matters in dispute could reoccur. Taken together, these factors mean that individual disputes may have a far greater financial impact than a valuation based on the narrow dispute scope defined by Ofcom, which for administrative purposes is necessarily contained. Ofcom should do nothing to deter one party referring a matter as a result of being the first mover on the issue. To do so would make it harder for all signatories to challenge a contract, typically used to supply regulated products, as the first mover would bear additional risks.

Were such a change introduced we don't believe it would be appropriate to charge a party whose dispute was subsequently upheld. Ofcom has indicated that this would be a relevant factor in its decision, but we consider that Ofcom should not award costs against any party where Ofcom has issued the determination in its favour. It would also be appropriate to set a maximum amount that could be recovered via this mechanism, as it would be unacceptable for any party to refer a dispute without having an understanding of the maximum cost consequences of the referral, particularly when they have no direct control over the costs.

Should Ofcom dispute charging ever commence, Ofcom should take steps to ensure that the ability or not to charge any party for the costs of running the investigation cannot influence the outcome of Ofcom's investigation. We would expect Ofcom to put in place an entirely separate process to consider these matters with clear guidance, a transparent process including a right of challenge (without having to revert to the CAT or other judicial body) built in.

We also consider that, if Ofcom intends to introduce a costs regime, it needs to be far more transparent and accountable regarding its use of exceptional circumstances. Exceptional circumstances have been cited in the Ethernet disputes¹ to extend the period of dispute investigations indefinitely. This is unacceptable given that it is clear that exceptional circumstances no longer exist in these cases. Some of the Ethernet disputes have now been considered by Ofcom for over two years. It appears that Ofcom is effectively taking as long as it deems necessary to reach a conclusion. This no doubt has a very significant bearing on the associated costs. Should a similar case arise in future, where exceptional circumstances are used in such a way, UKCTA has grave concerns that Ofcom's costs may spiral out of control and the disputing parties will have little choice but to pay them if directed to do so.

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¹ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01052/