



Reading International
Business Park
Basingstoke Road
Reading
Berkshire,
RG2 6DA

Verizon Enterprise Solutions response to Ofcom’s “Payment of costs and expenses in regulatory disputes” guidance

Verizon Enterprise Solutions (“Verizon”) welcomes the opportunity to respond to Ofcom’s “Payment of costs and expenses in regulatory disputes” guidance (the “Guidance”)

Verizon is the global IT solutions partner to business and government. As part of Verizon Communications – a company with nearly \$108 billion in annual revenue – Verizon serves 98 per cent of the Fortune 500. Verizon caters to large and medium business and government agencies and is connecting systems, machines, ideas and people around the world for altogether better outcomes.

Summary

Verizon recognises that Ofcom now has powers under section 190 of the Communications Act 2003 (the “2003 Act”) to recover the costs and expenses that it incurs in dealing with disputes.

However we are pleased to see that Ofcom states in the Guidance that, in general, it does not foresee changes to the current regime whereby all parties (those in dispute and Ofcom) simply pay their own costs.¹ We consider that dispute resolution is one of Ofcom’s many statutory duties, and stakeholders should not be required to pay Ofcom to carry out this particular duty unless there are exceptional reasons in a particular case where one or more parties has acted in a particularly unreasonable way.

In Verizon’s experience the significant majority of undertakings that bring disputes do so as a last resort following the genuine breakdown of commercial negotiations. Most

¹ Paragraph 9 of the Guidance.

parties will be well aware of the need to engage in genuine negotiation, and consider alternative means for resolution, prior to consideration of a dispute submission. Looking at the recent disputes handled by Ofcom, the vast majority of parties in dispute are large, well-established communications providers (“CPs”) who are well aware of their obligations regarding dispute resolution. They will invariably co-operate fully with Ofcom’s investigation and conduct themselves in a highly responsible and responsive manner. We would therefore suggest that, with reference to the factors set out in Table 1 of the Guidance, there will be very limited occasions on which it would be appropriate for Ofcom to seek costs.

In any event, we would have expected Ofcom to have set out some detail about how it would determine the appropriate costs that it has incurred on a dispute, or at least a framework methodology for doing so. We are disappointed that this is lacking from the Guidance, as it makes it very difficult to provide informed comment. It also raises concerns about the level of transparency that would be afforded to disputing parties about how costs are calculated.

The rationale for cost recovery

Ofcom states that “[..] the complexity and level of resource required to resolve these disputes has also been increasing. This has implications not only for the costs arising from Ofcom’s dispute resolution functions but also for the resources available for other discretionary activities”.²

We would make two observations on this statement:

- First, there is no evidence to suggest (or at least none has been provided in the Guidance) that disputes are becoming more complex to resolve. While issues disputed may often be multifaceted and detailed this has always been the case. This is not least due to the intricacies of the regulatory regime and the technical complexities of the telecoms sector, which is nothing new. We do not see why Ofcom now thinks that disputes have suddenly become more complex. It is perhaps the case that Ofcom is receiving longer and more detailed submissions

² Paragraph 2.7 of the Guidance

from parties, which is not the same thing. We would suggest that one of the key skills required to resolve disputes efficiently is to boil the issue(s) down to the core matters in order to make it possible to resolve them swiftly without consuming undue resource. We would suggest that if Ofcom has concerns in this regard, they could be more effectively managed by providing more detailed guidance to stakeholders on how it should present dispute submissions to Ofcom and how much detail it considers reasonable given the relevant constraints it must operate under.

- Second, and following from the point above, we consider that Ofcom may be losing sight of what it is required to do to resolve a dispute. Under the Framework Directive (the “Directive”)³ Ofcom is required to “issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months, except in exceptional circumstances” [emphasis added]. If Ofcom is faced with a highly complex dispute, it must be realistic about what it can achieve at the outset, and with due regard for its resource and capacity restraints. Just as importantly, it must set stakeholder expectations accordingly.

We would suggest that most if not all parties that bring disputes to Ofcom will recognise that Ofcom has finite resources. It is quite within Ofcom’s rights to make clear to parties at the outset that it will resolve the dispute to the best of its abilities within the relevant (statutory) parameters and taking account of resources. Exceptional circumstances aside, Ofcom must resolve disputes within four months, and all stakeholders should have that uppermost in mind when considering whether and how to bring a dispute. To be clear, any disputing party should be fully cognisant of the fact that Ofcom can only do so much in the time available, and they should set their own expectations accordingly. We consider that any disputing party should have the capacity and expertise to fashion a concise and reasonable submission on any matter, which does not place unreasonable demands on the regulator.

³ Directive 2009/140/EC Article 20, paragraph 1 (amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002).

We would argue that this must be the intention behind the wording of the Framework Directive. It was clearly not envisaged that disputes should consume vast resources and jeopardise other legitimate work of the regulator. Resolution of disputes should be swift. If not, the danger is that such disputes drag on indefinitely (see below), prolong uncertainty and/or or consume a disproportionate amount of resource to resolve.

Ofcom must operate with this mindset. It must therefore plan and prioritise rigorously to ensure it is able to meet its targets on timing. This includes ensuring that it uses its resources in a reasonable manner and does not place undue burden on them. While we recognise that this may be more difficult to achieve in practice, it is clear that the current balance is not right and that Ofcom must look to make material efficiencies in its approach to dispute resolution.

On a related point, we are very concerned that Ofcom may be using the concept of exceptional circumstances as a means to relieve the pressure on itself in resolving disputes in a timely and efficient manner. Ofcom will be aware that there are currently a number of disputes on which it has declared that exceptional circumstances exist, namely the PPC and Ethernet disputes.⁴ We fail to see why exceptional circumstances currently exist in these disputes. However Ofcom appears to consider that this is the case, and that once declared 'exceptional circumstances' removes all obligations on Ofcom to resolve a dispute in a timely manner, even when the core reason for the 'exceptional circumstances' has been resolved. In such circumstances Ofcom considers that it is able to take as long as it likes to resolve the dispute.

Proposed approach to costs

Verizon does not consider that Ofcom should be more inclined to require costs to be paid in the event that the dispute is primarily commercial in nature, and does not raise any issues that materially affect the interests of citizens, consumers and/or competition.⁵ First we do not see that it is appropriate to effectively penalise a stakeholder by requiring

⁴ See <http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/open-disputes/>

⁵ Paragraph 3.18 of the Guidance.



costs to be paid where, in Ofcom's subjective assessment, the dispute is "primarily commercial" in nature. Second, we consider that there are very few if any disputes that do not materially impact on citizens consumers and competition, whether in the short or longer term.

We are disappointed to see that Ofcom has not set out detail on how it would intend to calculate its costs in a given dispute. It is very important that Ofcom is fully transparent and accountable for its costs, in order to retain stakeholder trust and confidence. We consider that without due transparency there is an insufficient incentive on Ofcom to keep strict verifiable auditable records about the time and resource allocated to disputes.

We are also very concerned about the situation regarding costs which may arise in relation to disputes that extend beyond four months. For example in the PPC and Ethernet disputes mentioned above, Ofcom has cited exceptional circumstances and has set no fixed timetable for resolving the disputes (which affect multiple parties). Further, and controversially, it is refusing to provide any credible reason for the continued delay. In the case of the Sky / TalkTalk Ethernet case, Ofcom has now taken well over two years to resolve the dispute. If it were to determine that costs should be paid in such a case, the amounts at stake could be very considerable. There is no transparency on how much resource Ofcom is dedicating to this investigation, or at what level of seniority. Parties would therefore be in a highly unattractive position of facing very significant costs that Ofcom incurs, with no power to manage the costs as Ofcom simply takes as long as it sees fit to resolve the dispute. If Ofcom were to take such an approach in future, it would potentially have little regard for the high costs of a protracted investigation because it could in theory recover all its costs. Ofcom would as a result send completely the wrong signal to industry, which has a legitimate expectation that Ofcom is fully incentivised to resolve cases as soon as possible where exceptional circumstances no longer apply.

Verizon Enterprise Solutions
December 2012