

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

## Consultation document

This document seeks your comments on Ofcom's process for dealing with complaints and disputes.

February 2004

The deadline for comments is **19 March 2004**.

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# Section 1 Executive summary

1. Ofcom (the Office of Communications) is the new regulator for the communications sector. Under the Communications Act 2003 and the Office of Communications Act 2002, it has taken over the responsibilities of the Director General of Telecommunications, the Independent Television Commission, the Radio Authority, the Radiocommunications Agency and the Broadcasting Standards Commission.
2. Ofcom already has established processes for complaints about television, radio programmes and advertisements (pending outcome of consultation on 'Future Regulation of Broadcast Advertising'), complaints about interference to wireless spectrum, licensing to use wireless spectrum and consumer complaints about telecommunications providers. Details of these are set out on the Ofcom website ([www.ofcom.org.uk](http://www.ofcom.org.uk)) under 'Contact Ofcom'.
3. None of these is affected by this current consultation document, which sets out how Ofcom intends to handle complaints about anti-competitive behaviour. For the first time Ofcom, as a sectoral regulator, has concurrent powers under the Competition Act 1998 and the Enterprise Act 2002 to deal with anti-competitive behaviour relating to broadcasting and spectrum as well as telecommunications. This document also sets out how Ofcom intends to handle complaints about breaches of ex ante conditions and disputes relating to those conditions.
4. 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), details of all investigations will be published (on Ofcom's competition bulletin at: [www.ofcom.org.uk/bulletins](http://www.ofcom.org.uk/bulletins)) as they are opened and closed. Complainants and parties to disputes can expect regular contact with the team working on the investigation and regular updates on the progress of investigations. Complainants will always be provided with the name of, and contact details for, an investigation advisor responsible for running the relevant investigation.
5. 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.
6. The key points of Ofcom's procedures are summarised below:

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

7. 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.

8. 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 accurate and (in the case of a dispute) exhausted all avenues of commercial negotiation.

**Table 1: Summary of submission requirements for disputes and complaints**

Type of investigation	Submission requirements
Dispute	<ul style="list-style-type: none"> <li>• a clearly defined scope</li> <li>• evidence of failed commercial negotiation</li> <li>• a statement by an officer of the company, preferably the CEO, that all avenues of commercial negotiation have been exhausted</li> </ul>
Complaints	<ul style="list-style-type: none"> <li>• clear identification of the relevant ex ante obligation or abuse under the Competition Act</li> <li>• factual evidence supporting the allegation made</li> <li>• a statement by an officer of the company, preferably the CEO, that due care has been taken in verifying the evidence submitted</li> </ul>

9. 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 replaces. 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*

10. 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 infringement decision is made Twelve months for an infringement

	decision
Breaches of ex ante 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**

11. 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**

12. 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**

13. 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 formal powers to collect information required for investigations.

#### **Consulting on the outcome of disputes**

14. Ofcom will only consult on the outcome of a dispute when the issue is of interest to a large number of stakeholders and Ofcom intends to direct a change to existing arrangements. In all other cases, consultation will be restricted to the parties involved in the dispute. Where Ofcom does not direct a change, it will not consult.

## Scope of the guidelines

15. Ofcom deals with many different types of complaints made by industry players, consumer bodies and individual consumers. This document is designed to assist stakeholders to make representations to Ofcom about breaches of specific ex ante conditions imposed on communications providers, disputes about ex ante conditions and all competition related complaints including those made under the Competition Act 1998 (Competition Act). The ex ante conditions relevant for these guidelines are imposed under the Communications Act 2003 (Communications Act) and/or Broadcasting Acts and include:

- general conditions imposed on communications providers<sup>1</sup>;
- Significant Market Power (SMP) conditions imposed following a market review<sup>2</sup>;
- access conditions on providers of access control services<sup>3</sup>
- access conditions on providers of electronic programme guides;
- ‘fair and effective competition’ conditions (or conditions imposed to ensure fair and effective competition) in commercial television and radio broadcasting services; and
- conditions relating to spectrum trading<sup>4</sup>.

16. In addition, these guidelines cover:

- disputes between parties about, or related to, the conditions listed above;
- investigation of 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; and
- all complaints under the Competition Act about issues within Ofcom’s remit.

17. Specifically excluded from the scope of these guidelines are complaints about broadcasting content and standards (e.g. complaints about breaches of Ofcom’s broadcasting codes), advertising content, EPG content, complaints about spectrum interference and consumer complaints about communications providers, including complaints about unfair contract terms. Details of other contacts within Ofcom and links to other guidance can be found on Ofcom’s website, [www.ofcom.org.uk](http://www.ofcom.org.uk).

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<sup>1</sup> The General Conditions of Entitlement

([http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/2003/cond\\_final0703.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/cond_final0703.pdf))

<sup>2</sup> For example, see

[http://www.ofcom.org.uk/about\\_ofcom/publications/fixednarrowbandstatement.pdf](http://www.ofcom.org.uk/about_ofcom/publications/fixednarrowbandstatement.pdf)

<sup>3</sup> The future regulation of access control services, Oftel, November 2003

([http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/2003/access1103.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/access1103.pdf))

<sup>4</sup> Details are set out in the Ofcom/RA consultation on spectrum trading,

[http://www.ofcom.org.uk/consultations/current/spectrum\\_trading/?a=87101](http://www.ofcom.org.uk/consultations/current/spectrum_trading/?a=87101) November 2003

18. These guidelines are intended to help businesses and their advisors to understand Ofcom's processes and how best to present a case so Ofcom can deal with it in an efficient manner. The final guidelines will not be binding on Ofcom. However, where Ofcom departs from the final guidelines it expects to give reasons for doing so.
19. Ofcom will often have a choice between investigating complaints under the Competition Act or under sector-specific legislation (e.g. the Communications Act). These guidelines do not discuss Ofcom's strategy for using the Competition Act or the circumstances in which it may use sector specific legislation rather than the Competition Act. These issues will be dealt with in a separate consultation planned for the first quarter of 2004.

# Section 2 Responses to this consultation document

## How to respond

20. This consultation document seeks views on how Ofcom intends to handle disputes and complaints about anti-competitive behaviour and breaches of certain conditions that Ofcom may impose on providers of communications networks and services. Comments are welcome on any aspect of these draft guidelines. Specific issues on which comments are particularly welcome can be found at para 74.
21. This consultation is addressed to all organisations and individuals who may ask Ofcom to deal with a complaint or a dispute about competition in the markets Ofcom regulates, or about a breach of a condition imposed by Ofcom under the Communications Act 2003.
22. The closing date for responses is 19 March 2004. Ofcom's preferred method of response is by e-mail to:

[competition.complaints@ofcom.org.uk](mailto:competition.complaints@ofcom.org.uk)

If you wish to submit a response in hard copy, please send it to:

Disputes and complaints consultation  
Competition and Markets  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

Competition Complaints: 020 7783 4100

23. If you wish to submit confidential information as part of your response, please ensure that it is placed in a clearly identified separate annex so that Ofcom can publish non-confidential parts, along with the respondent's identity. If the whole of a response, including the identity of the respondent, is confidential this should be clearly stated. Copyright in responses will be assumed to be relinquished unless specifically retained.
24. This consultation is the responsibility of Heather Clayton, Director of Investigations at Ofcom.



25. Any comments or complaints about the conduct of this consultation should be addressed to:

Philip Rutnam  
Partner, Competition and Strategic Resources  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

email: [philip.rutnam@ofcom.org.uk](mailto:philip.rutnam@ofcom.org.uk)

Fax: +44(0)20 7981 3333

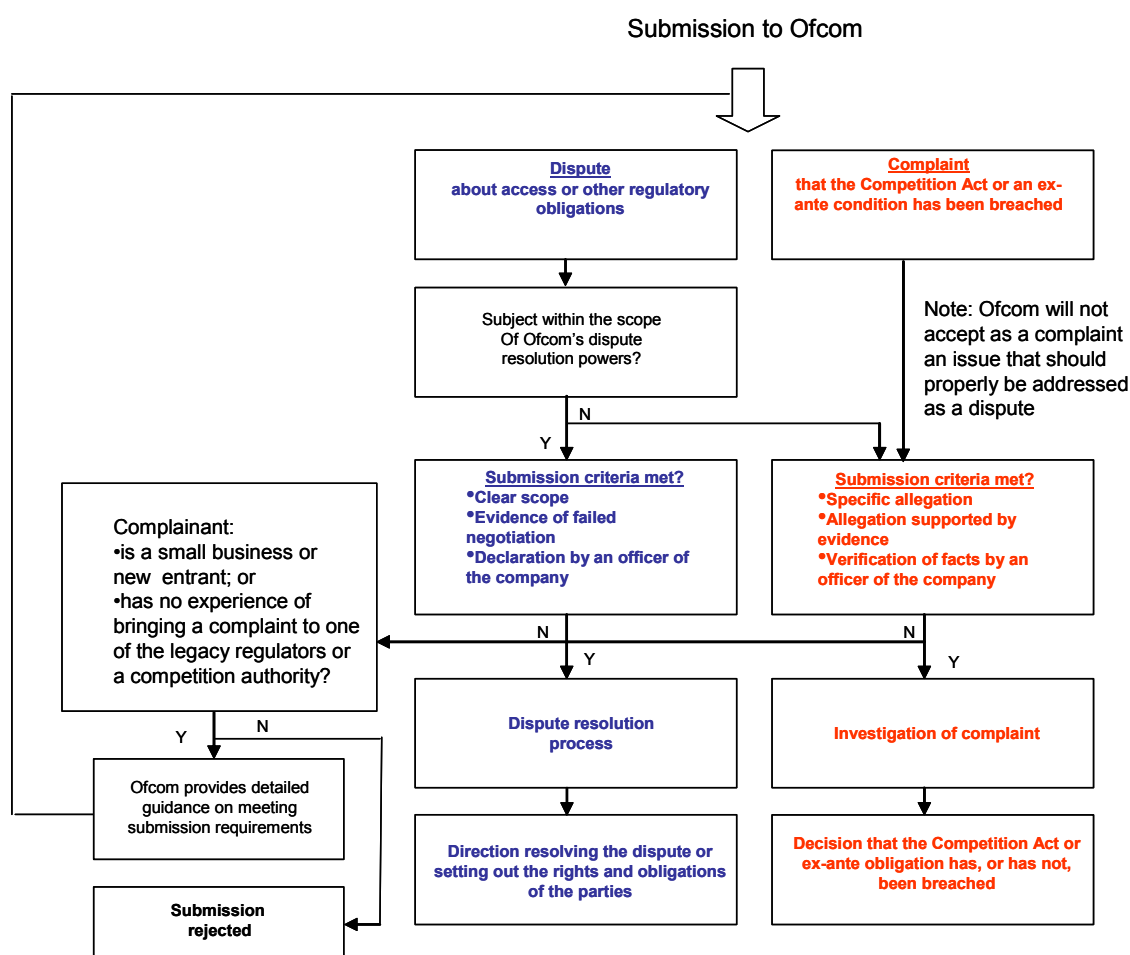
Telephone: +44(0) 20 7981 3000

26. Further details about Ofcom's consultation standards can be found in Annex C.

## Section 3 Complaints and disputes

27. There is a difference between a complaint and a dispute. In this document 'dispute' means the failure of commercial negotiation about a matter that falls within the scope of Section 185 of the Communications Act 2003. Ofcom's dispute resolution powers are limited to resolving disputes about electronic communication networks and services and spectrum. Disputes must relate to the provision of network access and/or other regulatory conditions imposed by Ofcom. Disputes about 'fair and effective competition' conditions in broadcasting 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.

Figure 1: An overview of disputes and complaints



28. A complaint, for the purposes of these guidelines, is an allegation that the Competition Act, or a specific ex ante condition, has been breached. The process for resolving disputes differs from that used to investigate a complaint. These differences are discussed in more detail later. They 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 a more appropriate way for the dispute to be resolved. The type of evidence required in a request for dispute resolution differs from that required for a complaint. Ofcom's approach may also differ in that the resolution of a dispute often represents a determination, or clarification, of the rights and obligations of the parties to that dispute, whereas a complaint results in a decision that a specific condition, or the Competition Act, has or has not been breached.

29. The following sections provide detailed guidance on the standards that submissions must meet and further details about Ofcom's investigation processes.

### **Dispute resolution and commercial negotiation**

30. Ofcom should only be asked to resolve a dispute between parties when all avenues of commercial negotiation have failed. 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. Typically, requests for the provision of access and requests for modifications to associated 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.
31. 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 replaces. 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 Directives<sup>5</sup> (transposed in the UK by the Communications Act). This structured process of market reviews and decisions about imposing or revoking conditions on SMP providers is clearly distinct from resolving disputes about how those conditions operate in practice<sup>6</sup>. Ofcom will not, therefore, deal with disputes 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 completed a review.
32. Ofcom may decide that a dispute referral about access in a market where Ofcom (or the legacy regulators) has not imposed an access obligation raises significant competition issues. In these circumstances, Ofcom may accept the dispute referral but will carry out an own-initiative investigation into whether an access obligation should be imposed before it resolves the dispute. However, Ofcom expects to follow this process only rarely.

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<sup>5</sup> [http://www.ofcom.org.uk/static/archive/oftel/ind\\_info/eu\\_directives/index.htm](http://www.ofcom.org.uk/static/archive/oftel/ind_info/eu_directives/index.htm)

<sup>6</sup> 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.

## Disputes about spectrum trading conditions

33. Ofcom has recently published a consultation about the introduction of spectrum trading<sup>7</sup> which gives a high-level outline of the dispute resolution procedure it envisages for spectrum trading disputes (see para 8.4.7 to 8.4.14 of the spectrum trading consultation). Ofcom intends to adopt the same general structure for all disputes. Therefore, Ofcom expects that the more detailed proposals outlined in this document will also be applicable to disputes about spectrum trading. However, there may be certain technical aspects of spectrum trading disputes that require a different submission format and/or specific evidence or procedures. Once the responses to the spectrum trading consultation have been received and Ofcom has heard stakeholders' views on the type of disputes that may arise as a result of spectrum trading, Ofcom will publish details of submission requirements for disputes about spectrum trading.

## Standard of evidence required by Ofcom

### Complaints

34. Complaints about anti-competitive behaviour often result in extensive, resource-intensive investigations. These investigations 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. Although Ofcom will consider all submissions it receives, it will expect submissions to contain a certain level of evidence before it will open an investigation. This requirement will not be applied in a bureaucratic way, and Ofcom will consider the circumstances surrounding each complaint, but Ofcom 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 those complaints that raise real concerns about anti-competitive behaviour and allow Ofcom to target its resources on the most important issues.
35. Complaints must be specific. A general allegation that the Competition Act, or a general set of ex ante conditions, has been breached is likely to be considered inadequate. In addition, the specific allegation must be supported by specific, relevant evidence. For example, an allegation that a price is predatory must be backed up by an analysis of costs. Of course, the exact costs of the target of the complaint may be unavailable. In these circumstances, the costs used to support an allegation could be based on a model or may be based on the complainant's own costs. If, after initial investigation, the factual evidence submitted by the complainant is incorrect, or based on a misunderstanding, Ofcom may close the investigation.
36. 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. In addition,

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<sup>7</sup> [http://www.ofcom.org.uk/consultations/current/spectrum\\_trading/?a=87101](http://www.ofcom.org.uk/consultations/current/spectrum_trading/?a=87101)

guidelines are available to assist stakeholders to submit Competition Act complaints to Ofcom. In particular, stakeholders should refer to the following publications issued by the Office of Fair Trading:

- OFT notice 414: Assessment of Individual Agreements and Conduct; and
- OFT notice 417: The Application in the Telecommunications Sector.

37. In summary, Ofcom will only accept a complaint where complainants:

- clearly identify the relevant ex ante condition (and the nature of the alleged breach of that condition) under sector specific legislation or alleged abuse under the Competition Act;
- submit sufficient factual evidence to back up their allegation; and
- submit a statement by an officer, preferably the CEO, of the company that due care has been taken in checking that the evidence submitted is accurate.

38. Full details of the required format and content of a complaint submission can be found in Annex A.

## **Disputes**

39. Ofcom will only accept a dispute where complainants submit clear information on all details of the dispute including:

- the relevant ex ante condition relating to the dispute where relevant;
- 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.

40. Ofcom recognises that a refusal to enter into discussions or tactics designed to stall negotiations can and have been employed by some companies. In such cases, the complainant will need to show 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.

41. In addition, where the dispute relates to new network access products, a business case must be provided that includes demand forecasts for the requested product.

42. Full details of the required format and content of a dispute referral can be found in Annex B.

## **Ofcom's investigation processes**

### **Acknowledging and accepting submissions**

43. Ofcom will attempt to acknowledge all submissions made to it within five working days.

44. Within fifteen working days, Ofcom aims to tell the complainant whether it intends to open an investigation into the complaint or dispute and provide the complainant with contact details for an investigation advisor who will handle the investigation. Ofcom will often need to clarify issues with complainants during the fifteen day period and where Ofcom needs extra time to decide whether it is appropriate to open an investigation, it will be prepared to explain why.

### **Disputes: Alternative Dispute Resolution**

45. The Communications Act enables Ofcom to decline to resolve a dispute where alternative mechanisms exist and represent an appropriate means of resolving the dispute. Ofcom will take this decision on a case-by-case basis. Ofcom acknowledges that the success of alternative dispute resolution depends on the incentives of the parties involved to reach a solution and also that practical considerations such as the number of parties involved should be taken into account.
46. 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. In the communications sector, however, the presence of operators with SMP and the existence, for public policy reasons, of conditions on all communications providers means 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. However, where a dispute exists between parties that are not dominant, the case for regulatory intervention is not as strong. Therefore, when considering whether to decline to resolve a dispute, Ofcom will 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 therefore regulatory intervention may be inappropriate.
47. The following table gives an indication of 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

48. Ofcom does not expect to decline to resolve many disputes and it is unlikely, therefore, that a dedicated mechanism or industry specific scheme (such as a panel of experts) would be cost effective or necessary particularly when there are a number of commercial organisations that provide mediation and arbitration services.

## Clarity on scope

### Disputes

49. At the start of an investigation, Ofcom will publish a statement setting out the scope of the dispute. Once this scope is established, Ofcom will not generally alter it during the investigation. Any issues that have been included in the submission but on which commercial negotiations have not taken place, or there has not been a reasonable attempt by one party to engage another in the negotiations, will not be included in the statement of scope and will not be addressed by Ofcom.

### Complaints

50. Ofcom will not publish a scope for complaints as it will for disputes, but will check it understands exactly what a complaint is about before it opens an investigation. 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 be bound by the scope of the original complaint.

## **Competition Bulletin**

51. Ofcom will publish details of all investigations when they are opened and closed. This information will appear on Ofcom's competition bulletin, which is available on its website ([www.ofcom.org.uk/bulletins](http://www.ofcom.org.uk/bulletins)). Ofcom will publish updates relating to milestones such as the publication of draft decisions or major changes to timetables or procedural issues under the relevant listing for each investigation. Stakeholders are able to subscribe to e-mail notification of changes to the competition bulletin.

## ***Gathering information***

52. Ofcom's timetable for resolving disputes is determined by the statutory deadline of four months. Ofcom must timetable its activities carefully over the four-month period. At the start of the dispute resolution process Ofcom will normally set a limit on the time it will spend collecting information and give a target date by which it aims to proceed to make a decision based on the best information available.
53. Accurate and timely information is critical to enable Ofcom to carry out efficient investigations into complaints and disputes. 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 intends to run investigations to tight deadlines and expects industry players to respond to information requests in a timely manner. Where information is essential for pursuing an investigation, Ofcom will use its formal powers to collect it and will not hesitate to take enforcement action against companies that fail to respond to formal requests for information. Ofcom intends only to depart from this strategy when the nature of the information required means that formal requests are inappropriate (e.g. where background information is required or information is required before a formal request can be issued).

## **Formal information requests under the Communications Act and the Broadcasting Act**

54. Where timescales allow and it is appropriate to do so, Ofcom will issue formal 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. Once a final information request has been issued, Ofcom does not expect to agree to an extension of the deadlines and will be robust in its enforcement of the requirement to respond.
55. The overall timescales for dispute resolution by Ofcom are set by legislation and Ofcom intends to meet these timescales unless circumstances are exceptional. Ofcom will, of necessity, set challenging deadlines for responses to information requests. Stakeholders routinely involved in disputes should consider the need to put in place adequate



mechanisms to ensure that they can meet their obligations to supply information within Ofcom's deadlines.

### *Formal information requests under the Competition Act*

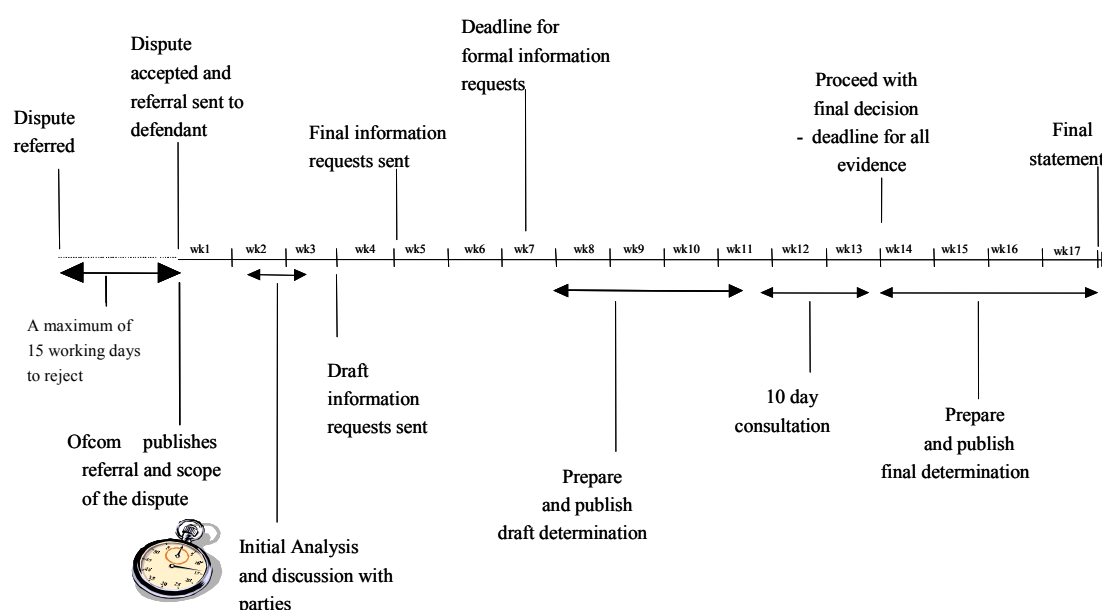
56. During Competition Act investigations, Ofcom will often issue information requests that seek to uncover whether or not a company had an anti-competitive intent in setting a certain strategy. It is inappropriate to issue such requests in draft. However, Ofcom will be prepared to consider representations about the timing and nature of information requests under the Competition Act within the first five days from issue. After this deadline, Ofcom will not generally agree to modify the request.

## Consultation

### Disputes

57. Where Ofcom intends to direct the parties involved in a dispute to enter into an agreement to alter the terms and conditions of transactions, Ofcom will formally consult the parties involved on its proposed resolution. Ofcom will normally allow at least ten working days for this consultation but in special circumstances it may allow less time.

**Figure 2: Typical timeline of a dispute resolution with consultation**



58. Ofcom acknowledges that short consultation periods can cause difficulty for stakeholders, and will give as much advance warning as possible of consultations. However, as Figure 2 illustrates (bearing in mind that the four-month deadline is a maximum and the target is 'the shortest possible time'), longer periods of consultation are neither feasible nor desirable.

59. Where Ofcom's conclusion does not result in a change in the arrangements between the parties Ofcom will not consult on its

conclusions. As discussed above, Ofcom will start the dispute resolution process by publishing the scope of the dispute and inviting interested stakeholders to submit information and evidence. Only where the issue is of interest to a large number of stakeholders, and Ofcom intends to direct a change, will Ofcom publish a draft determination for consultation among a wider audience. Ofcom will, of course, publish final determinations and reasons for its decisions in all cases.

## Complaints

60. In contrast to disputes, which often involve adjustments to access arrangements of interest to a wide range of stakeholders, 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.
61. Where Ofcom reaches a decision that there has been no breach, it will not consult on its findings but will publish non infringement decisions under the Competition Act and case closure statements for investigations under the Communications Act. These documents will set out in appropriate detail Ofcom's reasons for its decision.
62. 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.

## Targets for different investigations

63. The four-month deadline for the resolution of disputes is set by the Communications Act. Ofcom intends to set similarly tight targets for other types of investigations although these are for the purposes 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	Four months
Competition Act investigations	Six months where no infringement decision is made Twelve months for an infringement decision
Breaches of ex ante conditions	Four months for a closure statement or notification that a condition has been breached

64. 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 regular reports on its overall performance in meeting the targets set out above.

## Requests for urgent action

65. Ofcom has powers under the Communications Act (in the case of alleged breaches of conditions relating to electronic communications networks and services) and the Competition Act to act urgently where necessary, i.e. where the alleged misconduct is considered so serious that Ofcom is justified in taking action outside normal procedures and timescales in order to avert the potential consequences. Ofcom's powers in relation to both the Communications Act and Competition Act are set out below, followed by guidance for complainants who believe their complaint may justify urgent action by Ofcom under either power.

### ***Urgent Cases under the Communications Act***

66. Where Ofcom regards a case as 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. The provisions to take 'urgent action' apply to alleged breaches of conditions relating to electronic communications networks and services. The provisions covering 'urgent action' do not cover conditions imposed to ensure fair and effective competition in commercial television and radio broadcasting services.
67. Ofcom has discretion to decide whether or not to take urgent action. Section 98 of the Communications Act sets out the grounds on which a case may be considered as urgent. This is where a contravention of a relevant 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**

68. Ofcom has powers under the Competition Act to take interim measures before it completes its full investigation. Where Ofcom has a reasonable suspicion that the Chapter I or Chapter II prohibitions have been infringed and where Ofcom considers it necessary to act as a matter of urgency, Ofcom has discretion to consider the application of interim measures. Ofcom's powers to take interim measures apply only where Ofcom considers it necessary to act urgently for the purpose of:
- preventing serious, irreparable damage to a particular person or category of person; or
  - protecting the public interest.
69. 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***

70. If a complainant believes that its complaint justifies Ofcom taking urgent action, then it must clearly set out its full argument as soon as practicably

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 itself in bringing the full details of its complaint to Ofcom's attention. Likewise, complainants making representations about recent changes in (for example) agreements or conduct are more likely to be persuasive in arguing for urgent action than complainants alleging that long-established behaviour or agreements are anti-competitive.

71. A request for urgent action should include full evidence and information supporting the argument that the matter is a case for urgent action. It is not sufficient to demonstrate a case for investigation of an alleged contravention or infringement itself. There must be compelling evidence that the alleged contravention or infringement justifies the commitment of significant resources in Ofcom pursuing the issue as a matter of urgency. 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. The criteria a complainant should address in supporting a request for urgent action are those set out in the descriptions of the relevant powers above. These are the criteria which Ofcom itself will apply in assessing the case for urgency.
72. Complainants should not expect the case for urgent action to be considered as part of an ongoing full investigation into an alleged breach. A need for urgent action is, of necessity, a consideration that is properly made as soon as possible after an issue is raised. Ofcom would normally expect 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 Ofcom would expect to provide the complainant with a decision about urgent action quickly. Complainants should note that repeated requests for Ofcom to reconsider its decision on urgent action can be counterproductive, in that responding to these requests may divert resources away from the full investigation.

#### **Aims of the guidelines and comments from stakeholders**

73. The submission requirements set out in these guidelines are designed to allow Ofcom to focus its resources on dealing with those complaints which raise real concerns about anti-competitive behaviour and/or the breach of a condition. Complainants making well reasoned, adequate submissions can expect Ofcom to deal with the complaint or dispute in an efficient, effective and timely manner. However, Ofcom will be robust in its rejections of inadequate submissions. Ofcom appreciates that some companies such as small businesses or new entrants may require assistance in formulating complaints and Ofcom will provide this assistance. However, large, experienced stakeholders are expected to make adequate, well reasoned submissions and back up allegations of anti-competitive behaviour with evidence.
74. If you have comments to make on any aspect of these draft guidelines, please do so by 19 March 2004 as set out in Section 2. Ofcom particularly welcomes comments on:
  - Ofcom's processes for acknowledging and accepting submissions;
  - the proposed submission requirements for complaints and disputes;
  - fixing the scope of the dispute or complaint;

- the issuing and modification of formal information requests; and
- consultation on the outcome of disputes.

## Annex A

# Draft 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](mailto: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 therefore 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 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 accepts your submission, Ofcom will publish details of the complaint 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) or Chapter II (abuse of a dominant position) of the Competition Act (or both) and a clear explanation of why you believe the Competition Act is being breached; 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)

### 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 your 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 moved in the last 2-5 years;
- the approximate total size of the market - in value and volume terms - and how it has it 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 paragraphs 34 -37 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 B

# Draft 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](mailto: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.

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.

Unless you specifically request Ofcom not to do so, in the event that Ofcom accepts your submission, Ofcom will publish details 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

- 1) 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.
- 2) 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.
- 3) 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.
- 4) A description of the 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.
- 5) The remedies which you are seeking from resolution of the dispute (including an explanation as to why these remedies should be applied in resolving the dispute), 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

- 1) A description of any negotiations which have taken place between the parties
  - In the event that a party has refused to enter into negotiations, you must provide evidence to suggest that you have taken reasonable steps to engage the party in meaningful negotiations.
- 2) Details of the steps taken to resolve all of the issues which are in dispute
- 3) An explanation of why commercial agreement could not be reached
- 4) 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
- 5) 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:

## Annex C

# Ofcom's consultation standards

All Ofcom's consultations will adhere to its seven consultation principles. These will be published in every written consultation document that Ofcom issues. When it conducts a written consultation, Ofcom will:

- hold discussions with stakeholders before issuing a major consultation document - to find out whether we are thinking in the right direction. If this is not possible, an open meeting to explain the proposals will be held soon after publication.
- be clear about who is being consulted, why, on what questions and for how long.
- make the document as simple and concise as possible - with a summary of no more than two pages - and make it easy to respond to. This may involve issuing a shorter version aimed at hard-to-reach groups, like SMEs.
- allow ten weeks for responses, other than on dispute resolution.
- monitor and evaluate consultations, and designate a consultation champion - an evangelist within Ofcom for better consultation and reach out, and a contact point for comments on our process. Ofcom's first consultation champion is Philip Rutnam. He can be contacted at [philip.rutnam@ofcom.org.uk](mailto:philip.rutnam@ofcom.org.uk) and on +44(0) 20 7981 3000.
- explain why Ofcom is departing from any of these tests if it has to - for example, because of urgency or confidentiality. If a shorter period is required, Ofcom will draw this to the attention of stakeholders, as a red flag item.
- analyse responses with care and an open mind. We will give reasons for subsequent decisions, and an account of how the views expressed during consultation helped to shape those decisions.

***This consultation document departs from two of Ofcom's principles for the following reasons:***

Summary is longer than 2 pages

- The summary is intended to provide an "At A Glance" guide to the main stages of Ofcom's investigation processes. As such, it is neither feasible or appropriate to limit the summary to two pages only.

Shorter than normal consultation period

- The consultation period is six weeks. This is shorter than Ofcom's usual consultation period of ten weeks. However, as these draft guidelines deal only with operational issues, and do not address major policy issues, Ofcom considers that six weeks gives stakeholders adequate time to respond.