



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

**Responses to the consultation and Ofcom's views**

**July 2004**

1. Ofcom published “Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives” in draft on 6 February 2004 and invited comments from stakeholders by 19 March 2004. Ofcom received a number of responses, discussed in this document, which it took into account in finalising the guidelines. The final version of the guidelines was published on 15 July 2004.
2. Ofcom invited comments on any aspect of its draft guidelines but particularly on the following proposals:
  - Ofcom’s processes for acknowledging and accepting submissions;
  - Ofcom’s 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.
3. Responses were received from:
  - Association of Communications Service Providers (ACSP)
  - BBC
  - BT
  - Centrica
  - Freeserve
  - QVC
  - Sky
  - SMG
  - T-Mobile
  - UK Competitive Telecommunications Association (UKCTA)
  - Vodafone
  - Three confidential responses
4. Respondents broadly welcomed publication of the guidelines. A summary of respondents’ comments, and Ofcom’s response, is set out below.

## **Ofcom’s processes for acknowledging and accepting submissions**

### **Start of the fifteen-day enquiry phase**

5. In its response, Sky requested clarification from Ofcom on whether the fifteen-day enquiry phase starts from the date that a submission is received, or the date that it is acknowledged.

### **Ofcom’s response**

6. In the final version of the guidelines, Ofcom has clarified that the fifteen-day enquiry phase begins on the day a complete submission (including a non confidential version of the complaint which can be sent to the target) is received in Ofcom’s Competition and Market’s Project Office.

### **Rejecting submissions**

7. Freeserve considers that where Ofcom declines to open an investigation Ofcom should write to the complainant to ensure it understands Ofcom’s reasons for rejecting a complaint.

### **Ofcom's response**

8. Ofcom always informs the complainant what action, if any, it intends to take in response to a submission. Where Ofcom declines to open an investigation, it will explain why.

### **Ofcom's internal procedures for considering submissions**

9. In Competition Act cases, BT suggests that Ofcom introduces an internal process to evaluate whether or not it is appropriate for it to open an investigation, similar to the OFT's section 25 report.

### **Ofcom's response**

10. The fifteen-day enquiry period was introduced precisely for the purpose of evaluating whether or not it is appropriate for Ofcom to open an investigation. The enquiry phase ends with a recommendation from the case team which is very similar to the OFT's section 25 report process.

### **Complaints and disputes**

11. BT requests guidance on how Ofcom will treat disputes outside the scope of its dispute resolution powers, notably whether Ofcom will treat such submissions as complaints. UKCTA notes that Ofcom will accept as a complaint, an issue that was originally submitted as a dispute, but not vice versa, and asks for clarification.

### **Ofcom's response**

12. As set out in the final guidelines, the difference between a complaint and a dispute is the role of commercial negotiation in a dispute. Ofcom will not accept as a complaint an issue that should properly be submitted as a dispute, i.e. a complaint submission cannot be used as a mechanism to by-pass commercial negotiation before bringing an issue to the regulator. However, in certain cases Ofcom may treat a request for dispute resolution as a complaint if it appears that the dispute arises from a breach of an *ex ante* condition or an infringement of the Chapter I and/or II prohibitions of the Competition Act (and/or of Articles 81 and 82 of the EC Treaty) and where it is clear that it would be inappropriate to require a failure of commercial negotiations before Ofcom addressed an issue.

### **Referral of disputes for alternative dispute resolution (ADR)**

13. UKCTA suggests that Ofcom should be reluctant to resolve a dispute unless failure to agree would result in detriment to competition or consumers.
14. Centrica notes that UKCTA is working towards the implementation of an industry ADR scheme and encourages Ofcom to publicly support such an initiative. Sky considers that Ofcom should provide further guidance about what it would view as satisfactory alternatives for resolving a dispute.
15. T-Mobile considers that ADR can be lengthy and expensive and suggests that Ofcom should have some degree of involvement in all disputes, even those referred to ADR.

## **Ofcom's response**

16. Ofcom agrees that where failure to agree would not result in any lessening of competition or consumer detriment the involvement of the regulator may be inappropriate. Ofcom welcomes the work of UKCTA in establishing an industry ADR scheme. Although Ofcom does not have the power to direct that a particular scheme should be used it seems an obvious advantage that industry players are familiar with the options available to them. It appears to Ofcom that such a scheme may facilitate commercial negotiations between industry players and may therefore reduce the need for regulatory involvement. In addition, where parties use such a scheme in advance of referring a matter to Ofcom, it is possible that parties may agree on a limited set of issues where Ofcom's involvement is genuinely required.
17. Where a dispute is formally referred to ADR, Ofcom will not take an active role in its resolution. However, where satisfactory resolution is not reached in four months, parties have the option to refer the dispute back to Ofcom for resolution.

## **Ofcom's proposed submission requirements for complaints and disputes**

### **General comments**

18. Respondents including Vodafone, Freeserve and Centrica expressed concern that the proposed submission requirements might lead to inappropriate rejection of complaints by Ofcom. Respondents felt that complainants would find it difficult to provide the level of evidence suggested by the draft guidelines. Respondents noted that complainants do not have access to certain types of information that would support a complaint, for example, information on a target's costs to support an allegation of predation or margin squeeze.
19. Freeserve considers that Ofcom's requirements may increase the likelihood of appeals to the Competition Appeals Tribunal (CAT) and requests for judicial review following a decision by Ofcom not to open an investigation. Freeserve is concerned that this may lead to a situation where competition precedents are set by the High Court rather than CAT.
20. Sky notes that standard procedures and timescales will not apply in every case, and considers that Ofcom should always give reasons for departing from its guidelines. BT requests further guidance on when Ofcom would accept a submission that fell short of the published standards.

## **Ofcom's response**

21. The purpose of the guidelines is to ensure that Ofcom directs its resources to the most important issues where genuine competition concerns exist. The history of complaints, in particular in the telecommunications sector, suggests that most complaints originate from a few, well resourced, experienced companies. These companies are expected to submit well reasoned complaints and to provide facts to back up their allegations. Ofcom does not believe that opening investigations in response to unsubstantiated allegations or inadequate submissions represents an appropriate use of resources.
22. Ofcom acknowledges that complainants may be limited in the information they can provide. This is explicitly recognised in the guidelines. Complainants are not expected to submit details of the costs of other operators. They are, however,

expected to justify allegations of (for example) margin squeeze by reference to the information that is available to them such as an analysis of prices and their own cost base.

23. Ofcom sees no reason why the submission requirements should lead to a higher likelihood of appeal. Ofcom's requirements are reasonable and are designed to ensure that well reasoned complaints, raising serious issues, are dealt with promptly while minimising the costs (for Ofcom, the industry and the targets of complaints) that are associated with poor submissions or unsubstantiated allegations.
24. Ofcom does not consider that it is appropriate to publish additional guidance pre-empting the cases in which it might make an exception to the requirements set out in these guidelines. Ofcom has indicated that it may relax the guidelines for small companies and individual consumers. Where it departs from these guidelines, Ofcom will give its reasons for doing so, unless there are reasons why this is not possible, for example where it would compromise confidentiality.

### **Further guidance as to methodology for presenting analysis**

25. UKCTA suggests that Ofcom should provide guidance for complainants on the appropriate methodology when submitting cost analysis, including, for example, reasonable periods of return and discount rates.

### **Ofcom's response**

26. Ofcom considers that prescribing a methodology for cost analysis would be overly restrictive, and would potentially discourage submissions. However, Ofcom encourages complainants to ensure that the basis of preparation for any data they submit is clearly explained.

### **Ofcom's duty to resolve disputes**

27. QVC considers that the proposed submission requirements are inconsistent with Ofcom's obligation under the Communications Act to resolve disputes.

### **Ofcom's response**

28. Ofcom intends to resolve disputes in line with its duties under the Communications Act. The submission criteria set out at Annex 2 of the guidelines will enable Ofcom to confirm that a dispute does actually exist and that parties have taken steps to resolve the issue through commercial negotiation. The Communications Act allows Ofcom to specify the required form and content of requests to resolve a dispute.

### **Section 25 of the Competition Act**

29. Freeserve notes that the guidelines require complainants to provide more information than is required by section 25 of the Competition Act. BT, on the other hand, considers that Ofcom should launch Competition Act investigations only where the evidence submitted indicates that the behaviour complained about may have an "appreciable restrictive effect" on competition.

### **Ofcom's response**

30. Section 25 states that, in order to open an investigation, Ofcom must have reasonable suspicion that the Chapter I or Chapter II prohibition is being infringed. As described above, in a sector where complainants often employ specialist staff and many complaints are directed against a few companies, Ofcom considers it reasonable and appropriate to require complainants to submit as much information as possible at the submission stage. On the other hand, Ofcom does not agree with BT that Ofcom should launch investigations only where it has evidence of an effect on competition, as section 25 requires only that Ofcom has reasonable suspicion of a breach of the Competition Act. The purpose of an investigation is to enable Ofcom to establish whether there has been any breach, and this analysis may include an assessment of whether the behaviour complained about has an effect on competition.

### **CEO sign-off**

31. BT strongly supports Ofcom's proposal for all complaints to be supported by CEO level sign-off. However, other respondents (Centrica, T-Mobile, UKCTA and Sky) were concerned that CEO level sign-off was not an appropriate, or necessary, requirement.
32. Sky comments that Ofcom does not indicate whether there will be any repercussions for companies if the statements they provide are inaccurate or even intentionally misleading.

### **Ofcom's response**

33. For clarification, Ofcom requires submissions to be signed off by an officer of the company, and preferably the CEO.
34. Ofcom recognises that some submissions may inadvertently include inaccurate information. One reason for copying submissions to the target of a complaint on receipt is to identify where a grievance may be based on inaccurate information or on a misunderstanding. However, Ofcom will not look favourably on submissions where it considers that insufficient effort has been devoted to ensuring the accuracy of the information submitted, or submissions that it finds to be intentionally misleading. In extreme cases, Ofcom may close an investigation that was opened on the basis of incorrect information.

### **Evidence of commercial negotiation in dispute submissions**

35. BT, Centrica and UKCTA consider that Ofcom should provide further guidance on how it will assess whether all avenues of commercial negotiation have been explored. UKCTA asks whether failure to enter negotiation would constitute a failure of commercial negotiation. Vodafone considers that it may be difficult to demonstrate that all avenues of negotiation have been exhausted if one party claims that negotiations are ongoing while the other believes that no further movement is likely.
36. BT considers that Ofcom should only accept a dispute where the parties have exhausted any *contractual* provisions for dispute resolution.

## **Ofcom's response**

37. The nature of “meaningful negotiation” will depend on the circumstances of the case, and on the relationship between the parties in dispute. Consideration of contractual provisions for dispute resolution may be relevant in some cases. As stated in the final guidelines, Ofcom will usually accept, as an alternative to documentary evidence of commercial negotiations, evidence which suggests that one party has tactically refused to negotiate.

## **Providing guidance to less experienced stakeholders**

38. BT, Vodafone and Sky commented that while it may be appropriate for Ofcom to offer guidance to less experienced complainants, Ofcom must ensure that it this is consistent with its regulatory role. Sky considers that Ofcom should give further guidance as to what assistance it may give smaller stakeholders.
39. Other respondents commented that it was not clear which organisations Ofcom was referring to in this context. Centrica and UKCTA requested further guidance on what Ofcom considers to be a large company. Freeserve considers Ofcom's proposal implies that larger companies should routinely conduct a full analysis before Ofcom will open an investigation rather than during the course of an investigation.

## **Ofcom's response**

40. Ofcom agrees that any guidance it gives to less experienced complainants must be within its remit as regulator. Ofcom cannot give further guidance here as to what support it may offer less experienced complainants, as this will depend on the nature of the submission and on the complainant. Ofcom does not consider that it is necessary to set out the criteria by which it would judge whether a complainant is ‘small’ or less experienced. In response to Freeserve's comments, Ofcom notes that the submission requirements request details of the complaint, details of the complainant and target, details of what legislation the complainant believes has been breached and why, basic information required for an initial market definition, a description of the competitive conditions in the market, and any other information the complainant judges relevant. The provision of this information is only the starting point for the detailed analysis that is carried out during a Competition Act investigation.

## **Information available to complainants**

41. Centrica, UKCTA, QVC and Vodafone all noted that complainants have limited access to information about targets. UKCTA, Centrica and Freeserve consider that Ofcom's formal information gathering powers will in some cases be the only mechanism to obtain necessary information. UKCTA notes that it may be difficult for complainants to collect evidence as customers do not want to turn down an attractive deal or jeopardise their relationships with suppliers.
42. Centrica and UKCTA noted that Ofcom has removed a number of price publication obligations that previously applied to BT, and consider that this makes it more difficult for complainants to substantiate an allegation of margin squeeze.



## **Ofcom's response**

43. Ofcom acknowledges that complainants may be restricted in the evidence they can provide and this is recognised in the guidelines. Complainants must, however, provide reasons for suspecting that relevant legislation has been breached. The submission requirements request that complainants set out the reasons for their suspicions and allegations and provide factual evidence. There is no requirement to obtain confidential information about the targets of complaints. Ofcom notes that complainants have visibility of the cost of wholesale components and that, coupled with their knowledge of their own selling costs and retail prices, this should enable them to identify potential margin squeeze issues.

## **Fixing the scope of the dispute or complaint**

44. T-Mobile asks Ofcom to clarify whether parties will be consulted on the scope of a dispute. T-Mobile and UKCTA suggest consultation may be achieved by a meeting. Sky considers that Ofcom should consult the parties on issues of confidentiality before publishing the scope.
45. Vodafone considers that, where Ofcom changes its views on the scope of an investigation, it should make the parties aware of its reasons for doing so.
46. UKCTA considers that where the dispute relates to the provision of a new product, the scope be broadly worded to encompass pricing and terms. UKCTA considers that Ofcom should treat any request for new access to be an "exceptional circumstance".
47. Sky notes that it may not always be appropriate to publish details of an investigation if it would prejudice the legitimate interests of the parties.

## **Ofcom's response**

48. Ofcom invites comments from the parties before finalising the scope of a dispute. Five days are allowed for this consultation. Ofcom does not publish confidential information in Competition Bulletin entries. The information published is restricted to the background and scope of a dispute. The fact that Ofcom is investigating an issue does not imply that Ofcom has found a company in breach of its obligations, and Ofcom does not therefore consider that the legitimate interests of the target are harmed by transparency in Ofcom's investigations programme.
49. If Ofcom changes the scope of an investigation, it will make the parties aware of its reasons and will publish an update in the Competition Bulletin setting out the change.
50. To clarify, Ofcom publishes details of complaints, as well as disputes, and sends the target a non confidential version of the complaint or dispute submission on receipt (unless it would be undesirable to alert the target of Ofcom's interest).



## **Ofcom's proposed policy on formal information requests**

### **General**

- 51. BT, the BBC and Vodafone support Ofcom's proposal to start a dialogue with targets before sending a formal information request. Sky considers that Ofcom should inform targets of an imminent request before sending it.
- 52. BT considers that Ofcom should retain the flexibility to request information informally where appropriate.
- 53. Respondents commented on the resource requirements posed by formal information requests. T-Mobile considers that Ofcom should use, wherever possible, information already in its possession, and should not request the same information from undertakings more than once.

### **Ofcom's response**

- 54. As a matter of courtesy, Ofcom aims to give recipients notice that it intends to send formal information requests unless it is inappropriate to do so – typically where Ofcom is requesting documents that may show a company's intent or strategy aims behind certain types of behaviour.
- 55. To ensure the best use of its resources, Ofcom intends to use its effective formal information gathering powers, and does not consider that there is a role for informal requests, except where these are designed to gather background information or only a small amount of non critical information is requested.
- 56. Ofcom acknowledges that the resources required to respond to a formal information request may be considerable. Ofcom will have regard to its obligation to ensure that formal information requests are proportionate.
- 57. In response to T-Mobile's comment, Ofcom can and does rely on other sources of evidence where it is able to do so, for example general market information. The specifics of certain cases, however, often mean that Ofcom is obliged to collect specific information.

## **Different procedures in Competition Act cases**

- 58. Vodafone asks why Ofcom proposes to adopt a different policy to sending information requests in draft depending on the regulatory instrument it is using. Sky considers that Ofcom should issue section 26 requests in draft. Sky considers that Ofcom is not entitled to set a cut-off point for comments on the content of a section 26 information request under the Competition Act. BT considers that Ofcom should issue draft information requests under the Communications Act and Broadcasting Acts at least five days in advance of issuing a formal request.

### **Ofcom's response**

- 59. In the final guidelines, Ofcom has clarified the circumstances in which it will send draft information requests and will send draft section 26 requests where the case

timetable allows and/or the information request is particularly complex. Stating a period for representations to be made is an invitation for the recipient of the request to comment and reflects Ofcom's willingness to take into account representations made.

60. Ofcom often requests, under section 26 of the Competition Act, internal information and documents that may show what a company intended as an outcome of certain behaviour. In these circumstances, Ofcom believes it inappropriate to give advance warning of such a request.

### **Deadlines**

61. Respondents urged Ofcom to give sufficient time for targets both to comment on (draft) information requests, and to provide responses. Vodafone, Sky and BT comment that the standard time allowed for comments on draft information requests may not be sufficient.
62. Sky considers that where an investigation is not subject to statutory deadline, Ofcom should be more flexible in extending deadlines.

### **Ofcom's response**

63. Where Ofcom sends draft requests, Ofcom considers that three days is an adequate length of time for recipients to identify and communicate to Ofcom any problems with providing the information in the time requested. One function of the three-day period for comments is to help Ofcom confirm whether it has proposed a reasonable deadline for the provision of responses. Ofcom will be more sympathetic to requests for additional time when they come within the initial period. Last minute requests for extensions are extremely unhelpful and problems identified immediately are more convincing as a genuine reason why an extension should be granted.
64. Even where a case is not subject to statutory deadlines, Ofcom considers that it should address allegations of anti-competitive behaviour within the shortest possible timescale, to minimise consumer detriment caused by any abuse.

### **Confidentiality**

65. BT encourages Ofcom to adopt a policy of checking with the source of the information before it uses that information in a published document.

### **Ofcom's response**

66. All confidential information submitted to Ofcom must be clearly marked as such. Where Ofcom is in doubt over whether or not information is confidential it does check with the source of the information.

### **Consultation on the outcome of disputes.**

67. Some respondents disagreed with Ofcom's proposal to consult on the outcome of a dispute only where it constitutes a change to existing arrangements. Vodafone commented that it is not clear what Ofcom would consider to constitute a change in existing arrangements, or why interested parties would be any less interested in a decision that maintained existing arrangements. UKCTA considers that all

disputes should be subject to public consultation, whether or not Ofcom is proposing a change to existing arrangements. Centrica considers that if an issue is of considerable interest to the industry, Ofcom should consult even if it does not propose any change in current arrangements.

68. Not all respondents agreed with Ofcom's proposal to consult only where a dispute is of interest to third parties. UKCTA considered that Ofcom had not indicated how it intends to determine whether an issue in dispute is of interest only to the parties to a dispute.
69. Centrica, however, agrees that Ofcom's proposal only to consult on issues that are of relevance to the wider industry represents the most efficient use of Ofcom's resources. Vodafone considers that allowing third parties an opportunity to comment on a dispute may encourage 'free riding' on others' efforts.

### **Ofcom's response**

70. After considering the representations made, Ofcom has changed the guidelines and will consult where it maintains existing arrangements.
71. Ofcom has robust procedures in place to call for representations of interest in a dispute. At the beginning of each dispute, Ofcom publishes details and requests that all parties interested in the outcome of a dispute notify Ofcom. Ofcom maintains electronic mailing lists for updates to Ofcom's on-line Competition Bulletin and previously, where Ofcom has not received any notifications of interest, Ofcom has taken the step of writing to stakeholders drawing their attention to a particular dispute.

### **Timetable**

72. Respondents commented on Ofcom's proposed ten-day timescale for consulting on disputes. Sky considers that in some cases a longer period will be required. BT considers that Ofcom's proposed timescales may not be compliant with the Cabinet Office Code of Practice, and that Ofcom should allow fifteen working days for consultation.

### **Ofcom's response**

73. Ofcom is required to resolve disputes within the shortest time possible, up to a maximum of four months. In this context a ten-day consultation period is appropriate.

## **Other issues**

### **Proposed targets**

74. Respondents commented on the target times for resolution of investigations proposed by Ofcom.
75. SMG considers that target completion times for Competition Act cases should be reduced to four months for a no grounds for action decision and eight for an infringement decision. BT considers that Ofcom should set a single target of six months for all Competition Act investigations, publishing reasons wherever it exceeds this target. Sky notes that Ofcom's targets for Competition Act investigations have no statutory basis and that they imply that once an investigation has passed the six-month mark, they will result in an infringement decision. QVC considers that Ofcom should consider alignment of timescales for Competition Act and Communications Act investigations.

### **Ofcom's response**

76. Ofcom notes that, while a number of respondents have commented on targets, they have different views on appropriate targets. Ofcom has not therefore changed the targets set out in its draft guidelines. Ofcom notes that where it intends to make an infringement decision, there are procedural rules which lead to a longer process for infringement decisions.

### **Using the Competition Act**

77. Various respondents requested further guidance on how Ofcom will decide which is the most appropriate instrument where it has a choice between the Competition Act and sectoral powers.
78. Various respondents requested further guidance on process for conducting a Competition Act investigation. QVC noted that the guidelines do not discuss the different approach to market definition and abuse of dominance in competition law cases. UKCTA and Centrica ask Ofcom to provide further guidance on how it will assess anti-competitive intent in Competition Act investigations.

### **Ofcom's response**

79. As set out in the final guidelines, Ofcom has given additional guidance on how it will decide which is the most appropriate instrument to use when it has a choice between the Competition Act and sectoral powers.
80. The guidelines are not intended to set out Ofcom's approach to economic analysis. Respondents may wish to refer to OFT guidelines on issues including market definition and the assessment of dominance.

### **Own initiative investigations and new market reviews**

81. Various respondents requested clarification of Ofcom's policy and timescales for own initiative investigations.
82. Various respondents asked Ofcom to clarify when it would initiate a new market review.

### **Ofcom's response**

83. Ofcom may initiate an investigation on its own initiative, where it has evidence to suspect a breach of a regulatory obligation or an infringement of the Competition Act. Ofcom has not set a target for own initiative investigations but will complete these as promptly as resources allow.
84. The circumstances where a new market review may be initiated are outside the scope of these guidelines.