



# Draft Enforcement Guidelines

Ofcom's draft guidelines for the handling of competition complaints, and complaints and disputes concerning regulatory rules

Consultation

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## Important Consumer Information

These Guidelines apply to the submitting of complaints in relation to breaches of the regulatory rules and/or competition law, and to Ofcom's role in resolving regulatory disputes.

If you have a complaint you wish to make to Ofcom as a consumer, viewer or listener about a communications provider or a broadcaster, these Guidelines do not apply to you.

Ofcom already has established processes for complaints about television and radio programmes (including fairness and privacy issues), about advertisements on television and radio, complaints about interference to wireless spectrum and licensing to use wireless spectrum and consumer complaints about telecommunications providers. Details of these processes can be found on the Ofcom website at [www.ofcom.org.uk/complain/](http://www.ofcom.org.uk/complain/).

## Section 1

# Summary

- 1.1 Given Ofcom's principal duty to further the interests of citizens and consumers, enforcement<sup>1</sup> is an important part of Ofcom's overall strategic approach to regulation. Strategy and policy development alone are not sufficient to achieve Ofcom's objectives, set in the light of Ofcom's various duties. It is necessary to be prepared to take action to enforce those rules.
- 1.2 As the UK's communications regulator, Ofcom has sectoral powers to establish regulatory policies and rules operating in UK communications markets and to take action to enforce those rules and to resolve disputes.
- 1.3 As one of UK's national competition authorities, Ofcom also has specific powers under competition law to investigate complaints or concerns about anti-competitive conduct in communications or related markets.
- 1.4 Ofcom's strategy regarding the use of competition law is set out in these Guidelines. In summary, Ofcom will approach the question of how to proceed with complaints or investigations raising competition issues by considering whether a more appropriate way of proceeding would be under competition law or under sectoral powers.
- 1.5 These Guidelines set out Ofcom's approach to handling of complaints and disputes, and the procedures Ofcom uses in conducting investigations and resolving disputes. The purpose of these guidelines is to set out how Ofcom will seek to manage its enforcement resources to meet its statutory duties, and to set out clearly the processes we will adopt.
- 1.6 Two specific categories of Ofcom's enforcement activity are not covered by these Guidelines: complaints relating to content issues, which are covered by separate Guidelines issued by Ofcom's Content and Standards team<sup>2</sup> and also complaints in respect of issues relating to electromagnetic spectrum and harmful interference.
- 1.7 Although Ofcom has a primary role in enforcing regulatory rules and competition law in communications markets, it has limited resources and, in some circumstances, the interests of citizens and consumers are best served by referring matters to other agencies better placed to deal with those issues, or for parties to pursue private legal actions. These guidelines give those affected by Ofcom's decisions about whether to take forward an investigation a clear sense of Ofcom's approach to these questions.
- 1.8 Ofcom's previous guidelines on the handling of competition investigations were published in July 2004. Since that time Ofcom has carried out a full review of its investigations function, and as a result of this review Ofcom has refined its approach in this area. These revised Guidelines also reflect Ofcom's growing body of practice and established decisions, as well as the developing jurisprudence of the Competition Appeal Tribunal and the Community Courts.

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<sup>1</sup> Note that, in these Guidelines, the term 'enforcement' is used in a broad sense to include, for example, the activity of resolving regulatory disputes referred to Ofcom.

<sup>2</sup> <http://www.ofcom.org.uk/tv/ifi/guidance/standards/>

- 1.9 In these revised Guidelines Ofcom sets out a number of changes to its existing processes for the handling of competition complaints, and complaints and disputes concerning regulatory rules, including the following:
- More information about Ofcom's approach to consumer protection;
  - Greater clarity about the handling of investigations, including the factors that Ofcom will consider in deciding whether to conduct an investigation;
  - Changes to Ofcom's timing for the handling of competition law investigations; and
  - Information about Ofcom's approach to enforcing BT's Undertakings.
- 1.10 Ofcom is consulting on these revised Guidelines. Written views and comments on these Guidelines are requested by 14 September 2006. Following the end of the consultation period, Ofcom intends to publish the finalised version of these Guidelines.

## Section 2

# Ofcom's approach to enforcement

## Ofcom's enforcement powers

- 2.1 Ofcom's powers to take action to enforce regulatory rules or competition law, and resolve disputes, are set out in:
- The Communications Act 2003 (referred to throughout this document as the Communications Act);
  - The Competition Act 1998 (referred to throughout this document as the Competition Act) and Articles 81 and 82 of the EC Treaty;
  - The Enterprise Act 2002 (referred to throughout this document as the Enterprise Act); and
  - The Broadcasting Act 1990 and The Broadcasting Act 1996 (together, referred to throughout this document as the Broadcasting Acts).

## Ofcom's statutory duties and regulatory principles apply to enforcement work

- 2.2 Ofcom's principal duty, in carrying out its functions, as set out at section 3 Communications Act is to further the interests of citizens in relation to communications matters, and to further the interests of consumers in markets within Ofcom's areas of responsibility, where appropriate, by promoting competition. Ofcom's 'functions' for the purposes of section 3 include both those functions conferred under the Communications Act and under any other Act.<sup>3</sup> This general duty, and the specific duties set out in the Communications Act, apply to Ofcom's exercise of its enforcement powers.<sup>4</sup>
- 2.3 Additionally, where Ofcom is carrying out functions for the purpose of fulfilling Community obligations<sup>5</sup>, and in particular when resolving disputes<sup>6</sup>, Ofcom is required to act in accordance with the six Community requirements giving effect to Article 8 of the Framework Directive.<sup>7</sup> Ofcom must also comply with any directions made by the Secretary of State in respect of network and spectrum functions.<sup>8</sup>
- 2.4 Ofcom has established regulatory principles, to provide a clear statement of Ofcom's approach to regulating communications markets. These principles have been set consistent with Ofcom's duty, when exercising its powers under the Communications Act, to have regard to regulatory principles of transparency, accountability, proportionality, consistency and the targeting of regulation only at cases where

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<sup>3</sup> Communications Act, section 1(1).

<sup>4</sup> Note that in relation to the enforcement of competition law (under section 371 of the Communications Act), these duties (under section 3) only apply to the extent that the duty relates to a matter that the OFT could have regard to in carrying out its functions (s. 371(12)).

<sup>5</sup> This includes Ofcom's functions under Chapter 1, Part 2 Communications Act – see section 4(1) (a).

<sup>6</sup> Section 4 (1) (c)

<sup>7</sup> Communications Act, section 4. These duties, set for the purpose of fulfilling Community obligations, are discussed further in Section 6 of these Guidelines.

<sup>8</sup> Communications Act, section 5. No such directions have been made as at the time these Guidelines were issued.

action is needed, along with other principles Ofcom considers represent best regulatory practice.<sup>9</sup> Ofcom's regulatory principles are set out in Box 1 below.

- 2.5 All these regulatory principles apply to Ofcom's exercise of its enforcement powers. Two of the principles are of particular relevance to the conduct of investigations. The first principle is that Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required. The second is that Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome.

**Box 1: Ofcom's regulatory principles**

- *Ofcom will regulate with a clearly articulated and publicly reviewed annual plan, with stated policy objectives.*
- *Ofcom will intervene where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve.*
- *Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required.*
- *Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome.*
- *Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives.*
- *Ofcom will research markets constantly and will aim to remain at the forefront of technological understanding.*
- *Ofcom will consult widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation upon a market.*

### Advice to complainants and disputants

- 2.6 Parties considering making a complaint or referring a dispute to Ofcom should consider the following Ofcom advice:

- *Speak to us first.* Ofcom is always prepared to discuss emerging issues, and consider matters prior to their submission as a complaint or dispute. We will not be able to give a view on the merits of a complaint but can shed light on Ofcom's intentions in relation to a particular policy or regulatory rule, or bring to parties' attention previous investigations that have dealt with similar issues. Often, a discussion that involves both the investigations team and relevant policy teams can identify and solve issues or problems before the need for a formal investigation. Ofcom recognises the value of dispute prevention, as well as dispute resolution.

<sup>9</sup> Communications Act, section 3(3)

- *Seek to resolve matters through commercial discussions.* This is a requirement in relation to disputes, but parties may well find it in their interests to seek commercial resolution of issues before submitting a complaint. It may not be relevant in some situations but as far as it is appropriate, parties should seek to resolve their differences between themselves before asking Ofcom to intervene.
- *Read and apply the rules.* A number of initial contacts or submissions are not accepted because they do not comply with our Guidelines. The Guidelines are important and Ofcom will apply them in dealing with submissions.
- *Consider any relevant previous decisions.* Often, issues arise which have been the subject of previous investigations or enforcement actions. Please consider whether there are existing decisions that may clarify Ofcom's approach on particular questions, or be used to help you think through what Ofcom's likely approach will be. Previous decisions are published on Ofcom's Competition Bulletin.<sup>10</sup>
- *Gather as much evidence and information as possible.* Often, allegations or issues raised fail to be taken further on the basis that no evidence or information is put forward to support an allegation. Ofcom accepts that, in some cases, specific information (such as cost data) cannot be obtained by the complainants and must be gathered by Ofcom, but in all cases, Ofcom will require parties to provide available evidence to support a complaint. If submitting a complaint, it will be in your interest to gather as much evidence as possible rather than gathering the minimum requirement for submission and expecting that an investigation will fill in the gaps.
- *Use restraint and consider alternatives.* Those considering asking Ofcom to intervene should think through Ofcom's powers to handle complaints and resolve disputes, and also remember that Ofcom will approach the question of whether to intervene from the framework of our statutory duties, including our principal duty to further the interests of citizens and consumers, not the commercial interests of the parties. Not every matter of commercial disagreement between communications providers is suitable for resolution through an investigation. Ofcom commits to a demanding timetable in handling investigations and expects particularly large and well-resourced organisations to do the same in supporting an investigation (for example, in meeting deadlines for information requests). For such organisations, submitting a complaint or dispute with Ofcom implies (to Ofcom) that the organisation has considered and is prepared to meet this commitment.

2.7 Parties considering making a complaint or referring a dispute to Ofcom should also note that these guidelines are not a substitute for any regulation or law and are not legal advice:

- Ofcom's activities are governed by various UK and EU legislation, as amended from time to time (including but not limited to the Communications Act, the Competition Act, the Enterprise Act, the Broadcasting Acts), the EC Treaty, the EC Telecoms Framework Directives<sup>11</sup>, and the EC Modernisation

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<sup>10</sup> [http://www.ofcom.org.uk/bulletins/comp\\_bull\\_index/](http://www.ofcom.org.uk/bulletins/comp_bull_index/)

<sup>11</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the "Framework Directive"); Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on

Regulation<sup>12</sup>). Ofcom will also follow, where necessary, relevant judgments of the Community courts (the European Court of Justice and the Court of First Instance) and the Courts of the United Kingdom, in particular the Competition Appeal Tribunal (which has full appeal jurisdiction on the merits over many of Ofcom's decisions in the enforcement arena). Ofcom may also have regard to various guidelines, decisions and guidance published by agencies such as the OFT (whose guidelines in the competition enforcement field are often jointly produced with the sectoral regulators<sup>13</sup> including Ofcom) or by the European Commission. These Guidelines do not replace the need for stakeholders to consider in detail the relevant legislation, Community and UK case law and other guidance.

- These Guidelines are not a substitute for the EC Treaty or for legislation (including regulations or notices) made under it, nor for the judgments of the Community Courts interpreting European law nor for relevant European Commission notices and guidelines. These Guidelines are not a substitute for any law, regulation or court judgment.
- These Guidelines are not legal advice and those who believe that they may be affected by any of the issues or powers discussed in these Guidelines are strongly advised to get independent legal advice.
- These Guidelines will be kept under review and amended as appropriate in the light of further experience and developing law and practice.
- Although these Guidelines set out Ofcom's general approach in relation to enforcement in the areas covered by the Guidelines, they do not have binding legal effect. Ofcom will consider each case on its merits. We will only apply this approach where it is appropriate to do so and in the event that Ofcom decides to depart from the guidelines, we will set out our reasons for doing so.

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the authorisation of electronic communications networks and services (the "Authorisation Directive"); Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (the "Access Directive"); Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (the "Universal Service Directive") Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (the "Directive on privacy and electronic communications")

<sup>12</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

<sup>13</sup> The sectoral regulators in the competition field are Ofcom, the Gas and Electricity Markets Authority (OFGEM), the Northern Ireland Authority for Energy Regulation (OFREG NI) the Director General of Water Services (OFWAT), the Office of Rail Regulation (ORR); and the Civil Aviation Authority (CAA).

## Section 3

# Ofcom's enforcement activities

## Overview

- 3.1 The exercise of Ofcom's enforcement powers is handled by a specific directorate (Investigations) within Ofcom's Competition Group. The work of the Investigations team is 'converged' in the sense that it handles all such matters related to broadcasting and telecommunications (with two previously noted exceptions: issues about broadcast content<sup>14</sup> and questions about harmful interference in relation to spectrum<sup>15</sup>).
- 3.2 Each complaint or dispute relevant to these guidelines brought to Ofcom is handled initially by a dedicated unit (the Competition Group's Operations Team) specialising in dealing with front-line queries. Submissions which meet the requirements for acceptance are then assigned to a named case leader and, in most cases, a case sponsor, and placed under the supervision of a case director (in almost all cases, the Director of Investigations or a senior member of the Investigations team).
- 3.3 Once accepted, cases are considered during an "enquiry phase" of 15 working days. The purpose of the enquiry phase is to decide whether or not to conduct an investigation, and also to establish the nature of any investigation to be conducted or the scope of the dispute to be determined.
- 3.4 If the outcome of the enquiry is a decision to conduct an investigation, Ofcom will normally publish a Competition Bulletin entry setting out details of the case.
- 3.5 During an investigation, the case is handled by a case team led by a member of the Investigations team and will include specialists drawn from within Ofcom (for example, lawyers, economists, technical advisers, accounting/financial analysts or experts on particular areas of policy). In some cases, external advisors (for example, experts on cost analysis) may be retained to advise the case leader.
- 3.6 Each case has a specified timetable and one or more milestone dates (including the target closure date) set at the outset of the investigation. Throughout the case, and in particular on or near each milestone, Ofcom will keep parties informed of its progress, as far as appropriate.
- 3.7 Once an investigation has concluded, Ofcom will publish a closing Competition Bulletin entry, and also where appropriate publish a non-confidential version of any other relevant document (for example, a decision issued under the Competition Act or a notification issued under the Communications Act).
- 3.8 Ofcom also publishes a report every 6 months setting out the detailed breakdown of enquiries and investigations undertaken. This report will include information about Ofcom's application of these Guidelines and other information about the investigations programme and decisions taken by Ofcom in relation to investigations

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<sup>14</sup> Investigations of complaints relating to broadcast content are handled by the Content and Standards team within Ofcom's Content, Legal and International Group.

<sup>15</sup> Ofcom's work to keep the radio spectrum free from interference is undertaken by the Field Operations team within Ofcom's Technical Services and Operations Group.

closed during that reporting period. Previous reports are available on Ofcom's website.<sup>16</sup>

## Categories of investigation

3.9 Ofcom investigations include the following areas:

- Complaints alleging an infringement of either the Chapter 1 or Chapter 2 prohibitions under the Competition Act (and/or the corresponding provisions under the EC Treaty, Articles 81 and 82);
- Complaints alleging a contravention of a provision of the Communications Act, or a regulatory condition made under the Communications Act;
- Disputes falling within Ofcom's jurisdiction under the Communications Act;
- Complaints alleging a domestic or Community infringement under Part 8 of the Enterprise Act;
- Complaints relating to a failure by a person to comply with consumer protection legislation (for example, in relation to contract terms that are unfair as defined under the Unfair Terms in Consumer Contract Regulations ("UTCCRs"), whether directly or exercising Ofcom's powers under Part 8 of the Enterprise Act;
- Complaints alleging that a person has failed to comply with undertakings provided to Ofcom under the Enterprise Act (for example, in relation to BT's Undertakings provided in lieu of a market reference to the Competition Commission under section 154 of the Enterprise Act, or undertakings given to Ofcom by companies or individuals under Part 8 of the Enterprise Act); and
- Complaints alleging contravention of the Broadcasting Electronic Programme Guide ("EPG") Conditions or the EPG Code.

3.10 Ofcom may also investigate any matter on its own initiative (that is, without a complaint that meets the requirements set out in these Guidelines). One reason for doing so might be that individual consumers (i.e. residential or small business customers) make complaints to Ofcom (for example, through the Ofcom Contact Centre by telephone or online). Ofcom reviews the number and nature of consumer complaints as one source of evidence about issues that are affecting citizens and consumers in the UK. Another reason for conducting an investigation might be that Ofcom, in its regular contact with communications providers, broadcasters or other stakeholders identifies a particular issue to be investigated further.

## Enforcement of conditions imposed under the Communications Act or Broadcasting Acts

3.11 Ofcom may take enforcement action to ensure compliance with a number of different regulatory rules or conditions, including:

- General Conditions. These conditions are set by Ofcom and apply to all communications providers (although not every general condition will be relevant to all communications providers). A recurring source of complaints or

<sup>16</sup> <http://www.ofcom.org.uk/bulletins/crt/>

investigation in relation to general conditions have been in relation to numbering and number portability;

- Universal Service Conditions. These conditions are set by Ofcom on a designated communications provider, and require that provider to undertake a universal service obligation;
- SMP Conditions. These conditions are set by Ofcom in relation to a particular communications providers' position of market power in relation to a defined product market. Significant market power (SMP) is defined as "*a position equivalent to dominance, that is to say a position of economic strength affording it [the undertaking] a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers*"<sup>17</sup>. For the purposes of the EU regulatory framework for electronic communications networks and services, markets are defined and SMP is assessed using the same methodologies as under competition law;<sup>18</sup>
- Access conditions on providers of conditional access and access control services;
- Access conditions on providers of electronic programme guides;
- Conditions imposed to ensure fair and effective competition in broadcasting,<sup>19</sup> and
- Conditions relating to spectrum trading.

## Resolving disputes

3.12 The Communications Act<sup>20</sup> empowers Ofcom to handle certain types of disputes referred to it. Disputes fall within Ofcom's remit if they are between communications providers and/or those who provide associated facilities (or otherwise as set out section 185 of the Communications Act).

## Responding to persistent misuse of an electronic communications network or service

3.13 Ofcom has published a statement setting out its policy regarding the persistent misuse of an electronic network or service<sup>21</sup>. Those guidelines will be considered in any investigation involving possible contraventions of section 128 of the Communications Act.

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<sup>17</sup> Article 14(2) of the Framework Directive, (Directive 2002/21/EC)

<sup>18</sup> See Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services 2002/C 165/03

<sup>19</sup> Communications Act, section 316

<sup>20</sup> Communications Act Part 2 Chapter 3 Disputes and Appeals.

<sup>21</sup> [http://www.ofcom.org.uk/consult/condocs/misuse/misuse\\_state.pdf](http://www.ofcom.org.uk/consult/condocs/misuse/misuse_state.pdf)

## Powers under the Competition Act and the EC Treaty

3.14 Ofcom may carry out an investigation under the Competition Act if there are reasonable grounds for suspecting<sup>22</sup> that:

- There is or has been an agreement which may affect trade within the UK that has or had as its object or effect the prevention, restriction or distortion of competition within the UK (i.e. an infringement of the Chapter I prohibition<sup>23</sup>); or
- There is or has been an agreement which may affect trade between Member States that has or had as its object or effect the prevention, restriction or distortion of competition within the European Community (i.e. an infringement of the Article 81 prohibition); or
- There has been an infringement of the Chapter 2 prohibition on conduct that amounts to an abuse of a dominant position which may affect trade in the UK<sup>24</sup>; or
- There has been an infringement of the Article 82 prohibition on conduct that amounts to an abuse of a dominant position which may affect trade within the European Community.

3.15 See further below (at section 10) in relation to concurrency arrangements on competition investigations with the OFT and within the European Competition Network (the “ECN”).

## Information gathering powers

3.16 Under the Competition Act, Ofcom has the power to:

- Require a person to produce specified documents or specified information;
- Enter business premises without a warrant; and
- Enter and search any premises (both business premises and domestic premises) with a warrant<sup>25</sup>.

3.17 Under the Communications Act, Ofcom has the power to require the provision of specified documents or specified information:

- From any person who appears to have relevant information, in relation to the exercising of Ofcom’s functions under Chapter 1 of Part 2 of the Communications Act (under section 135 of that Act<sup>26</sup>); or

<sup>22</sup> See section 25 Competition Act.

<sup>23</sup> See for further information Guideline OFT 401, December 2004 Agreements and Concerted Practices.

<sup>24</sup> See for further information Guideline OFT 402, December 2004 Abuse of a Dominant Position.

<sup>25</sup> For further information on Ofcom’s investigation powers under the Competition Act see Competition Act 1998 (Office of Fair Trading’s Rules) Order 2004 (SI 2004/2751) and Guideline OFT 404, December 2004, Powers of Investigation

<sup>26</sup> Ofcom has published a policy statement on Information Gathering under section 145 of the Communications Act 2003 and section 13B of the Wireless Telegraphy Act 1949, 10 March 2005

- From a person who is a party to a dispute (or from any person who appears to Ofcom to have information relevant to Ofcom's handling or resolving the dispute), in relation to the resolution of disputes under Chapter 3 of Part 2 of the Communications Act (under section 191 of that Act).

3.18 Under Part 8 of the Enterprise Act, in relation to enforcement of certain consumer legislation, Ofcom may give notice under section 225 of that Act, to any person requiring the person to provide Ofcom with information specified in the notice.

### Enforcement powers

3.19 Under the Competition Act, Ofcom may issue such direction as Ofcom considers appropriate to bring an infringement to an end, under section 32 (in relation to an anti-competitive agreement) or section 33 (in relation to an abuse of a dominant position)<sup>27</sup>.

3.20 Ofcom may take various actions under the Communications Act in relation to investigations after following the procedures set out in the Act including:

- issuing a section 94 notification determining that there are reasonable grounds to believe that there is or has been a contravention of a general condition or a SMP condition, which may in certain circumstances be followed by a section 95 enforcement notification and a section 96 penalty notice.
- issuing a section 100 direction suspending service provision or a section 101 notification suspending apparatus supply for particular serious and repeated contraventions as set out in the Act;
- issuing a section 124 direction suspending service provision for contraventions of s120 (premium rate services) conditions;
- issuing a section 128 notification determining that there are reasonable grounds for believing that a person has persistently misused an electronic communications network or services, which may in certain circumstances be followed by a section 129 enforcement notice and section 130 penalties notice; and
- granting its consent to particular persons bringing civil proceedings in relation to a breach of a condition or breach of a section 95 enforcement notification or a section 98 or 100 direction under section 104.

3.21 This list is not exhaustive. Ofcom may exercise *any* of its powers responding to the findings of an investigation (for example, Ofcom might decide to launch a market review, or publish a proposal to amend or vary a condition set under the Communications Act). Actions following an investigation will not be limited to the exercise of Ofcom's statutory powers and may include, for example, deciding to issue a press release or other announcement, or referring some issues or evidence to other authorities for action, in particular where another authority is better placed to act. Equally in some cases, Ofcom may act in parallel with another authority, for example Trading Standards or the police.

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which sets out Ofcom's policy on information gathering under sections 135 and 136 Communications Act

<sup>27</sup> For further details of Competition Act enforcement, see guideline OFT 407, December 2004 Enforcement.

- 3.22 Ofcom will consider whether it is appropriate to take urgent action (in particular under section 98 Communications Act) or to impose interim measures in Competition Act cases (see further section 5 below).

## Penalties

- 3.23 Ofcom has the power to impose penalties under various provisions in the Communications Act. If Ofcom imposes any penalty under the Communications Act, it shall have regard to the guidelines published under section 392 of the Communications Act<sup>28</sup>.
- 3.24 Ofcom's power to impose penalties include penalties for failure to provide information under section 135 after following the statutory procedure set out in section 139. Ofcom takes contraventions of information requests (through failure to respond or through the provision of false or misleading information) very seriously and will consider using its power to impose penalties in appropriate cases. Ofcom may also suspend service provision or apparatus supply for serious and repeated contraventions after following the procedures in section 140 or 141 respectively.
- 3.25 Ofcom has the power to impose a fine in relation to an infringement of the Competition Act. If Ofcom imposes a fine under competition law, it will follow the fining guidelines published by the OFT<sup>29</sup>.

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<sup>28</sup> <http://www.ofcom.org.uk/about/accoun/pg/penguid.pdf>

<sup>29</sup> See guidelines OFT 423: OFT's Guidance as to the appropriate amount of a penalty, December 2004.

## Section 4

# Receiving complaints and referred disputes: the enquiry phase

## The enquiry phase

- 4.1 Once a complaint or dispute submission is accepted, Ofcom will open a case and that case will enter the enquiry phase (referred to here as an 'enquiry').
- 4.2 The enquiry is Ofcom's opportunity to ensure that it fully understands the nature of the complaint or the scope of the dispute, and to decide whether to conduct an investigation (or, for example, whether to take some other action in relation to a complaint).
- 4.3 During the enquiry, Ofcom may seek to hold meetings, by telephone or in person, with either or both of the complainant and the target of the complaint (or other parties to a dispute), although it does not always do so. Any information gathering during the enquiry is likely to be informal, and related to understanding the complaint or dispute and the demands an investigation would place upon Ofcom. Ofcom does not normally take a view on the merits of the complaint or dispute during an enquiry.
- 4.4 During an enquiry, Ofcom will make a decision whether to open an investigation (that is, to investigate a complaint or to accept a dispute for resolution).
- 4.5 An enquiry following the receipt of a complaint or a dispute will normally last no more than 15 working days. Ofcom believes that it should be possible to make a decision about whether to take a case forward to the investigation phase within that time. Ofcom may extend the enquiry phase if there is a good reason (or in some cases Ofcom may extend the enquiry with the consent of the complainant or party referring the dispute). One example of why Ofcom might extend is that Ofcom may need to discuss the issue that has been raised with the Office of Fair Trading, the Competition Commission or another regulator or public authority.
- 4.6 An enquiry launched by Ofcom on its own initiative will have a set duration (that is, a fixed date when the enquiry will end unless extended) although the enquiry may be longer than 15 working days. It is not uncommon for own-initiative enquiries to require additional planning to ensure that Ofcom is able to take a considered view on whether to open an investigation on its own initiative. For example, it may be necessary to make informal contact with a number of organisations in order to reach a view on whether they should be included as parties to, or targets of, an investigation.
- 4.7 During an enquiry, Ofcom will not normally make any public comment about a complaint or dispute.

## Submitting a complaint or referring a dispute

- 4.8 Submissions (making a complaint or referring a dispute) should be sent to:

Competition Group Operations Team  
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

- 4.9 Ofcom considers all submissions it receives. However, Ofcom expects submissions to contain a certain level of evidence before it will open an enquiry.
- 4.10 This requirement will not be applied in a bureaucratic way. Ofcom will consider the circumstances surrounding each submission, but will decline to open an enquiry in response to unsubstantiated allegations or inadequate submissions. The requirement to provide evidence substantiating an allegation enables Ofcom to identify complaints that raise real concerns about anti-competitive or unlawful behaviour and to target its resources on the most important issues.
- 4.11 Ofcom acknowledges that smaller companies or individuals may require assistance in formulating complaints. Ofcom will provide guidance to less experienced complainants. However, large, experienced stakeholders are expected to make adequate, well reasoned submissions and back up allegations of anti-competitive or unlawful behaviour with evidence.
- 4.12 In some circumstances, such as a complaint from an individual consumer that appears to raise serious issues, Ofcom may waive the submission requirements. Ofcom will always be prepared to explain why it has waived the submission requirements.
- 4.13 The most common reasons for not accepting submissions are:
- The complainant does not refer to the particular regulatory provision which it considers has been infringed, or, if it has done so, does not provide any evidence or reasoning to explain why a particular provision has been infringed.
  - The complainant makes a general complaint about 'anti-competitive' behaviour without specifying the conduct in question (eg. unlawful discrimination, excessive pricing), outlining why it is unlawful and also explaining the impact that it has had on its business and the consumer interest.
  - The issue that has been raised is the result of a commercial or contractual disagreement between organisations and is unrelated to regulatory issues (and where the submission does not relate to a dispute under section 185 Communications Act ).
  - The complaint relates to a consumer matter which could be better handled by Ofcom's contact centre.
  - It is clear that the complaint falls within the jurisdiction of another agency and that other agency is better placed to handle the complaint (for example, a complaint about a claim made in an advertisement which is a matter for the Advertising Standards Authority or a complaint about premium rate telephone lines which is a matter for ICSTIS).
- 4.14 Complaints, particularly about anti-competitive behaviour, often result in extensive, resource-intensive investigations which impose significant costs not only on Ofcom

but also on the target of the complaint, the complainant and often on others (such as competitors) who may be required by Ofcom to supply information.

- 4.15 Complaints must be specific. A general allegation that the Competition Act (and/or a breach of Articles 81 and 82 of the EC Treaty), or a broad set of *ex ante* conditions, has been breached is likely to be considered inadequate.
- 4.16 Allegations must be supported by specific, relevant evidence. For example, an allegation of predatory pricing or margin squeeze should be backed up by an analysis of costs and prices. Ofcom acknowledges that complainants may have little or no access to information on their competitors' costs. Where information about a target's costs is not available, the costs used to support an allegation could be based on a model or on the complainant's own costs or profitability before and after, for example, a significant price drop. If, after initial examination or during an enquiry or investigation, the factual evidence submitted by the complainant is incorrect, or based on a misunderstanding, Ofcom may close the case.
- 4.17 Those considering making a complaint under the Competition Act and/or the EC Treaty may also find it useful to refer to guidance published by the Office of Fair Trading (including for example *Agreements and concerted practices* (OFT 401), and *Abuse of a dominant position* (OFT 402)<sup>30</sup>).
- 4.18 In summary, Ofcom will only accept a complaint where complainants:
- clearly identify the relevant *ex ante* condition or law which they believe is being breached, or the alleged infringement of the Competition Act (and/or Articles 81 and 82 of the EC Treaty);
  - submit sufficient factual evidence to back up their allegations including evidence of harm suffered or expected to be suffered by the company and where available evidence of actual or potential effect on consumers; and
  - submit a statement by an officer, preferably the CEO, of the company that due care has been taken to ensure that the evidence submitted is correct and complete.
- 4.19 Full details of the required format and content of a complaint submission are set out in Annex 4.
- 4.20 Ofcom will generally only accept a dispute where the disputant submits clear information on all details of the dispute including:
- A clear and comprehensive explanation of the commercial context to the dispute;
  - relevant *ex ante* conditions or other regulatory conditions (e.g. a condition imposing the requirement to meet a request for access);
  - details of which paragraph of Section 185 of the Communications Act, the dispute specifically relates to;
  - a clear statement of the scope of the dispute;

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<sup>30</sup> See [www.ofcom.gov.uk](http://www.ofcom.gov.uk) for full set of guidance currently published by OFT and as revised from time to time

- 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.
- 4.21 Where the dispute relates to new services that are forms of network access, the complainant should also provide a business case for introduction of the requested product, including demand forecasts. This information is required by Ofcom to assess whether or not a request for a new network access product is reasonable.
- 4.22 Ofcom recognises that companies may refuse to enter into negotiations or introduce unreasonable delay in an attempt to stall negotiations. In such cases, the party asking Ofcom to resolve a dispute should demonstrate 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.
- 4.23 Full details of the required format and content of a request to Ofcom to resolve a dispute can be found in Annex 5.

### **Acknowledging and accepting submissions**

- 4.24 Ofcom aims to acknowledge all submissions made to it within two working days.
- 4.25 The enquiry phase begins on the day a complete submission (including a non confidential version which can be sent to the target of the complaint or other party in dispute) is received in the Competition Group's Operations Team. If a complainant decides to send a submission elsewhere in Ofcom (e.g. to the Chief Executive or a Board member) they are strongly encouraged to copy the submission to the Competition Group's Operations Team.
- 4.26 Ofcom will generally copy non-confidential submissions for both dispute resolution and complaints to the target at the beginning of the enquiry. In the case of complaints, no response is required from the target. In the case of disputes, Ofcom will request initial views on the appropriate scope of the dispute.
- 4.27 In the event that a non-confidential version of the submission is not included with the original submission (or a statement that the complaint or dispute as submitted is not confidential), Ofcom's 15 day enquiry phase target will not begin until a non-confidential version of the submission is made available.
- 4.28 If Ofcom opens an investigation into a complaint or accepts a dispute for resolution, Ofcom will notify the complainant and target. If Ofcom considers that it is not appropriate to open an investigation or accept a dispute submission, Ofcom will write to the complainant setting out its reasons.
- 4.29 Where Ofcom needs more than 15 working days to decide whether it is appropriate to open an investigation, it will be prepared to explain why.

## Assigning a case leader, sponsor and responsible director

- 4.30 Once a submission has been accepted, a case leader, case sponsor and case director will be appointed by the Director of Investigations. Ofcom aims to do this within one working day in most cases.
- 4.31 The case leader is the Ofcom staff member assigned to conduct the enquiry and any investigation. The case leader will generally be a member of the Investigations team.
- 4.32 The case leader leads a team that is drawn together on an *ad hoc* basis for each investigation in a way that ensures the proper mix of skills (for example, a case team might include any or all of the following skills: legal, economic, financial, technical or policy-specific). In most cases, there are 4-6 people in the case team, although larger and smaller case teams are also common. The case leader also acts as primary point of contact with stakeholders during any investigation.
- 4.33 The case sponsor is generally a more senior, or more experienced, investigator, or someone with specific expertise (for example, having led investigations in the same area previously). The role of the case sponsor varies from case to case but reflects both the need to provide appropriate management and supervision for case leaders and also to act as a mentor and in a supporting role.
- 4.34 The case director is the senior Ofcom officer responsible for the matter. The case director is either the Director of Investigations or, in relation to specific areas of responsibility, may be a Principal-level senior member of the Investigations team. More rarely, another Director within the Competition Group may be assigned as case director (or co-Director).
- 4.35 All investigations are the responsibility of the Director of Investigations, who is accountable to the Partner, Competition Group. All investigations go through appropriate internal governance which may include any or all of the Investigations Management Group, Policy Executive and the Ofcom Board, as appropriate.

## Contact with the case team during an enquiry

- 4.36 The primary point of contact for complainants and parties to disputes, and those under investigation, is the case leader. Ofcom will provide the name and contact details of the case leader to relevant stakeholders.

## Enquiries initiated by Ofcom

- 4.37 Ofcom may commence enquiries 'on its own initiative'. An own-initiative enquiry will not normally be publicly announced (i.e. prior to an investigation being launched).
- 4.38 A major source of own-initiative enquiries is the need to respond to apparent patterns or trends in complaints from individual consumers to Ofcom or to some other body (e.g. ICSTIS). However, own-initiative enquiries may arise in relation to matters where Ofcom considers it furthers the interests of citizens or consumers to commence the enquiry or investigations process, without reference to an external stakeholder or complaints.
- 4.39 Ofcom will inform the target when an own-initiative enquiry commences unless there is a good reason not to do so (for example, if it would compromise Ofcom's ability to conduct an investigation if the target was alerted). In those cases where Ofcom does inform the target, Ofcom will provide both the nature of the enquiry (ie the specific

concern into which Ofcom may be considering launching an investigation), and the nominated date by when a decision whether to conduct an investigation will be made.

### Anonymous complaints

- 4.40 Ofcom will protect the identity of complaints in the event that complainants wish to remain anonymous. Complainants who wish to remain anonymous are advised to make this clear from the outset to Ofcom.
- 4.41 If a complaint is made anonymously to Ofcom (that is, where Ofcom does not know the identity of the party making the complaint), Ofcom may decline to accept the submission, notwithstanding these Guidelines. In particular, Ofcom is unlikely to open an investigation following allegations made from an unidentified source (although it may consider evidence received anonymously).

### Deciding whether to open an investigation

- 4.42 Ofcom does not have the resources to investigate all the complaints that it receives. In order to ensure that its resources are used effectively, it must therefore make decisions about whether to open investigations based on a process of weighing up the likely benefits of conducting an investigation (generally, in terms of our statutory duties) against the resources involved and the other activities we might undertake instead. The decision whether to open an investigation in this way is commonly referred to as a decision made on the basis of “administrative priority”, a description that is used when Ofcom’s decision about whether to investigate is made without taking a view on the merits of the complaint.
- 4.43 Ofcom may only open an investigation under the Competition Act where Ofcom has reasonable grounds for suspecting an infringement has occurred.<sup>31</sup> Ofcom will consider this question in the light of the evidence provided by the complaint and any other information relevant that may be considered (for example, information gathered informally by the case team during the enquiry). This threshold does not apply to complaints made under other Acts although the requirement under these Guidelines that complaints be properly reasoned and supported by evidence, where available, applies in all cases.
- 4.44 In addition, Ofcom will only open an investigation where it would be an appropriate use of Ofcom’s resources to do so. Ofcom makes decisions about whether to conduct an investigation by applying a sense of administrative priority, and considering Ofcom’s statutory duties, its established priorities such as those set in the applicable Ofcom Annual Plan. In doing so, Ofcom will apply relevant regulatory principles. In particular, Ofcom’s enforcement activities follow the regulatory principles of being proportionate and targeted only at cases in which action is needed.
- 4.45 Among the factors that Ofcom will consider in deciding whether to conduct an investigation (on the basis of administrative priorities and subject to its statutory duties) include:
- The resources required to conduct an investigation, given the need to do justice to the interests of all parties likely to be affected by an investigation (for example: citizens and consumers; the complainant; third parties; and the

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<sup>31</sup> Competition Act, section 25.

target of the investigation). Particular issues may arise where there are specific policy or specialist skills that are required to conduct an investigation;

- The risk to the interests of citizens or consumers as a result of the alleged contravention or infringement (and whether that risk is immediate or not and whether it is direct or indirect);
- Whether the issue that has been identified directly relates to Ofcom's broader strategic goals or priorities (including those within Ofcom's Annual Plan);
- Whether the conduct is on-going;
- Whether the allegation concerns conduct that is, or that appears to be, a repeated, intentional or particularly flagrant contravention or infringement;
- Whether there is a point of public policy of wider application with respect to which an investigation would help to clarify Ofcom's approach for stakeholders;
- Whether the company under investigation has a history of similar contraventions or infringements, or a demonstrated record of poor compliance;
- In the case of complaints in relation to competition concerns of alleged abuse of a dominant position infringing Chapter 2 Competition Act/Article 82 EC, whether Ofcom has recently found (for example in a market review) that no communications provider (including the target of the complaint) occupies a position of significant market power in the market which appears relevant to the complaint; and
- Whether there are other alternative proceedings (for example, planned market reviews) that are likely to achieve the same ends, or deal with the same issues, as the planned investigation. This could include, for example, whether other agencies may be better placed to investigate the complaint.

4.46 A common factor that may lead to a decision not to undertake an investigation is that the matters at issue, or closely related questions, are likely to be considered in a current or planned policy process. However, it may still be appropriate to conduct an investigation before or during a policy process in some circumstances – for example, where there is evidence of ongoing consumer harm meaning that more urgent action is required.

4.47 A decision by Ofcom not to open an investigation does not imply any view by Ofcom about the merits of a complaint.

## Section 5

# Conducting an investigation: the investigation phase

## Opening an investigation

- 5.1 If Ofcom decides to open an investigation, it will normally inform the relevant parties (being the complainant, the target and – in the case of a dispute - any other interested parties) and publish a Competition Bulletin<sup>32</sup> entry concerning that investigation.

## Ofcom will set a clear scope or statement of the subject of the investigation

- 5.2 In the case of disputes, at the start of an investigation, Ofcom will publish a Competition Bulletin entry setting out the scope of the dispute, and will not generally alter the scope during the investigation without a good reason. Ofcom will normally allow five working days for interested parties to comment on the published scope of the dispute.
- 5.3 If the submission includes a request for Ofcom to consider issues concerning which commercial negotiations have not taken place, or where there has been no reasonable attempt to engage in negotiations, these issues will generally not be included in the statement of scope and will not be addressed by Ofcom. An exception to this principle may apply if there are closely related matters, or particular identified matters about which it would not serve any purpose to, in effect, require the parties to seek to negotiate where this would be a hollow exercise. In these cases, Ofcom may include those additional matters in the scope of the dispute and will be prepared to explain its reasons for so doing.
- 5.4 Ofcom does not set the scope of complaints in the same way as for disputes. At the start of an investigation, Ofcom will publish a Competition Bulletin entry setting out the subject of the investigation, often after checking with the complainant that it understands the complaint.
- 5.5 Ofcom may elect to widen an investigation of a complaint after commencement, and will normally state that it has done via the Competition Bulletin. Ofcom will apply the same principles of administrative priority in electing to widen the investigation beyond the original complaint as it does in opening an investigation, although it will take into account the work already done in the initial investigation in so doing.
- 5.6 Neither the scope of a dispute nor the statement of the subject of an investigation will limit Ofcom's responsibility to consider taking action if Ofcom becomes aware of contraventions or infringements that are not part of the original ambit of the investigation. If necessary, Ofcom may open a parallel own-initiative investigation into fresh issues that have arisen. If, for example, Ofcom finds reasonable grounds to believe that a contravention has occurred or is occurring, it may elect to take action through for example a section 94 notification immediately (for example, to prevent on-going harm to consumers).

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<sup>32</sup> [www.ofcom.org.uk/bulletins](http://www.ofcom.org.uk/bulletins)

## The Competition Bulletin

- 5.7 Ofcom's investigations will be conducted openly and in a transparent manner. Unless there are confidentiality concerns or tactical considerations (such as the undesirability of alerting the target of an investigation or a related criminal investigation is ongoing), Ofcom will generally publish details of all investigations on its Competition Bulletin as they are opened and closed. Ofcom will not publish any Competition Bulletin entry where doing so could prejudice the progress of the investigation.
- 5.8 The purpose of the Competition Bulletin is to ensure that there is a transparent and up-to-date record of Ofcom's investigations programme. Ofcom will publish updates relating to significant milestones such as the publication of draft decisions or major changes to timetables or procedural issues under the relevant entry for each investigation.
- 5.9 Stakeholders who want to be kept up to date with ongoing investigations can subscribe to e-mail notification of changes to the Competition Bulletin<sup>33</sup>.

## Contact with the case team during an investigation

- 5.10 As noted above, the primary point of contact for complainants and parties to disputes, and those under investigation, is the case leader. Ofcom will provide the name and contact details of the case leader to relevant stakeholders, and these will be made available in the Competition Bulletin entry, if any.
- 5.11 Parties involved in investigations can expect regular contact with the team working on the investigation and regular updates on the progress of investigations.
- 5.12 Under most circumstances, parties can expect contact from the case leader at least every four weeks. Of necessity, sometimes this may be as no more than a short telephone call or email that there have been no substantive developments. In some cases, there may be more frequent contact, particular during information gathering or when the parties are commenting on a statement of objections or a draft determination or decision.

## When there is a need to move quickly

- 5.13 Ofcom has the power to take action in relation to urgent cases, both under the Competition Act (the power to impose interim measures) or in relation to urgent issues under the Communications Act. Ofcom may exercise these powers either because it has received an application to do so, or acting on its own initiative.
- 5.14 If Ofcom has reasonable grounds to suspect that a case is an urgent<sup>34</sup> case under the Communications Act:
- Ofcom may reduce the time given under a section 94 notification to make representations, comply with a notified obligation or remedy the consequences of a contravention<sup>35</sup>; and

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<sup>33</sup> [http://www.ofcom.org.uk/static/subscribe/comp\\_bull.htm](http://www.ofcom.org.uk/static/subscribe/comp_bull.htm)

<sup>34</sup> Section 98(2) Communications Act

<sup>35</sup> Communications Act, s.98(3).

- Ofcom may make a direction suspending or restricting a provider's activities.<sup>36</sup>
- 5.15 In urgent cases, Ofcom may also decide not to provide an opportunity to make representations before giving a direction under sections 100 or 101 suspending service provision or apparatus supply in the case of serious and repeated contraventions that have already been the subject of enforcement action under section 95 or a penalty imposed under section 96 (or both).<sup>37</sup>
- 5.16 Ofcom's discretion under the Communications Act to take urgent action under section 98 applies only to alleged breaches of conditions relating to electronic communications networks and services and only where the contravention 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 persons (other than the contravening provider) who are communications providers or persons who make associated facilities available; or
  - serious economic or operational problems for persons who make use of electronic communications networks, electronic communications facilities or associated facilities'.<sup>38</sup>
- 5.17 Ofcom has discretion under section 35 of the Competition Act to impose interim measures, before it completes its investigation, where it has reasonable suspicion that the provisions of the Competition Act are being infringed. Where Ofcom has started an investigation but not completed it, Ofcom may impose interim measures in order to:
- prevent serious, irreparable damage to a particular person or category of person; or
  - protect the public interest.
- 5.18 In these circumstances, Ofcom may give such directions as it considers appropriate for that purpose i.e. of preventing serious, irreparable damage and/or protecting the public interest.<sup>39</sup>

### **Making an application for urgent action or interim measures**

- 5.19 If you believe that Ofcom should take urgent action in relation to your complaint, or you seek for Ofcom to impose interim measures, then you must clearly set out your full argument with supporting evidence as soon as possible. A complainant is unlikely to be persuasive in its argument that a matter is a case for swift action if it

<sup>36</sup> More specifically, 'a direction that [the provider's] entitlement to provide electronic communications networks or electronic communications services, or to make associated facilities available, is suspended (either generally or in relation to particular networks, services or facilities; or a direction that that entitlement is restricted in the respects set out in the direction.' (s.98(4)). Sections 98(5) to (8) also apply to such a direction.

<sup>37</sup> Communications Act, section 102.

<sup>38</sup> Section 98(2) Communications Act

<sup>39</sup> See further the guidance OFT 407 Enforcement, December 2004 in relation to interim measures (at section 3).

demonstrates a failure to act with urgency in bringing the full details of its complaint to Ofcom's attention.

- 5.20 Ofcom will assess any request for urgent action or interim measures against the relevant statutory criteria noted out above. When considering an application for interim measures under the Competition Act, for example, Ofcom must be satisfied that swift action is necessary to prevent serious, irreparable damage and/or to protect the public interest.
- 5.21 A request for urgent action or interim measures must, in addition to providing evidence of a contravention of a condition or an infringement of competition law, demonstrate that the matter deserves urgent attention. Complainants should provide compelling evidence that the alleged contravention or infringement justifies the commitment of significant resources in Ofcom pursuing the issue as a matter of urgency.
- 5.22 Such evidence may include a financial assessment of the losses directly attributable to the alleged behaviour (although 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) relative to total turnover of the complainant, details of other companies likely to be affected, and information about why the damage caused will be irreparable (for example if the results of the behaviour cannot be reversed because the number of consumers involved renders this impracticable or companies will exit a market with high barriers to entry).
- 5.23 Representations about proposed or recent changes in agreements or conduct are generally more likely to present grounds for urgent action than allegations about established behaviour or agreements.
- 5.24 Even if there is sufficient grounds to conclude that Ofcom has the power to do so, Ofcom may elect not to take urgent action or interim measures. In particular in order to facilitate quick action, Ofcom may decide to accept a written assurance in lieu of taking urgent action or interim measures if Ofcom is satisfied that these will address concerns that might otherwise form the basis for action. Such an informal assurance (which may be detailed and will always be in writing) from a company under investigation that it will do something, or refrain from doing something, that may obviate the need for formal directions. Ofcom is never bound to accept or even consider such an assurance if it is more appropriate to exercise its statutory powers in a particular case.<sup>40</sup>
- 5.25 Ofcom will be transparent in its dealings with the parties as to any decision to accept assurances (although it may negotiate in private with some parties in some circumstances).
- 5.26 Ofcom expects to be able to assess the case for urgent action or interim measures on the merits of the facts brought to Ofcom's attention at an early stage, and expects to provide the complainant with a decision about these matters quickly, subject to the supporting evidence provided by the complainant. However, complainants should note that repeated requests for Ofcom to reconsider a decision on urgent action can be counterproductive, as responding to these requests may divert resources away from the full investigation.

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<sup>40</sup> See further OFT 407 at 3.17 – 3.20 in relation to assurances in lieu of interim measures directions under the Competition Act.

## Information gathering

- 5.27 Ofcom relies on accurate information, provided in a timely manner, to carry out efficient investigations into complaints and disputes.
- 5.28 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 therefore expects stakeholders to respond to information requests to strict deadlines.
- 5.29 Ofcom will generally use its statutory powers to collect the information it needs to pursue investigations and may take enforcement action against companies that fail to respond to statutory requests for information. However, Ofcom may use informal requests for information in certain circumstances, in particular, when the nature of the information required means that a statutory request is inappropriate (e.g. where background information is required or information is required before a request can be issued or the information required is in answer to a very simple query).
- 5.30 Ofcom has issued guidelines relating to the exercise of Ofcom's powers under section 135 and 136 of the Communications Act and section 13A of the Wireless Telegraphy Act 1949.<sup>41</sup> Those guidelines apply to the exercise of those statutory powers.
- 5.31 Where the timetable of the investigation allows and/or the information request is particularly complex, Ofcom will normally issue formal information requests in draft, allowing three working days for representations to be made on scope 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. Where an information request is straightforward of the information is required quickly, Ofcom will not send a draft information request.
- 5.32 Once a final information request has been issued, Ofcom will not usually agree to an extension of the deadline and will be robust in enforcing the requirement to respond subject to compelling reasons being provided to support a requested extension.
- 5.33 Ofcom is obliged by the Communications Act to meet the statutory four-month target for resolving disputes, except in exceptional circumstances. In addition, Ofcom has set administrative timetables for all investigations, and although those commitments do not have statutory force, Ofcom considers that it is consistent with its statutory duties that investigations be carried out in a timely manner and in line with guidance given to stakeholders. Therefore, where the case timetable demands it, Ofcom may set challenging deadlines for responses to information requests. Stakeholders routinely involved in disputes should consider the need to develop adequate mechanisms to ensure that they can meet their obligations to supply information.
- 5.34 Ofcom requests that all responses to information requests are supplied with a non-confidential version including submissions as to why the stakeholder submits that particular information is confidential. Stakeholders should note that, when responding to statutory information requests, a blanket marking of 'confidential' on all information supplied is unhelpful for both Ofcom and the stakeholder. A statement that all information supplied is 'confidential' often obliges Ofcom to take a view on what is, and is not, genuinely confidential and the process of checking with the

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<sup>41</sup> Information gathering under section 145 of the Communications Act 2003 and section 13B of the Wireless Telegraphy Act 1949: Policy Statement, published 10 March 2005.

company concerned can be lengthy and time consuming. Stakeholders are requested to suggest non-confidential summaries of information (for example “[confidential details of contracts]”) and non-confidential ranges of numbers in their proposed non-confidential version rather than simply removing information. Ofcom will review requests for confidentiality in Competition Act cases under Part 9 Enterprise Act and under the OFT’s rules order.<sup>42</sup> Ofcom will consider sections 26 and 393 of the Communications Act in relation to requests for confidentiality of information provided under the Communications Act.

- 5.35 As already stated, it forms part of Ofcom’s regulatory principles to investigate and enforce in a transparent manner. Further, as many of Ofcom’s enforcement decisions are subject to appeals to the Competition Appeal Tribunal under section 192 of the Communications Act or under section 46 and 47 of the Competition Act, it is important that its decisions show on their face how Ofcom has considered representations made to it during its investigation. Ofcom therefore takes the general view that disclosure of information about a particular business is normally necessary for the purpose of facilitating the carrying out by Ofcom of its enforcement functions. This may include disclosure of information gathered in an investigation to the investigated party in order to protect their rights of defence and may include disclosure of information gathered to a complainant subject to confidentiality considerations.

### **The rights of complainants and other interested parties**

- 5.36 Ofcom recognises the important role that individuals or firms who are not themselves targets of an Ofcom investigation (‘third parties’) may play in relation to Communications Act and Competition Act investigations. While complainants are often important third parties in investigations, not all third-parties whose involvement is appropriate are necessarily complainants (for example, competitors, customers and suppliers in the market).
- 5.37 Ofcom’s primary mechanism for notifying third parties of current investigations is the Competition Bulletin, and Ofcom does not engage in any active identification of third parties (other than the complainant). Any individual or organisation who wishes to be considered as a third-party participant in an investigation should contact the relevant case leader as soon as they can. The earlier that role is identified, the better for all concerned.
- 5.38 Ofcom is not obliged to provide any rights of involvement to parties simply because they wish to be involved. The relevant question is whether that person has a sufficient interest in the outcome of the investigation (in most cases, an economic interest) and/or whether the involvement of that person would further Ofcom’s statutory duties relevant to enforcement. Third parties who do not have a sufficient interest but are nonetheless keen to follow the progress of an investigation are also welcome to make contact with the case leader and to follow the progress of the investigation on the Competition Bulletin.
- 5.39 Although it will approach each investigation and the role of a given third party on a case-by-case basis<sup>43</sup>, Ofcom will aim to offer at least the following opportunities for

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<sup>42</sup> Competition Act 1998 (Office of Fair Trading’s Rules) Order 2004, SI 2004/2751

<sup>43</sup> Ofcom will consider the guidance and practice of the OFT in Competition Act investigations, OFT451, April 2006 Involving third parties in Competition Act investigations. Ofcom will also consider European Commission practice on complainant’s rights.

involvement in Competition Act investigations to third-party complainants and other participants:

- The opportunity to consider and make submissions regarding any statement of objections issued by Ofcom; and
- The opportunity to consider and make submissions regarding any draft decision that there are no grounds for action (non-infringement decision).

- 5.40 Ofcom intends that the period of time given for comment will be roughly equivalent as between the target of the investigation and third-party participants in most cases, although this may vary in some circumstances (for example, where a third party who was previously not interested in an investigation seeks to be involved as a participant in an investigation mid-way through the period for comment).
- 5.41 In all cases, Ofcom will only disclose information subject to its duties under Part 9 Enterprise Act in Competition Act investigations and Ofcom will assess whether to redact confidential information from any document.
- 5.42 In relation to Communications Act investigations, again Ofcom will consider its statutory functions on a case-by case basis to assess the need for third party complainant's comments including whether third parties should be given access to documents during an investigation and will assess whether to redact confidential information from any document.

### **Ofcom's timescales for carrying out investigations**

- 5.43 Ofcom's target timescales for carrying out investigations differ according to the case in question. These timescales (including the timescale for resolving disputes, further detail on which is set out in section 6) are set out in table 1, below.

**Table 1: Summary of targets for completion of different types of investigations**

| <b>Type of investigation</b>   | <b>Target</b>   |
|--|---|
| Disputes   | Four months (except where exceptional circumstances arise)  |
| Complaints concerning breaches of <i>ex ante</i> conditions                    | Four months for a closure statement or notification that Ofcom has reasonable grounds for believing that a condition has been breached  |
| Own-initiative investigations concerning breaches of <i>ex ante</i> conditions | Six months for a closure statement or notification that Ofcom has reasonable grounds for believing that a condition has been breached   |
| Competition Act investigations   | At six months: <ul style="list-style-type: none"> <li>• A statement of objections will have been issued; or</li> <li>• A draft no grounds for action decision will have been issued; or</li> <li>• A further timetable will have been issued, confirming a date for one of the above (normally up to a further 3 months)</li> </ul> |
| Unfair contract terms investigations   | Four months (six months for investigations opened on Ofcom's own-initiative)  |
| Part 8 of the Enterprise Act investigations                                    | Six months to obtain undertakings   |
| Enforcement programmes   | Initially six months (with further extension(s) if necessary)   |

### **Investigations of complaints in relation to *ex ante* rules will take 4 or 6 months**

- 5.44 Ofcom will aim to complete investigations of complaints it receives concerning a contravention of an *ex ante* regulatory rule (for example, under the Communications Act) within 4 months of commencing the investigation.
- 5.45 Ofcom will aim to complete investigations it launches on its own initiative concerning a contravention of an *ex ante* regulatory rule under the Communications Act or contraventions of Part 8 of the Enterprise Act, within 6 months of commencing the investigation.

### **Enforcement programmes – industry-wide investigations to drive compliance**

- 5.46 Ofcom may also launch own-initiative investigations as “enforcement programmes”, which are broadly based programmes designed to deploy Ofcom’s resources to address compliance issues across a relatively large group of firms or individuals.

(For example, Ofcom has taken this approach in relation to the requirement on all communications providers to offer their customers access to an ADR scheme).

- 5.47 Ofcom will identify those who are the subject of the programme by class although not necessarily individually (e.g. “all communications providers who offer publicly available telephony services”). Although not all the companies covered by the programme are named on the Competition Bulletin individually, Ofcom will generally seek to notify individual companies before taking statutory enforcement action against them.
- 5.48 In these programmes, Ofcom will initially set a plan for the first 6 months of activity. At the end of this period, Ofcom will decide whether to extend the programme for a further 6 month term. Such programmes may be extended multiple times, if there continues to be useful work to be done that furthers Ofcom’s statutory objectives. Ofcom may also launch specific investigations of named persons on its own initiative based on information gathered in this type of programme.<sup>44</sup>

### **Investigation of complaints under the Competition Act**

- 5.49 Investigations under the Competition Act are typically complex and require detailed information gathering and analysis. Ofcom no longer intends to set a fixed period for the completion of all Competition Act investigations. Instead, Ofcom aims to set specific and pre-determined milestone dates in each case. Those milestone dates will be case-specific and set in accordance with these Guidelines. The parties to the investigation will be kept informed by Ofcom of the proposed timetable and any changes to the timetable. Ofcom may also publish indicative milestone dates on the Competition Bulletin although the decision to do so will be taken on a case-by-case basis. Generally speaking, Ofcom is prepared to be open about its expected timetables for case completion but recognises that these dates may need to change depending on the circumstances of particular cases.
- 5.50 In relation to Competition Act investigations, Ofcom intends that 6 months into the investigation, a significant milestone will be set. The purpose of this milestone is to ensure that investigations quickly reach a substantive and fully reasoned position that is put to the target and/or the complainant for comment.
- 5.51 If the investigation remains open at that time, by 6 months from the start of the investigation, Ofcom aims either to have taken one of the following steps or to inform the parties of the progress of the investigation and its proposed timetable for making such steps:
- It will have issued a Statement of Objections (“SO”); or
  - It will have issued a draft decision that there has been no infringement and that, therefore, there are no grounds for action.
- 5.52 If, after 6 months, Ofcom is not yet at a stage where it could issue an SO or a draft decision that there has been no infringement, it will at that point set a milestone date when it expects to do so. Ofcom does not expect that deadline to be longer than 12

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<sup>44</sup> For example, CW/00838/05/05, Ofcom’s enforcement programme in relation to the requirement to have a Code of Practice for Sales and Marketing for telephony providers was, at the time these Guidelines were finalised, into its third 6-monthly term, with four separate individual investigations completed or underway as a result. See [http://www.ofcom.org.uk/bulletins/comp\\_bull\\_index/comp\\_bull\\_ocases/open\\_all/cw\\_838/](http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_838/).

months from the original investigation commencement date. In most cases, Ofcom intends to set a date less than 9 months from commencement of the investigation.

- 5.53 Ofcom will keep its timetables under review and keep the parties informed of changes to the timetable and reasons for the changes.
- 5.54 It is difficult to predict with certainty how cases will progress after the issuing of an SO or draft decision that there are no grounds for action, since at that point Ofcom will need to consider submissions made to it by stakeholders responding to that document. However, in the case of a draft decision that there are no grounds for action, assuming that Ofcom considers the parties' submissions and remains of the view that there are no grounds for action, then Ofcom will generally seek to finalise its decision within 1 month from the end of the period when submissions may be made concerning the draft decision.
- 5.55 Following the issuing of an SO, Ofcom will aim to issue a further document, being one of the following:
- an infringement decision based on the SO; or
  - a draft decision that there are no grounds for action, or
  - a second (or subsequent) SO if required.
- 5.56 Ofcom aims to issue such a further document within six months but will set a target date depending on the precise circumstances of the investigation and will keep the parties informed of its expected timing.
- 5.57 It is possible that some competition investigations will run beyond 12 months, in particular where particularly complex issues of competition law and/or evidence gathering arise, or where cases are related to matters under appeal to the Competition Appeal Tribunal. Ofcom will treat cases that have gone on longer than 12 months as a priority in most cases, but may not be able to make firm commitments as to timing in every case.
- 5.58 Given the range and the highly specific nature of Competition Act investigations, this framework, including the initial 6 month milestone, may not apply in some cases. Accordingly, where there are reasons why it is not appropriate to follow this approach, Ofcom will inform the parties of how it intends to handle the investigation and provide any relevant target milestone dates.

## Section 6

# Resolving disputes

## Ofcom's role in resolving disputes

- 6.1 When resolving a dispute under the Communications Act, Ofcom's intervention as arbiter between the parties is as a regulator, not as a third party resolving a dispute.<sup>45</sup> Such dispute resolution is therefore a form of regulation. In contrast to litigation and alternative dispute resolution ("ADR") mechanisms, such as arbitration, mediation and expert determination, the four types of dispute (discussed further below) referable to Ofcom under the Communications Act are therefore to be regarded as *regulatory disputes*.
- 6.2 It follows that, when resolving a regulatory dispute, Ofcom is carrying out a different function to when it is taking enforcement action in respect of a contravention of, say, a condition set under section 45 of the Communications Act. When resolving regulatory disputes, Ofcom is under a duty to consider a dispute which it has decided to handle (or, as the case may be, which dispute has been referred back to Ofcom where it has not been resolved by alternative means) and then to make a determination for resolving it. In contrast, enforcement action, such as securing compliance with *ex ante* conditions, is normally a discretionary measure.
- 6.3 The resolution of regulatory disputes must essentially be aimed at achieving the policy objectives of Article 8 of the Framework Directive. Section 4 of the Communications Act therefore requires that, when resolving such disputes, Ofcom acts in accordance with the six Community requirements that give effect to Article 8. In summary, those requirements are:
- to promote competition in communications markets;
  - to secure that Ofcom contributes to development of the European internal market;
  - to promote the interests of all European Union citizens;
  - to act in a manner which, so far as practicable, is technology-neutral;
  - to encourage, to the extent Ofcom considers it appropriate, the provision of network access and service interoperability; and
  - to encourage such compliance with certain international standards as is necessary for facilitating service interoperability and securing freedom of choice for the customers of communications providers.
- 6.4 The different nature of resolving a regulatory dispute as compared to taking enforcement action is also reflected in the different procedures and powers available to Ofcom in these two cases.
- 6.5 Ofcom must resolve disputes within a statutory timetable (which is discussed further below). In contrast, Ofcom is not under a statutory timetable when taking

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<sup>45</sup> See the judgment of the Competition Appeal Tribunal in *Hutchison 3G (UK) Limited v. The Office of Communications*, 29 November 2005, [2005] CAT 39, paragraph 138.

enforcement action, although Ofcom can and does set administrative timetables for doing so.

- 6.6 However, this procedural aspect of dispute resolution may serve in certain cases as an important adjunct to many areas of Ofcom's communications policy. For example, where Ofcom has imposed, say, an *ex ante* requirement on a communications provider to offer network access to another person on reasonable terms and conditions, the parties are expected to engage in commercial negotiation to agree the basis on which those services are to be provided. If those negotiations fail (or a dispute later arises in fulfilling contractual commitments based on *ex ante* regulatory rights or obligations), swift resolution of the dispute could prove a vital component of the overall regulatory regime to ensure that parties are not able to defeat the substantive objectives of policy by, for instance, stalling talks or insisting on unreasonable terms and conditions. Ofcom's intervention to resolve disputes may therefore be an important part of the regulatory toolkit.
- 6.7 The nature of the outcome is also different in the two cases. When taking enforcement action, Ofcom can exercise its powers by taking various measures in the light of the specific circumstances in each case, such as enforcement notifications enforceable in civil proceedings, the imposition of penalties, directions suspending service provision sanctioned by a criminal offence, and the giving of Ofcom's consent to parties for the bringing of civil proceedings. In contrast, whilst a determination made by Ofcom for resolving a dispute binds all the parties to the dispute, Ofcom has no further statutory powers available similar to those for taking enforcement action. This may therefore be an issue for all parties to consider.

### Types of dispute

- 6.8 Parliament has conferred on Ofcom functions to resolve only the following four types of regulatory disputes under the Communications Act:
- a dispute relating to the provision of network access (section 185(1) of the Communications Act<sup>46</sup>);
  - a dispute, which is not an 'excluded dispute'<sup>47</sup>, relating to rights or obligations conferred or imposed by or under Part 2 of the Communications Act or any of the enactments relating to the management of the radio spectrum that are not contained in Part 2 (section 185(2) of the Communications Act<sup>48</sup>);
  - a dispute under sections 185(1) or (2) involving other member states, that is to say a cross-border dispute (section 189 of the Communications Act<sup>49</sup>); and
  - a dispute relating to interconnection which would before 25 July 2003 have been referable to the Director General of Telecommunications and Ofcom is satisfied that the circumstances that prevented the making of such a

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<sup>46</sup> This provision implements Article 5(4) of the Access Directive.

<sup>47</sup> Four categories of *excluded disputes* are specified in section 185(7) of the 2003 Act, namely if the dispute is about: (i) obligations imposed on a communications provider by SMP apparatus conditions; (ii) contraventions of sections 125 to 127; (iii) obligations imposed on a communications provider by or under any of sections 128 to 131; or (iv) the operation in the case of a communications provider of section 134.

<sup>48</sup> This provision implements Article 20 of the Framework Directive.

<sup>49</sup> This provision implements Article 21 of the Framework Directive. This type of dispute is not dealt with specifically in these Guidelines.

reference are exceptional (paragraph 22(2) of Schedule 18 to the Communications Act);

### Considering jurisdictional issues and requirements of making a reference

- 6.9 When Ofcom receives a dispute referral, the Communications Act requires Ofcom to decide whether or not it is appropriate for Ofcom to handle the dispute. However, Ofcom is required to make such a decision only after that it is satisfied that the dispute has been referred<sup>50</sup> to Ofcom *under and in accordance with* section 185 of the Communications Act. Two main issues therefore arise for Ofcom's immediate consideration as part of the process of accepting (or, as the case may be, rejecting) a referred dispute.
- 6.10 First, as to whether (or not) the dispute has been referred *under* section 185, Ofcom must consider and be satisfied that the dispute in question falls within one of the four above-mentioned types of regulatory dispute. Subject to the second issue discussed below in paragraph 6.12, this is not a matter of form (i.e. it is not a matter dependant on the disputant telling Ofcom that the dispute is one falling within (say) section 185(1)), but is one of substance. On occasion, it may therefore be necessary for Ofcom to take a preliminary view on these matters and then to reconsider them in more detail in the dispute itself. This is especially the case where the subject-matter of the dispute is inextricably linked with this jurisdictional point.
- 6.11 To take an example, if a dispute has been referred on the basis that there is a dispute between the parties concerning 'interconnection' (so as to fall within section 185(1) of the Communications Act), the opposing party might argue that the dispute does not, in fact, involve interconnection. In such a case, whether or not the dispute concerns interconnection is a matter that is likely to be 'rolled up' with Ofcom's consideration and determination resolving the dispute itself. In contrast, certain disputes referred to Ofcom may, on the information supplied to Ofcom, *prima facie* make it plain that they fall outside Ofcom's powers to resolve them. For instance, if a dispute actually concerns a broadcasting matter falling within Part 3 of the Communications Act and does not relate to the provision of network access, Ofcom may conclude that it is not a dispute referred under section 185 and it therefore has no jurisdiction to resolve it under Chapter 3 of Part 2 of the Communications Act. Also, if one of the parties is not a communications provider (within the meaning of the Communications Act), it may not be referable to Ofcom under that Chapter.
- 6.12 Secondly, as to whether (or not) the dispute has been referred *in accordance with* section 185, Ofcom will consider the disputant's referral submission to ascertain whether it addresses comprehensively and unambiguously all of the information specified in Section 4 (including the manner set out in Annex 5) of these Guidelines. Such clear, comprehensive and unambiguous details are, in particular, important to enable Ofcom to consider the above-mentioned first issue on Ofcom's jurisdiction to resolve a dispute. These Guidelines include below discussion of the possible consequences of a disputant failing to comply with these information requirements, which are to be taken as a notice of requirements under section 185(5) of the Communications Act.

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<sup>50</sup> Where a dispute falls under the transitional provision under paragraph 22(2) of Schedule 18 to the 2003 Act, it will have the effect as if that dispute were a dispute which was referred to Ofcom under section 185.

- 6.13 To provide clarity to disputants of certain relevant questions that Ofcom will address as part of this process, set out below are the two types of dispute that are likely to be most common.

### ***Section 185(1) disputes***

- 6.14 Where a disputant refers to Ofcom a dispute under section 185(1), the first question that Ofcom will consider is whether, in the light of the disputant's submission, the dispute relates<sup>51</sup> to the provision of network access within the meaning of section 151(3).
- 6.15 Secondly, Ofcom will consider whether the dispute relating to provision of network access is a dispute as between relevant parties (as specified in paragraphs (a) to (e) of section 185(1)), namely:
- a dispute between different communications providers;
  - a dispute between a communications provider and a person who makes associated facilities available;
  - a dispute between different persons making such facilities available;
  - a dispute relating to the subject-matter of a condition set under section 74(1) of the Communications Act between a communications provider or person who makes associated facilities available and a person who (without being such a person) is a person to whom such a condition applies; or
  - a dispute relating to the subject-matter of such a condition between different persons each of whom (without being a communications provider or a person who makes associated facilities available) is a person to whom such a condition applies.

### ***Section 185(2) disputes***

- 6.16 Where a disputant refers to Ofcom a dispute under section 185(2), the first question that Ofcom will consider is whether, in the light of the disputant's submission, the dispute relates to rights or obligations conferred or imposed by or under Part 2 of the Communications Act (such as general conditions, SMP conditions, etc.) or any of the enactments relating to the management of the radio spectrum that are not contained in that Part.
- 6.17 Secondly, Ofcom will consider whether the dispute relating to such rights or obligations is a dispute between different communications providers.
- 6.18 Thirdly, Ofcom will consider whether the dispute is an 'excluded dispute' under the terms of the Communications Act (see above).

### ***Accepting or rejecting a referred dispute***

- 6.19 If the disputant's referral submission does not provide sufficient and unambiguous information for Ofcom to address and consider the jurisdictional matters discussed

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<sup>51</sup> Section 185(8) of the 2003 Act clarifies that the disputes that relate to the provision of network access include disputes as to terms or conditions on which it is or may be provided in a particular case.

above, Ofcom will not accept the dispute (on the basis that the reference does not satisfy the requirements as to the manner in which it should be made). Again, these Guidelines should therefore be taken as a notice of requirements under section 185(5) of the Communications Act.

- 6.20 In some cases, where the referral appears to satisfy in Ofcom's view these information requirements, it may however, be apparent to Ofcom that, on the information provided to it, the disputant has drawn materially incorrect conclusions in addressing the jurisdictional questions relevant to the dispute in question.
- 6.21 To take a few examples for the purposes of a section 185(2) dispute, such conclusions might relate to matters, such as the disputant basing his claim by reference to an *ex ante* condition which has been revoked or is plainly irrelevant to the issues raised in the reference, or (say) to a services market in relation to which an SMP condition does not in fact relate, but which nevertheless forms the premise of the dispute.
- 6.22 Taking into account the cost and resource implications the resolution of disputes are likely to have to Ofcom (as well as the parties to the dispute), Ofcom might in these circumstances elect to decide some or all of these issues as preliminary issues instead of or before proceeding to consider the substantial issues raised in the dispute. If Ofcom makes any preliminary findings during the enquiry phase, Ofcom will inform the referring party and, if appropriate, any other parties to the dispute.
- 6.23 However, Ofcom will approach such disputes on a case-by-case basis: it will always consider the most appropriate way of proceeding in each case. This is because Ofcom recognises that, in some cases, these types of issue could prove complex and require full and detailed consideration before the matter can be finally resolved. For example, as already mentioned above, the main issue for Ofcom's determination in resolving a dispute could relate to whether an issue under dispute actually concerns the provision of network access or interconnection.<sup>52</sup>

### Handling the dispute or resolution by alternative means

- 6.24 Having established that the dispute has been referred under and in accordance with section 185, Ofcom must decide whether or not it is appropriate for it to handle the dispute. The Communications Act prescribes that Ofcom may only decline to handle a dispute that has been referred to Ofcom if it considers that:
- alternative means (ADR or other means) exist to resolve the dispute;
  - resolution of the dispute by those means would be consistent with the Community requirements set out in section 4 of the Communications Act; and
  - those means are likely to lead to a prompt and satisfactory resolution of the dispute.
- 6.25 Ofcom will consider on a case-by-case basis whether ADR (or other alternative means) is an option satisfying those conditions. In particular, Ofcom will consider the

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<sup>52</sup> The dispute between BT and Vodafone regarding wholesale connections between BT's and Vodafone's networks (radio base station backhaul circuits), which decision was subsequently appealed to the Competition Appeal Tribunal in *British Telecommunications plc v. The Office of Communications (formerly The Director General of Telecommunications)*, 12 May 2004, [2004] CAT 8, is an example as to the potential complexity of the issues involved.

history of the dispute as set out in disputant's submission (and any supporting evidence of any attempts by the parties to resolve the issues), taking into account also any comments on it that Ofcom receives by the other party or parties.

### ***Existence of alternative mechanisms***

- 6.26 In many commercial contracts, it is common to find escalation clauses so that parties are contractually bound to attempt a negotiated settlement by following a particular process. Parties to litigation are also routinely encouraged by the court to seek to resolve disputes, in whole or in part, by means of ADR prior to the need for formal adjudication or decision.
- 6.27 As a result of these developments in recent years, there are a number of institutions and organisations currently offering a wide range of ADR services, such as the Centre for Effective Dispute Resolution<sup>53</sup> and the Chartered Institute of Arbitrators<sup>54</sup> and so on.<sup>55</sup>
- 6.28 However, the availability of ADR is not the only “*alternative means*” that Ofcom might consider in deciding whether or not to handle a dispute. Ofcom will consider the question of the existence of alternative means for each dispute referred to it on a case-by-case basis. Where Ofcom considers that alternative means might assist the resolution of the parties' dispute, it will work closely with the parties to the dispute to identify how best to proceed. Ofcom expects to do this rarely and has not done so previously.
- 6.29 In this context, we note that Ofcom has established the Office of the Telecommunications Adjudicator (“OTA”), which is independent of Ofcom and industry. Its role is to facilitate the resolution of issues covered by that scheme (primarily in relation to the provision of access to unbundled local loops by Openreach) amongst the companies that have elected to participate in the OTA scheme<sup>56</sup>. Mediation or facilitation by the OTA is an example of alternative means to handle a dispute that Ofcom may consider in particular cases.
- 6.30 In addition, Ofcom notes that the communications industry has taken its own initiative by establishing the Communications Providers' ADR Service.

### ***Consistency with the Community requirements***

- 6.31 Whether or not the resolution of the dispute by alternative means would be consistent with the Community requirements set out in section 4 of the Communications Act is a matter that Ofcom will consider on a case-by-case basis.

### ***Likelihood of a prompt and satisfactory resolution***

- 6.32 ADR (such as mediation) normally offers a number of advantages to more formal dispute resolution, which may be applicable in a particular case.

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<sup>53</sup> <http://www.cedr.co.uk/>

<sup>54</sup> <http://www.arbitrators.org/index.asp>

<sup>55</sup> These serve as examples only as Ofcom has not taken a view that one institution's of services is preferable over another; nor is it possible for Ofcom to suggest that they would be generally suitable in all cases of disputes referred to Ofcom. They illustrate that several types of ADR are already generally available to resolve disputes.

<sup>56</sup> For more information, see <http://www.offta.org.uk> and [http://www.ofcom.org.uk/telecoms/groups/telecoms\\_adj\\_sch/](http://www.ofcom.org.uk/telecoms/groups/telecoms_adj_sch/)

- 6.33 However, the success of alternative means generally depends on the motives and incentives of the parties involved to reach a commercial solution. One type of case showing the absence of such motives and incentives might be where a party has been determined by Ofcom as having significant market power (“SMP”) in a particular market and is subject to *ex ante* regulatory obligations. In such a case, failure by the parties to reach a settlement may result in outcomes that harm the interests of citizens and consumers. Ofcom will therefore consider on a case-by-case basis (and on the information presently before it at the time of the referral) how to proceed.
- 6.34 Whilst the market position of the parties and the policy context within which a dispute arises is important consideration that Ofcom will take into account in deciding whether or not to handle the dispute, it is to be noted that similar disincentives and consumer harm could result from situations other than where one or more parties have SMP. To take an example, the Access Directive<sup>57</sup> anticipates that imbalances in negotiations might be present in non-SMP cases so as to necessitate regulatory intervention by a national regulatory authority:

”In markets where there continue to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services, it is appropriate to establish a framework to ensure that the market functions effectively. National regulatory authorities should have the power to secure, where commercial negotiation fails, adequate access and interconnection and interoperability of services in the interest of end-users. In particular, they may ensure end-to-end connectivity by imposing proportionate obligations on undertakings that control access to end-users. Control of means of access may entail ownership or control of the physical link to the end-user (either fixed or mobile), and/or the ability to change or withdraw the national number or numbers needed to access an end-user’s network termination point. This would be the case for example if network operators were to restrict unreasonably end-user choice for access to Internet portals and services.”

- 6.35 In any event, Ofcom considers that alternative means are normally unlikely to lead to a resolution of the dispute, unless all the parties agree that it is the most appropriate mechanism. Therefore, Ofcom’s general position is to decide that it is appropriate for it to handle such cases.

### ***Notifying the parties of Ofcom’s decision***

- 6.36 As soon as reasonably practicable after Ofcom has decided whether or not it is appropriate to handle the dispute, it will inform the parties to the dispute of its decision and the reasons for it. Ofcom’s notification will state the date on which the decision was taken. As mentioned in section 2 of these Guidelines, Ofcom’s regulatory principles provide that it normally consults widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation upon a market. However, Ofcom does not consider that the decision to handle (or, as the case may be, not to handle) a dispute is a decision that in itself imposes regulation. Accordingly, Ofcom will not consult on such decisions before they are taken.

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<sup>57</sup> See 6<sup>th</sup> recital to the Access Directive’s preamble.

## Referring disputes back to Ofcom

- 6.37 Where Ofcom has decided not to handle the dispute but it has not been resolved by alternative means before the end of the four months after the day of Ofcom's decision, the dispute may be referred back to Ofcom by one or more of the parties to the dispute. Ofcom envisages that any referral back should include full details of the steps that the parties have taken to try and resolve the dispute by alternative means, information on why resolution has not been achieved by these alternative means and a clear statement of the matters that remain in dispute. It should also include confirmation of whether the information included in the original dispute remains relevant.
- 6.38 The four month timetable for resolving the dispute will begin from the day the dispute is referred back to Ofcom. Ofcom will then scope and plan its handling of the dispute.

## Scoping of a dispute

- 6.39 At the start of an investigation dealing with a dispute, Ofcom will publish a Competition Bulletin entry setting out the scope of the dispute, and will not generally alter the scope during the investigation. Ofcom will allow five working days for interested parties to comment on the published scope of the dispute. The purpose of defining a scope is so that it is clear to the parties and Ofcom from the outset of an investigation precisely those issues Ofcom will be required ultimately to resolve by way of a determination. Ofcom's experience in dealing with disputes also shows that, in order to resolve a dispute within the 4 month statutory timeframe, it is essential to define the scope in as precise terms as is possible.
- 6.40 If the submission includes a request for Ofcom to consider issues on which commercial negotiations have not taken place, or where there has been no reasonable or genuine attempt to engage in negotiations, these issues will not generally be included in the statement of scope and will not generally be addressed by Ofcom. However, in some cases, it may be necessary to include matters which have not been the specific subject matter of negotiations in order to determine a particular dispute, for example where the subject matter of a dispute potentially raises a number of regulatory obligations but commercial negotiations have focussed only on one of those obligations.

## Consulting on the outcome of disputes

- 6.41 Ofcom has discretion under section 188(3) of the Communications Act to decide its procedure for the consideration and determination of the dispute as it considers appropriate.
- 6.42 Before making a final determination in relation to a dispute, Ofcom will normally consult on its proposed determination. This approach is consistent with Ofcom's regulatory principles mentioned in section 2 of these Guidelines. However, in some cases, Ofcom may decide to depart from this practice, particularly where it considers that it is practicable and it would otherwise be consistent with Ofcom's duties. If Ofcom decides to depart from this practice, Ofcom will set out its reasons for doing so.
- 6.43 That said, Ofcom considers that, in general, consultation prior to making its final determination has a number of advantages, including offering an opportunity for the parties to comment on any factual or other errors they consider Ofcom has made in its draft determination or to make observations on submissions made by the other

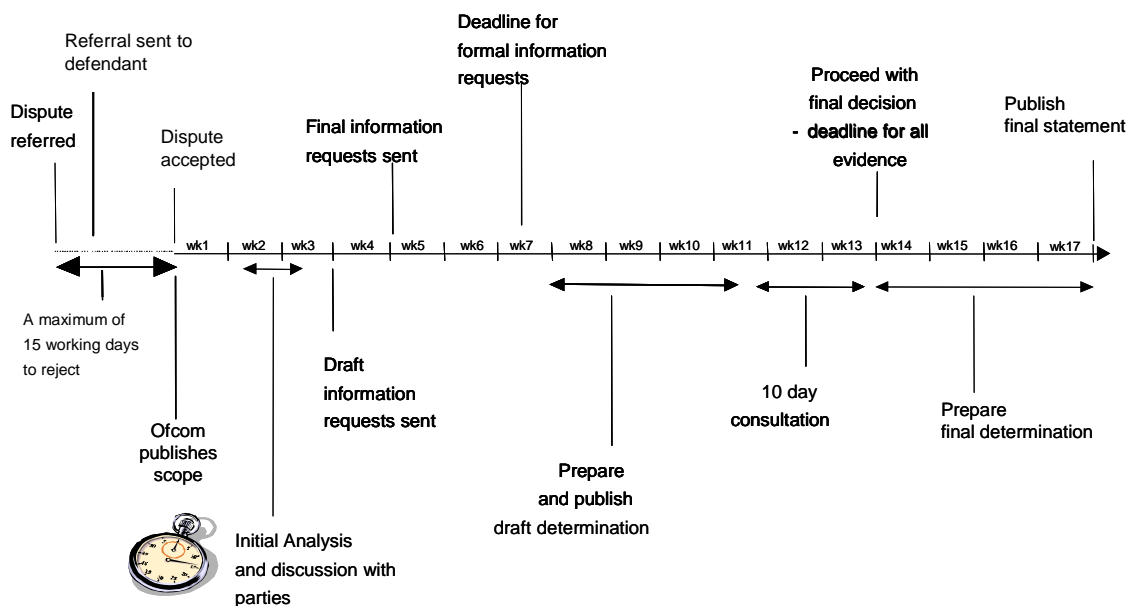
parties to the dispute. Where a number of stakeholders may be affected, or where there are issues likely to directly affect citizens and consumers, Ofcom may consult publicly by publishing details of its proposed determination on its website and seeking comments. However, where the outcome of a dispute is likely to be only of interest to the parties involved, consultation will be limited to the parties and may be less formal in nature.

- 6.44 Normally, Ofcom expects to allow 10 working days for representations to be made on its draft determination. In some cases, Ofcom may reduce that 10 working day period to a shorter period appropriate to the circumstances of each case. Ofcom acknowledges that 10 working days (or less) is a challenging timetable and will give as much advance warning as possible of consultations. However, as Figure 1 below illustrates, longer periods of consultation are neither feasible nor desirable given Ofcom's statutory obligation to resolve disputes within 4 months (unless the circumstances are, in Ofcom's view, exceptional in the dispute in question).
- 6.45 In accordance with section 188(7)(a), Ofcom will send a copy of its final determination, together with a full statement of its reasons for it, to every party to the dispute. In addition, Ofcom will normally publish a non-confidential version of the final determination on its website. Publication will normally take place even where stakeholders (other than the parties to the dispute) have not been invited to comment on Ofcom's draft determination.
- 6.46 In this context, Ofcom generally considers that, unless the parties are able to show that public disclosure of information relating specifically to the affairs of the party concerned would seriously and prejudicially affect the interests of that party, the publication of final determinations regarding a regulatory dispute is in the public interest. This is because, as discussed above, disputes resolved by Ofcom are regulatory in their nature and it forms part of Ofcom's regulatory principles to regulate in a transparent manner. Ofcom will have regard to its duties under sections 26 and 393 of the Communications Act before publishing or disclosing information.
- 6.47 Further, as Ofcom's determinations are subject to appeals to the Competition Appeal Tribunal under section 192 of the Communications Act, it is important that its determinations show on their face how Ofcom has considered representations made to it during its investigation. Ofcom therefore takes the general view that disclosure of information about a particular business (as well as of submissions made to Ofcom on matters in dispute) is normally necessary for the purpose of facilitating the carrying out by Ofcom of its dispute resolution functions.
- 6.48 Whether or not the publication of specific information would or might seriously and prejudicially affect the interests of a party is a matter for Ofcom to determine. Although the parties are generally invited to indicate whether and, if so, on what grounds particular information is commercially confidential and sensitive whenever it provides information to Ofcom, it is not Ofcom's normal practice to invite comments-on-comments with regard to Ofcom's expressed view on parties' confidentiality markings in disputes. Also, Ofcom does not regard submissions of legal or regulatory policy argument to be confidential and they will therefore be disclosed publicly.
- 6.49 In contrast to Ofcom's previous practice, Ofcom will no longer specifically invite interested stakeholders to make themselves known to Ofcom and submit information or evidence, when publishing a Competition Bulletin entry. This practice has not added value to disputes previously and therefore Ofcom does not propose to continue the practice. However, any such interested stakeholder, who considers that they might have useful information or evidence for the purpose of Ofcom's

investigation of a dispute, is generally encouraged to contact Ofcom at the earliest possible stage of its investigation phase.

- 6.50 As noted above, Ofcom must resolve disputes within a statutory timetable. Except in exceptional circumstances or where the court orders the handling of the dispute by Ofcom to be stayed or sisted, Ofcom must make their determination no more than 4 months after the day of its decision to handle the dispute (or, as the case may be, after the day on which the dispute is referred back to it).
- 6.51 Sometimes, circumstances arise which make it impossible, or undesirable, for Ofcom to resolve a dispute within 4 months. The Communications Act explicitly contemplates that, exceptionally, disputes will take longer than 4 months.
- 6.52 Circumstances which have led to disputes requiring longer than 4 months to resolve include the issue in dispute either being or about to be considered by Ofcom as part of a policy project. In these cases, Ofcom did not resolve the dispute until after the policy project had been completed. In all circumstances, Ofcom will seek to resolve disputes that have gone on longer than 4 months as quickly as possible and treat those cases as a priority.
- 6.53 Figure 1 below sets out a typical timeline of a dispute resolution with consultation in order to resolve a dispute within the normal statutory timetable.

**Figure 1: Typical timeline of a dispute resolution with consultation**



## Resolving a dispute

### Main powers in spectrum disputes

- 6.54 In the case of a dispute relating to rights and obligations conferred or imposed by or under the enactments relating to the management of the radio spectrum, Ofcom’s

main power<sup>58</sup> to make a determination for resolving the dispute is limited to making a declaration setting out the rights and obligations of the parties to the dispute.

### **Main powers in all other types of dispute**

- 6.55 In the case of all referable disputes other than spectrum disputes, Ofcom's main power<sup>59</sup> to make a determination for resolving the dispute is to do one or more of the following:
- to make a declaration setting out the rights and obligations of the parties to the dispute;
  - to give a direction fixing the terms or conditions of transactions between the parties to the dispute;
  - to give a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom; and
  - for the purpose of giving effect to a determination by Ofcom of the proper amount of a charge in respect of which amounts have been paid by one of the parties of the dispute to the other, to give a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment.
- 6.56 Ofcom will use its discretion on a case-by-case basis as to which of these powers it should exercise in resolving the regulatory dispute in question, given (among other things) the published scope of the dispute. In particular, where the issue in the dispute relates to *ex ante* regulation already imposed by Ofcom (such as following an SMP market review), Ofcom will normally have regard to such regulation in resolving the dispute to ensure that, so far as is possible and practicable and in the light of Ofcom's duties and regulatory principles, the regulation is consistent in outcomes.
- 6.57 In the case of a dispute referred back, Ofcom may<sup>60</sup>, in making its determination, take account of decisions already made by others in the course of an attempt to resolve the dispute by alternative means. Ofcom's final determination may therefore include provision ratifying such decisions. However, as Ofcom will always recognise the "without prejudice" nature of such negotiations, Ofcom will approach each dispute referred back afresh and consider such decisions carefully and objectively, so that no party is at a disadvantage in making a genuine attempt to settle the dispute by alternative means. In any event, Ofcom would only take account of such decisions if it would be consistent with achieving the policy objectives of Article 8 of the Framework Directive, as required by section 4 of the Communications Act.

### **Costs and expenses in dealing with disputes**

- 6.58 In dealing with a regulatory dispute, both Ofcom and the parties will normally incur costs such as legal costs and expenses by, for example, taking up the time of senior managers and internal experts.

<sup>58</sup> Section 190(3) of the 2003 Act.

<sup>59</sup> Section 190(2) of the 2003 Act.

<sup>60</sup> Section 190(5) of the 2003 Act.

- 6.59 As regards a party's costs and expenses, Ofcom may<sup>61</sup>, in its final determination resolving the dispute, require a party to the dispute to make payments to another party to the dispute in respect of costs and expenses incurred by that other party in consequence of the reference of the dispute to Ofcom, or in connection with it.
- 6.60 In addition, Ofcom may<sup>62</sup>, in its final determination resolving the dispute, require a party to the dispute to make payments to Ofcom in respect of costs and expenses incurred by it in dealing with the dispute. However, Ofcom may only require such payments where:
- the dispute relates to the rights and obligations of the parties to the dispute under the enactments relating to the management of the radio spectrum; or
  - it appears to Ofcom that the reference of the dispute by that party was frivolous or vexatious or that that party has otherwise abused the right of reference conferred by Chapter 3 of Part 2 of the Communications Act.
- 6.61 Normally, Ofcom would expect that wider benefits to the public interest will be the effect of it resolving a regulatory dispute, particularly as the resolution should be aimed at achieving the policy objectives of Article 8 of the Framework Directive. However, in some referred disputes, it may be the case that, despite Ofcom acting in accordance with its duties under section 4 of the Communications Act, the resolution is unlikely, in Ofcom's opinion, to result in wider public interests such as ultimately benefiting consumers or citizens in relevant markets in terms of (among other things) choice, prices and quality.
- 6.62 Therefore, where Ofcom considers that mainly the private interests of a party are at stake in resolving a dispute, it will normally be minded not to require the payment of costs and expenses incurred by another party. However, there may be circumstances where it is appropriate to make a direction with respect to costs. For example, to the extent that Ofcom would regard any particular party to a dispute as being 'unsuccessful' in relation to its final determination, if such unsuccessful party shows that the successful party acted unreasonably in refusing to agree to ADR (instead of referring the dispute to Ofcom), Ofcom may make an order as to costs in favour of that unsuccessful party. However, Ofcom will approach this issue on a case-by-case basis in each referred dispute and determine it by having regard to all the circumstances of the particular case.
- 6.63 Factors which may be relevant to the question of costs may include (but are not limited to): (i) the conduct of the parties both prior and during Ofcom's investigation of the dispute, including the extent to which the parties have genuinely (and not as a tactical ploy or otherwise) attempted to resolve its dispute; (ii) the nature of the dispute is inappropriate for resolution through ADR because, for instance, a meaningful negotiation would require Ofcom's determination on issues of law or construction under relevant legislation or regulation; (iii) a party reasonably believes he has a strong case on the merits; (iv) the costs of ADR would be disproportionately high in relation to quantifiable sums (if any) at stake in the dispute; (v) ADR would have had a reasonable prospect of success; and (vi) Ofcom have encouraged the parties to agree to ADR or to settle and withdraw the dispute by reference to discussions or possible solutions emerging as part of Ofcom's investigation into the dispute.

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<sup>61</sup> Section 190(6)(a) of the 2003 Act.

<sup>62</sup> Section 190(6)(b) of the 2003 Act.

- 6.64 Where a party requests Ofcom to award it such costs and expenses, that party is required in its complaint submission (or, if the party is a respondent to the dispute, in its comments on the complaint submission) to provide detailed submissions explaining how the wider public interests would be served by imposing such a requirement in Ofcom's final determination, together with its submissions addressing the above-mentioned factors (as well as any other factors it considers that Ofcom should have regard to).
- 6.65 In deciding on this matter, Ofcom will normally also have regard to the fact that many parties will usually be in a constant regulatory dialogue with Ofcom about regulatory or policy matters. Its starting point is therefore that costs of maintaining specialised regulatory and compliance departments, and taking specialised advice, are costs that should normally not be recoverable, unless the requesting party demonstrates convincingly to Ofcom's satisfaction that special circumstances apply to the dispute in question. The party requesting costs and expenses will also be required to produce a detailed schedule of its costs and expenses at such time as Ofcom requires it.
- 6.66 To resolve the dispute within the 4 month timeframe, Ofcom expects that it would normally only determine the issue of liability of a party to pay another party's costs and expenses in its final determination in resolving the main issue(s) of the dispute. Where Ofcom decides that a party should pay such costs and expenses, it generally considers this to be an exceptional circumstance and it will therefore issue a further determination outside the 4 month timeframe setting out its detailed assessment of costs and expenses to be paid.
- 6.67 As regards payment of Ofcom's costs, it may require payment of its costs and expenses in dealing with spectrum disputes from either or both parties to the dispute, depending on the circumstances in each case. In addition, Ofcom will normally require payment for its costs and expenses in dealing with all disputes from a referring party if it considers that party was frivolous or vexatious in making a reference or if it has otherwise abused the right of reference conferred by Chapter 3 of Part 2 of the Communications Act. In exercising this power, Ofcom will take into account all the circumstances and information before it in each case that might suggest that the referring party has abused the dispute resolution process.

## **Pursuing other proceedings or regulatory activity**

### ***Civil or criminal proceedings in or before a court***

- 6.68 Where a dispute is referred or referred back to Ofcom, the reference does not prevent the person making it, another party to the dispute, Ofcom, or any other person, from bringing, or continuing, any legal proceedings with respect to any of the matters under dispute.
- 6.69 If, in any legal proceedings with respect to a matter to which a dispute relates, the court orders the handling of the dispute by OFCOM to be stayed or sisted:
- Ofcom is required to make a determination for resolving the dispute only if the stay or sist is lifted or expires; and
  - the period during which the stay or sist is in force must be disregarded in determining the period within which Ofcom is required to make such a determination.

### ***Ofcom's enforcement activities***

6.70 As discussed in section 3 of these Guidelines, Ofcom has a number of powers to take action to enforce regulatory rules or competition law. It is therefore to be noted that a reference or reference back to Ofcom of a dispute does not prevent Ofcom from:

- giving a notification in respect of something that it has reasonable grounds for believing to be a contravention of any obligation imposed by or under any an enactment;
- exercising any of its other powers under any enactment in relation to a contravention of such an obligation; or
- taking any other step in preparation for or with a view to doing anything mentioned in the preceding paragraphs.

### ***Other Ofcom regulatory activities***

6.71 In addition, Ofcom may exercise the following powers in consequence of its consideration of any dispute:

- its powers under Chapter 1 of Part 2 of the Communications Act to set, modify or revoke general conditions, universal service conditions, access related conditions, privileged supplier conditions or SMP conditions;
- its powers to vary, modify or revoke wireless telegraphy licences or grants of recognised spectrum access;
- its power to make, amend or revoke regulations under section 1 or 3 of the Wireless Telegraphy Act 1949.

## Section 7

# Enforcing laws that protect consumers

## Consumer protection is a priority for Ofcom

- 7.1 In the 2006/07 Annual Plan, Ofcom identified 9 priorities. One of these priorities was the protection of citizens and consumers. Ofcom aims to protect consumers and citizens in a number of ways, including by taking appropriate enforcement action.
- 7.2 Investigations, and enforcement, are an important element in Ofcom's work to address this priority, but are also only elements in a wider strategy, which includes work in consumer policy (setting the strategic direction of Ofcom's approach to consumer issues) and the handling of consumer complaints through the Ofcom Contact Centre and the Ofcom website.
- 7.3 Ofcom has specific powers as a designated enforcer under Part 8 of the Enterprise Act, as well as powers to apply some consumer protection legislation directly, such as the Unfair Terms in Consumer Contracts Regulations. Ofcom has also set a number of regulatory conditions that regulate the way in which companies offer services to residential and small business customers, such as rules on sales and marketing activity, and the requirement to offer customers an avenue of complaint through an independent alternative dispute resolution body. Ofcom's process for the investigation and enforcement of these regulatory conditions is outlined in section 5. Ofcom liaises with the OFT and other enforcement agencies including Trading Standards and the police to assess which agency is best placed to act in consumer cases. Ofcom's enforcement may be in parallel with another agency in appropriate cases.
- 7.4 Another important element in consumer protection is Ofcom's role as a back-stop enforcer to the decisions of ICSTIS, the co-regulatory agency for premium rate services.

## Ofcom's role under Part 8 of the Enterprise Act

- 7.5 Ofcom is a "designated enforcer" under Part 8 of the Enterprise Act, meaning that it is empowered to take action to enforce certain consumer protection legislation<sup>63</sup>, including the Unfair Terms in Consumer Contracts Regulations<sup>64</sup> and the Distance Selling Regulations<sup>65</sup> and Control of Misleading Advertising Regulations. Ofcom will consider complaints suggesting a breach of one or more pieces of relevant legislation and investigate where it believes the evidence demonstrates a business practice which does not comply with that legislation. Ofcom has powers under the Enterprise Act to request undertakings from a trader in respect of future conduct and, where such undertakings are not given (or are given and subsequently broken), to seek an order from the court. Any breaches of orders made by the court may lead to financial penalty or even imprisonment for contempt of court.

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<sup>63</sup> The Director General of Telecommunications is listed as a designated enforcer in the schedule of the Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003

<sup>64</sup> <http://www.opsi.gov.uk/si/si1999/19992083.htm>

<sup>65</sup> <http://www.opsi.gov.uk/si/si2000/20002334.htm>

- 7.6 Ofcom also has a role in considering any ‘super-complaints’ made under the Enterprise Act in respect of communications markets. The Secretary of State for Trade and Industry can designate certain bodies which represent consumers to make super-complaints. Super-complaints can be made to Ofcom by a designated consumer body when it thinks that one or more features of a market may be harming consumers to a significant extent.<sup>66</sup>
- 7.7 On receipt of a super-complaint, Ofcom considers the evidence submitted and may investigate further to establish the extent, if any, of the alleged problems. Ofcom must then publish a response within 91 days of receipt of the super-complaint stating what action, if any, it proposes to take in response to the complaint and giving reasons for its decision.<sup>67</sup>
- 7.8 Further action may include a market study by Ofcom, enforcement action by Ofcom or referral of the market to the Competition Commission for further investigation, or by any other action available to Ofcom.

### **Unfair Terms in Consumer Contracts Regulations**

- 7.9 In relation to the UTCCRs, Ofcom may consider complaints brought by consumers in relation to allegedly unfair terms. Ofcom may also consider the other terms and conditions of the provider in question, and may raise any obvious concerns or issues with the provider in question.
- 7.10 If a provider does not amend its contract terms and Ofcom remains concerned over the nature of those terms, then Ofcom may take the provider in question to court to seek a ruling on the legitimacy of those terms. Only the court can ultimately decide whether a particular term is ‘unfair’ or not, and Ofcom may decide to reserve its position in lieu of court action if it believes the issue is not sufficiently serious to merit formal action at that time. Taking such a position does not prevent Ofcom from reconsidering the matter, however, in the light of further evidence or consumer complaints.
- 7.11 Although Ofcom has powers to enforce the UTCCRs both directly and under the provisions of Part 8 of the Enterprise Act, for policy and case handling reasons it will generally only undertake the latter where there is evidence of persistent infringement of the UTCCRs over a period of time, evidence that the collective interests of consumers in the UK are being harmed, or where a provider’s conduct also raises issues under other pieces of consumer protection legislation, as well as the UTCCRs.

### **Enforcement of the PRS Code and ICSTIS Directions**

- 7.12 ICSTIS<sup>68</sup> is the co-regulatory agency tasked with regulating the provision of premium rate services (“PRS”). PRS offer consumers with some form of content, product or service via fixed and mobile telecoms lines, and is charged to users’ telephone bill as defined in the Communications Act. The statutory provisions for regulation of PRS are set out at sections 120 to 124 of the Communication Act).

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<sup>66</sup> See further guidelines OFT518 Overview of the Enterprise Act at section 8.

<sup>67</sup> See further guidelines OFT504 Super-complaints: guidance for designated consumer bodies.

<sup>68</sup> ICSTIS is the Independent Committee for the Supervision of Standards of Telephone Information Services ([www.icstis.org.uk](http://www.icstis.org.uk))

- 7.13 Those who offer PRS to members of the public are required to comply with the ICSTIS Code of Practice (“the Code”), which is prepared by ICSTIS in consultation with industry and the public and which has been approved by Ofcom.<sup>69</sup>
- 7.14 Under the Code, ICSTIS can issue directions, and impose penalties (fines) on those who do not comply with the terms of the Code.
- 7.15 In the event that a communications provider does not comply with ICSTIS directions, then ICSTIS can refer that matter to Ofcom for enforcement action.
- 7.16 Ofcom expects to accept ICSTIS referrals for investigation other than in exceptional circumstances. The purpose of the investigation will be to establish whether there are reasonable grounds for believing that a communications provider has failed to comply with a direction given by ICSTIS for the purpose of enforcing its Code, as required by the PRS Condition.
- 7.17 Failure to comply with ICSTIS directions undermines the co-regulatory scheme for PRS and thereby threatens a regime that operates in the interests of citizens and consumers.
- 7.18 Where there are reasonable grounds for believing that a communications provider has contravened the PRS Condition, Ofcom expects to take enforcement action. Where there is on-going harm to consumers, Ofcom may seek to take urgent action to bring that harm to an end, including directing suspension of service provision under s124 Communications Act in appropriate cases.

### **Enforcement of Persistent Misuse provisions of the Communications Act**

- 7.19 Where Ofcom has reasonable grounds for believing that a person has engaged in any form of pattern of behaviour or practice using an electronic communications network or service that has the effect or likely effect of causing another person unnecessarily to suffer annoyance, inconvenience or anxiety (defined as “persistent misuse”), Ofcom can take action to identify that conduct<sup>70</sup>, and – if it continues and once a period for representations has expired – require the misuse to be brought to end<sup>71</sup> and/or impose a penalty of up to £50,000 per contravention after following the procedure set out in the Communications Act.<sup>72</sup>
- 7.20 Ofcom has issued a statement of policy setting out its approach to the exercise of its powers in relation to persistent misuse of an electronic communications network or service (under sections 128 to 130 of the Communications Act).<sup>73</sup>
- 7.21 In summary, Ofcom considers that a wide variety of forms of conduct that annoy, inconvenience or worry consumers is appropriately dealt with as persistent misuse and that new forms of conduct previously not identified as persistent misuse will still be caught by these provisions notwithstanding that those forms of conduct are not specifically described in the statement of policy, in the event that consumers suffer

<sup>69</sup> Further information available on PRS (including links to relevant documents) can be found on Ofcom’s website at <http://www.ofcom.org.uk/telecoms/ioi/nwbnd/prsindex/>

<sup>70</sup> By issuing a notification under section 128 of the Communications Act.

<sup>71</sup> By issuing a notification to the misuser under section 129 of the Communications Act

<sup>72</sup> Communications Act, section 130(1). Note that the maximum penalty is set by the Secretary of State. £50,000 was set as the maximum penalty as at the time these Guidelines are issued but this amount may change over time.

<sup>73</sup> [http://www.ofcom.org.uk/consult/condocs/misuse/misuse\\_state.pdf](http://www.ofcom.org.uk/consult/condocs/misuse/misuse_state.pdf)

the harm described above as an effect or likely effect of that conduct, and the behaviour is persistent.

## Section 8

# Enforcing BT's undertakings

## The BT Undertakings

- 8.1 On 22nd September 2005 Ofcom decided to accept undertakings from British Telecommunications Group plc ("BT") in lieu of a reference of certain markets to the Competition Commission under the Enterprise Act 2002.
- 8.2 The Undertakings comprise a new regulatory stage between Ofcom and BT, with the ultimate beneficiaries being citizens and consumers who will benefit from fairer and more intense competition between the entities that rely on access to the BT network to deliver services to their customers.

## Ofcom's role in ensuring BT adhere to the spirit and the letter of the Undertakings

- 8.3 Ofcom accepted Undertakings from BT in order to address a number of concerns in specified telecoms markets. Ofcom publishes implementation reports in which it monitors BT's progress towards implementation of its undertakings<sup>74</sup>. Whilst the implementation reports describe BT implementation in respect of its Undertakings, Ofcom can only reach a definitive view of compliance in relation to a particular complaint or allegation of non-compliance by BT by carrying out an investigation.
- 8.4 In terms of process, Ofcom aims to handle complaints received about BT's compliance with the Undertakings in the same way as other complaints about a failure by a communications provider to comply with an *ex ante* rule (although recognising that there are some important differences that mean that this approach may need to be adapted to some extent).
- 8.5 That means that such complaints will only be accepted if they are clear and contain supporting evidence, as set out previously in these Guidelines. Any submissions that are accepted would then be handled by a case leader and case team, and go through an enquiry phase, during which Ofcom will aim to set the subject of any investigation, and decide to conduct an investigation.
- 8.6 Ofcom expects that the investigations process is more appropriate for cases where there is an allegation involving the letter of the Undertakings. Adherence to the spirit of the Undertakings is less suitable, and allegations that have, at their core, a concern about BT's adherence to the spirit of the undertakings are less likely to be suitable for the investigations process.

## Those considering complaints in relation to the Undertakings should consider all their options

- 8.7 Within the Undertakings, BT has undertaken to establish (and has since established) an Equality of Access Board ("EAB") and the Equality of Access Office ("EAO").
- 8.8 The EAO in particular is tasked by the EAB with investigating potential instances of non-compliance with the Undertakings. Complainants considering bringing a complaint that relates to BT's compliance with the Undertakings should also consider

<sup>74</sup> <http://www.ofcom.org.uk/telecoms/btundertakings/implementation/>

whether they feel it is appropriate to engage first with the EAB, Openreach or other part of BT if relevant directly to resolve matters.

- 8.9 There is no requirement on parties bringing complaints in relation to BT's compliance with the Undertakings to first raise their concerns with the EAO or BT. However, Ofcom suggests that those considering making such a complaint should consider this option.

### **Possible actions in response to breaches of the Undertakings**

- 8.10 Following an investigation into potential breaches of the Undertakings, Ofcom can consider taking action against BT under either the Undertakings themselves or the Enterprise Act.

- 8.11 Action under part 15 of the Undertakings:

- Where Ofcom has reasonable grounds to believe that BT has breached any of the Undertakings it can issue a notification to BT. Such a notification must specify the Undertakings which Ofcom believes have been breached and Ofcom's reasoning for reaching this view. The notification should also attach a draft Direction which may set out the steps BT should take to ensure future compliance. BT should be given at least one month to comment on the notification and draft Direction;
- Where Ofcom has issued a notification and considered any representations received from BT and is satisfied that BT is in breach of the Undertakings then Ofcom can issue a Direction setting out the steps BT should take to ensure compliance. breach(es) and Ofcom's reasons can issue Notification of breach under section 15 of the UILs (plus can request info as part of investigation under section 14); and
- Where BT has received a Direction, it may within 2 weeks (or longer if agreed with Ofcom) give notice to Ofcom that it either (a) accepts the Direction; or (b) that the BT Board does not accept the Direction. Where the BT Board does not accept the Direction, it shall not have effect. If no notice is given BT, then the Direction will be taken to apply. Where BT accepts a Direction, it shall comply with it and failure to do so would constitute a breach of the Undertakings.

- 8.12 Action under the Enterprise Act:

- The Undertakings may be enforced by civil proceedings for an injunction or for interdict or for any other appropriate relief or remedy brought by Ofcom under section 167(6) Enterprise Act.
- Under Section 15.3 of the Undertakings no prior finding or direction under the Undertakings is required for there to be a breach of the Undertakings. In addition, no direction under the Undertakings is required as a prerequisite of taking action under the Enterprise Act.
- Under section 167(3) of the Enterprise Act, a duty will be owed by BT to any person who may be affected by the breach.

## Section 9

# Enforcing *ex ante* conditions and rules

### Ofcom will publish the outcome of every investigation

- 9.1 Ofcom intends that each time it concludes an investigation, the relevant Competition Bulletin entry will set out the basis on which the matter is closed. Ofcom intends that in most cases, it will publish a non-confidential version of any notification or decision it reaches in its investigation in line with the general principle of transparency and in order to inform stakeholders of its approach to enforcement.
- 9.2 In relation to investigations concerning alleged contraventions of *ex ante* conditions or other regulatory rules, Ofcom will decide whether there are reasonable grounds for believing that a contravention has occurred or is occurring. If Ofcom considers that there are reasonable grounds for believing that a contravention has occurred or is occurring, Ofcom will consider what, if any, action to take.
- 9.3 During an investigation, before or after reaching a decision regarding an alleged contravention, Ofcom may elect to take actions other than statutory enforcement, if Ofcom considers that doing so would be consistent with Ofcom's duties.
- 9.4 Once Ofcom is satisfied that there are not reasonable grounds for believing that a contravention has occurred or is occurring, Ofcom may close the investigation. In that case, Ofcom may publish a case closure document, to provide a more detailed statement of reasons for reaching that view (for example, if there are points of wider application that might be clarified in a case closure document), or it may simply close the case and publish a Competition Bulletin entry.

### Outcomes other than statutory enforcement

- 9.5 Ofcom may consider, and may accept, informal assurances in some cases in respect of conduct under investigation under the Communications Act and may decide to close a case on the basis of those assurances.
- 9.6 In some cases, informal assurances will not be appropriate. For example, if a case raises issues that affect a wide group of stakeholders, or members of the public, then it may not be appropriate. In each case where it is relevant, Ofcom will form a judgement based on the facts of the case, the terms of the proposed assurance and Ofcom's duties in relation to citizens and consumers and parties likely to be affected by Ofcom's decision.
- 9.7 It is generally rare that assurances would be accepted if a case is nearing completion or in compliance activity (i.e. after statutory enforcement has begun).
- 9.8 Ofcom will generally only accept informal assurances on the following basis:
- It furthers the interests of citizens and consumers for Ofcom to do so (for example, because it addresses a problem (that does not have wider import) in a cost-effective way);
  - The assurances address the concerns raised by Ofcom in any investigation;

- The assurances are provided in writing in the form of a (non-statutory) undertaking, signed by a senior officer of the company;
- The party giving the assurances consents to a non-confidential version of the assurances being published on Ofcom's website and/or the Competition Bulletin;
- The assurances include a measurable commitment to some form of compliance monitoring in the future.

9.9 Some or all of these points may not apply in particular cases, or may not be relevant, and any decision to accept informal assurances will be made on a case-by-case basis. Ofcom is never bound to accept any informal assurances, nor is Ofcom obliged to end an investigation simply because the conduct being the subject of the complaint has ceased. Ofcom's powers of enforcement relate to past, as well as current, conduct.

### **Issuing a notification under section 94**

9.10 If Ofcom has reasonable grounds to believe that a person has contravened, or is contravening, a condition set under the Communications Act, it may issue a notification under section 94 to that person.

9.11 It is in the interests of citizens and consumers that, where conditions under the Act have been imposed on communications providers, those conditions are backed up by effective enforcement action. Therefore where, having investigated, Ofcom considers that there are reasonable grounds to believe that a contravention is occurring, Ofcom expects to issue a section 94 notification unless there is a good reason not to do so.

9.12 Factors that would weigh against issuing a section 94 notification include:

- If the contravention has been brought to an end, and there is no public policy benefit in having a clear statement of Ofcom's view of the standard of conduct expected of communications providers. (Note that simply bringing the contravention to an end will not, of itself, provide a strong case for Ofcom not to issue a section 94 notification, particularly if the contravention was only ended after the enquiry or investigation had commenced); or
- If the contravention is trivial or *de minimis*, and the communications provider has undertaken to Ofcom to cease the conduct, remedy any consequences (where relevant) and to establish a compliance process to prevent recurrence.

### **Issuing an enforcement notification under section 95**

9.13 A notification under section 95 is an enforcement order requiring a communications provider to take certain actions in relation to a contravention of a condition set under the Communications Act following a section 94 notification.

9.14 Ofcom will consider proceeding to a section 95 enforcement notification where it is satisfied following the period allowed in the section 94 notification that the provider has not take all such steps as Ofcom considers appropriate to comply with the condition set out in the section 94 and for remedying the consequences of the notified contravention. In particular, Ofcom expects to proceed to a section 95

notification where there is some specific action by the communications provider that would be consistent with Ofcom's objective to further the interests of citizens and consumers. For example, a section 95 notification may be used where the recipient of a section 94 has not taken all reasonable steps to remedy the consequences of its contravention to require actions to be taken to compensate consumers for harm suffered as a result of a contravention.

- 9.15 A section 95 notification is not a pre-requisite to the setting of a penalty under section 96 and Ofcom may issue a section 95 notification at the same time as imposing a penalty, or may, depending on the circumstances of the case, move directly to impose a penalty in relation to a failure to comply with a notification issued under section 94.

### **Imposing a penalty under section 96**

- 9.16 If a person who has received a notification under section 94 fails to comply with the terms of that notification, Ofcom may impose a penalty under section 96. The purpose of a penalty is to punish unlawful conduct and to create a deterrent effect for all stakeholders, helping to ensure Ofcom's objective of furthering the interests of citizens and consumers by helping to foster widespread compliance with legislation and regulatory rules. Parties should consider Ofcom's separate Guidelines on the setting of an amount of a penalty.<sup>75</sup>
- 9.17 Although each case will be considered on the relevant facts, Ofcom would normally expect to impose a penalty in each case where a communications provider has failed to comply with a section 94 notification in a material respect, unless there is a good reason not to do so.

### **Ofcom giving consent for civil proceedings under section 104**

- 9.18 Ofcom will consider on a case-by-case basis whether to grant consent (and whether such consent should be subject to conditions) under section 104 for the bringing of proceedings for civil liability for breach or conditions or enforcement notification. To date Ofcom has not yet granted consent but will publish details of any consents granted in the competition bulletin subject to confidentiality issues.

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<sup>75</sup> <http://www.ofcom.org.uk/about/accoun/pg/penguid.pdf>

## Section 10

# Enforcing competition law

## Ofcom's concurrent power to enforce competition law

- 10.1 Ofcom exercises its powers as a national competition authority following the Concurrency Regulations<sup>76</sup> and the European Commission's Notice on Cooperation within the Network of Competition Authorities (the "Network Notice")<sup>77</sup>. Where Ofcom receives a competition complaint, Ofcom will agree with the OFT at an early stage which authority (the OFT or Ofcom) is best placed to act and therefore should proceed in the case (including where appropriate sending a copy of the complaint to the OFT). This step is usually taken at the outset of a formal investigation prior to Ofcom using any formal investigatory powers. Equally, the OFT may pass competition complaints made to the OFT in relation to the communications sector to Ofcom to agree which authority should proceed in the case. In certain cases, the OFT or Ofcom may pass the investigation of a complaint to the other authority at a later stage in an investigation where the OFT and Ofcom agree to transfer an investigation and subject to notifying the company under investigation under Rule 7, Concurrency Regulations.
- 10.2 Ofcom regularly participates in the Concurrency Working Party ("CWP") with the OFT and other sectoral regulators where the regulators' approach to competition enforcement issues including particular cases are discussed.<sup>78</sup> Ofcom also participates in the Joint Regulators Group.
- 10.3 In relation to cases which raise issues under either Article 81 and/or Article 82, Ofcom applies the case allocation principles set out in the European Commission's Network Notice to determine whether Ofcom or the OFT or a National Competition Authority ("NCA") from another Member State or the European Commission is well placed to act.<sup>79</sup> Ofcom will notify the European Commission before or without delay after using its powers of investigation in a competition investigation raising Article 81/82 issues.<sup>80</sup> In the context of an Ofcom investigation raising Article 81 and/or Article 82 issues, Ofcom will co-operate with the European Commission and other NCAs in the European Competition Network following the Network Notice. This may include the exchange of information by Ofcom within the ECN subject to the confidentiality and disclosure provisions of the Modernisation Regulation and Part 9 Enterprise Act.

## Deciding whether to proceed under the Competition Act or sectoral powers

- 10.4 In some cases, Ofcom has a choice between pursuing an investigation under the Competition Act (and/or Articles 81 and 82 of the EC Treaty<sup>81</sup>) or under sector-specific regulation. The section sets out Ofcom's strategy towards using the Competition Act in investigations. This process does not apply to disputes.

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<sup>76</sup> See Competition Act 1998 (Concurrency) Regulations 2004, SI 2004/1077 and OFT 405 Concurrent application to regulated industries, December 2004

<sup>77</sup> Commission Notice on cooperation within the Network of Competition Authorities, 2004/C 101/03

<sup>78</sup> See further OFT405 in relation to the practice and procedure of the CWP.

<sup>79</sup> See further OFT405 and guidelines OFT442 Modernisation in relation to case allocation within the European Competition Network.

<sup>80</sup> Article 11(3) Modernisation Regulation and sections 26 to 28A Competition Act 1998.

<sup>81</sup> Ofcom notes the provisions of Article 3 Modernisation Regulation.

- 10.5 Ofcom's strategy is to operate with a bias against intervention. Our expectation is that through a process of de-regulation we will be withdrawing *ex ante* regulation and relying increasingly on competition law.
- 10.6 Ofcom is committed to using the Competition Act where appropriate. It is in the interests of citizens and consumers that regulation be kept to a minimum and that the costs saved by removing additional or unnecessary regulation are passed back to consumers in the form of lower prices or better services, as a result of competition.
- 10.7 Section 317 of the Communications Act prescribes the approach Ofcom must take in using the Broadcasting Act powers rather than the Competition Act in relation to broadcasting matters:
- “Before exercising any of their Broadcasting Act powers for a competition purpose, Ofcom must consider whether a more appropriate way of proceeding in relation to some or all of the matters in question would be under the Competition Act 1998.
- If Ofcom decide that a more appropriate way of proceeding in relation to a matter would be under the Competition Act 1998, they are not, to the extent of that decision, to exercise their Broadcasting Act powers in relation to that matter.
- If Ofcom have decided to exercise any of their Broadcasting Act powers for a competition purpose, they must, on or before doing so, give a notification of their decision”.
- 10.8 Accordingly, Ofcom considers whether to use the Broadcasting Act or the Competition Act in investigations involving broadcasting on each occasion.
- 10.9 Ofcom will adopt the same approach in relation to electronic communications networks and services and use of the Communications Act or the Competition Act as it is required to do in relation to broadcasting. On each occasion before using its powers under the Communications Act for competition purposes, Ofcom will consider whether a more appropriate way of proceeding would be under the Competition Act, and will proceed under the Competition Act if considers that it is more appropriate to do so.
- 10.10 The opening Competition Bulletin entry will state what legal instrument Ofcom is using and where Ofcom has decided to use the Broadcasting Act or Communications Act in preference to the Competition Act, Ofcom will state its reasons for doing so.

### **Possible outcomes of a Competition Act investigation**

- 10.11 Once Ofcom has opened an investigation, it will continue to gather evidence and develop its understanding of the facts of the case before taking one of the following actions:
- Close the case on the grounds of administrative priority (in almost all cases, in the early stages of an investigation ) or other grounds unrelated to the substance of the case (for example withdrawal of the complaint);
  - Close the case because there are insufficient grounds to establish an infringement (i.e. a “no grounds for action decision”);

- Close the case on the basis of commitments received under the Competition Act;
  - Issue a decision that an infringement has occurred or is occurring, and directions to bring an infringement to an end.
- 10.12 A no grounds for action decision will normally be preceded by a draft decision for consultation by the target of the investigation and, in some cases, the complainant and other interested parties.
- 10.13 An infringement decision will always be preceded by a statement of objections. In some cases, it will be appropriate to have further statements of objections where there is a material change or addition to Ofcom's case in order that Ofcom's concerns be fully disclosed to the parties under investigation and to protect their rights of defence.
- 10.14 In appropriate cases, Ofcom will consider whether interim measures under section 35 Competition Act should be taken (see section 5 above).

### **Case Closure**

- 10.15 Ofcom may, under some circumstances, decide not to continue with an investigation without reaching any view on the substantive merits, i.e. without reaching either a decision that there has been no infringement, nor issuing a statement of objections or accepting commitments. Any decision to close a case will be taken on a case by case basis and will usually be where there has been some change in circumstances, for example that the complainant withdraws the complaint or where there is a change in the market or the alleged conduct meaning that Ofcom decides not to take the case forward to a decision on the merits. In these circumstances Ofcom may conclude that, in light of its statutory duties, the case is not of sufficient administrative priority to Ofcom and it is not appropriate to spend further time or effort on the case.
- 10.16 It is also important to note that Ofcom bears the burden of proof in all cases under competition law to demonstrate that an infringement has occurred. Accordingly, where the conduct of a person is investigated by Ofcom, and the case is closed on administrative priority or other procedural grounds, this will mean that Ofcom has not gathered evidence to support an infringement decision and that Ofcom is taking no decision on the merits of the case.
- 10.17 Complainants should note that Ofcom may consider closing a case in the event that a complaint is withdrawn by the complainant, but will not always do so, if there are issues of public policy or possible harm to consumers arising from the alleged infringement.

### **Deciding that there are insufficient grounds to establish an infringement**

- 10.18 In any investigation under competition law, Ofcom must satisfy itself that there is sufficient evidence of an infringement (in other words, Ofcom bears the onus of proof in making any assertion that there is an infringement). If there is insufficient evidence to establish an infringement, then Ofcom will issue a reasoned decision setting out the basis on which Ofcom has reached that conclusion (a no grounds for action decision).

- 10.19 A no grounds for action decision does not prevent Ofcom from investigating similar conduct in future, or re-investigating the same conduct where significant new evidence arises.

### Deciding to accept commitments from those under investigation

- 10.20 Under the Competition Act, Ofcom can accept binding commitments from parties under investigation in appropriate circumstances.<sup>82</sup>
- 10.21 A person or persons may offer binding commitments to Ofcom at any time during the course of an investigation and up until a decision is made. However, Ofcom is unlikely to consider it appropriate to accept commitments offered at a very late stage in its investigation.<sup>83</sup> Once commitments are offered, Ofcom may discuss the form and content of the commitments in order to reach agreement as to what might be acceptable to Ofcom.
- 10.22 The question of whether or not a person under investigation elects to initiate a discussion about commitments, or the substance of any discussion about commitments, are not relevant to Ofcom's consideration of whether an infringement has occurred and Ofcom will not use the offer of commitments as evidence in any subsequent decision about the agreement or conduct under investigation.
- 10.23 In deciding whether to accept commitments, Ofcom must follow the procedural requirements set out in Schedule 6A Competition Act including giving notice to persons it considers likely to be affected by the commitments (which might include publishing the notice) and considering representations made. Ofcom will have regard to the guidance published by the OFT in relation to commitments which set out further details of the procedure to be followed.<sup>84</sup> Parties under investigation, and who wish to understand Ofcom's approach to whether to accept commitments are advised to consider that guidance in detail.

### Issuing a statement of objections

- 10.24 In all cases where Ofcom considers that the evidence gathered is sufficient to support the conclusion on the facts available to Ofcom that an infringement has occurred, or is occurring, Ofcom will issue a statement of objections to the person under investigation.<sup>85</sup>
- 10.25 A statement of objections must state the prohibition that has been infringed, the facts on which Ofcom relies, the objections raised by Ofcom, the action Ofcom proposes to take and its reasons for the proposed actions.
- 10.26 Ofcom will provide a person receiving a statement of objections a period of time in which to make written representations to Ofcom concerning the matters set out in that statement and will give such persons access to Ofcom's file.<sup>86</sup>

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<sup>82</sup> See OFT407, Enforcement at section 4 for guidance on the circumstances in which it may be appropriate to accept binding commitments.

<sup>83</sup> See OFT407, Enforcement at section 4 for guidance on the circumstances in which it may be appropriate to accept binding commitments.

<sup>84</sup> OFT 407, Enforcement, Incorporating the Office of Fair Trading's guidance as to the circumstances in which it may be appropriate to accept commitments, at section 4 and Annex A.

<sup>85</sup> See further Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2004/2751 (the "OFT's Rules")

<sup>86</sup> See further the OFT's Rules, in particular at section 5

- 10.27 Ofcom will also give a person to whom it has issued a statement of objections the opportunity to request an oral hearing (a structured meeting at which the party and their representatives make oral submissions and answer questions).
- 10.28 Ofcom may consult complainants and other third parties on the Statement of Objections (see section 5 above) and will consider in each case whether such consultation is necessary in order for Ofcom to carry out its Competition Act functions.<sup>87</sup>

### **Making directions in relation to an infringement of the Competition Act or EC Treaty**

- 10.29 Having issued a statement of objections, and after considering the representations provided to it, Ofcom may issue a final infringement decision including directions under section 32 or section 33.
- 10.30 Ofcom may require such directions under sections 32 or 33 as it considers appropriate to bring the infringement to an end.<sup>88</sup>
- 10.31 Ofcom may also impose penalties in a decision finding an infringement and follows the OFT's guidance on competition penalties.<sup>89</sup>

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<sup>87</sup> Ofcom notes the OFT's approach to involving third parties in Competition Act investigations, OFT451. Ofcom also notes the European Commission's approach.

<sup>88</sup> See the OFT's rules and OFT 407 at section 2 for the procedure on directions.

<sup>89</sup> See the OFT's rules and OFT 407 at section 5 and OFT 423: OFT's Guidance as to the appropriate amount of a penalty.

## Section 11

# After enforcement: the compliance phase

### Ofcom's approach to compliance

- 11.1 Once a case is resolved with either an undertaking from a company to do something or take some action, or because Ofcom has made a binding statement as to one or more parties' obligations, the case enters the compliance phase.
- 11.2 This may occur for a number of reasons, including:
- Ofcom issues a notification under sections 94 or 95 of the Communications Act;
  - Ofcom issues a determination resolving a dispute under section 190 of the Communications Act;
  - Ofcom issues an infringement decision under the Competition Act that sets out directions to bring that infringement to an end;
  - Ofcom accepts binding commitments under the Competition Act; or
  - Ofcom decides to close a case under the Communications Act without reaching a final view, on the basis of informal assurances given by the person under investigation.
- 11.3 There is no specific time limit for the compliance phase, since each case will depend on its facts.
- 11.4 Generally, Ofcom will not grant extensions to any compliance deadline established unless it receives an application prior to the expiry of the deadline together with an explanation of why the deadline should be extended including supporting evidence for the extension request.
- 11.5 Ofcom will report material developments on the Competition Bulletin and also report on cases in the compliance phase in its six-monthly reports on the investigations programme.

## Section 12

# Appeals against Ofcom's decisions

- 12.1 Ofcom notes that its decisions under the Competition Act are appealable to the Competition Appeal Tribunal under Sections 46 and 47 Competition Act. Ofcom's decisions under the Communications Act are also appealable to the Competition Appeal Tribunal under Section 192 Communications Act.
- 12.2 Parties to an investigation or to enforcement action wishing to appeal an Ofcom decision should consider these provisions and the Competition Appeal Tribunal's rules and guidance.<sup>90</sup> Ofcom would suggest that parties who are considering making an appeal obtain legal advice.

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<sup>90</sup> <http://www.catribunal.org.uk/rules/default.asp>

## Annex 1

# Responding to this consultation

## How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 14 September 2006**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://www.ofcom.org.uk/consult/condocs/enforcement/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email [robert.macdougall@ofcom.org.uk](mailto:robert.macdougall@ofcom.org.uk) attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Robert MacDougall  
 Floor 4  
 Competition Group  
 Riverside House  
 2A Southwark Bridge Road  
 London SE1 9HA
- Fax: 020 7783 4109
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.

## Further information

- A1.6 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Robert MacDougall on 020 7783 4338.

## Confidentiality

- A1.7 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), ideally on receipt (when respondents confirm on their response coversheet that this is acceptable).
- A1.8 All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any confidential parts of a response in a separate annex so that non-confidential parts may be published along with the respondent's identity.

- A1.9 Ofcom reserves its power to disclose any information it receives where this is required to facilitate the carrying out of its statutory functions.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use in order to meet its legal requirements. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

### Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish the finalised version of these guidelines.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm)

### Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk) . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash  
Ofcom  
Sutherland House  
149 St. Vincent Street  
Glasgow G2 5NW

Tel: 0141 229 7401  
Fax: 0141 229 7433

Email [vicki.nash@ofcom.org.uk](mailto:vicki.nash@ofcom.org.uk)

## Annex 2

# Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

### Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

### During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest.

A2.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organizations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

### After the consultation

A2.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

## Annex 3

# Consultation response cover sheet

- A3.1 In the interests of transparency, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, without disclosing the specific information that you wish to remain confidential.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed coversheets confidential.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at [www.ofcom.org.uk/consult/](http://www.ofcom.org.uk/consult/).
- A3.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your coversheet only so that we don't have to edit your response.

**Cover sheet for response to an Ofcom consultation**

**BASIC DETAILS**

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

**CONFIDENTIALITY**

What do you want Ofcom to keep confidential?

|                      |                          |   |                          |
|----------------------|--------------------------|---|--------------------------|
| Nothing              | <input type="checkbox"/> | Name/contact details/job title              | <input type="checkbox"/> |
| Whole response       | <input type="checkbox"/> | Organisation                                | <input type="checkbox"/> |
| Part of the response | <input type="checkbox"/> | If there is no separate annex, which parts? |                          |

**DECLARATION**

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom’s website, unless otherwise specified on this cover sheet, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

## Annex 4

# Format for submitting a complaint to Ofcom

A4.1 Complaints should be submitted to:

Competition Group Operations Team  
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

A4.2 If you need any further guidance on how to submit a complaint to Ofcom, please contact the Competition Group Operations Team.

A4.3 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 provide a separate non confidential version which can be copied to the target of the complaint.

A4.4 Unless you specifically request Ofcom not to do so, Ofcom will disclose your business 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.

A4.5 Unless you specifically request Ofcom not to do so, in the event that Ofcom decides to investigate your complaint, Ofcom will publish details of the complaint, including your business name, on Ofcom's website.

A4.6 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) and/or Chapter II (abuse of a dominant position) of the Competition Act (and/or Article 81 and/or Article 82 of the EC Treaty) and a clear explanation of why you believe the Competition Act, Article 81 and/or Article 82 of the EC Treaty are being breached; and/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;
- evidence of actual or potential effect on consumers;
- 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**

Note: for breaches of *ex ante* conditions imposed following a market review, Section D is not required. In addition, complainants may reference relevant sections of Ofcom's market reviews in support of a Competition Act complaint.

#### ***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 the 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 in the last 2-5 years;
- the approximate total size of the market - in value and volume terms - and how it has 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 - Verification by an officer of the company**

### ***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 5

# Format for submitting a dispute to Ofcom

A5.1 A request for resolution of a dispute should be submitted to:

Competition Group Operations Team  
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

A5.2 If you need any further guidance on how to submit a request for dispute resolution to Ofcom, please contact the Competition Group Operations Team.

A5.3 On receipt, 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.

A5.4 In the event that Ofcom accepts your submission, Ofcom will publish details, including the business names of the parties, of the dispute on Ofcom's website.

A5.5 A submission should contain the following information:

### 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

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.

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.

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.

Where the dispute relates to *ex ante* conditions, an explanation of how the dispute meets the requirements of Section 185 of the Communications Act.

A description of the *ex ante* conditions to which it 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.

Details of the way in which you wish to see the dispute resolved, including an explanation as to why Ofcom should reach this outcome, 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**

A description of any negotiations which have taken place between the parties; or, in the event that a party has refused to enter into negotiations, evidence to suggest that you have taken reasonable steps to engage the party in meaningful negotiations.

Details of the steps taken to resolve all of the issues which are in dispute.

An explanation of why commercial agreement could not be reached.

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.

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: