BT Response to Ofcom's Consultation – Dispute Resolution Guidelines

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1. Executive Summary

- BT shares Ofcom's goal of ensuring that it handles disputes expeditiously, effectively and economically. We agree that central to achieving this - particularly against a backdrop of increasing resource challenges - is to reduce the number and complexity of the disputes that Ofcom receives.

- We therefore welcome Ofcom's proposals to encourage CPs to resolve their issues through negotiation. We support Ofcom's increased emphasis on Alternative Dispute Resolution and its proposals for introduction of a more rigorous enquiry phase, which focuses on better understanding of where and why the parties are actually in disagreement.

- We are concerned, however, that Ofcom's proposed guidelines are in the nature of a "one size fits all" solution.

- As Ofcom is well aware, the complexity and value of disputes referred to Ofcom vary greatly. While many are non-complex, relatively low value, and purely commercial (e.g. disputes concerning contractual terms around interconnection), others are highly complex, of high value and involve novel regulatory policy (e.g. the 080/0845 disputes). In BT's view, Ofcom's proposed guidelines are more apt to deal with the former rather than the latter. As such, our suggestions and comments in this Response focus around the more complex-type of disputes.

- Key amongst our comments is that Ofcom should adopt a process that differentiates between disputes and matters concerning regulatory compliance, and deals with compliance issues under its compliance powers and delay its resolution of the dispute in the meantime per its exceptional circumstances power.

- We also comment that where a dispute raises novel regulatory issues and requires Ofcom to take significant regulatory decisions, Ofcom should take these via an industry-wide consultation ahead of resolving the particular dispute. In cases where such regulatory issues involve network access issues, Section 105 Communications Act 2003 provides a process for Ofcom to make regulatory decisions.

- We also have concerns about Ofcom's proposals on information gathering and its proposed changes to the way it consults on provisional conclusions and findings. We believe that reduced flexibility over sending draft information requests and around deadlines to provide essential information, combined with reduced opportunity to comment on draft determinations, will end up being counter-productive to Ofcom's goal of handling disputes expeditiously, effectively and economically.

2. Introduction

We have structured this response to address the key areas and aspects of the dispute process. We have sought to draw on past disputes to provide evidence of the issues which Ofcom and the various industry participants need to work together to resolve.

We have grouped our comments under the following headings:

- Submitting a dispute
- Evidence of the parties being in dispute and the role of ADR
- Instituting the Enquiry Phase
- The Enquiry Phase Meeting
- Information gathering Requirements
- Consultation on provisional conclusions – v – Draft Determinations
- Remedies
- Costs
- Exceptional Circumstances

One general suggestion we would make is that Ofcom consider trialling some of the changes for a period on a suitable number and mix of cases, and then seek feeback and re-evaluate. We believe that there would be benefits to adopting such a course of action, particularly as many of the changes are significant and may or may not be effective in practice.

3. Submitting a dispute

At paragraph 4.15 Ofcom reminds the parties that if they do not refer disputes to Ofcom in the manner set out in its guidelines, Ofcom would not be obliged to accept the dispute. We make the following suggestions with regard to the way in which parties should bring a dispute to Ofcom, by reference, in Section 7, to the information that parties should provide. A general suggestion is that, in paragraph 7.7, Ofcom replace "should" with "must", in order to make clear that a dispute submission is required to contain the designated information, as opposed to simply being requested by Ofcom as a matter of best practice. We would recommend that Ofcom include the caveat: "unless the applicant can show good reason why the information is not required or cannot be provided".

3.1 <u>Section A: Preliminary Information</u> (paragraph 7.8).

The list here usefully amplifies the previous Ofcom list, but adds two significant categories of information. The first relates to the regulatory environment and regulatory compliance, in relation to which we set out our position in section 4 below.

The second is in relation to proposed remedies. We think that Ofcom's new suggestion (that the party bringing the dispute should identify the commercial outcome that they seek) is helpful. We believe, however, that that party should also be required to give a basic explanation of the outcome that it believes the other party to the dispute is seeking. This would have two significant advantages. It would give a sense of "how far apart" they

believe the parties are. It would also help to evidence that proper attempts at settling the dispute had taken place and failed. If a party bringing the dispute did not know the outcome that the other party wants, it would clearly be evidence of a failure to negotiate.

3.2 Section B: The issues in dispute (paragraphs 7.9 and 7.10)

With respect to paragraph 7.9, we suggest that the list of issues in dispute should include not only their nature, but also their value. If the dispute has a number of aspects, the referring party should be required to show the value of each aspect.

Paragraph 7.10 contains a requirement for CPs to specify in relation to ex ante conditions or other regulatory conditions "why they consider that the relevant obligation is not being met". We agree that the party seeking to bring the matter before Ofcom should articulate clearly the nature of its concern, including any concerns with regard to compliance with regulatory obligations. However, as explained further below, we consider that it is inappropriate for Ofcom to seek to determine compliance matters in a regulatory dispute investigation. If a party does allege non-compliant behaviour, we suggest that at this stage Ofcom should review the potential compliance issue separately, prior to determining the dispute. Hence, we suggest that the third bullet to paragraph 7.10 should include a requirement that the referring party make clear which issues are within the scope of the disputes regime and which are within the domain of the compliance regime.

3.3 Section C: History of Commercial Negotiations (paragraph 7.11 and 7.12)

We suggest that the referring party should be required to include an explanation of why it considers that alternative dispute resolution procedures are unlikely to prove adequate to resolve the issues between the parties.

Having regard to our comments above on paragraph 7.8, we suggest that paragraph 7.12 be clarified to make it clear that the settlement offers that must be produced are not only those made by the party bringing the dispute, but also any that may have been made by the other party and rejected by the CP bringing the dispute.

We suggest also that the guidelines need to recognise the distinction between offers of settlement that have been made in the course of commercial negotiations and offers that have been passed between the legal advisors instructed by each party on a "without prejudice" basis. The referring party should be required to make the former public to Ofcom. The latter, however, should not be disclosed by the referring party, as it is a basic common law right that communications passed between legal representatives on an undisclosed basis should not be at risk of being used against that party at a later stage.

3.4 Other pre-Enquiry Phase comments.

We make three final comments with regard to pre-Enquiry Phase issues.

Paragraph 3.17 provides advice to parties considering a dispute. The final bullet exhorts such parties to "be prepared", stating that in most cases Ofcom will not grant extensions to deadlines and *"that Ofcom will typically need to make decisions based on the evidence it has received within the deadlines it submits"*. Our comment is that we would welcome some recognition from Ofcom here that whilst it is incumbent on the parties to do their utmost to meet Ofcom's requirements, by the same token Ofcom's requirements must be proportionate, in particular having regard to the short time scales and the nature of the process. We will deal later with our more general suggestions in relation to information gathering.

Paragraph 5.18 states that the applicant will send the other party a non-confidential version of their submission, and the other party will be asked to respond and send its comments to the applicant. We believe that it would help if the guidelines made clear that both the applicant and the other party had to supply the non-confidential version of their submissions at the same time as the confidential version.

Finally, given the emphasis on ensuring that the information the parties supply is sufficient to deal with the matter, we wonder why Ofcom believes that there is a need for the EPM questionnaire and why the information required for the EPM should not be included in the list of information to be contained in the initial submission. Ofcom could then ask the other party to provide its relevant information as part of its response (as per Ofcom's paragraph 5.18) to the initial submission.

4. Evidence of parties being in dispute and the role of ADR

4.1 Evidence that the parties are in dispute.

At paragraph 5.7, Ofcom states that it "accept proof that one party has refused to cooperate in commercial negotiations as proof of a dispute". (emphasis added)

Whilst we recognise that there may well be cases where a party stalls or delays negotiations, or otherwise refuses to enter into negotiations, and that this may be a good reason for accepting a dispute, we are aware of other cases where the party stalling is the one who then says that there is a dispute for Ofcom to handle.

Similarly, BT can point to more than one example where it has been willing to continue to negotiate or considers that negotiations have not been exhausted, but yet finds itself facing another CP who submits a potential dispute to Ofcom on the grounds that negotiations have failed and are exhausted. An example of this is the recent 0800 pricing ladder disputes (NCCN 956 and NCCN 1007). We made it clear to the MNOs that we were happy to discuss where each of them sat on the pricing ladder, and from our point of view we were still in negotiation. One MNO in particular (and another to a lesser extent) did not want to discuss this with us and submitted a dispute to Ofcom.

For this reason, we propose that in the final sentence of paragraph 5.7 (which states that refusal to cooperate will usually be accepted as proof of a dispute), Ofcom should make

clear that it expects to see evidence that: (a) the party bringing the dispute has done everything it reasonably can to negotiate and (b) any lack of cooperation or willingness to negotiate is by the "other party" and not itself. This would mean that the onus was on the party bringing the dispute to show that it had taken negotiations as far as they could go, but that they are at an end because of the approach taken by the other party.

Whilst the current process requires Ofcom to assess whether negotiations have taken place and broken down, our view is that Ofcom has in practice viewed this as a mechanical assessment, and undertaken it without a high degree of scrutiny. We therefore welcome the additional focus on this aspect as set out in Section 7, and we trust that Ofcom will carefully assess applications and the information provided them with a more "real world" critical eye.

But after, having done that, Ofcom finds that there has been a refusal to negotiate, we would suggest that before Ofcom moves straight to acceptance of the dispute, it places the uncooperative party on notice that it has one last chance to negotiate. Further, Ofcom should warn the party that if it continues to fail to negotiate and Ofcom is forced to open a dispute, that party will be at significant risk of a costs order being made against it, should it not be wholly successful at the conclusion of the dispute.

4.2 <u>The role of ADR.</u>

In considering the role of ADR at paragraph 5.13, Ofcom states that it "would typically expect ADR to be less effective, for example, where one of the Parties has already been found by Ofcom to be in a position of SMP in the relevant market such that there is an imbalance in negotiating power between the parties."

Whilst this may be the case in some instances, for example where the two disputing CPs are very different sized entities, we believe that the last 2-3 years have shown this to be an increasingly questionable proposition. By way of example we refer Ofcom to Mobile Termination Rates Disputes, where the MNOs had SMP and BT did not. It is hard to see how there was any imbalance negotiating power in these disputes. Similarly, in the PPCs dispute, all of the parties were of significant size and well-resourced. Both of these cases are very different to the sorts of disputes that may have existed 10 to 15 years ago when disputes brought to the regulator were mainly related to interconnection between BT and much smaller new entrants.

We therefore invite Ofcom to reassess this proposition and at the very least to qualify it significantly to make clear that ADR may be an effective mechanism even where one party has SMP.

We would also suggest that the potential for different types of ADR is a subject that is worthy of further industry and Ofcom discussion. BT would be willing to participate in further consultations on this issue.

4.3 Referring disputes back to Ofcom where alternative means have failed.

Paragraphs 5.14 to 5.16 deal with matters referred back to Ofcom following attempts at ADR. Paragraph 5.15 states that any referral back must evidence what steps were taken to resolve the dispute by alternative means.

We believe that as an ADR decision cannot be made binding unless both parties agree that at the outset, there is a risk that one party may seek thereafter to have a "second bite of the cherry" by referring the matter back to Ofcom as a dispute. We would like to see Ofcom be more explicit that where an arbitrator has delivered an ADR decision, Ofcom will only overturn that decision if it is shown by the referring party that the arbitrator's decision is manifestly wrong or contrary to established regulatory policy. Further, we would like Ofcom to indicate that it would be more willing to make costs orders against CPs who try unsuccessfully to have such a second bite of the cherry.

5. Instituting the Enquiry Phase

5.1 Dispute versus enforcement

Before considering the mechanics involved in opening a dispute, there is a significant point of principle that needs to be addressed – the distinction between disputes and regulatory non-compliance.

We recognise that this is an issue BT has previously raised with Ofcom, but we consider that it is appropriate to raise it again here, particularly in light of the changes that will apply to the regulatory enforcement regime when the revised EU Directives are implemented in the UK in May 2011. (Please see our December 2010 response to the BIS consultation).

As Ofcom will soon have the power to impose fines of up to 10% of turnover if regulatory non-compliance is found, it is essential that Ofcom properly and thoroughly investigate compliance issues, with an appropriate standard of proof and with fair and reasonable checks and balances built in to the process. BT does not believe that the dispute resolution process, with its short duration and aim to resolve issues on a basis that is fair and reasonable between the parties, is the appropriate process for determining serious compliance issues, particularly with the risk of substantial penalties if a breach is found.

Hence, in the event that a dispute also raises an allegation of potential non-compliance, BT believes that Ofcom should resolve the compliance issue under its compliance powers, ahead of looking at other issues in dispute. Where a communications provider faces a risk of fines if Ofcom finds non-compliance, it would not be reasonable to deny the communications provider in breach the opportunity to defend itself fully, and indeed to appeal against any finding of non-compliance.

In order to ensure that due process is provided by Ofcom in instances of alleged regulatory non-compliance, we recommend the following approach:

1. Ofcom consider if the case in fact raises a regulatory compliance issue.

2. If Ofcom's preliminary assessment is that there is no potential compliance issue requiring resolution, it advise the parties of that finding and then proceed to consider whether it is appropriate to take the dispute, having regard to the view that the parties have complied with their obligations. If Ofcom considers it is inappropriate to take the dispute, it should close the case. If Ofcom considers it is appropriate to take the dispute, it should proceed to resolve the dispute.

3. If Ofcom's preliminary assessment is that there is a potential compliance issue, Ofcom should make a ruling that Exceptional Circumstances apply and therefore effectively "stop the clock" on the handling of the dispute. Ofcom should then determine the compliance issue by the application of the appropriate compliance processes.

4. Once Ofcom makes know the outcome of the compliance investigation and there are still issues that can legitimately be handled by the dispute process, Ofcom should "restart the clock" and resolve the dispute in the light of its findings on the compliance issue.

We believe that Ofcom'se adoption of such an approach, and in particular its clear articulation at any one point in the process what issue it is investigating and under what power, would greatly aid transparency and possibly reduce the number of disputes and/or appeals.

5.2 Resolving uncertainty of obligations

We believe that Ofcom should consider a further stage at the outset of the case – whether the obligations which are at the heart of the case are sufficiently clear and clearly understood, such that the parties can be sure as to what is required of them as a consequence of the regulatory obligation imposed on them.

While in some disputes all that may be required in order to resolve the dispute is simple clarification of a regulatory construct or obligation, in others Ofcom has needed to take significant regulatory policy decisions. We can give three examples of this:

- Mobile Call Termination prices – introduced the "Gains from Trade" test.
- Pricing of Partial Private Circuits –introduced Distributed Stand Alone Cost ceilings as a "very significant consideration" in determining whether charges are cost orientated.
- Number Translation Services pricing (0800/0845/0870 prices) – introduced three regulatory principles to be used in order to determine whether charges are fair and reasonable.

We suggest that the disputes process is not the appropriate forum in which to take such significant new regulatory policy decisions, particularly where they concern network access. In such cases, BT believes that Ofcom should use the process set out in Section 105

Communications Act 2003. In BT's view, all three of the above cases would have been suitable for consideration under Section 105. They all involved situations where there was no clear, unambiguous, settled, regulatory policy, and Ofcom should have made directions under Section 105 setting the regulatory policy for the future.

We consider that the Section 105 route is appropriate for a number of reasons:

- It would give the opportunity for industry-wide consultation and allow Ofcom to consider a wider range of views.
- Industry-wide consultation is an ingredient of first class decision making.
- It would result in more transparent regulation.
- It would reduce the risk of dispute determinations being appealed.

In summary, the Section 105 route or otherwise making directions that clarify what is required by a particular obligation, is a fair and equitable way to resolve a previously unclear regulatory issue, so that all parties are aware of what is required of them in future. Ofcom's decisions resulting from this process can then inform the resolution of the dispute between the parties (while undertaking the Section 105 process, the dispute can by halted for Exceptional Circumstances).

5.3 Timescales.

We welcome Ofcom's proposal to spend time "getting it right" at the outset of the case, and the idea that all parties should come together at the EPM. Ofcom admits that its timescales here may be challenging and it exhorts the parties to commit. Whilst we agree with that, we believe that the timescales are very short if parties need to involve individuals of a suitable level of seniority.

The risk, therefore, is that in the interests of expediency, Ofcom forces parties to adopt a sub-optimal approach, with the result that the Enquiry Phase and the EPM fail to deliver the benefits that might be capable of achievement.

Similarly, if there is a dispute on the scope of the dispute, a little more time and effort expended on resolving that issue at the Enquiry Phase may well mean that the dispute itself progresses more smoothly.

For both these reasons, we invite Ofcom to consider whether, in particular cases, there is more to be gained than lost by extending the enquiry phase beyond the currently proposed 15 day limit.

6. The Enquiry Phase Meeting

6.1 Possible Mediation?

We consider that Ofcom's proposal to bring the parties together at an Enquiry Phase Meeting is a positive one. Whilst the parties should have already made serious attempts to

settle the dispute, we believe that gathering the parties together at the outset will potentially be more conducive to settlement than the current regime. Indeed, when parties are drafting their submissions in the comfort of their own offices, their minds are more focused on tactics than on settlement.

In this regard, we invite Ofcom to consider going further than the proposed guidelines and consider whether there is the potential for Ofcom to have a mediation role at the outset of the EPM before moving on to discuss with the parties matters such as scope and the information required. This might be in the form of a preliminary "without prejudice" meeting between the parties representatives facilitated by a senior Ofcom official – but not the proposed case handler – whose role would be to offer support to the parties in reaching a commercial solution before accepting a full dispute. Even if this only succeeded in a minority of cases in resolving, or substantially reducing the scope of, disputes, we believe that it would still be time well spent.

6.2 The purpose of an EPM

If any mediation at the start of an EPM has failed, then a successful EPM will, we believe, be one where the following outcomes can clearly be recorded before the parties depart:

- Agreement of all the parties on the scope of the dispute and its bounds
- Agreement of all the parties on the issues that need to be determined in order to resolve the dispute
- Agreement of all the parties on the information required, who is best placed to provide it, and how and when it will be supplied
- A clear understanding of all the parties of the process to be followed and of whether Exceptional Circumstances are likely to apply or not.

The extent to which Ofcom and the parties are able to secure each of these outcomes will likely depend on the parties' preparation, engagement, and co-operation, as well as the level of complexity of the dispute.

With regard to the scope of the dispute, the information provided by the parties should already start to provide clarity/agreement on facts/issues, and discussion at the EPM may help to clarify and focus on the key issues. However, where there is no agreement between the parties as to scope, it will be critical that Ofcom is prepared to state its views on scope at the EPM, in response to what may be said by the parties. This offers the best of the parties reaching consensus in this regard. Otherwise, all that will happen thereafter is that Ofcom will publish its scope decision and the parties are left without the opportunity to make formal representations on the subject. This will substantially increase the risk that there will be a challenge to Ofcom's finding on the scope of the dispute. Hence, where consensus on scope at the EPM cannot be reached, we would suggest that Ofcom submit to the parties a draft of its proposed scope, and invite submissions, before reaching a final conclusion.

As explained further below, we also suggest that at the EPM Ofcom consider whether the case is of the type that can be resolved within the 4 month period, or if it would be

appropriate to make a finding of Exceptional Circumstances. We comment further on this in Section 11 of our response below. This may have avoided the situation of the most recent 0800 dispute (concerning NCCN 1007), where we asked Ofcom to declare exceptional circumstances in light of the CAT's ongoing consideration of the previous 0800 dispute (which involved similar issues), but Ofcom has not done so and that question is now on appeal.

7. Information gathering

Paragraph 5.19 provides that "The EPM will also assist in defining what further evidence may be needed in order to resolve the dispute". Paragraph 6.12 then explains that it will be Ofcom's practice not to formally consult on a draft information request.

We appreciate and support the goal of ensuring that time is not lost unnecessarily at the outset of the case, but we believe this underestimates the challenges that can arise in supplying information.

We believe that the EPM offers a good opportunity to ensure that information gathering is no more onerous than necessary and that Ofcom is focused on the right issues, especially if the parties are able to reach common ground on what the real issues in the case are. However, we doubt that in practice the parties will be able agree at the EPM exactly what can be delivered and when it can be delivered by. We are aware of occasions where the proposal sounds simple and that it ought to be reasonably quick to extract the information, but where further reference to those who own the data reveals that it will be extremely complex and time consuming.

There are a number of other issues that Ofcom may avoid through dialogue with parties about the information request. These include that a request may be disproportionate, beyond the scope of Ofcom's powers, or not relevant to the dispute.

We set out below examples of these issues, all of which demonstrate that in practice crafting information requests is a complex task that requires a degree of iteration and dialogue between Ofcom and the parties to the dispute, and that in the long run there are benefits in doing so.

1. <u>Disproportionality: NCCN Porting Dispute 2010</u>

Ofcom submitted a Draft Information Request dated 26 February 2010. Many of the questions in the request sought the same or similar information as previously provided by BT in the previous NCCN500 investigation. We pointed this out to Ofcom and invited them to review the information previously sent to ensure that they were not repeating questions to which we had already responded.

Ofcom took this on board, and acknowledged in the Information Request that BT did not have to supply information already sent in the original NCCN500. Instead, it required BT to

provide the date BT had originally sent the data, to whom and to provide assurance that the information already supplied was accurate.

2. Relevance: NCCN Porting Dispute 2010.

A question in the Draft Information Request asked if BT had entered into contracts with SPs specifically on the basis of the impact of NCCN500 on ported numbers. BT responded that the provision of this contractual information would not assist Ofcom in the dispute as scoped, and a request for this information was, therefore, inappropriate and unreasonable.

3. Going beyond the scope of powers: 0870 Dispute 2009.

The Draft Information Request contained questions that asked BT to provide its opinion on particular issues.

In its response, BT challenged on the grounds that Ofcom's information gathering powers are limited to provision of information and that it is beyond the limit of an information gathering request to require BT to venture statements of opinion.

4. Lack of clarity of request: Everything Everywhere Dispute October 2010 and 0800 Dispute 2010.

In the Everything Everywhere dispute, questions 7 and 9 in of Ofcom's Information Request were unclear, thus meaning that BT did not know what it was required to do in order to respond. Question 7, for example, asked BT to provide details of contracts for 080 number hosting services that have been amended since the introduction of NCCN1007. It was unclear whether this referred to contracts which had been amended as a result of NCCN1007 or to all 080 contract changes. If it had been the latter, it would have taken BT many months to source, sort and supply the information, as there are many thousands of contracts that would have needed to be analyzed. Question 9 asked if BT can distinguish between zero-rated and non-zero rated calls. It was unclear if this was referring to the retail charge for the call or the payment received by the terminator (BT).

In response, Ofcom clarified these matters by amending the Information Requests and extended the deadline for responding accordingly.

In the 0800 Dispute 2010, again we needed to ask for clarity of some of the questions (2 and 9). Ofcom again amended the questions in the Information Request to address our concerns.

5. Presentation of information: e.g. Request for information re PPP.

Ofcom is aware that on occasions it has sought information in ways that is extremely difficult, if not impossible, for BT to produce. In particular, one of our key systems for reporting financial information is Aspire, which displays data in pre-defined costs sectors, with little flexibility. Hence, if Ofcom asks for financial data cut another way, it is very difficult (if not impossible) for BT to provide this without undertaking a significant manual

excercise. In such cases, again, dialogue with Ofcom would help to ensure that the request can be framed in a way that the information required is capable of production within the limitations of our systems.

Against the backdrop of all these potential different issues and the examples given above, we invite Ofcom to reconsider the decision not to send draft information requests. We believe that in the long run it will help if Ofcom builds into the process the opportunity for the party who will be subject to the request to receive the draft list of information that has hopefully been agreed at the EPM, and to comment on the availability of the information, its accessibility, its scope, and the proportionality generally of the request.

Provision of information in the more complex cases can also be an iterative process. That is, as the case progresses, it may become clear that further information is necessary. The guidelines do not address how Ofcom will hand this in practice.

If the goal is to try to expedite this stage of the process, we invite Ofcom to consider if it would be possible to "standardise" information requests to some extent. That is, if Ofcom tend to request certain types of information in particular cases, Ofcom could consider including in the dispute submission requirements or the EPM questionnaire a request for information about the documents it will need. For example

- Do you think billing data will be required? If so, for what products and for what period? All data or sample set?
- Do you think sales volume data will be required? If so, for what products and for what period? All data or sample set?
- Do you think pricing information will be required? If so, for what products over what period?
- Do you think underlying costs data will be required? If so, for what products over what period?
- Will any of the data be region specific?

If Ofcom has been able to share with the parties its provisional thinking about the types of information that will be required, it may enable the parties to have a "first view" at the EPM as to the likelihood that it can be supplied. This, again, might mean that the time needed to "sanity check" a proposed request can be shorter.

Paragraph 6.13 proposes that "Ofcom will not typically give extensions for further time to provide the requested information. If Parties cannot provide the information in the specified time they should explain this and the reasons why in their response".

This proposition needs to be considered in the context of the recent consultation on the implementation of the amended EU Directives, which suggests that the maximum penalty that should be imposed for failure to comply with an information gathering obligation should be increased from £50,000 to £2m, and the fact that it is anticipated that Ofcom will be able to impose fines "immediately" where non-compliance is proven.

We, and we suspect many other CPs, will be reluctant to heed paragraph 6.13 and not send in information on time if the potential repercussions are a fine of up to £2m. The parties must therefore have clarity of what is required and Ofcom must fully understand what they can realistically deliver. If there are concerns as to what is required, the debate is required at the outset, and not against the backdrop of a potentially draconian penalty for non-compliance.

The aspects of information gathering that have perhaps been overlooked is as to which party is best placed to provide the necessary information, what is the most equitable way to share out the burden of information gathering, and whether appropriate information already exists and/or has been provided already.

There should be no presumptions in this regard. To meet requirements of proportionality, Ofcom should always apply the "will any lesser measure do" test, be rigorous in considering the options and alternatives and look carefully at suggestions that on party cannot supply the information requested.

Again, we can give examples that evidence the need to adopt such an approach.

1. 0800 NCCN 956 dispute

Ofcom said in its final determination of this dispute that it could not work out whether MNOs were retaining more than their costs of origination because the MNOs could not provide the underlying information to Ofcom. Yet, separately, it was evident from Ofcom's 16 December 2010 consultation on non-geographic call services (NGCS) that the MNOs must have supplied Ofcom with this information, as in this consultation document Ofcom had been able to calculate fairly precisely how much MNOs had charged over and above freephone and national rates.

2. Leased Lines Charge Control consultation

We recognise that this is an example associated with a market review rather than a dispute, but the underlying premise is of equal application to disputes. In this case, BT was asked to provide information on its estimated point of handover costs, which the Competition Commission later found Ofcom to have erroneously accepted. One point the Commission made is that Ofcom could have judged the accuracy of some of BT's figures if it had asked BT's customer during the consultation about their point of handover requirements.

8. Consultation on provisional conclusions – v – Draft Determinations

We agree with Ofcom that it has had in the past provided rather detailed draft determinations late in the four month process, and that parties were given a relatively short period of time to respond.

The reasonableness of the timescales for responding to draft determinations will depend on whether the determination contains a significant amount of material and complex findings

and/or regulatory new thinking, or is simply a mechanical calculation based on information provided by the parties.

Ofcom is aware, for example, of BT's concerns with regard to the process adopted in the 0800 dispute – where Ofcom introduced novel regulatory concepts at a late stage, and BT had very little time in which to gather relevant evidence and produce its response.

Against that backdrop, we welcome the proposal at paragraph 6.23 that Ofcom will share what may best be described as its "early, provisional, conceptual thinking". Given our concerns about Ofcom giving short notice, this could be a critically important step and one that could help to provide a degree of transparency of process, and an opportunity for representations that help reduce the need for appeals of disputes decisions. However, in our view, this should be just a first step in an interactive process. If, for example, Ofcom provided at the early stages only the basic framework for its decision and only later provided "the numbers", there must be sufficient time for parties to analyse those numbers and respond.

Accordingly, we do urge Ofcom to see its proposal, at paragraph 6.23, as only the first step in a more open and transparent decision-making process. We suggest that Ofcom should provide the parties with its early conceptual thinking as proposed, and give them the opportunity to comment at the high level. Then, in the light of responses received, Ofcom could revisit and modify its original proposal and at a later stage, closer to when it would currently issue a draft determination, provide a more detailed and reasoned draft decision. The timescales for each stage may vary depending on the circumstances of the case, but overall we believe that this sort of approach need not impact detrimentally on overall time scales.

We have suggested, above, that if at the outset of a case Ofcom can see that it will clearly involve novel regulatory policy, it should stay the dispute pending consultation pursuant to Section 105 Communications Act 2003. We recognise, however, that it may only be later in the case, as Ofcom gets to grips with the issues, and once it has had an opportunity to consider the information provided to it, that Ofcom identifies that the dispute may raise such novel regulatory issues. If Ofcom finds that its line of early thinking suggests that there may be new policy issues, it is better that Ofcom air these early. It may be that the parties consider that the policy set out in Ofcom's early thinking is reasonably uncontroversial, in which case the dispute can move on to resolution expeditiously. Or it may be that the policy turns out to be highly controversial, in which case, the solution may be to consider whether the matter is one that should be addressed by Ofcom taking action at this stage under Section 105 Communications Act 2003, and exercising Exceptional Circumstances to stay the dispute pending the outcome of the Section 105 process.

The inference in paragraph 6.26 is that parties who supply information which they consider to be confidential will be required to say why they consider it to be confidential, and that Ofcom will then express its view on the parties confidentiality markings. Ofcom then says that it may publish information marked as confidential in order to comply with its obligations. What we are not clear on is what will happen if Ofcom expresses its view that a confidentiality marking is inappropriate. Where Ofcom has opined that a party has provided

and market confidential information which is not in fact confidential, can Ofcom then decide to publish that information without prior consultation with the party. This significantly concerns BT as the commercial interests of that party could be improperly detrimentally impacted.

We are somewhat surprised at what appears to be Ofcom's rather uncompromising stance on this point, given the risks of criminal proceedings being brought against individual employees of Ofcom pursuant to Section 393 Communications Act 2003, if it transpires that the disclosure went beyond what was needed to disclose for the purpose of facilitating the carrying out by Ofcom of its functions.

We therefore suggest that it would be in the interests of all parties, i.e. the parties to the dispute, and the employees of Ofcom, if Ofcom agreed that it would at least consult with those who have provided information and marked it in confidence prior to publication of any such material.

9. Remedies

We welcome the underlying approach proposed by Ofcom, i.e. that the party bringing the dispute should specify the remedy it seeks. We have proposed above that the applicant should also seek to explain what it believes the other party is seeking, and that that party should correct this, if necessary, when it submits its first comments on the applicants submission (as described in paragraph 5.18).

At paragraph 6.15, Ofcom restates the powers it has as per Section 190(2) Communications Act 2003, but stresses that it is not limited to the remedies proposed by the parties. That is undoubtedly true, and the simplest example of this is where the party bringing a dispute says it is entitled to 100, the other party says it is entitled to 0, and Ofcom finds that it is in fact entitled to 50.

Our concern, however, is that whilst Ofcom has wide discretion in resolving disputes, it should not use its wide ranging powers to make a decision that is in effect outside of the ambit of the dispute between the parties. If it does, it runs the risk of being appealed on the basis that its decision has effectively widened the scope of the dispute beyond what the parties consider is the dispute between them that requires resolution. We would welcome recognition in the guidelines that whilst Ofcom has a wide discretion as to the remedy it imposes, it must be a remedy that is limited to the scope of the dispute as agreed by the parties and Ofcom at the outset, and that it should not go further than that.

We have suggested elsewhere in our response that if the dispute raises new or unresolved policy issues which have wider impact than the particular dispute, Ofcom has the ability to use the Section 105 Communications Act procedure – which could well find that a wider set of remedies may be appropriate. Similarly, if the case involves compliance issues, there is a mechanism to resolve these. So, taken all together, it is clear that Ofcom has all the tools it needs to address a variety of situations. We believe that its use of the right tools at the right times would bring real benefits to industry and to Ofcom.

10. Costs

We note that with respect to costs, Ofcom has merely restated its current position, noting that BIS are consulting on the question of amendment to Section 190(6) Communications Act 2003, and indicating that it may review its policy and practice in relation to costs once the outcome of that consultation is known.

In its response to the BIS consultation BT set out its views that when it has the power to charge for its administrative costs, Ofcom should impose a fee for bringing a dispute in all cases, in order to dis-incentivise speculative disputes and to incentivise the parties to settle their differences by other means. We still think this would be a beneficial course of action and invite Ofcom to start thinking how it might set up such as system should the Communications Act 2003 be amended as is currently proposed.

We also suggested that where a party seeks to bring a dispute prematurely, i.e. if negotiations have not actually been exhausted, that party should be advised that it is at risk of a costs order. Ofcom already has the power to consider awarding inter party costs, and could therefore adopt such an approach already.

Finally, we suggested that if the parties go to arbitration and then seek to bring a dispute because they are dissatisfied with the outcome of that arbitration, Ofcom should be slow to overturn the arbitrators decision, i.e. only doing so where it is manifestly wrong. Additionally, if the party is unsuccessful in overturning the arbitrators's decision, it should be susceptible to a costs order against it. We repeat that suggestion now.

11. Exceptional circumstances

We appreciate that Ofcom's goal is to develop a process that allows most disputes to be resolved within the prescribed four month time limit. However, recognising the trend towards fewer, but more complex disputes, we urge Ofcom to enhance the draft guidelines by developing a section that is more explicit both in relation to when Ofcom may find exceptional circumstances, and as to how Ofcom will progress the particular case once it has found exceptional circumstances. Currently there is no existing guidance in this area, which could lead to further appeals[1].

We invite Ofcom to consider including in such a section:

- the process Ofcom will go through in order to find Exceptional Circumstances;
- examples of the reasons why Ofcom may find that there are Exceptional Circumstances in a particular case, and
- what Ofcom will do once it finds that the case does involve Exceptional Circumstances.

[1] Although we recognise that the outcome of cases currently before the CAT may lead to judicial guidance in this respect.

In relation to the process, as indicated above, we believe that the EPM offers an opportunity for a preliminary assessment of whether the case may be one where a finding of Exceptional Circumstances will be required. Obviously, however, there may be other opportunities as well. It may be that the case that the volume of information that is produced at the information gathering stage means that a longer time frame will be required, or that consideration of the issues reveals that the matter is considerably more complex than at first anticipated. We suggest that the guidelines should suggest that (a) consideration of Exceptional Circumstances should be on the agenda for the EPM, and (b) that if after the EPM any party has reason to believe that there are good reasons to make a finding of Exceptional Circumstances, it should have the right to make a submission to Ofcom in that regard, that the other party will then have an opportunity to respond. Ofcom will then make a decision in relation to that applications.

With regard to examples of possible reasons for finding Exceptional Circumstances, we have already identified two situations that should be on the list. These are where there is a need to resolve compliance issues and cases where the use of the Section 105 Communications Act 2003 process is necessary to resolve a network access question involving significant regulatory policy. Other potential reasons include the complexity of the case generally, or the amount of materials to be considered or, where there are proceedings elsewhere which, when resolved, will have a material bearing on the outcome of the current dispute.

Finally, we suggest that it would be in the interests of all parties, and would aid transparency, if Ofcom committed publicly that when it makes a finding that Exceptional Circumstances apply in a particular case, it will also be explicit what the Exceptional Circumstances are, and the revised timescales and procedural steps that it will follow as a result of that finding.

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