

DISPUTE RESOLUTION GUIDELINES CONSULTATION RESPONSE

Cable&Wireless
Worldwide

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EXECUTIVE SUMMARY

- Our desire is that Ofcom has a framework which enables it to make sound decisions.
- The proposed changes are beneficial to stakeholders and in particular increase transparency of the process and the submissions of the parties involved. Ofcom could take a step further by encouraging confidentiality rings in appropriate cases. This in our view would benefit the overall system of disputes and also subsequent appeals.
- Ofcom has supplemented the existing enquiry phase. While supporting Ofcom's desire to have all relevant information to hand at the time a dispute is "accepted" we are concerned that the enquiry phase is open to extension (which we have experienced in the past). We propose that for transparency that Ofcom reports on the enquiry phase for each dispute in the same manner in which it currently reports on dispute timescales.

Introduction

Commercial organisations regularly review and reconsider working methods. We welcome Ofcom as a regulator undertaking the same approach and reconsidering if processes are fit for purpose.

Dispute resolution is a function required under the EU legislation. Cable&Wireless Worldwide has over recent years been involved in disputes over significant issues. Ofcom has a number of obvious issues to consider when creating appropriate processes for dispute resolution; timescales are tight, issues are often complex, greater transparency during the process may reduce subsequent appeal of decisions in some cases.

It is recognised that Ofcom has finite resources which need to be utilised efficiently. We agree that CPs should have an obligation to bring forward only dispute submissions that have been adequately written and that provide sufficient details about the negotiations and associated situation (SMP conditions and pricing information). However, we do remind Ofcom of the information asymmetry which occurs when dealing with BT and the lag in publication of regulatory accounts.

Ofcom usefully reports on the timescales taken to resolve disputes. We believe that the enquiry phase is a process unique to the UK. This can lengthen the time to resolve a dispute. Ofcom states that the enquiry phase is intended to extend to only 15 days. We are aware of situations where this has been longer. Ofcom ought to provide transparency on its usage of the enquiry phase and include within the report on dispute timescales separate details of the enquiry phase at least for dispute which have extended enquiry periods.

Comment on the specific proposals

1. Acceptance of a dispute

C&W Worldwide believes that once a CP has demonstrated with evidence that negotiations have broken down and that Ofcom has concluded that the issue in dispute falls within the remit of Ofcom that this immediately trigger the commencement of formal proceedings.

2. Existence of alternative means

We are of the view that Ofcom could clarify that disputes that relate to the compliance with SMP conditions are appropriately dealt with by Ofcom and not appropriate for ADR or other dispute resolution.

3. Resolving disputes

We understand the constraint of the four month deadline to resolve disputes is challenging in situations where Ofcom has large amounts of financial analysis to undertake or financial / network data to obtain from the parties. Ofcom discusses that it would like to determine whether handling the issue via dispute resolution is the best mechanism or whether another regulatory route would be an alternative. We would highlight that most disputes are around the repayment of money by either party. We note that repayment of money is only a regulatory option under section 190(d). Consequently dispute resolution will remain a key regulatory tool for disputing CPs.

4. Information gathering

Ofcom proposes to move away from its practice of issuing draft information requests during dispute resolution cases. We caution against the complete removal of dialogue pre presentation of formal

information request. Perhaps the draft request could be a less formal email to clarify a CPs system capability to generate the required data. It is additionally worth noting that while parties subject to the dispute will be prepared / expecting an information request this would not be true of parties outside of the dispute. Ofcom may need to consider a more standard approach should data be required from parties outside of the dispute.

5. Resolving matters through commercial discussions

Ofcom will be aware that often negotiations with BT are stonewalled. BT often attempts to put off negotiations pending future activity which it deems relevant to the situation. In many cases delaying negotiations to the future date proposed by BT will not yield information that will further aid the settlement of the issue. Ofcom must recognise in such situations that progress on the matters to be negotiated will be limited.

6. Consider relevant previous decisions

Over the last years the body of precedent has grown considerably. The need to consider previous relevant decisions is an important addition to the process. It may well be useful for Ofcom to raise particular concerns of precedent (if possible) at the “speak to us first” stage.

7. Be prepared

Ofcom requests that parties are prepared to engage in the process over the dispute period. CPs can only successfully manage this if timescales are predictable. We can consider and manage employee availability and appropriate cover in advance of submitting a dispute. However, our ability to manage this can only be against the standard timescales. Should the dispute investigation not follow the standard timescales this may prove problematic.

8. Statutory ground for referral

While section 185(1) remains in force there should be a forth step beyond confirming the criteria in section 185(2) are met before Ofcom confirms it has jurisdiction under section 185(2). Ofcom should also confirm that the dispute does not fall within section 185(1). As the CAT has confirmed sections 185(1) and 185(2) are mutually exclusive. Thus, for example a dispute may meet the

criteria in section 185(2) but will fall to be considered under section 185(1) if it also related to network access and otherwise meets the requirements of section 185(1).

9. The enquiry phase

Ofcom has for a while added a separate process step which allows for an enquiry phase which first occurs prior to a dispute being officially accepted and triggering the 4 month dispute resolution timescales. In contrast the Framework Directive appears to require a determination within four months of referral with no extra time allowed for an enquiry phase. We regard it unlikely that the intention of the legislature would have been to impose a strict deadline for resolution but given complete freedom as to the length of a preceding enquiry phase. We suggest that Ofcom clarifies that it would only extend the 15 day working period for the enquiry phase in exceptional situations mirroring the situation for dispute resolution. Furthermore we request that Ofcom adds to its reporting on dispute resolution timescales specific reporting on the timescales for the enquiry phase where the standard 15 day period has been exceeded to provide adequate transparency over the use of the enquiry phase.

10. Enquiry Phase Meeting

We agree that such a meeting would be beneficial. We are hopeful that this could in some cases lead to more commercial settlements at the eleventh hour. We hope it does not prove to be a robotic step, but instead a genuine attempt to understand the issues at stake and an opportunity for Ofcom to make comments, as well as the parties involved in the dispute.

11. Disclosure of parties submissions

We welcome Ofcom's proposal to disclose each party's submissions to the other party to the dispute. It is a basic requirement of procedural fairness in all forms of dispute resolution that a party must be able to see submissions from its opponent. Disclosure is likely to improve the quality of Ofcom's decision making as parties can ensure all points made by their opponent are fully addressed and there is less risk of a misunderstanding which might occur where Ofcom attempts to summarise a point being made. In addition, there will be considerably less work for Ofcom if it only needs to forward documents rather than to attempt to summarise their contents.

It would be a further improvement if parties could be encouraged by Ofcom to agree to the creation of a confidentiality ring in appropriate cases. This would allow professional advisers to access some or all confidential material submitted by the other party to the dispute. Confidentiality rings are constructed at the CAT stage. By using them prior to appeal it means that all issues can be fully discussed during the dispute stage and points are not delayed for full debate until the CAT stage.

We recognise that Ofcom is limited in its powers to require the creation of confidentiality rings. This does not however prevent Ofcom for encouraging them.

12. Joining related dispute and making representations without bringing a separate dispute

Ofcom identifies the opportunity for stakeholders to request that their dispute is joined with other dispute. Ofcom does not make similar provision for it to consolidate disputes at its own initiative.

We believe that it is appropriate for Ofcom to consider a cut off date by which other parties may join a dispute in order that timescales for conclusion are not delayed.

Ofcom proposes to publish at the final determination stage a non confidential version of the dispute submission. If this were made available sooner in the process perhaps at the time of publication in the bulletin third parties would be better placed as to whether they should submit their own dispute for consolidation.

13. Consultation on provisional conclusions

We welcome the new approach. We do however question the feasibility of having the consultation at week 8 given the short period that Ofcom will have between digesting information from information requests and then coming to a provisional decision and drafting the consultation document (even if it is shorter). It is not clear why quite so much time is needed after the publication of provisional views for discussions with stakeholders and further analysis. It might be more efficient for Ofcom to schedule some kind of semi-formal bilateral or plenary hearings after the publication of provisional views so as to facilitate the gathering of views and evidence more efficiently. Alternatively, Ofcom may wish to consider - in larger cases - publishing provisional views piecemeal on an issue-by-issue basis rather than in one go. This has proven effective in some Competition Commission enquiries and also, for example, in Ofcom's consultations in relation to

mobile termination rates where it has published a number of separate consultations dealing with discrete issues. Whilst there is no need for the formal draft determinations that Ofcom has published to date, Ofcom should be careful to provide enough information for its proposals to be intelligible to all parties. Parties can only engage meaningfully if they have quite a full understanding of Ofcom's proposed resolution and the reasons for it.

In relation to timescales but also in general Ofcom does not discuss how internal governance applies to decisions made in dispute resolution. Clarification of this would be useful.