

Dispute Resolution Guidelines

Ofcom's guidelines for the handling of regulatory disputes

**Response to Ofcom's consultation
of 17 December 2010 ("Consultation")**

by Verizon UK Limited ("Verizon Business")

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1. ABOUT VERIZON BUSINESS

Verizon Business welcomes the opportunity to respond to Ofcom's consultation on its Dispute Resolution guidelines. Verizon Business is the global IT solutions partner to business and government. As part of Verizon Communications – a company with nearly \$108 billion in annual revenue – Verizon Business serves 98 percent of the Fortune 500. Verizon Business caters to large and medium business and government agencies and is connecting systems, machines, ideas and people around the world for altogether better outcomes. Verizon Business offers communications services using a combination of its own high-speed fibre-optic network and wholesale services provided by other communications providers.

Verizon Business is a member of UKCTA and supports the response that has been submitted by UKCTA. Verizon Business is also keen to present its own perspective, in addition, as a participant in the dispute resolution process.

RESPONSE TO OFCOM'S PROPOSALS

a) *Introduction and highlights*

Verizon has been an active participant in the dispute resolution process and it is good to see Ofcom looking at this area. It is in our view a jurisdiction Ofcom has performed diligently and a very important one; often dispute resolution represents the only avenue for redress in important cases. Accordingly Verizon welcomes the Consultation and the opportunity to respond.

There is much good in what Ofcom proposes but we do have some concerns. Of particular concern to Verizon is Ofcom's proposed approach to confidentiality. Ofcom proposes greater transparency: more documents will be published, including dispute submissions and comments made in response. Ofcom proposes that while parties may claim commercial confidentiality in relation to information, blanket confidentiality will not ordinarily be accepted. Verizon is certainly of the view that greater transparency of submissions between the parties is useful and welcome. However publication of all submissions on the Ofcom website would in our view pose substantial problems. Perversely it is likely to make parties more guarded; it may discourage the submission of disputes at all. In addition, it is likely to provoke wrangling amongst the parties and with Ofcom about what constitutes confidential information.

Verizon supports the publication of a "Dispute Consultation" to stakeholders rather than a full draft determination to streamline the process. However, Ofcom like anyone can make mistakes, including in the drafting of the Determination. Verizon is of the view that the parties to the dispute (on which the Determination will be legally binding) should have an opportunity to view and comment, even if in a limited way, on a draft of the Determination.

Ofcom could, in Verizon's view give greater guidance on the potential extension of the statutory time limit for resolving disputes. Ofcom could usefully give thought and indications at this stage as to what might constitute "exceptional circumstances" and how long an extension might last for in those cases.

Verizon supports the introduction of an Enquiry Phase Meeting in principle. If such a meeting can be made to work efficiently in practice, we consider that a second tri-partite meeting, after the Dispute Consultation, could help the effective resolution of the dispute and implementation of the Determination.

b) *Enquiry phase*

Ofcom proposes that there will no longer be consultation on a draft information request in order to stream-line the resolution process. The Consultation does not make clear however whether the time saved will be allocated to Ofcom, or to allow the parties additional time to respond to the information request. In the absence of a consultation, it would be useful for the parties to be informed of the information that Ofcom is likely to request in as much detail and as far in advance as possible.

The specification that the length of the enquiry phase will be 15 working days unless there is a good reason for an extension is welcome. However, it would be useful if Ofcom could indicate in what type of circumstances this will be extended, and for how long.

In the Consultation document, Ofcom proposes that it will publish the dispute submission and any comments from the other party in response alongside the final determination. While transparency between the parties is welcome, Verizon has significant concerns about public disclosure of this information, as discussed above. Verizon notes that Ofcom does not refer to s.393 Communications Act 2003 (which imposes restrictions on the disclosure of information) in relation to this information, though it does elsewhere in the Consultation document. We would expect Ofcom to have full regard to these restrictions when implementing the new guidelines in relation to information obtained throughout the resolution process.

Ofcom's proposals give guidance as to what type of situation between communications providers qualifies as "in dispute" for the purpose of Ofcom's dispute resolution. Verizon welcomes Ofcom's recognition that the other party might engage in delaying tactics which give the appearance of continued commercial negotiations but which are in fact in dispute.

Verizon considers the extent to which ADR can be considered a viable alternative to dispute resolution to be limited. Verizon welcomes Ofcom's recognition of the limitations of ADR in an SMP situation. We question the contention that ADR is more cost effective and less bureaucratic in than resolution by Ofcom. Verizon's own experience of dispute resolution via Ofcom has been positive. The recent dispute between Verizon and BT regarding transit traffic was resolved by Ofcom swiftly (in precisely four months), came to a definitive, binding decision with minimal resource demands on the parties involved.¹ Conversely, ADR has the potential to be a lengthy, costly and non-binding process.

Beyond practical considerations, Ofcom has a duty under the Communications Act 2003 to resolve disputes relating to conditions imposed under the EU Directives and communications providers have a right for such disputes to be heard. This stems from the Directives themselves; as expressed in Recital 32 of the Framework Directive: "an aggrieved party that has negotiated in good faith but failed to reach agreement should be able to call on the national regulatory authority to resolve the dispute". ADR bodies do not have the same dispute resolution considerations and we doubt that it would be appropriate for the type of regulatory matters Ofcom currently hears as disputes to be determined, for example, by an arbitrator. As the CAT has stated on more than one occasion, dispute resolution sits within Ofcom's "overall regulatory remit"; "Ofcom carries out its dispute resolution function as a regulator and not as a third party arbitrator". Restating this view, the CAT continued that it was not meant by this "that nothing in Ofcom's role in dispute resolution should be regarded as akin to the role of a commercial arbitrator, simply that it was not Ofcom's *only* role" [emphasis in original].²

Ofcom proposes to introduce a tri-partite Enquiry Phase Meeting. Verizon supports the proposal; in principle it is a good idea. It is however, difficult to foresee how successful such meetings will be in practice. Verizon hopes that they can work in a similarly constructive way to those which have been held in the appeals process. In our experience during the Competition Commission phase of the LLCC appeal, such meetings proved effective in

¹ 'Disputes between BT and each of Cable & Wireless, Gamma, Colt, Verizon and Opal regarding the repayment by BT of certain charges for the transit of traffic' CW/01048/06/10

² *T-Mobile & others v Office of Communications* [2008] CAT 12 Judgment on the Core Issues

highlighting areas of agreement and disagreement. However, they may not be as informal as Ofcom anticipates; parties are likely to want legal representatives to attend, for example.

Verizon Business is concerned that there is potential for difficulties in meeting Ofcom's challenging timescales. For example the Questionnaire requires detailed information with "immediate turn around". If Ofcom requires historical data to be submitted, this may be an unrealistic request.

c) *Main resolution stage*

In addition to the raised regarding the main resolution stage in section a) above, Verizon would like to contribute the following comments on Ofcom's proposals. It seems sensible to Verizon to avoid unnecessary delay by not consulting on draft information requests. However, the proposals in the consultations could, in Verizon's view result in less certainty about the information that will be gathered from the parties. It could mean less visibility of the information that a party is not able to provide. Ofcom could provide greater clarity on the process which would be followed once the party has been given the allotted time to provide the information but is not able to do so. How will Ofcom approach this if the claim is in their view unjustified? Greater clarity on this process could be useful.