



# Dispute Resolution Guidelines

Ofcom's guidelines for the handling of regulatory  
disputes

Consultation

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## Section 1

# Executive Summary

- 1.1 Ofcom has a duty to resolve certain disputes in the communications sector where those disputes fulfil the criteria set out in section 185 of the Communications Act 2003 (the “2003 Act”).
- 1.2 Ofcom is revising its guidance on these regulatory disputes, previously published in 2004.<sup>1</sup> This is a consultation on our new dispute guidelines.
- 1.3 Regulatory dispute proceedings often involve complex issues and are usually highly contentious between the relevant parties. We have experienced a significant increase in the number of regulatory disputes referred to Ofcom in the past few years, with 2009 seeing us open a record number of dispute enquiries. Since the 2003 Act came into force, we have built up considerable experience of resolving disputes. Given that regulatory disputes must be resolved within four months<sup>2</sup>, they can be highly resource intensive for both Ofcom and the disputing parties (the “Parties”). We consider that it is now appropriate to review our processes in light of (i) our experiences to date, (ii) the increasing number of disputes being submitted to us, and (iii) the need to be ever increasingly efficient, especially in the context of constraints on resources following the Government’s comprehensive spending review in October 2010.
- 1.4 Current guidance on regulatory dispute resolution dates from 2004. We published draft guidelines for consultation in 2006<sup>3</sup>, which remain the most up-to-date statement on the way we handle regulatory disputes referred to us.
- 1.5 We intend to publish a final statement on these guidelines in early 2011.
- 1.6 We note that the Department for Business Innovation & Skills (“BIS”) is currently consulting on the implementation of revisions to the European Framework on Electronic Communications.<sup>4</sup> This consultation includes proposals to make changes to section 185 of the 2003 Act. In particular, the proposals include that section 185 of the 2003 Act is amended so that it only applies to disputes in relation to conditions set or modified under section 45 of the 2003 Act. References in these guidelines to disputes under section 185(1) of the 2003 Act are therefore subject to the outcome of this BIS consultation.

## What is in these guidelines?

- 1.7 These guidelines set out:
  - 1.7.1 Ofcom’s duties and powers in resolving regulatory disputes which fall within the provisions of sections 185-191 of the 2003 Act;

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<sup>1</sup> Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives, published July 2004

[www.ofcom.org.uk/bulletins/eu\\_directives/guidelines.pdf](http://www.ofcom.org.uk/bulletins/eu_directives/guidelines.pdf);

<sup>2</sup> Except in exceptional circumstances (section 188(5) of the 2003 Act)

<sup>3</sup> <http://www.ofcom.org.uk/consult/condocs/enforcement/enforcement.pdf>

<sup>4</sup> See Department for Business Innovation & Skills consultation “*Implementing the revised EU Electronic Communications Framework*”, Sept 2010 <http://www.bis.gov.uk/Consultations/revised-eu-electronic-communications-framework>

- 1.7.2 Ofcom's process for handling and resolving such disputes in the future;
  - 1.7.3 practical guidance for stakeholders who are involved in referring a dispute to Ofcom, or who are otherwise involved in a dispute which has been referred to Ofcom.
- 1.8 This document also highlights our proposals for important changes to the form and timing of key processes involved in dispute resolution. In particular:
- 1.8.1 formal involvement of Parties at an early stage, including a meeting prior to accepting or rejecting a dispute, in order to clarify the key issues that are in and out of the scope of a potential dispute;
  - 1.8.2 increased transparency of the issues in dispute by seeking clarity and agreement on facts/issues which are and are not agreed, as well as the disclosure of all Parties' submissions (save those aspects that are commercially confidential) to the other Parties to a dispute; and
  - 1.8.3 no consultation on draft information requests. This practice has delayed the obtaining of information in what is a statutorily time constrained process.
- 1.9 We are also proposing to change the manner in which we consult on our provisional findings. As set out above, the dispute resolution process is a short one, in which disputes must be resolved in four months or less, except in exceptional circumstances. As an exception from the usual position, Article 6 of the Framework Directive expressly provides that Ofcom is under no obligation to consult on a draft dispute determination. However, to date we have chosen to consult stakeholders on draft determinations, publishing a full draft of our proposed determination for comment. Our experience of this practice has been that we have not been in a position to consult on such a draft until relatively late into the four month process, resulting in a significant concentration of work in the last month of that process.
- 1.10 We remain of the view that it is desirable to provide stakeholders with an opportunity to comment on our provisional views and reasoning, before making a final dispute determination. In light of our experience to date, we propose to replace the draft determination with a shorter paper setting out for comment Ofcom's provisional reasoning and assessment in relation to the matters in dispute. We would aim to publish this as early as possible, in order where possible and appropriate to consider whether to allow stakeholders a period, beyond the usual 10 working days, up to a possible 15 working days, to respond, as well as greater time for Ofcom to engage with stakeholders on their responses.
- 1.11 We believe the proposals set out above at paragraphs 1.8 - 1.10 would simplify the dispute resolution process, offer greater transparency in our handling and resolution of regulatory disputes, and make them more efficient and effective for both the Parties concerned and Ofcom.
- 1.12 Section 2 also sets out other areas of Ofcom's dispute resolution and enforcement functions, which are not covered by these guidelines.

### Next steps

- 1.13 Stakeholders are invited to comment on these guidelines. The deadline for responses is **11 February 2011**.

- 1.14 We will update these guidelines from time to time to reflect further changes in our duties, powers and procedures.

## Section 2

# Scope of these Guidelines

### What do these guidelines cover?

- 2.1 Sections 185-191 of the Communications Act 2003 (“2003 Act”) set out Ofcom’s duties and powers in resolving regulatory disputes.
- 2.2 These guidelines explain how Ofcom handles regulatory disputes referred to it in accordance with section 185 of the 2003 Act. Broadly, this document sets out:
  - 2.2.1 the form and manner in which disputes should be referred to Ofcom;
  - 2.2.2 the information/evidence Ofcom requires in order to determine at the outset whether the statutory grounds for a referral are fulfilled and whether it is appropriate for Ofcom to handle the case;
  - 2.2.3 the kind of information Ofcom might expect the Parties to submit to Ofcom during the course of proceedings to enable Ofcom properly to determine the dispute; and
  - 2.2.4 the remedies available to Ofcom in any given case.

### What is not in these guidelines?

- 2.3 Ofcom is also responsible for the following areas of dispute resolution and enforcement, which are not covered by these guidelines:
  - 2.3.1 from next year, disputes concerned with Online Copyright Infringements;
  - 2.3.2 investigations relating to regulatory obligations;
  - 2.3.3 investigations relating to competition law;
  - 2.3.4 compliance with consumer protection provisions in Part 8 of the Enterprise Act 2002, including the Consumer Protection from Unfair Trading Regulations 2008 (the “CPRs”);
  - 2.3.5 compliance with regulatory conditions, where the complaint or concern is about consumer protection;
  - 2.3.6 potentially unfair terms in consumer contracts under the Unfair Terms in Consumer Contracts Regulations 1999 (the “UTCCRs”);
  - 2.3.7 compliance with the “persistent misuse provisions” of the 2003 Act (including silent calls);
  - 2.3.8 complaints about broadcast content; and
  - 2.3.9 protection of the radio spectrum from harmful interference.
- 2.4 The Department for Business Innovation & Skills (“BIS”) is currently consulting on the implementation of revisions to the European Framework on Electronic

Communications.<sup>5</sup> Ofcom intends to publish further and updated guidance for the handling these areas by May 2011.

- 2.5 Finally, these guidelines do not cover complaints from individual consumers. If you wish to make a complaint to Ofcom as a consumer, viewer or listener about a communications provider or a broadcaster, please visit our website for advice on how to make a complaint: [www.ofcom.org.uk/complain/](http://www.ofcom.org.uk/complain/).

### Status and purpose of these guidelines

- 2.6 These Guidelines set out the form and manner in which dispute referrals should be made and the approach Ofcom is likely to take in resolving any disputes it accepts, taking into account that each referral will be assessed on its facts, case by case.
- 2.6.1 **Section 3** sets out Ofcom's dispute resolution duties and powers;
  - 2.6.2 **Section 4** sets out the statutory grounds for making a dispute referral to Ofcom and the manner and form that Parties' submissions should take in referring a dispute to Ofcom for resolution;
  - 2.6.3 **Section 5** sets out the sets out how Ofcom assesses whether the dispute satisfies the statutory grounds for a dispute referral and, if so, how Ofcom decides whether it is appropriate to accept or reject it;
  - 2.6.4 **Section 6** sets out the approach Ofcom will take in resolving the dispute;
  - 2.6.5 **Section 7** provides the section 185(4) format for submitting a dispute.
  - 2.6.6 **Annex 1** sets out how to respond to this consultation;
  - 2.6.7 **Annex 2** sets out Ofcom's consultation principles;
  - 2.6.8 **Annex 3** provides a cover sheet for responding to this consultation;
  - 2.6.9 **Annex 4** provides further background to Pre-EPM Questionnaires; and
  - 2.6.10 **Annex 5** sets out Ofcom's main statutory duties and regulatory principles.
- 2.7 These guidelines are not a substitute for any regulation or law and are not legal advice.
- 2.8 These guidelines will be kept under review and amended as appropriate in the light of further experience and developing law and practice and any change to Ofcom's powers and responsibilities.
- 2.9 These guidelines set out Ofcom's general approach to dispute resolution in the areas covered by the guidelines. They do not have binding legal effect. Where we depart from the approach set out in these guidelines, we will explain why.

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<sup>5</sup> See Department for Business Innovation & Skills consultation "*Implementing the revised EU Electronic Communications Framework*", Sept 2010 <http://www.bis.gov.uk/Consultations/revised-eu-electronic-communications-framework>

## Section 3

# Overview of Ofcom's dispute resolution function

## Ofcom's specific duties relating to disputes under the 2003 Act

- 3.1 Ofcom's duties and powers in resolving regulatory disputes are set out in sections 185-191 of the 2003 Act.
- 3.2 In exercising its dispute resolution functions, Ofcom acts as the regulator and not as a commercial mediator or arbitrator. Ofcom's dispute resolution role is a regulatory function which must be exercised consistently with Ofcom's statutory duties and obligations as the sectoral regulator, in particular as set out in sections 3 and 4 of the 2003 Act. Ofcom's statutory duties and regulatory principles are set out at Annex 5.
- 3.3 There are two key procedural stages in Ofcom's assessment of any dispute submission:
1. **Enquiry Phase:** During this phase (usually 15 working days) Ofcom considers, (a) whether the statutory grounds for a dispute referral under the 2003 Act have been met and, (b) whether it is appropriate for Ofcom to handle the dispute. If Ofcom decides it is appropriate for it to handle the dispute, it will define the exact scope of the dispute and open formal proceedings.
  2. **Formal Proceedings:** During this phase, Ofcom will determine the dispute following consultation with, and taking account of any submissions from, the Parties to the dispute (and any other interested parties that have a view on the dispute). Ofcom must determine the dispute within four months of its decision that it is appropriate for it to handle the dispute, except in exceptional circumstances.

## Existence of a dispute and the statutory grounds for referral

- 3.4 Before Ofcom accepts a dispute, it will expect the Parties to provide evidence that they have exhausted possible means to resolve the dispute themselves and to show that they are indeed in dispute. Ofcom will then decide on the basis of the information available to it whether in its view the dispute referral fulfils any of the statutory grounds for a dispute referral.
- 3.5 Ofcom has jurisdiction to resolve the following types of regulatory disputes under the 2003 Act:
- 3.5.1 a dispute relating to the provision of network access (section 185(1) of the 2003 Act<sup>6</sup>); and
  - 3.5.2 a dispute, which is not an 'excluded dispute'<sup>7</sup>, relating to rights or obligations conferred or imposed by or under Part 2 of the 2003 Act or any

<sup>6</sup> This provision implements Article 5(4) of the Access Directive.

<sup>7</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



of the enactments relating to the management of the radio spectrum that are not contained in Part 2 (section 185(2) of the 2003 Act<sup>8</sup>).

### Existence of alternative means

- 3.6 According to section 186(3) of the 2003 Act, Ofcom will accept the dispute unless there are alternative means to resolve the dispute promptly and satisfactorily, in line with the Community requirements set out in section 4 of the 2003 Act.
- 3.7 In some cases, for example, Ofcom may consider that it would be appropriate to send the dispute for alternative dispute resolution (“ADR”). We would make this assessment on the particular facts of each individual case.
- 3.8 If the dispute is not resolved by alternative means before the end of the four months after the day of Ofcom’s decision not to accept the dispute, one or more of the Parties may refer the dispute back to Ofcom.

### Resolving disputes

- 3.9 Ofcom must resolve disputes within the four month statutory deadline, except in exceptional circumstances (section 188(5) of the 2003 Act).
- 3.10 Ofcom’s powers when resolving disputes are set out in section 190 of the 2003 Act.
- 3.11 In all cases Parties should have realistic expectations of the depth of analysis Ofcom is able to carry out within the four month statutory deadline. Whilst dispute resolution is a separate regulatory function to be used in parallel to Ofcom’s other regulatory powers, Ofcom is clearly not able to undertake the type of analysis it would normally carry out in exercising its *ex ante* regulatory powers or its powers under the Competition Act 1998.
- 3.12 Where necessary, Ofcom will consider exercising any of its regulatory powers listed in section 190(4) of the 2003 Act, or any other of its regulatory powers as the sectoral regulator, instead of or at the same time as resolving the dispute.

### Information gathering

- 3.13 Ofcom has specific information gathering powers under section 191 of the 2003 Act. Ofcom may require such further information from any Party to the dispute or any third party who it appears to Ofcom may have relevant information.
- 3.14 In light of the tight statutory deadlines for resolving disputes, Ofcom may set challenging deadlines for the provision of such further information and Ofcom will in future not normally issue information requests in draft form in advance (this represents a change from our previous practice). Sections 138-144 and section 404 of the 2003 Act apply in relation to failures to comply with Ofcom’s requests for information according to section 191 of the 2003 Act.

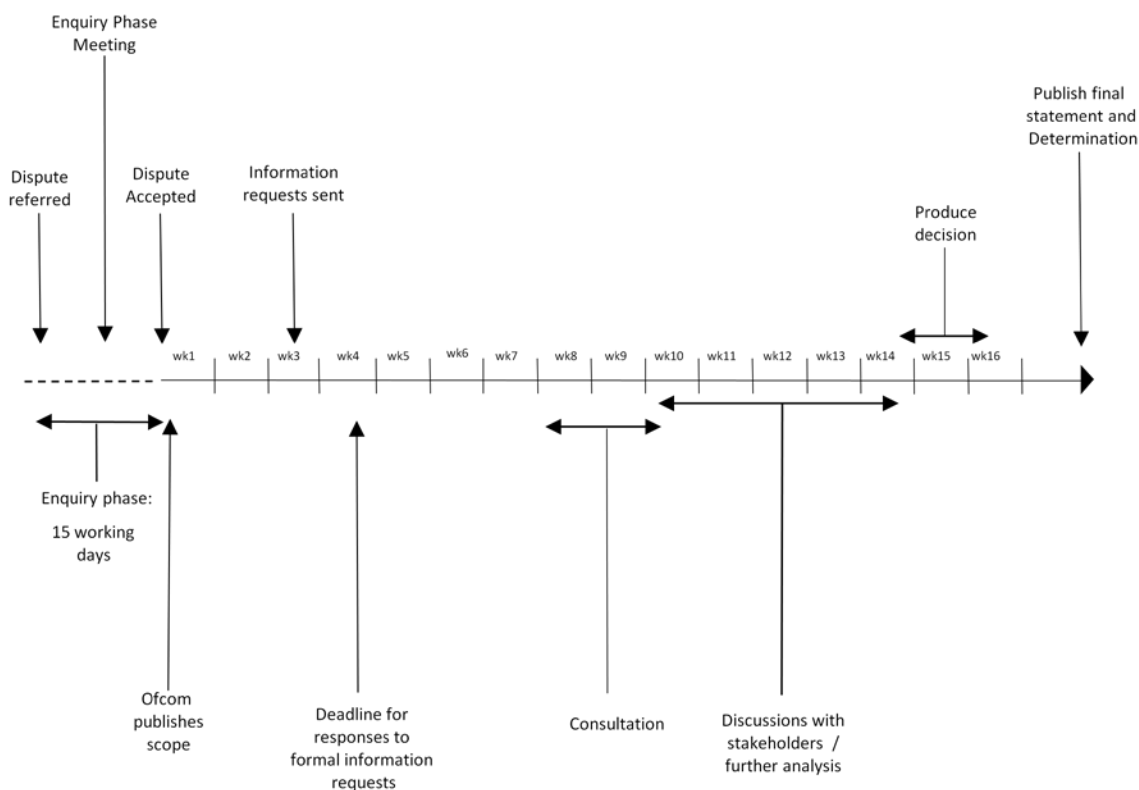
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provider by or under any of sections 128 to 131; or (iv) in the case of a communications provider, the operation of section 134.

<sup>8</sup> This provision implements Article 20 of the Framework Directive.

## Statutory Timeline

3.15 The figure below sets out the key stages in the typical four month timetable for the resolution of a dispute.



## Contact with the case team during the enquiry phase and formal proceedings

3.16 A dispute is handled by a case team made up of members of Ofcom's Investigations team, lawyers and various other specialists (e.g. economists and financial analysts) as appropriate. The primary point of contact for Parties to disputes is the case leader. Ofcom will provide the name and contact details of the case leader to relevant Parties and will also publish these contact details in the Competition and Consumer Enforcement Bulletin entry announcing the commencement of the resolution of the matter.

## Advice to Parties to disputes

3.17 Parties considering referring a dispute to Ofcom should initially consider the following:

- **Seek to resolve matters through commercial discussions:** As far as possible, Parties should seek to resolve the dispute themselves before asking Ofcom to intervene. Ofcom will wish to see evidence that negotiations have been exhausted before opening a dispute.
- **Speak to us first:** Ofcom is always prepared to discuss emerging issues, and consider matters prior to the submission of a dispute. Ofcom recognises the value of dispute prevention, as well as dispute resolution.

- **Consider any relevant previous decisions:** Please consider whether there are existing Ofcom decisions or rulings by the Competition Appeal Tribunal (“CAT”)<sup>9</sup> that provide an indication of the likely approach to be followed on particular issues. Previous Ofcom decisions are published on Ofcom’s Competition and Consumer Enforcement Bulletin (“CCEB”).<sup>10</sup> The CCEB also gives details of any appeals against Ofcom decisions, which may help you in considering how to submit your case.
- **Read and apply these Guidelines:** Submissions which do not comply with the requirements set out in these Guidelines may not be accepted.
- **Be prepared:** We are required by the 2003 Act to resolve disputes within four months, except in exceptional circumstances. This is a demanding timetable and Parties referring or otherwise involved in disputes need to be aware of the demands this places on them as well as on Ofcom. In most cases, Ofcom will not grant extensions to deadlines to respond to information requests or to consultation deadlines, and Parties need to commit to work with Ofcom in this process, and recognise that Ofcom will typically make decisions based on the evidence that it has received within the deadlines that it sets. If you submit a dispute, we will assume that you have considered and are prepared to meet this commitment.

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<sup>9</sup> <http://www.catribunal.org.uk/>

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

## Section 4

# Making a dispute referral to Ofcom

- 4.1 This section explains how Parties can submit a request for Ofcom to resolve a dispute and how we decide whether to accept such a referral for consideration as part of an Enquiry Phase.

### Statutory grounds for referral

- 4.2 Ofcom currently only has the power to resolve the following types of regulatory disputes under the 2003 Act:
- 4.2.1 a dispute relating to the provision of network access (section 185(1) of the 2003 Act<sup>11</sup>); and
  - 4.2.2 a dispute, which is not an ‘excluded dispute’ according to section 185(7) of the 2003 Act, relating to rights or obligations conferred or imposed by or under Part 2 of the 2003 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 2003 Act<sup>12</sup>).
- 4.3 During the Enquiry Phase, Ofcom will consider whether or not the dispute in question falls within one or both of these types of regulatory disputes. This question is one which will need to be considered by Ofcom in all cases as a matter of substance, irrespective of the Parties’ own view of the nature of the dispute.
- 4.4 It may sometimes be necessary for Ofcom to take a preliminary view on jurisdictional issues and then to reconsider them in more detail during the resolution of the matter. This is particularly likely in cases where it is necessary for Ofcom to consider in detail the subject-matter of the dispute in order to determine whether it falls within the scope of its dispute resolution powers. For 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 2003 Act), the opposing party might argue that the dispute does not, in fact, involve interconnection. In such a case, the question of whether the dispute does concern interconnection is likely to be included as part of Ofcom’s consideration of dispute submissions during the Enquiry Phase so that, where appropriate, it has already taken a view on this matter before deciding whether there is a dispute to be resolved and proposing how that dispute should be determined.
- 4.5 In contrast, some disputes referred to Ofcom may be clearly outside the scope of Ofcom’s dispute resolution powers. For example, if a dispute actually concerns a broadcasting matter (such as, for example, ensuring adherence to the broadcasting codes by broadcasters as required by their licence conditions) falling within Part 3 of the 2003 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 2003 Act.

<sup>11</sup> This provision implements Article 5(4) of the Access Directive.

<sup>12</sup> This provision implements Article 20 of the Framework Directive.

- 4.6 In order to provide more guidance to Parties considering a dispute reference, Ofcom sets out below how Ofcom would be likely to consider dispute references under the more common grounds for referral, sections 185(1) and 185(2) of the 2003 Act.

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

- 4.7 Where a party refers a dispute to Ofcom under section 185(1) of the 2003 Act, the first question that Ofcom will consider is whether, in the light of the party's submission, the dispute relates to the provision of network access within the meaning of section 151(3) of the 2003 Act.<sup>13</sup>
- 4.8 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) of the 2003 Act), namely:
- 4.8.1 a dispute between different communications providers;
  - 4.8.2 a dispute between a communications provider and a person who makes associated facilities available;
  - 4.8.3 a dispute between different persons making such facilities available;
  - 4.8.4 a dispute relating to the subject-matter of a condition set under section 74(1) of the 2003 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
  - 4.8.5 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**

- 4.9 Where a party refers a dispute to Ofcom under section 185(2) of the 2003 Act, the first question Ofcom will consider is whether the dispute relates to rights or obligations conferred or imposed by or under Part 2 of the 2003 Act (such as general conditions, significant market power ('SMP') conditions, etc.) or any of the enactments relating to the management of the radio spectrum that are not contained in that Part.
- 4.10 Secondly, Ofcom will consider whether the dispute relating to such rights or obligations is a dispute between different communications providers.
- 4.11 Thirdly, Ofcom will consider whether the dispute is an "excluded dispute" according to section 185(7) of the 2003 Act. 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 of the 2003 Act; (iii) obligations imposed on a communications provider by or under any of sections 128 to 131 of the 2003 Act; or (iv) in the case of a communications provider, the operation of section 134 of the 2003 Act.

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<sup>13</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 access is, or may be, provided in a particular case.

- 4.12 We will work with Parties to ensure that they understand the requirements set out in these guidelines for submitting a dispute referral. If a submission does not meet our requirements, we can provide some guidance to help Parties identify what else they need to do before Ofcom will consider accepting a submission.
- 4.13 We expect stakeholders to make adequate, well reasoned submissions supported by evidence.

### **Submission requirements for a complaint**

- 4.14 Ofcom will only open an Enquiry Phase where the information provided by the party referring the dispute is sufficient to enable Ofcom at the outset to determine whether the dispute satisfies the statutory conditions for a referral and whether or not it is appropriate for Ofcom to accept it.
- 4.15 We expect dispute submissions to meet minimum requirements before we take any further action. These include having the facts of the case and details of the issues in dispute, the remedies sought and evidence that commercial negotiations have been exhausted.
- 4.16 Parties are reminded that if they do not refer disputes in the manner set out in these guidelines (Section 185(4) of the 2003 Act), Ofcom is not obliged to accept the dispute (Section 186 (1) of the 2003 Act). A full list of submission requirements, together with contact details for where to send a dispute submission, is at section 7.

### **Ofcom's handling of the submission**

- 4.17 All submissions are handled initially by the Competition Group's Investigations Programme Manager. The Investigations Programme Manager responds to queries and provides advice on the process of submitting a complaint or dispute and should generally be the first port of call for a potential disputant.
- 4.18 Upon receipt, the Investigations Programme Manager will confirm receipt of the submission within one working day.
- 4.19 The Investigations Programme Manager will then assess whether the submission contains the requisite documentation and information<sup>14</sup>. Confirmation of whether or not the submission satisfies these requirements will be provided by them within two working days of receipt of the submission.
- 4.20 Where the Investigations Programme Manager has confirmed that the requisite documentation and information was contained in the submission, the submission will be accepted for consideration by Ofcom as part of an Enquiry Phase.
- 4.21 Where the Investigations Programme Manager has confirmed that a submission did not contain the requisite documentation and information, it will not be accepted for further consideration by Ofcom. In such circumstances, the Investigations Programme Manager will advise the Party of the specific reasons.
- 4.22 The next section explains how Ofcom handles submissions during its Enquiry Phase in order to decide whether it is appropriate for Ofcom to handle a dispute.

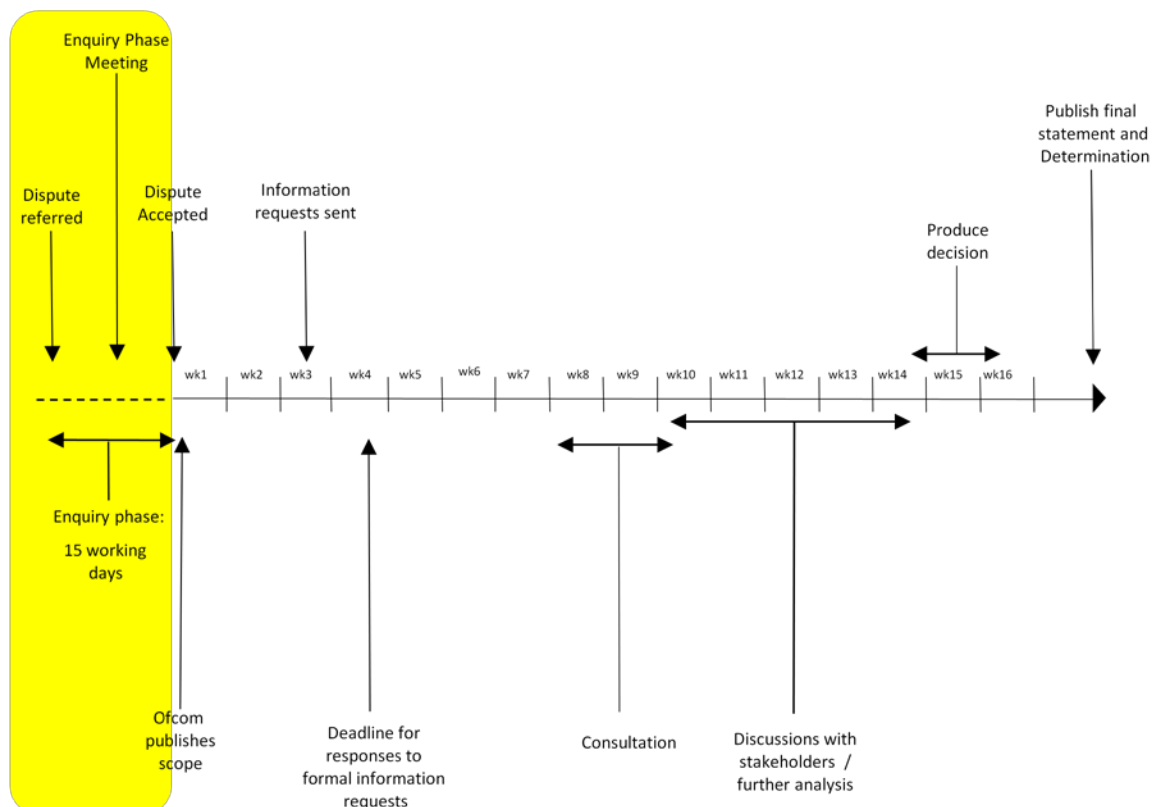
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<sup>14</sup> Sections A – E, and where appropriate F, of the section 185(4) format for submitting a dispute referral, plus a signed declaration by an officer of the company.

## Section 5

# The Enquiry Phase

- 5.1 This section describes the Enquiry Phase process and the assessment Ofcom makes at the outset about whether the statutory grounds for a dispute referral are met and whether it is appropriate for Ofcom to accept the dispute.



## Purpose of the Enquiry Phase

- 5.2 Once Ofcom is satisfied that it has been provided with sufficient information to consider the referral submission, including non-confidential versions of submissions, Ofcom will allocate the matter a case number and open an enquiry. The Enquiry Phase involves Ofcom considering whether or not it is appropriate for Ofcom to handle the dispute and will normally last no more than 15 working days.
- 5.3 Ofcom may extend the Enquiry Phase beyond 15 working days if there is a good reason (or, in some cases, at the request of the party referring the dispute). Where Ofcom needs more than 15 working days to decide whether it is appropriate to accept the dispute, it will inform the Parties of this fact.
- 5.4 During the Enquiry Phase, Ofcom will decide:<sup>15</sup>

<sup>15</sup> Ofcom's assessment of these issues during the Enquiry Phase does not preclude a further assessment of these matters at a later point in the event that Ofcom accepts the dispute for resolution.

- 5.4.1 whether the Parties are in dispute and whether the submitted dispute satisfies any of the statutory grounds for referral (section 185 of the 2003 Act);
  - 5.4.2 whether it is appropriate for Ofcom to handle the dispute or whether there are alternative means available for resolving the dispute; and
  - 5.4.3 the scope of the dispute to be determined.
- 5.5 During the Enquiry Phase, we do not publish details of enquiries, or comment publicly on enquiries. Note that in the interests of transparency, as part of publishing a final determination, Ofcom may also publish non-confidential versions of both the dispute submission and the other Party's comments on it (as well as any non-confidential versions of comments on the consultation on Ofcom's provisional conclusions). This represents a change from our previous practice.

### **Evidence that the Parties are in dispute**

- 5.6 Ofcom will expect the Parties to have provided evidence that they have exhausted all reasonable means of resolving the dispute themselves. In light of this information, Ofcom will decide whether it considers that the Parties are in dispute.
- 5.7 Ofcom recognises that some companies may refuse to enter into negotiations afresh, use delaying or stalling tactics in on-going negotiations or otherwise obstruct the proper course of commercial negotiation. In such cases, the party referring the dispute must be able to demonstrate to Ofcom that it has taken all reasonable steps to engage the other party in commercial negotiations. Ofcom will usually accept evidence that one party has refused to cooperate in commercial negotiations as proof of a dispute.

### **Are either or both of the statutory grounds for a dispute referral fulfilled?**

- 5.8 If Ofcom considers that the Parties are indeed in dispute, Ofcom will consider whether the dispute has been properly referred according to section 185 of the 2003 Act .

### **Is it appropriate for Ofcom to handle the dispute or are there alternative means for resolution?**

- 5.9 Having established that the dispute has been properly referred according to section 185, Ofcom must decide whether or not it is appropriate for it to handle the dispute.
- 5.10 Section 186 of the 2003 Act provides that Ofcom may only refuse to handle a dispute which has been properly referred to Ofcom for resolution if:
  - 5.10.1 alternative means exist to resolve the dispute; and
  - 5.10.2 resolution of the dispute by those means would be consistent with Ofcom's Community requirements set out in section 4 of the 2003 Act; and
  - 5.10.3 those means are likely to lead to a prompt and satisfactory resolution of the dispute.

### **Existence of Alternative Means**



- 5.11 Ofcom will consider on a case-by-case basis whether alternative means are available to resolve the dispute promptly and satisfactorily, in line with its statutory duties and obligations.
- 5.12 An example of alternative means would be alternative dispute resolution (“ADR”), for example arbitration or mediation. 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>16</sup> and the Chartered Institute of Arbitrators,<sup>17</sup> etc.<sup>18</sup> In addition, Ofcom notes that the communications industry has taken its own initiative by establishing the Communications Providers’ ADR Service.<sup>19</sup> In some cases, this may help industry to resolve disputes without the need for formal intervention by Ofcom.
- 5.13 Alternative means of resolving disputes such as ADR can offer a number of advantages to more formal dispute resolution, for example in terms of cost and time to the Parties. However, Ofcom recognises that the success of ADR for dispute resolution often depends on the motives and incentives of the Parties involved to reach a commercial solution. In certain circumstances, Ofcom 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.

### **Referring disputes back to Ofcom where alternative means have failed**

- 5.14 Where Ofcom has initially decided that it is not appropriate for it to handle the dispute on the basis that alternative means exist, but where the dispute has not been resolved by alternative means before the end of the four months after the date of Ofcom’s decision, the dispute may be referred back to Ofcom by one or more of the Parties to the dispute.
- 5.15 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.
- 5.16 In such circumstances, Ofcom’s four month timetable for resolving the dispute will begin from the day the dispute is referred back to Ofcom, subject to any clarification Ofcom may need from the Parties about the nature of the dispute, e.g., where the scope of the dispute has changed.

### **Enquiry Phase Meeting and the clarification of facts and issues**

- 5.17 Submissions will often require points of clarification and involve Ofcom raising these with the Parties. Any information gathering during this phase is likely to be limited to assisting Ofcom to understand the dispute.

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<sup>16</sup> <http://www.cedr.co.uk/>

<sup>17</sup> <http://www.arbitrators.org/index.asp>

<sup>18</sup> These serve as examples only as Ofcom has not taken a view that one institution’s 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 generally available to resolve disputes.

<sup>19</sup> <http://www.communications-adr.com/index.asp>

- 5.18 The first step in this process of clarification is that we will send the non-confidential version of the submission including the list of facts and issues to the other party to the dispute. In doing so, we will invite that party to comment on the submission. In the interests of transparency, we will then provide these comments to the party submitting the dispute referral (this represents a change from our previous practice). Where comments are confidential, we will ask for a non-confidential version that can be shared with the other party to the dispute. We will require Parties to justify any claims of commercial confidentiality, and will not typically entertain blanket claims.
- 5.19 Following the initial exchange of non-confidential documents, we will normally expect all Parties to attend a joint Enquiry Phase Meeting (“EPM”) held by Ofcom. This represents a change from our previous practice. The EPM is intended to be an informal meeting, attended by commercial and regulatory affairs representatives of the Parties. The purpose of the meeting will be to enable us to confirm the facts agreed by the Parties, the facts that remain in dispute and to help clarify issues so as to inform our decision of what is in and out of scope, should we decide that it is appropriate for us to handle the dispute. The EPM will also assist in defining what further evidence may be needed in order to resolve the dispute. Finally, at the EPM Ofcom will outline the process and timetable for the dispute should it be accepted.
- 5.20 In preparation for an EPM, all Parties to the dispute will be expected to complete a pre-EPM Questionnaire prior to the meeting. Inevitably due to the limited time of the enquiry phase this will require an immediate turnaround, with Parties completing the forms within the period specified by Ofcom. Examples of the types of pre-EPM questions are set out at Annex 4. The responses to the pre-EPM Questionnaire will then be shared by Ofcom with the Parties and will provide the focus for the EPM.
- 5.21 The EPM will be arranged to be held at Ofcom’s premises (with facilities for remote access provided for Parties unable to attend in person). In relation to the date of the EPM, we will need parties to be flexible and while we will endeavour to find a date and time that is best for all Parties, Ofcom will need to reserve the right to fix the EPM for a specific time and date that will allow it to complete the enquiry within 15 working days.
- 5.22 We expect the EPM to be an integral part of our normal procedures during the Enquiry Phase. However, we recognise that in some circumstances, submissions and responses to pre-EPM Questions could lead us to conclude that an EPM may not be appropriate. In such circumstances, we will advise Parties of this decision.
- 5.23 Ofcom would normally expect the process of issuing pre-EPM Questionnaires through to holding an EPM to take around five working days. Ofcom acknowledges that this will necessitate the full cooperation of all Parties, in particular as it is unlikely that it will be possible to grant any extensions of time for completion of the pre-EPM questionnaires and Parties may need to adjust their schedules so that they can attend the EPM meeting.

### **Notifying the Parties of Ofcom’s decision to accept or reject a dispute for resolution**

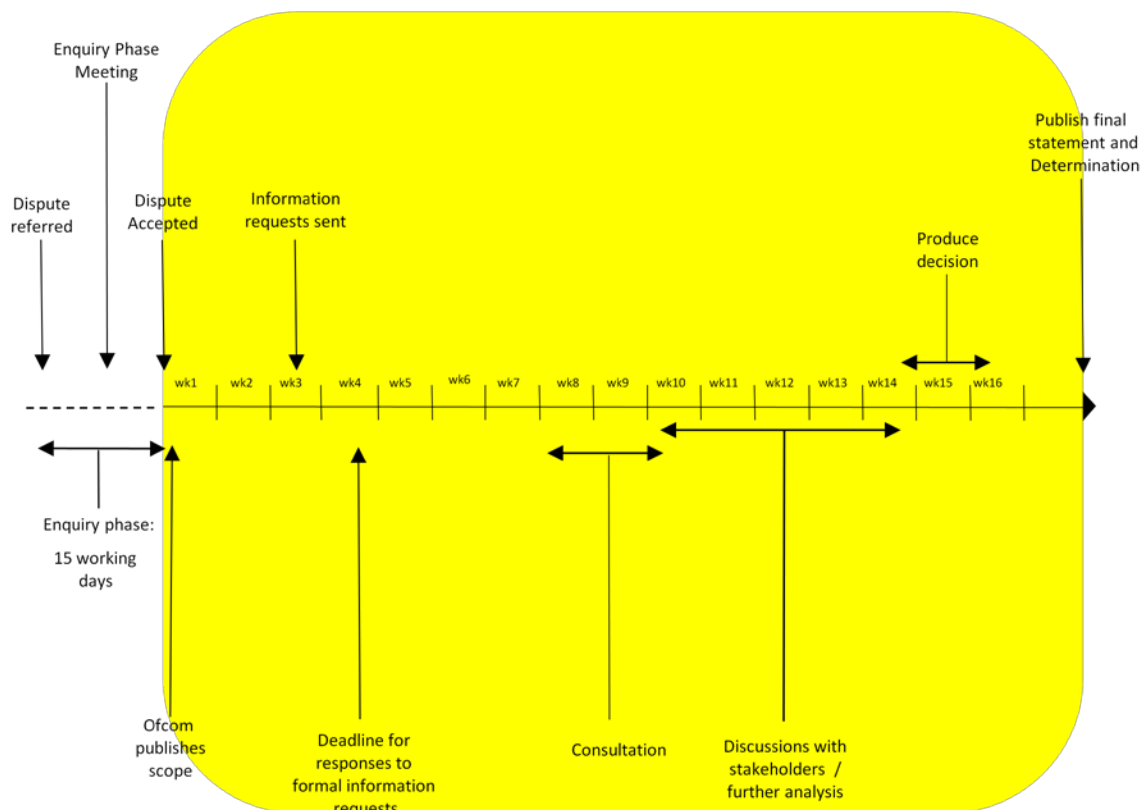
- 5.24 As soon as reasonably practicable after Ofcom has decided whether or not it is appropriate for it to handle the dispute, it will inform the Parties to the dispute of its decision and the reasons for it.
- 5.25 In the event that Ofcom does consider it appropriate for it to handle the dispute, Ofcom will subsequently publish this fact and the scope of the dispute in the

Competition and Consumer Enforcement Bulletin. This is discussed in more detail in the next section, which sets out how Ofcom resolves a dispute.

## Section 6

# Resolving a dispute

- 6.1 This section provides guidance on Ofcom’s approach once it has decided that it is appropriate for it to handle a dispute and so has accepted a dispute for resolution.



## Publication of acceptance of dispute and its scope

- 6.2 Once we have accepted a dispute for resolution, we will publish our decision in the Competition and Consumer Enforcement Bulletin (“CCEB”) section of our website at [http://www.ofcom.org.uk/bulletins/comp\\_bull\\_index/](http://www.ofcom.org.uk/bulletins/comp_bull_index/), setting out the names of the Parties to the dispute and the scope of the dispute.
- 6.3 Defining and publishing the scope of the referred dispute ensures there is clarity from the outset of precisely what issues Ofcom is required to resolve during the course of the dispute. Ofcom’s experience in dealing with disputes shows that, in order to resolve a dispute within the four month statutory time limit, it is essential to define the scope as precisely as possible. The scope will therefore confirm those matters in scope and where appropriate, also those out of scope.
- 6.4 Ofcom will base its decision on the scope on the basis of the exchange of information provided during the Enquiry Phase, in particular, concerning the submission and subsequent comments from the Parties, as clarified by the EPM.
- 6.5 We do not propose to consult on the scope of the dispute. Parties will have an opportunity at the EPM to put forward any views they might have as to scope. This represents a change from our previous practice.

- 6.6 Ofcom may update CCEB entries during the formal proceedings phase of the dispute. Stakeholders who want to keep up to date with ongoing disputes can subscribe to email notification of changes to the Competition and Consumer Enforcement Bulletin.<sup>20</sup>

### **Joining related disputes and making representations without bringing a separate dispute**

- 6.7 An Ofcom dispute determination binds only the Parties to that dispute. Where more than one dispute is brought by separate stakeholders which (a) meet the statutory grounds for referral, and (b) raise substantially the same issues as one another, following publication of Ofcom's decision to accept the dispute the relevant stakeholders have the opportunity to ask for their disputes to be joined and considered together. In certain cases, Ofcom will actively seek comment from affected third parties. Ofcom expects to share any third party submissions with the Parties.
- 6.8 Stakeholders who wish their disputes to be joined with another dispute must provide evidence that they are in dispute and all the information required in section 7. Where such submissions include comments that are confidential, we will ask for a non-confidential version that can be shared with the other party to the dispute. We will require stakeholders to justify any claims of commercial confidentiality, and will not typically entertain blanket claims.
- 6.9 Stakeholders that do not wish to bring their own separate disputes, but are interested in the outcome of particular dispute, will have the opportunity (a) to subscribe to email notification of changes to the Competition and Consumer Enforcement Bulletin, and (b) to respond to Ofcom's provisional conclusions for the resolution of a dispute (see paragraph 6.23 below).

### **Information requests**

- 6.10 In order to assist Ofcom to resolve a dispute, Ofcom may request information from the Parties or any other person who it appears to Ofcom may have relevant information, using its powers set out in section 191 of the 2003 Act.
- 6.11 Section 191 specifies that a person required to provide information under this section: 'must provide it in such manner and within such reasonable period as may be specified by OFCOM'. Accurate information provided in a timely manner is critical to the efficient resolution of disputes. To date, and in line with our policy statement on information gathering<sup>21</sup>, Ofcom has sent out draft information requests under section 191 and has allowed recipients time to comment before sending out finalised requests. This practice has delayed the obtaining of information.
- 6.12 Given the tight timescales involved in resolving disputes, in order to help avoid unnecessary delays Ofcom proposes that its general practice in disputes will be not to formally consult on a draft information request. If Parties do not have all the information sought in the request they should advise Ofcom of this in their response to that request.
- 6.13 Ofcom's general practice is that information sought under a formal information request should be provided to Ofcom within 5-10 working days (depending on the

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<sup>20</sup> [http://www.ofcom.org.uk/static/subscribe/comp\\_bull.htm](http://www.ofcom.org.uk/static/subscribe/comp_bull.htm)

<sup>21</sup> [http://stakeholders.ofcom.org.uk/consultations/info\\_gathering/statement/](http://stakeholders.ofcom.org.uk/consultations/info_gathering/statement/)

complexity of the request). This will remain the case. In general, due to the constraints of needing to resolve the dispute within four months, 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. Where information is confidential, we may ask for a non-confidential version and we will require stakeholders to justify any claims of commercial confidentiality. We will not typically entertain blanket claims that everything is confidential.

## Resolving the dispute

6.14 Ofcom will consider each dispute on a case-by-case basis according to its specific facts, the submissions made by the Parties and any other submissions received, any applicable regulatory obligations and Ofcom's regulatory principles and statutory duties.

## Remedies

6.15 Parties are encouraged to set out the remedies which they consider to be appropriate to resolve the dispute in their dispute submissions. These should be in line with Ofcom's powers under section 190(2) of the 2003 Act, and Ofcom's regulatory principles and statutory duties. However Ofcom, as the sectoral regulator, is not limited to the remedies proposed by the Parties in resolving a dispute. Ofcom will consider on a case-by-case basis what remedy is appropriate to resolve the dispute. Other than in relation to spectrum disputes<sup>22</sup>, Ofcom's main power in resolving a 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.

6.16 Ofcom's main power in a spectrum dispute is to make a declaration setting out the rights and obligations of the parties to the dispute.

6.17 In the case of a dispute that has been referred back to Ofcom following an attempt at resolution by alternative means, Ofcom may, in making its determination, take account of decisions already made by others in the course of an attempt to resolve

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<sup>22</sup> 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 (Section 190(3) of the 2003 Act) 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.

the dispute by alternative means<sup>23</sup>. 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 Ofcom’s regulatory principles and statutory duties, as set out in sections 3 and 4 of the 2003 Act.

- 6.18 Where appropriate, Ofcom will also consider exercising any of its regulatory powers listed in section 190(4) of the 2003 Act, or any other of its regulatory powers as the sectoral regulator.
- 6.19 For the avoidance of doubt, where a dispute is referred to (or referred back to) Ofcom, the reference does not prevent any affected person from bringing or continuing legal proceedings before the courts in accordance with section 104 of the 2003 Act.

### **Consultation on Ofcom’s provisional conclusions: new form for consultation with the Parties**

- 6.20 As set out in section 1 above, we are also proposing to change the manner in which we consult on our provisional findings. The statutory dispute resolution process is a short one, in which disputes must be resolved in four months or less, except in exceptional circumstances. As an exception from the usual position, Article 6 of the Framework Directive<sup>24</sup> expressly provides that Ofcom is under no obligation to consult on a draft dispute determination.
- 6.21 However, to date we have chosen to consult stakeholders on draft determinations, publishing a full draft of our proposed determination for comment. Our experience of this practice has been that we have not been in a position to consult on such a draft until relatively late into the four month process, resulting in a significant concentration of work in the last month of that process.
- 6.22 We remain of the view that it is desirable to provide stakeholders with an opportunity to comment on our provisional views and reasoning, before making a final dispute determination.
- 6.23 We therefore intend to introduce a simpler consultation process, which we will normally apply before making a final determination. Instead of publishing a full draft determination, Ofcom proposes by circa week 8 of the dispute to publish a shorter document, setting out for comment the main elements of Ofcom’s provisional reasoning and assessment in relation to the matters in dispute (the “Dispute Consultation”).
- 6.24 This form of document will be much shorter than previous draft determinations have tended to be.
- 6.25 In most cases, we would expect to publish the Dispute Consultation on our website. An exception to this would be where a party to the dispute is able to show that publication would seriously prejudice its interests. Ofcom will consider whether or not any such claim by a party or parties is well founded and whether disclosure of

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<sup>23</sup> Section 190(5) of the 2003 Act.

<sup>24</sup> See Article 6 of the Framework Directive (Directive 2002/21/EC)

information may facilitate the carrying out of its functions (including Section 188(8) of the 2003 Act).

- 6.26 Although the Parties are generally invited to indicate whether and, if so, on what grounds they consider specific information in a submission to Ofcom to be confidential, Ofcom will not normally invite further comment from the relevant party once it has expressed its view on Parties' confidentiality markings in disputes. For the avoidance of doubt, Ofcom does not regard submissions on legal or regulatory policy to be confidential and any such submissions will normally be disclosed publicly. Further, Ofcom will sometimes be required to publish/disclose information marked as confidential in order to meet legal obligations.
- 6.27 In order to manage the process as effectively as possible, and in light of our intention to publish a Dispute Consultation earlier in our process than is currently typically the case for the publication of a draft determination, we will where possible and appropriate consider whether to allow stakeholders a period beyond the usual 10 working days, up to a possible 15 working days, to comment on the Dispute Consultation<sup>25</sup>.

### Final determination

- 6.28 In accordance with section 188(7)(a) of the 2003 Act, Ofcom will send a copy of its final determination, together with a full explanatory statement, to every party to the dispute. The final determination is binding on the Parties and is enforceable in court between the Parties.
- 6.29 In addition, Ofcom will normally publish a non-confidential version of the final determination on its website in the Competition and Consumer Enforcement Bulletin. Ofcom considers that the publication of final determinations is generally in the public interest and in line with Ofcom's regulatory duties.<sup>26</sup>
- 6.30 Stakeholders should note that when publishing a final determination, Ofcom may also publish non-confidential versions of both the dispute submission and any other party's comments on it, as well as any non-confidential submissions received in response to the Dispute Consultation. This represents a change from our previous practice.

### Statutory time limit / exceptional circumstances

- 6.31 As noted above, Ofcom has a statutory duty under section 188(5) of the 2003 Act to resolve disputes within four months after the day:

- 6.31.1 it issues a decision that it is appropriate for it to handle the dispute; or
- 6.31.2 the dispute is referred back to Ofcom in accordance with section 186(6) of the 2003 Act,

unless Ofcom concludes that there are exceptional circumstances, or where the court orders the handling of the dispute by Ofcom to be stayed or sisted in accordance with section 187(3) of the 2003 Act.

<sup>25</sup> Parties should note that Ofcom may nevertheless shorten the 10 working day timetable, as appropriate in individual cases.

<sup>26</sup> Ofcom will have regard to its duties regarding commercial confidentiality under sections 26 and 393 of the 2003 Act before publishing or disclosing information.



- 6.32 If appropriate, Ofcom will on a case-by-case basis consider whether there are exceptional circumstances, in light of any representations which have been made to it. We consider that exceptional circumstances should be construed narrowly in light of the fact that they are intended to be exceptional, and on the facts of each particular case.
- 6.33 Where Ofcom does find that exceptional circumstances exist, such that it will not resolve a dispute within four months, Ofcom will nevertheless typically seek to resolve the dispute as soon as practicable after the four month deadline has elapsed.

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

- 6.34 Ofcom currently has powers to require one party to make payments to another in respect of costs and expenses incurred as a result of the dispute reference.<sup>27</sup>
- 6.35 In addition, Ofcom may require a party to the dispute to make payments to Ofcom in respect of costs and expenses incurred by Ofcom in dealing with the dispute.<sup>28</sup> However, Ofcom may only require such payments to Ofcom 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 dispute reference 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 2003 Act.
- 6.36 To date, Ofcom has expected that the resolution of a referred dispute will have wider benefits to the public interest, in line with Ofcom's statutory duties, as set out in sections 3 and 4 of the 2003 Act. Therefore, even where a dispute might be considered mainly to concern the private interests of the referring party, Ofcom has not to date normally directed that party to make a payment to another party for costs and expenses incurred. In considering whether it is appropriate to require the payment of costs or expenses of other Parties, Ofcom's starting point has been that the costs of maintaining specialised regulatory and compliance departments and the costs of taking specialised advice, are normally not recoverable, unless the requesting party demonstrates convincingly to Ofcom's satisfaction that special circumstances apply in the dispute in question.
- 6.37 We note that the ordering of costs is subject to the Department for Business Innovation & Skills' consultation on the implementation of revisions to the European Framework on Electronic Communications.<sup>29</sup> The Department is consulting on giving Ofcom broader powers in relation to costs in disputes. Depending on the outcome of that consultation, Ofcom may review its policy and previous practice in this regard.

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<sup>27</sup> Section 190(6)(a) of the 2003 Act.

<sup>28</sup> Section 190(6)(b) of the 2003 Act.

<sup>29</sup> See Department for Business Innovation & Skills consultation "*Implementing the revised EU Electronic Communications Framework*", Sept 2010 <http://www.bis.gov.uk/Consultations/revised-eu-electronic-communications-framework>

## Section 7

# Section 185(4) format for submitting a dispute referral to Ofcom

7.1 Submissions should be made to:

Investigations Programme Manager, Competition Group  
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

7.2 If you need any further guidance on how to make a submission to Ofcom, please contact the Competition Group's Investigations Programme Manager.

7.3 On receipt, Ofcom will send a non confidential version of the dispute submission to the Parties named in the dispute submission. If the dispute submission contains confidential information, you must provide a separate non-confidential version which can be copied to the other Parties, as well as explaining why you believe the information to be confidential.

7.4 In the event that Ofcom accepts the dispute submission, Ofcom will normally publish details of the dispute, including the business names of the Parties in Ofcom's Competition and Consumer Enforcement Bulletin on its website. Where publishing a final determination, Ofcom may also publish the non-confidential version of the dispute submission.

7.5 Parties referring a dispute must ensure that the information provided is specific and relevant and does not go beyond what is needed to resolve the dispute. The submission of unnecessary or irrelevant information or evidence could delay the opening of the Enquiry Phase. In certain exceptional cases however, in particular with respect to smaller companies or individuals, Ofcom may, taking into account all the circumstances, consider relaxing some of these conditions.

## Contents of a submission

7.6 Parties are reminded that if they do not refer disputes in the manner set out in these guidelines (Section 185(4) of the 2003 Act), Ofcom is not obliged to accept the dispute (Section 186(1) of the 2003 Act).

7.7 A submission should contain the following information:

### Section A: Preliminary information

7.8 Please provide:

- business name, address, telephone/fax number, and/or email address and, if relevant, the contact details of an individual who can discuss the detail of the dispute;

- a brief explanation of the nature of the party's business (e.g. network operator, internet service provider etc) and its scale (local, national, international - approximate turnover is helpful);
- details of the other Parties in dispute (nature of the party's business; contact details);
- details of the relationship between the Parties to the dispute;
- a summary of the dispute including the legal basis according to which the dispute is being referred (i.e. section 185(1), section 185(2)<sup>30</sup>) and an explanation (with evidence) of how the relevant conditions are fulfilled (see paragraph 3.5 – 3.17 above);
- a concise explanation of the commercial context to the dispute;
- full details of any *ex ante* regulatory condition or other regulatory condition applying to any party to the dispute and whether and, if so, how such conditions apply in this case; and
- a proposed remedy or remedies for resolution of the dispute.

## **Section B: The issues in dispute**

7.9 Please provide a clear and precise delineation of the scope of the dispute, including:

- full details of the relevant products or services;
- a list of all the issues which are in dispute; and
- a clear and comprehensive explanation of the commercial context to the dispute, including all relevant background and evidence.

7.10 Full details of any justification given (including relevant evidence) for the conduct or action leading to the dispute.

- If the dispute relates to a request for a new access product or service: business plans of relevant product or service including forecasts, demonstrating how and when it is intended to make use of the products or services requested.
- If the dispute concerns a variation or amendment to existing agreed terms between the Parties: a copy of the relevant version of the contract or terms, clearly identifying the clauses that are subject to the dispute.
- If the dispute relates to *ex ante* conditions or other regulatory conditions applying to any party to the dispute: a full description of the relevant regulatory 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. Parties should explain why they

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<sup>30</sup> Or section 22 of Schedule 18 of the 2003 Act

consider that the relevant obligation is not being met. For example, if a party is alleging that a charge is not cost oriented, that party must set out its reasoning. Parties should also explain whether there have been any significant market changes in the relevant market or markets since any such regulatory condition was imposed.

### **Section C: History of commercial negotiations**

7.11 Please provide 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 all reasonable steps have been taken to engage that party in meaningful negotiations. Ofcom would expect to see:

- 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; and
- 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.

7.12 We are aware that in negotiations, Parties may make without prejudice offers in an attempt to settle disputes. We do not wish to dissuade Parties from actively seeking to resolve disputes in this way, and whilst we will wish to see details of such offers where that may be relevant to determining whether meaningful negotiations have taken place, the existence or content of such offers will not be treated as relevant information or determine our resolution of a dispute.

### **Section D: Ofcom's Statutory and Community Duties**

7.13 For all submissions, Ofcom expects the following information:

- identification and applicability of any of Ofcom's regulatory principles and statutory duties (as set out in sections 3 and 4 of the 2003 Act), which the referring party considers is relevant in this case; and
- where relevant, a clear explanation of how the subject matter of the dispute may relate to broader regulatory issues or policies (where, for example, the matter in dispute is also subject to an SMP finding).

### **Section E: Proposed Remedy**

7.14 Please include details, with reasons, of the appropriate remedy for the dispute, for example:

- full details, including an accurate technical description, of a requested product or service; and
- the specific level at which the relevant charge should be set.

7.15 For each suggested remedy or outcome, Parties must also give a full justification and explain how that remedy:

(a) falls within section 190 of the 2003 Act, and

(b) would be consistent with Ofcom's statutory duties, as set out in sections 3 and 4 of the 2003 Act, as well as Ofcom's regulatory principles (see Annex 5).

## **Section F: Supporting information and evidence**

7.16 Where relevant and available, Ofcom expects the Parties to provide the following specific information and evidence:

- copies of the relevant contract or terms which are the subject of the dispute (see Section B);
- business plans relating to the relevant product or service (see Section B);
- all relevant documentary evidence of commercial negotiations between the Parties relating to the disputed matter or matters (see Section C);
- relevant details about the provision of the product or service in question;
- a full chronology of all the relevant facts;
- detailed and specific cost/price information for the provision of the relevant product or service, as well as cost/price trends (where available). In all cases, costs/price information and data must, in view of the strict statutory timetable for resolving disputes, be presented in a usable format, including, where relevant, a fully executable model;
- full and complete benchmarking data. This could be on an international, industry or other basis. In the alternative, explain why no such data is available or relevant; and
- all relevant previous decisions, determinations, rulings by courts/tribunals, guidance, opinions/recommendations and policy statements at the UK or EC level.

7.17 Where you consider that information which falls into one of the above categories is either not relevant, or that information is not available, please explain why this is the case.

7.18 In all cases, Ofcom expects the Parties to provide information and evidence that is focused and appropriately tailored to the relevant issues in dispute.

7.19 In all cases, Ofcom expects the Parties to provide non-confidential versions of such information and evidence.

### **Declaration by an officer of the company:**

7.20 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. All information and evidence provided in referring this dispute to Ofcom is, to the best of my knowledge and belief, true and accurate.

7.21 Signed:

7.22 Position in the company:

7.23 Date:

### **Acknowledgement of submissions**

7.24 We will acknowledge receipt of a submission within one working day.

7.25 This does not necessarily mean that we think the submission meets the requirements set out above. As set out in section 4, if a submission does not meet the requirements set out above, we will advise you on what else may be needed before we will consider the submission to be complete.

## Annex 1

# Responding to this consultation

## How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document **by close of business on 11 February 2011**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://stakeholders.ofcom.org.uk/consultations/dispute-resolution-guidelines/>, 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 you consider any part of your response to be confidential (the response coversheet is incorporated into the online web form).
- A1.3 For larger consultation responses, particularly those with supporting charts, tables or other data, please email [lawrence.knight@ofcom.org.uk](mailto:lawrence.knight@ofcom.org.uk) attaching your response, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted to the address below, marked with the title of the consultation.
- Lawrence Knight  
Competition Group  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- A1.5 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 Lawrence Knight on 020 7981 3411.

## 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. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.
- A1.8 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.

- A1.9 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at:  
<http://www.ofcom.org.uk/about/accoun/disclaimer/>

### Next steps

- A1.10 Following the end of the consultation period, Ofcom intends to publish a final version of these guidelines.
- A1.11 You can register to receive free email 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

- A1.12 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.13 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.
- A1.14 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:
- A1.15 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 Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's '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.

### After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, 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 and good regulatory practice, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk).
- 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 where appropriate.
- 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 parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. 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 cover sheet 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

Please tick below what part of your response you consider is confidential, giving your reasons why

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?	

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

### DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. 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

# Pre-EPM Questionnaires

- A4.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk).
- A4.2 The underlying aims of introducing an Enquiry Phase Meeting (“EPM”) are to:
- 4.2.1 Improve the transparency of the Enquiry Phase (i.e. exchange of submissions);
  - 4.2.2 Better limit the parameters of the issues in dispute (i.e. excluding areas of agreement in respect of factual evidence, regulatory principle);
  - 4.2.3 Test the possibility of alternative means of resolution;
  - 4.2.4 Confirm applicable regulatory statements;
  - 4.2.5 Engage with Parties on proposed timetables; and
  - 4.2.6 Should a dispute be accepted, inform decisions on scope and information required.
- A4.3 The hope is that satisfaction of these aims will deliver a more efficient and streamlined process where a dispute is opened given the better information and stakeholder engagement at an earlier stage than is currently generally achieved.
- A4.4 The purpose of the EPM is not for Ofcom to opine on the merits of the submissions or make any judgement as to factual evidence.

### Questions for a pre-EPM Questionnaire

- A4.5 The following provides examples of what might be requested by a pre-EPM Questionnaire:
- A party’s view on the product/service that is the subject of the dispute;
  - A party’s view on the date range relevant to the dispute;
  - A party’s view on the amount that is in dispute and how it is broken down/calculated;
  - A party’s view on any relevant exclusions from the dispute;
  - A party’s provision of a timeline of relevant commercial events;
  - A party’s provision of a timeline of relevant regulatory events/statements (precedent);
  - A party’s view on the preferred remedy;
  - A party’s view on why there are no alternative means.

## Annex 5

# Ofcom's statutory duties and regulatory principles

### Sections 3 and 4 of the 2003 Act

- A5.1 Ofcom's principal duty in carrying out its functions, as set out in section 3(1) of the 2003 Act, is:
- (a) to further the interests of citizens in relation to communications matters; and
  - (b) to further the interests of consumers in relevant markets, where appropriate, by promoting competition.
- A5.2 Further, as set out in section 3(2) of the 2003 Act, Ofcom is required to secure each of the following:
- a) the optimal use for wireless telegraphy of the electro-magnetic spectrum;
  - b) the availability throughout the United Kingdom of a wide range of electronic communications services;
  - c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;
  - d) the maintenance of a sufficient plurality of providers of different television and radio services;
  - e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services;
  - f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both:
    - (i) unfair treatment in programmes included in such services; and
    - (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.
- A5.3 Section 3(3) of the 2003 Act require Ofcom to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles appearing to Ofcom to represent the best regulatory practice.
- A5.4 Section 3(4) of the 2003 Act requires Ofcom to have regard to such of the following as appear to Ofcom to be relevant in the circumstances:
- a) the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom;

- b) the desirability of promoting competition in relevant markets;
- c) the desirability of promoting and facilitating the development and use of effective forms of self-regulation;
- d) the desirability of encouraging investment and innovation in relevant markets;
- e) the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom;
- f) the different needs and interests, so far as the use of the electro-magnetic spectrum for wireless telegraphy is concerned, of all persons who may wish to make use of it;
- g) the need to secure that the application in the case of television and radio services of standards falling within sections 3(2)(e) and (f) of the 2003 Act is in the manner that best guarantees an appropriate level of freedom of expression;
- h) the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection;
- i) the needs of persons with disabilities, of the elderly and of those on low incomes;
- j) the desirability of preventing crime and disorder;
- k) the opinions of consumers in relevant markets and of members of the public generally;
- l) the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and in urban areas;
- m) the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in sections 3(1) and 3(2) of the 2003 Act is reasonably practicable.

A5.5 Section 3(5) of the 2003 Act requires Ofcom, when performing its duty to further the interest of consumers, to have regard in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.

A5.6 Section 4 of the 2003 Act requires that where Ofcom is carrying out functions for the purpose of fulfilling its “Community obligations” (additional duties imposed by European legislation), which includes regulatory dispute resolution,<sup>31</sup> it must act in accordance with the six Community requirements which give effect, among other things, to the requirements of Article 8 of the Framework Directive.<sup>32</sup> In summary, those requirements are:

- to promote competition in communications markets;
- to secure that Ofcom contributes to the development of the European internal market;

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<sup>31</sup> The Community obligations are set out at section 4 of the 2003 Act. Ofcom is required to act in accordance with the Community obligations where it is carrying out its functions under Chapter 1 of Part 2 of the 2003 Act, which amongst other areas covers regulatory disputes.

<sup>32</sup> Ref

- to promote the interests of all European Union citizens;
- to act in a manner which, so far as practicable, is technology-neutral; and
- to encourage, to the extent Ofcom considers it appropriate, the provision of network access and service interoperability for the purposes of securing efficiency and sustainable competition in communications markets and the maximum benefit for the customers of communications network and services providers; 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.

### **Ofcom's regulatory principles**

A5.7 Ofcom has established a set of regulatory principles, which provide a clear statement of Ofcom's approach to regulating communications markets. These principles are consistent with Ofcom's duty under the 2003 Act to have regard to regulatory principles of transparency, accountability, proportionality, consistency and the targeting of regulation only at cases where action is needed, and to other principles Ofcom considers represent best regulatory practice.

A5.8 Ofcom's regulatory principles are:

- 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; and
- Ofcom will consult widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation upon a market.

### **Ofcom's principles of pricing and cost recovery**

A5.9 Many disputes concern issues surrounding charges for goods or services. Where appropriate, Ofcom will also consider the application of each of the six principles of

pricing and cost recovery<sup>33</sup> as an appropriate basis for assessing different options which is fair and reasonable as between the disputing Parties. These are:

- Cost causation;
- Cost minimisation;
- Effective competition;
- Reciprocity;
- Distribution of benefits; and
- Practicability.

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<sup>33</sup> Cost causation, cost minimisation, effective competition, reciprocity, distribution of benefits and practicability.