



# Communications Act 2003

## 2003 CHAPTER 21

### PART 2

#### NETWORKS, SERVICES AND THE RADIO SPECTRUM

### CHAPTER 3

#### DISPUTES AND APPEALS

#### *Disputes*

#### **185 Reference of disputes to OFCOM**

- (1) This section applies in the case of a dispute relating to the provision of network access if it is—
- (a) a dispute between different communications providers;
  - (b) a dispute between a communications provider and a person who makes associated facilities available;
  - (c) a dispute between different persons making such facilities available;
  - (d) a dispute relating to the subject-matter of a condition set under section 74(1) 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
  - (e) 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.
- (2) This section also applies in the case of any other dispute if—
- (a) it relates to rights or obligations conferred or imposed by or under this Part or any of the enactments relating to the management of the radio spectrum that are not contained in this Part;

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- (b) it is a dispute between different communications providers; and
  - (c) it is not an excluded dispute.
- (3) Any one or more of the parties to the dispute may refer it to OFCOM.
- (4) A reference made under this section is to be made in such manner as OFCOM may require.
- (5) The way in which a requirement under subsection (4)—
- (a) is to be imposed, or
  - (b) may be withdrawn or modified,
- is by a notice published in such manner as OFCOM consider appropriate for bringing the requirement, withdrawal or modification to the attention of the persons who, in their opinion, are likely to be affected by it.
- (6) Requirements imposed under subsection (4) may make different provision for different cases.
- (7) A dispute is an excluded dispute for the purposes of subsection (2) if it is about—
- (a) obligations imposed on a communications provider by SMP apparatus conditions;
  - (b) contraventions of sections 125 to 127;
  - (c) obligations imposed on a communications provider by or under any of sections 128 to 131; or
  - (d) the operation in the case of a communications provider of section 134.
- (8) For the purposes of this section—
- (a) the disputes that relate to the provision of network access include disputes as to the terms or conditions on which it is or may be provided in a particular case; and
  - (b) the disputes that relate to an obligation include disputes as to the terms or conditions on which any transaction is to be entered into for the purpose of complying with that obligation.

## **186 Action by OFCOM on dispute reference**

- (1) This section applies where a dispute is referred to OFCOM under and in accordance with section 185.
- (2) OFCOM must decide whether or not it is appropriate for them to handle the dispute.
- (3) Unless they consider—
- (a) that there are alternative means available for resolving the dispute,
  - (b) that a resolution of the dispute by those means would be consistent with the Community requirements set out in section 4, and
  - (c) that a prompt and satisfactory resolution of the dispute is likely if those alternative means are used for resolving it,
- their decision must be a decision that it is appropriate for them to handle the dispute.
- (4) As soon as reasonably practicable after OFCOM have decided—
- (a) that it is appropriate for them to handle the dispute, or
  - (b) that it is not,

they must inform each of the parties to the dispute of their decision and of their reasons for it.

- (5) The notification must state the date of the decision.
- (6) Where—
- (a) OFCOM decide that it is not appropriate for them to handle the dispute, but
  - (b) the dispute is not resolved by other means before the end of the four months after the day of OFCOM’s decision,
- the dispute may be referred back to OFCOM by one or more of the parties to the dispute.

### **187 Legal proceedings about referred disputes**

- (1) Where a dispute is referred or referred back to OFCOM under this Chapter, the reference is not to prevent—
- (a) the person making it,
  - (b) another party to the dispute,
  - (c) OFCOM, or
  - (d) any other person,
- from bringing, or continuing, any legal proceedings with respect to any of the matters under dispute.
- (2) Nor is the reference or reference back to OFCOM under this Chapter of a dispute to prevent OFCOM from—
- (a) giving a notification in respect of something that they have reasonable grounds for believing to be a contravention of any obligation imposed by or under any an enactment;
  - (b) exercising any of their other powers under any enactment in relation to a contravention of such an obligation; or
  - (c) taking any other step in preparation for or with a view to doing anything mentioned in the preceding paragraphs.
- (3) If, in any legal proceedings with respect to a matter to which a dispute relates, the court orders the handling of the dispute by OFCOM to be stayed or sisted—
- (a) OFCOM are required to make a determination for resolving the dispute only if the stay or sist is lifted or expires; and
  - (b) the period during which the stay or sist is in force must be disregarded in determining the period within which OFCOM are required to make such a determination.
- (4) Subsection (1) is subject to section 190(8) and to any agreement to the contrary binding the parties to the dispute.
- (5) In this section “legal proceedings” means civil or criminal proceedings in or before a court.

### **188 Procedure for resolving disputes**

- (1) This section applies where—
- (a) OFCOM have decided under section 186(2) that it is appropriate for them to handle a dispute; or

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- (b) a dispute is referred back to OFCOM under section 186(6).
- (2) OFCOM must—
  - (a) consider the dispute; and
  - (b) make a determination for resolving it.
- (3) The procedure for the consideration and determination of the dispute is to be the procedure that OFCOM consider appropriate.
- (4) In the case of a dispute referred back to OFCOM under section 186(6), that procedure may involve allowing the continuation of a procedure that has already been begun for resolving the dispute by alternative means.
- (5) Except in exceptional circumstances and subject to section 187(3), OFCOM must make their determination no more than four months after the following day—
  - (a) in a case falling within subsection (1)(a), the day of the decision by OFCOM that it is appropriate for them to handle the dispute; and
  - (b) in a case falling within subsection (1)(b), the day on which the dispute is referred back to them.
- (6) Where it is practicable for OFCOM to make their determination before the end of the four month period, they must make it as soon in that period as practicable.
- (7) OFCOM must—
  - (a) send a copy of their determination, together with a full statement of their reasons for it, to every party to the dispute; and
  - (b) publish so much of their determination as (having regard, in particular, to the need to preserve commercial confidentiality) they consider it appropriate to publish.
- (8) The publication of information under this section must be in such manner as OFCOM consider appropriate for bringing it to the attention, to the extent that they consider appropriate, of members of the public.

## **189 Disputes involving other member States**

- (1) This section applies where it appears to OFCOM that a dispute referred or referred back to them under this Chapter relates partly to a matter falling within the jurisdiction of the regulatory authorities of another member State.
- (2) A dispute relates to matters falling within the jurisdiction of the regulatory authorities of another member State to the extent that—
  - (a) it relates to the carrying on of activities by one or both of the parties to the dispute in more than one member State or to activities carried on by different parties to the dispute in different member States; and
  - (b) the activities to which the dispute relates, so far as they are carried on in another member State, are carried on in the member State for which those authorities are the regulatory authorities.
- (3) For the purposes of subsection (2) the activities that are carried on in a member State include anything done by means of an electronic communications network, or part of such a network, which is situated in that member State.

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- (4) Before taking any steps under this Chapter in relation to the reference or the dispute, OFCOM must consult the other regulatory authorities within whose jurisdiction the matter falls.
- (5) It shall be the duty of OFCOM to secure that steps taken in relation to the reference or dispute (whether taken by them or by the other regulatory authorities) are, so far as practicable, agreed between OFCOM and those authorities.
- (6) Accordingly, section 188 is to have effect in relation to the reference as if the period for making a determination which is specified in subsection (5) of that section were such period (if any) as may be agreed between—
  - (a) OFCOM; and
  - (b) the other regulatory authorities within whose jurisdiction the matter falls.

## **190 Resolution of referred disputes**

- (1) Where OFCOM make a determination for resolving a dispute referred to them under this Chapter, their only powers are those conferred by this section.
- (2) Their main power (except 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) is to do one or more of the following—
  - (a) to make a declaration setting out the rights and obligations of the parties to the dispute;
  - (b) to give a direction fixing the terms or conditions of transactions between the parties to the dispute;
  - (c) 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
  - (d) 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.
- (3) Their main power in the excepted case is just to make a declaration setting out the rights and obligations of the parties to the dispute.
- (4) Nothing in this section prevents OFCOM from exercising the following powers in consequence of their consideration under this Chapter of any dispute—
  - (a) their powers under Chapter 1 of this Part to set, modify or revoke general conditions, universal service conditions, access related conditions, privileged supplier conditions or SMP conditions;
  - (b) their powers to vary, modify or revoke wireless telegraphy licences or grants of recognised spectrum access;
  - (c) their power to make, amend or revoke regulations under section 1 or 3 of the Wireless Telegraphy Act 1949 (c. 54).
- (5) In the case of a dispute referred back to OFCOM under section 186(6)—
  - (a) OFCOM may, in making their determination, take account of decisions already made by others in the course of an attempt to resolve the dispute by alternative means; and

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- (b) the determination made by OFCOM may include provision ratifying decisions so made.
- (6) Where OFCOM make a determination for resolving a dispute, they may require a party to the dispute—
  - (a) to make payments to another party to the dispute in respect of costs and expenses incurred by that other party in consequence of the reference of the dispute to OFCOM, or in connection with it; and
  - (b) to make payments to OFCOM in respect of costs and expenses incurred by them in dealing with the dispute.
- (7) OFCOM are not, under subsection (6)(b), to require payments to be made to them by a party to the dispute except—
  - (a) in a case 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
  - (b) where it appears to OFCOM that the reference of the dispute by that party was frivolous or vexatious or that that party has otherwise abused the right of reference conferred by this Chapter.
- (8) A determination made by OFCOM for resolving a dispute referred or referred back to them under this Chapter binds all the parties to the dispute.
- (9) Subsection (8) is subject to section 192.

## **191 OFCOM’s power to require information in connection with dispute**

- (1) Where a dispute has been referred or referred back to OFCOM under this Chapter, they may require any person to whom subsection (2) applies to provide them with all such information as they may require for the purpose of—
  - (a) deciding whether it is appropriate for them to handle the dispute;
  - (b) determining whether it is necessary for them to consult the regulatory authorities of another member State; or
  - (c) considering the dispute and making a determination for resolving it.
- (2) This subsection applies to—
  - (a) a party to the dispute; and
  - (b) a person who is not a party to the dispute but appears to OFCOM to have information that is relevant to the matters mentioned in subsection (1)(a) to (c).
- (3) 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.
- (4) In fixing the period within which information is to be provided in accordance with a requirement under this section OFCOM must have regard, in particular, to—
  - (a) their obligation to make a determination for resolving the dispute within the period specified in section 188;
  - (b) the nature of the dispute; and
  - (c) the information that is required.
- (5) Sections 138 to 144 apply for the enforcement of a requirement under this section as they apply for the enforcement of requirements under section 135 or 136.

- (6) In its application for the enforcement of this section, section 138 is to have effect as if it allowed OFCOM to specify such period of less than one month for doing the things mentioned in subsection (3) of that section as they consider appropriate for the purpose of enabling them to comply with an obligation of theirs to make a determination within a particular period.

### *Appeals*

## **192 Appeals against decisions by OFCOM, the Secretary of State etc.**

- (1) This section applies to the following decisions—
- (a) a decision by OFCOM under this Part, the Wireless Telegraphy Act 1949 (c. 54) or the Wireless Telegraphy Act 1998 (c. 6) that is not a decision specified in Schedule 8;
  - (b) a decision (whether by OFCOM or another) to which effect is given by a direction, approval or consent given for the purposes of a provision of a condition set under section 45;
  - (c) a decision to which effect is given by the modification or withdrawal of such a direction, approval or consent;
  - (d) a decision by the Secretary of State to which effect is given by one of the following—
    - (i) a specific direction under section 5 that is not about the making of a decision specified in Schedule 8;
    - (ii) a restriction or condition set by regulations under section 109;
    - (iii) a direction to OFCOM under section 132;
    - (iv) a specific direction under section 156 that is not about the making of a decision specified in Schedule 8.
- (2) A person affected by a decision to which this section applies may appeal against it to the Tribunal.
- (3) The means of making an appeal is by sending the Tribunal a notice of appeal in accordance with Tribunal rules.
- (4) The notice of appeal must be sent within the period specified, in relation to the decision appealed against, in those rules.
- (5) The notice of appeal must set out—
- (a) the provision under which the decision appealed against was taken; and
  - (b) the grounds of appeal.
- (6) The grounds of appeal must be set out in sufficient detail to indicate—
- (a) to what extent (if any) the appellant contends that the decision appealed against was based on an error of fact or was wrong in law or both; and
  - (b) to what extent (if any) the appellant is appealing against the exercise of a discretion by OFCOM, by the Secretary of State or by another person.
- (7) In this section and Schedule 8 references to a decision under an enactment—
- (a) include references to a decision that is given effect to by the exercise or performance of a power or duty conferred or imposed by or under an enactment; but

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- (b) include references to a failure to make a decision, and to a failure to exercise a power or to perform a duty, only where the failure constitutes a failure to grant an application or to comply with any other form of request to make the decision, to exercise the power or to perform the duty;

and references in the following provisions of this Chapter to a decision appealed against are to be construed accordingly.

- (8) For the purposes of this section and the following provisions of this Chapter a decision to which effect is given by the exercise or performance of a power or duty conferred or imposed by or under an enactment shall be treated, except where provision is made for the making of that decision at a different time, as made at the time when the power is exercised or the duty performed.

### **193 Reference of price control matters to the Competition Commission**

- (1) Tribunal rules must provide in relation to appeals under section 192(2) relating to price control that the price control matters arising in that appeal, to the extent that they are matters of a description specified in the rules, must be referred by the Tribunal to the Competition Commission for determination.
- (2) Where a price control matter is referred in accordance with Tribunal rules to the Competition Commission for determination, the Commission is to determine that matter—
  - (a) in accordance with the provision made by the rules;
  - (b) in accordance with directions given to them by the Tribunal in exercise of powers conferred by the rules; and
  - (c) subject to the rules and any such directions, using such procedure as the Commission consider appropriate.
- (3) The provision that may be made by Tribunal rules about the determination of a price control matter referred to the Competition Commission in accordance with the rules includes provision about the period within which that matter is to be determined by that Commission.
- (4) Where the Competition Commission determines a price control matter in accordance with Tribunal rules, they must notify the Tribunal of the determination they have made.
- (5) The notification must be given as soon as practicable after the making of the notified determination.
- (6) Where a price control matter arising in an appeal is required to be referred to the Competition Commission under this section, the Tribunal, in deciding the appeal on the merits under section 195, must decide that matter in accordance with the determination of that Commission.
- (7) Subsection (6) does not apply to the extent that the Tribunal decides, applying the principles applicable on an application for judicial review, that the determination of the Competition Commission is a determination that would fall to be set aside on such an application.
- (8) Section 117 of the Enterprise Act 2002 (c. 40) (offences of supplying false or misleading information) shall have effect in relation to information supplied to the Competition Commission in connection with their functions under this section as it



has effect in relation to information supplied to them in connection with their functions under Part 3 of that Act.

- (9) For the purposes of this section an appeal relates to price control if the matters to which the appeal relates are or include price control matters.
- (10) In this section “price control matter” means a matter relating to the imposition of any form of price control by an SMP condition the setting of which is authorised by—
  - (a) section 87(9);
  - (b) section 91; or
  - (c) section 93(3).

#### **194 Composition of Competition Commission for price control references**

- (1) The Secretary of State must appoint not less than three members of the Competition Commission for the purposes of references under section 193.
- (2) In selecting a group to perform the Commission’s functions in relation to a reference under section 193, the chairman of the Commission must select at least one, and not more than three, of the members appointed under this section to be members of the group.

#### **195 Decisions of the Tribunal**

- (1) The Tribunal shall dispose of an appeal under section 192(2) in accordance with this section.
- (2) The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal.
- (3) The Tribunal’s decision must include a decision as to what (if any) is the appropriate action for the decision-maker to take in relation to the subject-matter of the decision under appeal.
- (4) The Tribunal shall then remit the decision under appeal to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision.
- (5) The Tribunal must not direct the decision-maker to take any action which he would not otherwise have power to take in relation to the decision under appeal.
- (6) It shall be the duty of the decision-maker to comply with every direction given under subsection (4).
- (7) In the case of an appeal against a decision given effect to by a restriction or condition set by regulations under section 109, the Tribunal must take only such steps for disposing of the appeal as it considers are not detrimental to good administration.
- (8) In its application to a decision of the Tribunal under this section, paragraph 1(2)(b) of Schedule 4 to the Enterprise Act 2002 (c. 40) (exclusion of commercial information from documents recording Tribunal decisions) is to have effect as if for the reference to the undertaking to which commercial information relates there were substituted a reference to any person to whom it relates.
- (9) In this section “the decision-maker” means—

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- (a) OFCOM or the Secretary of State, according to who took the decision appealed against; or
- (b) in the case of an appeal against—
  - (i) a direction, approval or consent given by a person other than OFCOM or the Secretary of State, or
  - (ii) the modification or withdrawal by such a person of such a direction, approval or consent,
 that other person.

### **196 Appeals from the Tribunal**

- (1) A decision of the Tribunal on an appeal under section 192(2) may itself be appealed.
- (2) An appeal under this section—
  - (a) lies to the Court of Appeal or to the Court of Session; and
  - (b) must relate only to a point of law arising from the decision of the Tribunal.
- (3) An appeal under this section may be brought by—
  - (a) a party to the proceedings before the Tribunal; or
  - (b) any other person who has a sufficient interest in the matter.
- (4) An appeal under this section requires the permission of the Tribunal or of the court to which it is to be made.
- (5) In this section references to a decision of the Tribunal include references to a direction given by it under section 195(4).

### *Interpretation of Chapter 3*

### **197 Interpretation of Chapter 3**

- (1) In this Chapter—
  - “network access” has the same meaning as in Chapter 1 of this Part;
  - “the Tribunal” means the Competition Appeal Tribunal; and
  - “Tribunal rules” means rules made under section 15 of the Enterprise Act 2002.
- (2) References in this Chapter, in relation to a dispute, to the regulatory authorities of other member States are references to such of the authorities of the other member States as have been notified under the Framework Directive to the European Commission as the regulatory authorities of those States for the purposes of the matters to which the dispute relates.
- (3) In this section “the Framework Directive” has the same meaning as in Chapter 1 of this Part.