

COMMUNICATIONS ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Networks, Services and the Radio Spectrum

Chapter 3: Disputes and Appeals

399. The dispute provisions in the Act reflect the requirements of Articles 20 and 21 of the Framework Directive. Article 20 enables disputes under the Framework Directive and the other Communications Directives between persons providing electronic communications networks and electronic communications services in the same jurisdiction to be referred to OFCOM by either party. Article 21 of the Framework Directive stipulates the procedures to be followed when cross-border disputes arise. Sections 185 to 190 implement these provisions of the Directives accordingly.
400. The appeals mechanisms in the Act have been devised to meet the specific requirements of Article 4 of the Framework Directive. Article 4 of the Framework Directive, in effect, requires that any person who is affected by a decision of OFCOM or the Secretary of State which relates to networks or services or rights of use of spectrum must have the right of appeal on the merits against that decision to an appeal body that is independent of the parties involved. The Act therefore sets out a mechanism for appeal on the merits to the Competition Appeal Tribunal (CAT) against any decision (with specified exceptions) taken by OFCOM under Part 2 of the Act or the Wireless Telegraphy Acts 1949 or 1998, against certain specified decisions of the Secretary of State and against directions, approvals and consents pursuant to conditions under section 45. Once the CAT has reached its decision it must remit the decision under appeal to OFCOM, the Secretary of State or the person responsible for the direction, approval or consent as appropriate, with such directions, if any, as it considers necessary.

Section 185: Reference of disputes to OFCOM

401. This section enables parties to certain disputes relating to network access or dealing with obligations under Part 2 of the Act and other legislation relating to radio spectrum management to be referred by a party to OFCOM. The types of disputes that may be referred are: (i) network access disputes between different communications providers, between communications providers and persons making associated facilities available or between different persons making associated facilities available; (ii) disputes concerning the access-related conditions set under section 74(1) between communications providers or persons making associated facilities available and persons to whom that section applies or between different persons to whom that section applies; (iii) disputes between different communications providers dealing with obligations under Part 2 of the Act (other than disputes about obligations imposed by SMP apparatus conditions, the persistent misuse of networks or services, restrictions in leases and licences or offences relating to networks and services) or under other legislation relating to radio spectrum management.

402. Under *subsection (4)*, OFCOM may stipulate the manner in which a reference may be made by a party to the dispute. Any requirements imposed by OFCOM must be published in a notice. This section implements Article 20(1) of the Framework Directive.
403. [Paragraph 22](#) of Schedule 18 (transitional provisions) makes provision for OFCOM to deal with disputes arising under ‘old’ rules (notably, the Telecommunications (Interconnection) Regulations 1997). Such disputes will in effect continue to be resolved under the ‘old’ rules as regards their substance. This means that, for example, only the latter’s (more restricted) range of remedies can be applied; in particular, OFCOM cannot award costs or compensation. However, these disputes will be handled under the new *procedural* arrangements – so that, for example, the decisions will be appealable to the CAT, and must be taken within 4 months (rather than 6 as in the present rules) – (see subparagraph (1)). After the end of the transitional period (specified in section 408), OFCOM will only be able to deal with these disputes if they are satisfied that the circumstances are ‘exceptional’ – e.g. if it was not reasonable or possible for the issue in dispute to have been discovered before (subparagraph (2)(d)). Where they take a decision under these provisions, OFCOM must also take steps as soon as possible to decide whether or not to replace the direction giving effect to such a decision with a condition of entitlement under the new regime, and then to either introduce such a condition or else abandon the old direction.
404. Any direction given under regulation 6 before the Telecommunications (Interconnection) Regulations 1997 are revoked will be enforceable under paragraph 13 of Schedule 18. Paragraph 22 also provides (subparagraphs (5) to (7)) for directions made by Ofcom to resolve disputes under the Interconnection Regulations to have continued effect even after the revocation of the Regulations by the Act. However OFCOM’s powers to continue such directions are restricted to obligations which could be replaced by new-style obligations and are subject to the duty to review and either replace or abandon them as described above.

Section 186: Action by OFCOM on dispute reference

405. If a dispute is referred to OFCOM by a party under section 185, OFCOM must handle the dispute unless they believe that there are alternative means, which would promptly and satisfactorily resolve the dispute consistently with the European Community requirements in section 4. Where OFCOM conclude that it is appropriate for the referred dispute to be resolved by alternative means, they must inform the parties to the dispute of their decision as soon as practicable. However, if the dispute is not resolved by the alternative means within 4 months, under *subsection (6)* either party to the dispute may refer it back to OFCOM. Section 186 implements Article 20(2) of the Framework Directive.

Section 187: Legal proceedings about referred disputes

406. Subject to *subsection (8)* of section 190 (determinations bind the parties) and the terms of any agreement between the parties to a dispute, a reference of a dispute under section 185 or a reference of a dispute back to OFCOM under *subsection (6)* of section 186 is without prejudice to the rights of the person referring the dispute, the other parties to the dispute, OFCOM or any other person to bring or continue any legal proceedings dealing with the dispute. Any reference or reference back also does not prevent OFCOM from taking enforcement action in relation to the subject matter of the dispute. OFCOM, however, must comply with any court order requiring OFCOM to stay their handling of a dispute for the period of time specified by the court (which may be indefinite). The period of time specified by the court shall not be counted towards the 4 months that OFCOM have to resolve a dispute under section 185. Section 187 implements Article 20(5) of the Framework Directive.

Section 188: Procedure for resolving disputes

407. This section requires OFCOM to consider and determine any dispute referred under section 185 that they decide to handle or any dispute referred back to them under *subsection (6)* of section 186. Unless there are exceptional circumstances or it is reasonably practicable for OFCOM to make a determination in a shorter period of time, OFCOM must determine a dispute within 4 months of the date on which OFCOM determines that it is appropriate for them to handle the dispute or on which the dispute is referred back to them. OFCOM must send a copy of their determination and the reasons for their decision to each party to the dispute. Subject to commercial confidentiality, OFCOM must also publish its determination. Section 188 implements Article 20(1) and (4) of the Framework Directive.

Section 189: Disputes involving other member States

408. This section requires OFCOM to consult with the regulatory authorities of other member States prior to handling, considering or making a determination of a dispute referred to them under section 185 or referred back to them under *subsection (6)* of section 186 if the dispute relates partly to anything done by means of an electronic communications network falling within the jurisdiction of those authorities.

*Under *subsection (2)*, a dispute falls within the jurisdiction of other regulatory authorities when it relates to the activities that are carried out by a party to the dispute in more than one member State or by different parties in different member States and the other regulatory authorities are the authorities for those activities in the other member State or one of the other member States.

409. Where a dispute involves other regulatory authorities, *subsection (5)* imposes a duty on OFCOM to agree with them, so far as practicable, the steps to be taken in relation to the dispute. *Subsection (6)* requires OFCOM to resolve the dispute within such period of time as may be agreed with the other regulatory authorities.

410. This section implements Article 21(2) of the Framework Directive.

Section 190: Resolution of referred disputes

411. When determining a dispute under Chapter 3 of Part 2 of the Act, OFCOM may:

- issue a declaration setting out the rights and obligations of each party to the dispute;
- fix terms or conditions of transactions between the parties to a dispute (except where the dispute relates to radio spectrum management legislation);
- impose enforceable obligations requiring the parties to enter into a transactions on terms or conditions set by OFCOM (except where the dispute relates to radio spectrum management legislation);
- direct a party to the dispute to make payments to adjust under- or overpayment (except where the dispute relates to radio spectrum management legislation);
- require a party to make payments in respect of costs and expenses incurred by another party;
- require a party to make payments in respect of costs and expenses incurred by OFCOM, where the dispute relates to radio spectrum management legislation or where it appears to OFCOM that the reference was frivolous or vexatious or that a party otherwise abused his right of reference under Chapter 3;
- take account of any decisions made by others and ratify any such decisions, where a dispute has been referred back under *subsection (6)* of section 186.

412. These powers to resolve a dispute do not prevent OFCOM from separately exercising their powers to (i) set, modify or revoke general conditions, specific conditions dealing with universal service, access, privileged suppliers or SMP, (ii) to modify or revoke wireless telegraphy licences or grants of recognised spectrum access; or (iii) to make, vary or revoke any regulations under section 1 or 3 of the Wireless Telegraphy Act 1949.
413. Any determination made by OFCOM is binding on the parties to the dispute; however, they may appeal against the determination in accordance with section 192.

Section 191: OFCOM's power to require information in connection with dispute

414. This section gives OFCOM powers to require parties to disputes and other persons to provide them with information that enables OFCOM to:
- decide whether they should handle a dispute;
 - determine whether they need to consult the regulatory authorities of other member States; and
 - consider and determine a dispute.
415. Information requested by OFCOM must be provided within the period specified by OFCOM. Requests for information under this section may be enforced by OFCOM using the procedure set out in sections 138 to 144. This section implements Article 5 and 21 of the Framework Directive.

Section 192: Appeals against decisions by OFCOM, the Secretary of State etc.

416. This section provides for appeal to the Competition Appeal Tribunal (CAT) against decisions (with specified exceptions) made by OFCOM under Part 2 of the Act and the Wireless Telegraphy Acts 1949 and 1998 and against decisions made further to a condition of entitlement set under section 45. The specified exceptions are set out in Schedule 8 and are either (i) decisions that do not have immediate effect on a person, but are of a legislative or quasi-legislative nature that require a further act or decision to be given effect, or (ii) decisions on matters which fall outside the scope of the Communications Directives. For example, a decision taken by OFCOM relating to the making or revision of a statement of policy on information-gathering under section 145 would not have immediate effect on any person. It would only be where OFCOM exercised their powers under section 135 to require the provision of information, in accordance with that statement, that there would be a decision that would actually have effect on any person. Another example is decisions under section 175 (special procedure for contraventions by multiplex licence holders), which fall outside the scope of the Directives.

*For the purposes of this section and the rest of this Chapter, a decision includes OFCOM's exercise of any power and any failure by them to grant an application or to exercise any power following a request (*subsection (7) and (8)*).

417. **Section 192** also applies to specific decisions of the Secretary of State given under section 5 (directions in respect of Part 2 functions) or section 156 (directions with respect to radio spectrum) (in both cases, excluding decisions specified by Schedule 8), under section 109 (restrictions and conditions subject to which the electronic communications code applies) or under section 132 (suspension or restriction of a communication provider's entitlement).
418. The right of appeal extends to any person affected by a decision to which this section applies. *Subsections (3) to (6)* provide that an appeal can be made only by sending a notice of appeal to the CAT, and prescribe the contents of the notice. This section and sections 193 to 195 implement Article 4 and 11(3) of the Framework Directive and Article 10(7) of the Authorisation Directive.

Section 193: Reference of price control matters to the Competition Commission

419. If an appeal under section 192(2) raises a price control matter specified in the rules of the CAT, the matter must be referred to the Competition Commission for determination in accordance with the rules and directions of the CAT and (subject to that) using such procedure as Competition Commission consider appropriate.

*A price control matter as defined in *subsection (10)* relates to the imposition of any form of price control by an SMP condition set under section 87(9), 92, or 93(3).

420. The Competition Commission must notify the CAT of a determination concerning a price control matter and the CAT must follow the determination of the Competition Commission unless it would be set aside under the principles of judicial review.

Section 194: Composition of Competition Commission for price control references

421. This section requires the Secretary of State to appoint not less than three members of the Competition Commission for the purposes of references of price control matters to them under section 193. In selecting a group to determine a matter referred to the Competition Commission under section 192, the chairman of the Competition Commission must select at least one, but no more than three, of the members appointed by the Secretary of State to be members of the group.

Section 195: Decisions of the Tribunal

422. The CAT is to decide an appeal on the merits, and then decide the appropriate action to be taken by the maker of the decision that is being appealed. Where an appeal is made against a decision under section 109 (restrictions and conditions subject to which the electronic communications code applies), the CAT must decide the appeal in accordance with the principles of good administration. The CAT's decision should be communicated to the original decision-maker along with directions regarding the implementation of the CAT's decision. However, the CAT cannot require the original decision-maker to take any action that he would not otherwise have the power to take.

Section 196: Appeals from the Tribunal

423. A decision of the CAT may be appealed on a point of law, with the permission of the CAT or the appellate court, to the Court of Appeal or, in Scotland, to the Court of Session. Such an appeal may be brought by a party to the original CAT proceedings, or by any third party who has sufficient interest in the decision.

Section 197: Interpretation of Chapter 3

424. This section provides for the interpretation of defined terms used in Chapter 3.