



Ofcom's Investigations Programme
Report on activity between 1 October 2007 and 31 March 2008

Competition Group

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Section 1

Introduction

1.1 This report provides a detailed analysis of the work of Ofcom's Investigations Programme during the period between 1 October 2007 and 31 March 2008 and compares this activity with that for the preceding period between 1 April and 30 September 2007. Unless stated, it reflects the position as at 31 March 2008.

Ofcom's roles and duties

- 1.2 Ofcom has a number of roles and duties relating to identifying and responding to conduct which is unlawful or which is anti-competitive, and in resolving disputes. Responding to complaints or disputes filed by market participants - or in some instances by consumers - the Investigations Programme ensures that Ofcom responds quickly, firmly and effectively to breaches of regulatory rules or relevant law and is able to act effectively in resolving disputes.
- 1.3 As a sectoral regulator, under the Communications Act, Ofcom has responsibilities to enforce *ex ante* rules (for example, rules imposed on providers with significant market power, and rules imposed on all providers as general conditions) and to determine disputes between providers of electronic communications networks and services. Ofcom also has responsibilities under the Broadcasting Acts to enforce *ex ante* rules.
- 1.4 As a national competition authority, Ofcom is empowered to enforce competition law concurrently with the OFT and acts as the competition enforcement authority for the communications sector. Ofcom's role under competition law includes:
- enforcing the Chapter I and Chapter II prohibitions of the Competition Act 1998;
 - enforcing Articles 81 and 82 of the EC Treaty; and
 - investigating markets and making references under the Enterprise Act 2002.
- 1.5 Ofcom also has a role to enforce consumer protection law for the communications sector. Whilst the primary role for handling individual consumer complaints rests with the Ofcom Advisory Team (OAT), Ofcom's Investigations Programme conducts investigations under:
- The Communications Act 2003;
 - Part 8 of the Enterprise Act 2002; and
 - The Unfair Terms in Consumer Contracts Regulations 1999 (and other consumer protection legislation);
- 1.6 This enforcement activity is carried out by Ofcom's Investigations Team, which sits within the Competition Group. The role of the Investigations Team is to identify any areas of concern regarding Communications Providers' compliance with rules relating to consumers' rights and competition between communications companies. If an area of concern relating to these rules is identified, either by Ofcom itself or by complaints made to Ofcom by customers, Communications Providers or other relevant organisations, the Investigations Team will evaluate the evidence and, if necessary, take enforcement action against the relevant company.

- 1.7 In July 2004 Ofcom published Guidelines setting out its approach when investigating competition complaints and resolving disputes between companies in the communications sector. The Guidelines provide companies with a clear, easy to follow tool-kit explaining how both small and large companies should prepare the evidence required before Ofcom will take forward a formal investigation.
- 1.8 In July 2006 Ofcom issued revised Enforcement Guidelines for consultation.¹ The revised guidelines reflect the outcome of Ofcom's internal review of its investigations function and Ofcom's growing body of practice and established decisions in this area, as well as the developing jurisprudence of the Competition Appeals Tribunal. The revised guidelines set out a number of changes to Ofcom's existing processes for the handling of competition complaints, and complaints and disputes concerning regulatory rules, including the following:
- More information about Ofcom's approach to consumer protection;
 - Greater clarity about the handling of investigations, including the factors that Ofcom will consider in deciding whether to conduct an investigation;
 - Changes to Ofcom's timing for the handling of competition law investigations; and
 - Information about Ofcom's approach to enforcing BT's Undertakings.
- 1.9 Ofcom expects to publish a further document in relation to the Enforcement Guidelines in due course.
- 1.10 Ofcom's approach continues to seek to reduce the costs to industry of Ofcom's work and to focus scarce resources to deliver the best outcomes for citizens and consumers. Unsubstantiated complaints, or those which could be better resolved elsewhere, are dealt with quickly at an early stage. This allows Ofcom to focus on the most serious allegations inhibiting fair and effective competition in the sector, or in relation to the most serious cases of harm to consumers.
- 1.11 Ofcom has published seven previous six-monthly reports, setting out in detail the work of the Investigations Programme. This, the eighth report, covers the period between 1 October 2007 and 31 March 2008 and compares the level of activity with that during the preceding six months.

¹ Available at <http://www.ofcom.org.uk/consult/condocs/enforcement/enforcement.pdf>

Section 2

Overview

Main points

- 2.1 The main points arising in comparing activity during this period and the preceding six months are:
- Ofcom received 133² complaints and disputes (up from 78³);
 - Ofcom opened six investigations (compared to nine);
 - Ofcom accepted no disputes for resolution (compared to four in the previous reporting period) but referred the parties in three disputes to alternative dispute resolution;
 - All of the six investigations opened during the reporting period were opened on Ofcom's own-initiative (compared to five in the previous reporting period).
- 2.2 The report also provides details of Ofcom's performance against its stated targets for handling enquiries and completing investigations into complaints and resolution of disputes. Results are:
- none of the enquiries opened during the period exceeded their targets without specific defined reasons and agreement by the Director of Investigations; and
 - none of the investigations opened during the reporting period had exceeded targets as at 31 March 2008. Also, 89% of all of the investigations opened by Ofcom since it assumed its powers in December 2003, that had been closed by 31 March 2008, were completed on time.
- 2.3 Neil Buckley was appointed Director of Investigations in September 2007 and directed the programme for the whole of this reporting period.

Summary

- 2.4 Between 1 October 2007 and 31 March 2008 Ofcom received a total of 125 complaints and dispute referrals. 118 of these cases were either dealt with through informal processes or rejected or redirected within Ofcom on receipt. In addition, Ofcom identified eight issues for possible investigation on its own-initiative.
- 2.5 Of the remaining 15, Ofcom moved 13 into its 'enquiry phase' (during which Ofcom decides whether to launch an investigation into a complaint or to resolve a dispute) and two were moved straight to investigation. Of the 13 cases considered in the enquiry phase, four resulted in investigations being opened and three were still being considered as at 31 March 2008.
- 2.6 Therefore six (5%) of the total requests received (including issues identified at Ofcom's own-initiative) were found to warrant investigation.

² Includes issues identified at Ofcom's own-initiative.

³ Includes issues identified at Ofcom's own-initiative.

Performance and evaluation

- 2.7 The following table examines Ofcom's performance in handling the enquiries and investigations opened between 1 October 2007 and 31 March 2008. An examination of Ofcom's performance in meeting its targets for completing investigations since it assumed its powers on 29 December 2003 is discussed in section 3. It should be noted that this reflects the position as at 31 March 2008.

Ofcom's performance against its published targets (incorporating statutory targets) between 1 October 2007 and 31 March 2008 (as at 31 March 2008) is shown in the following table:	
Category & Target	Achievement level (for closed cases opened during reporting period)
Decision to reject or accept enquiry within 15 working days	67% (of 11 opened, 9 closed) (100% with senior management agreement to extend for complex cases)
Decision to reject or accept Competition Act enquiry within eight weeks ⁴	100% ⁵ (two opened, one closed)
Resolution of disputes (4 months except where exceptional circumstances apply)	N/A (none opened)
Competition Act investigations (6 months where 'no grounds for action' decision made. 12 months for an infringement decision)	N/A (none opened) Two cases opened prior to the reporting period remain open, each of these has exceeded target
Part 8 of the Enterprise Act investigations (6 months to obtain undertakings)	N/A (none opened)
Investigations into breaches of <i>ex ante</i> conditions and unfair terms in consumer contracts (4 months for a closure statement or notification that a condition has been breached)	N/A (none opened) One case opened prior to the reporting period remains open and has exceeded target
Own-initiative investigations (6 months)	100% (of six opened, two closed)
Total investigations	100% (of six opened, two closed) None of the four ongoing investigations opened between 1 October 2007 and 31 March 2008 had exceeded its target as at 31 March 2008

⁴ See paragraph 3.4

⁵ For the one closed enquiry recorded as being completed on time, Ofcom set a ten week enquiry period at the outset due to Xmas and the New Year.

Enforcement Activity

Consumer enforcement

- 2.8 Consumer enforcement continues to be of the highest priority for Ofcom. Ofcom continues to invest time and resources into building a strong and sustainable programme of effective action to enforce consumer law and protect consumers in the markets we regulate from scams and unfair practices.
- 2.9 During the reporting period, Ofcom has continued to pursue a programme of activity to tackle industry-wide practices or failure of compliance. Examples include:
- Imposing penalties on Abbey National plc (£30,000) and Complete Credit Management Limited (£5,000) under section 130 of the Communications Act 2003 for making an excessive number of abandoned calls.
 - The issue of a s94 notification of contravention to Economy Calls Limited in relation to Sales and Marketing activity.
 - The issue of a s94 & s98 notification of contravention to Virgin Media for failure to make Caller Location Information for all 999 calls available to the Emergency Organisations handling those calls.
 - The issue of a s94 notification of contravention to Telecom Plus plc (trading as The Utility Warehouse Discount Club) for preventing customer transfers through the unauthorised use of the Cancel Other process (i.e. without the customer's express consent).
 - Imposing a penalty of £30,000 on Prodigy Internet Limited following the failure of Prodigy to comply with requirements to provide information to Ofcom in relation to an industry wide consumer protection enforcement programme.
- 2.10 During the reporting period Ofcom opened a number of new investigations to protect consumers from detrimental conduct as follows:
- **An Ofcom own initiative investigation into Virgin Media about compliance with General Condition 4 (emergency call numbers).** Under General Condition 4 Virgin Media is required to ensure that its customers can access Emergency Organisations by using emergency call numbers, including the "999" number. Virgin Media is also required, to the extent technically feasible, to make Caller Location Information for all 999 calls available to the Emergency Organisations handling those calls.

As recorded above, Ofcom issued a notification to Virgin Media under sections 94 and 98 of the Communications Act 2003 on 21 December 2007. The notification set out that there were reasonable grounds to believe that Virgin Media had failed to make Caller Location Information for all 999 calls available to the Emergency Organisations handling those calls.

The notification therefore required Virgin Media to take the following actions by 11 January 2008:

- to ensure data on its customer databases indicates the geographic location of the customer;
- to ensure that, to the extent technically feasible, there are no discrepancies between its customer databases and those available to emergency organisations; and

- to make any relevant representations to Ofcom about the matters contained in the notification and explanatory statement.

Ofcom had reasonable grounds to believe that this is an urgent case and it was therefore appropriate to require these actions to be completed sooner than the normal deadline (which would be one month after a notification is issued).

- **An Ofcom own initiative enforcement programme to give effect to General Condition 4 (emergency call numbers).** Separate to the investigation above, Ofcom also opened a monitoring and enforcement programme to assess compliance by other fixed Communications Providers with General Condition 4. As part of this programme we are establishing a system of monitoring occasions when a 999 call has been made and the caller location information has been missing or found to be incorrect. If Ofcom finds evidence that other fixed Communications Providers are failing to provide Caller Location Information in relation to 999 calls we will take action as a matter of urgency.
- **A second Ofcom own initiative enforcement programme in relation to compliance with General Condition 14.2.** General Condition 14.2 requires all Originating Communications Providers (OCPs) who bill domestic and small business customers for NTS and PRS calls to establish, maintain and comply with a Code of Practice for the provision of information relating to PRS and a Code of Practice for NTS calls. Those Codes must be consistent with the guidelines set out at Annex 1 (PRS) and Annex 2 (NTS) to General Condition 14.

Ofcom conducted a previous investigation into compliance with General Condition 14.2 which was closed on 14 March 2007. That investigation revealed non-compliance by several OCPs with respect to their Codes. Ofcom closed the case after receiving commitments from OCPs that they would amend their Codes to be compliant with General Condition 14.2, but stated that it would continue to monitor ongoing compliance. Ofcom has opened this investigation as part of that ongoing compliance monitoring.

Background on NTS and PRS

NTS and PRS numbers are examples of non-geographic numbers (most start with 08 or 09) that do not relate to a specific geographic location, but instead relate to a particular service. NTS services include information services, some technical helplines, access to telephone banking, sales and customer service lines and dial-up pay-as-you-go Internet services. PRS services include TV voting lines, competitions, scratchcards, adult entertainment, chat lines, business information services, technical helplines, mobile phone ringtones and game downloads, horoscopes and interactive TV games. Directory enquiry services (on 118xxx) also fall within the definition of premium rate services for the purposes of the Communications Act 2003.

- **A second Ofcom own initiative enforcement programme in relation to compliance with General Condition 14.7.** General Condition 14.7 requires Communications Providers to implement and comply with an Ofcom approved independent Dispute Resolution Scheme for their domestic and small business customers, in relation to the provision of public electronic communications services.

Two such Dispute Resolution Schemes have been approved by Ofcom. They are the Office of Telecommunications Ombudsman (Otelco) (<http://www.otelo.org.uk>) and the Communication and Internet Services Adjudication Scheme (CISAS) (<http://www.cisas.org.uk/>).

The investigation is monitoring compliance with General Condition 14.7 across the industry and will target those Communications Providers who are not members of an Ofcom approved Scheme.

2.11 In addition to opening these new investigations, Ofcom also extended the duration of the following consumer focussed enforcement programmes during the reporting period:

- Own-initiative investigation: monitoring and enforcement of mis-selling and conduct relating to the transfer of customers between Communications Providers;
- Own-initiative investigation: monitoring and enforcement of rules preventing annoyance caused to consumers by silent and abandoned calls; and
- Own-initiative enforcement programme to give effect to General Condition 22 (Service Migrations).

Competition enforcement

2.12 No new Competition Act investigations were opened during the reporting period and none were closed. The two ongoing cases were:

- [BT's residential broadband pricing](#); and
- [BT's charges for NTS call termination](#).

2.13 Both of these cases have raised a range of difficult and complex issues (please see paragraph 3.25 for an explanation of the current status of these investigations).

Section 3

Detailed analysis

- 3.1 The Investigations Programme, conducted within Ofcom's Competition Group, consists of a variable case load of enquiries, investigations into complaints and resolution of disputes related to anti-competitive behaviour or complaints or disputes about breaches of various *ex ante* conditions. It does not cover complaints about content or spectrum issues. The Programme also considers consumer complaints about unfair contract terms and conducts investigations into other alleged breaches of consumer protection legislation following referral from the OAT, or on its own-initiative. However, the primary role for handling individual consumer complaints remains with the OAT.
- 3.2 The information in this section focuses on activity in the period from 1 October 2007 to 31 March 2008, as at 31 March 2008, with comparative data shown for the preceding six months. It covers:
- enquiries;
 - investigations;
 - resolution of disputes
 - Communications Act investigations
 - Competition Act investigations
 - Enterprise Act investigations
 - appeals; and
 - cases in compliance.

Enquiries

- 3.3 When a matter is brought to Ofcom as a complaint or dispute, it is first reviewed by the Competition Group's Operations Team to assess whether the matter should be accepted, or rejected on receipt for any reason, such as the information provided falling short of the submission requirements as set out in the complaint and dispute guidelines. If the matter is accepted, it is then considered as an enquiry, during which Ofcom decides whether it intends to launch an investigation into a complaint or to resolve a dispute or, after more detailed consideration, to reject the matter. Ofcom's target is to complete the enquiry phase within 15 working days of receipt of a complete submission. Where Ofcom needs extra time to decide whether it is appropriate to open an investigation or to resolve a dispute, its policy is to explain why to the parties concerned.
- 3.4 In the Summer of 2007 Ofcom introduced a new process for handling enquiries of complaints made under the Competition Act 1998 and/or the EC Treaty. The enquiry period for such complaints is now eight weeks. This extended enquiry period enables Ofcom to select the right cases and devote resources to cases where there is material consumer harm.
- 3.5 Between 1 October 2007 and 31 March 2008 the Operations Team received a total of 125 complaints and disputes from which Ofcom opened seven enquiries, including two under the Competition Act/EC Treaty. Six enquiries were also opened on Ofcom's own-initiative. One of these related to payment of Ofcom's administrative

charges and the remaining 12 enquiries related to telecommunications matters. The higher level of complaints received during the current reporting period was largely as a result of significantly more issues being directed to the Competition Group by individual consumers which were redirected to the OAT to handle and the receipt of a number of complaints related to a single matter which, following consideration, Ofcom saw no merit in pursuing.

Enquiries by outcome

Number of enquiries	01/04/07 to 30/09/07	01/10/07 to 31/03/08
Total received ⁶	78	133
Rejected/redirected on receipt/dealt with through informal processes	61	118
Rejected during enquiry	8	6
Still in enquiry phase (as at 31/03/08)	1	3
Accepted for investigation	8 ⁷	6 ⁸

- 3.6 Where there is a substantive reason why the decision to investigate a complaint or accept a dispute cannot be made within the target period, Ofcom will extend the enquiry phase, such extension usually being a matter of a few days. Three of the 11 enquiries opened between 1 October 2007 and 31 March 2008 that were subject to the 15 working day target were held in enquiry phase beyond this target with agreement of the Director of Investigations. Similarly one enquiry opened in the previous period remained open with agreement as at 31 March 2008.
- 3.7 During the reporting period two enquiries were opened into complaints of alleged breaches of competition law. For one of these, Ofcom set a ten week enquiry period at the outset due to the Christmas and New Year holiday period – this enquiry was completed within this target. The other was subject to an eight week enquiry period that has since been extended with the agreement of the Director of Investigations and remained ongoing as at 31 March 2008.
- 3.8 All decisions to extend the enquiry phase were taken by the Director of Investigations. Of the three extended enquiries that were completed by 31 March 2008, one resulted in an investigation being opened. The reasons leading to extension for the three enquiries were as follows:

⁶ Includes issues identified at Ofcom's own-initiative.

⁷ Includes three investigations that were not subject to the enquiry phase. One further investigation was opened for which the enquiry phase commenced before 1 April 2007.

⁸ Includes two investigations that were not subject to the enquiry phase.

- In two cases to enable Ofcom to consult with the parties to a dispute on the suitability of alternative dispute resolution being used to resolve the issues in question; and
- to enable a meeting to be held with senior management of the target company and allow consideration of further representations that it wished to make.

3.9 The longest period that any of the three extended cases that were closed by 31 March 2008 were kept in enquiry phase was 25 working days. On average, these cases were in enquiry phase for 22 working days. Apart from the three cases where extensions to the enquiry phase were agreed for specific defined reasons, the remaining six enquiries on which a decision had been taken by 31 March 2008 were all completed within the 15 day timescale.

Reasons for rejection/redirection on receipt

Number of enquiries	01/04/07 to 30/09/07	01/10/07 to 31/03/08
Total rejected/redirected	61	113
Redirected to other Ofcom Group	48	81
Did not comply with guidelines	4	7
Other	9	25

3.10 The vast majority (94%) of the matters that were redirected to other Ofcom Groups were referred to the OAT to respond. These related to issues raised by individual consumers that were originally directed to members of the Competition Group but which ordinarily can be dealt with most effectively by OAT. Most of those categorised as 'other' related to a single matter in which Ofcom, after consideration, saw no merit in pursuing. The number rejected on the grounds that the submission requirements of the Ofcom guidelines had not been met again represented a fairly small minority (6%) of total rejections.

Reasons for rejection during the enquiry phase

3.11 Once a matter is accepted as an enquiry, it may still be rejected in the enquiry phase and not accepted for investigation. The reasons for rejection in the enquiry phase are set out in the following table.

Numbers of enquiries	01/04/07 to 30/09/07	Numbers of enquiries	01/10/07 to 31/03/08
Total rejected	7	Total rejected	6
Not for Ofcom	1	Not for Ofcom	0
Already considered/considering	1	Already considered/considering	0
Administrative priority	2	Administrative priority	2
Insufficient information	2	Insufficient information	1
No indication of breach	1	No indication of breach	0
Referred to ADR	0	Referred to ADR	3

Summary of enquiry activities

3.12 In summary, Ofcom received a higher level of complaints and disputes during the period 1 October 2007 and 31 March 2008 than the preceding six months (as recorded previously this was largely due to more individual consumers directing complaints to the Competition Group which were re-routed to the OAT and the receipt of a number of complaints related to a single matter in which Ofcom, following consideration, saw no merit in pursuing).

Investigations

3.13 Once a complaint is accepted for investigation or a dispute accepted for resolution following the enquiry phase, Ofcom has different targets for concluding cases depending on the type of case. These deadlines are currently:

- four months to resolve a dispute, except in exceptional circumstances;
- four months to complete a Communications Act investigation into a complaint⁹;
- four months to complete an investigation under the Unfair Terms in Consumer Contracts Regulations 1999;
- six months to obtain undertakings under the Enterprise Act 2002; and
- six months to complete an investigation opened on Ofcom's own-initiative.

3.14 The targets for Competition Act/EC Treaty investigations are the subject of consultation as set out in the draft enforcement guidelines. The proposed targets are:

- At six months:
 - a statement of objections will have been issued; or
 - a draft no grounds for action decision will have been issued; or

⁹ This deadline applies to cases where we take no action or issue a s.94 notification; in cases where we fine, or issue a notification other than under s.94, this deadline does not apply

- a further timetable will have been issued, confirming a date for one of the above (normally up to a further 3 months).

Summary of investigation and dispute resolution activity

Number of cases	01/04/07 to 30/09/07	01/10/07 to 31/03/08
Total opened	9 ¹⁰	6
Of which closed by 31/03/08	7	2
Ongoing as at 31/03/08	2	4

Notes

- Five of the six investigations opened between 1 October 2007 and 31 March 2008 related to telecommunications matters. The other related to Ofcom's administrative charges.

Complaint investigations and disputes by type

Number of investigations	01/04/07 to 30/09/07	01/10/07 to 31/03/08
Total opened	9	6
Disputes	4	0
Communications Act	4	6
Competition Act	0	0
Enterprise Act	1	0
Unfair Terms in Consumer Contract Regulations	0	0

¹⁰ The enquiry phase for one of these investigations commenced before 1 April 2007

Disputes

Analysis of disputes by type

Number of disputes	01/04/07 to 30/09/07	01/10/07 to 31/03/08
Total opened	4	0
Pricing	4	0
Requests for new products	0	0
SLAs / processes	0	0
Other	0	0

Disputes by outcome

Number of disputes	01/04/07 to 30/09/07	01/10/07 to 31/03/08
Total opened	4	0
Closed without determination	0	0
Closed following determination	3	0
Withdrawn	0	0
Ongoing as at 31/03/08	1	0

- 3.15 As can be seen from the table above no dispute referrals were accepted for resolution between 1 October 2007 and 31 March 2008. The one ongoing dispute that was accepted for resolution between 1 April and 30 September 2007 is a dispute between BT and various providers about 0870 termination rates. Ofcom received comments made in response to the draft determination issued on 16 November 2007 that, before reaching a final conclusion in this dispute, we should await the outcome of the appeals lodged against Ofcom's determination of disputes between T-Mobile and BT, O2 and BT, Hutchison 3G and BT and BT and each of Hutchison 3G, Orange Personal Communications Services and Vodafone relating to call termination rates. Ofcom noted that those appeals relate to the approach adopted in determining "reasonableness" for the purposes of the end-to-end connectivity obligation, and may therefore be of direct relevance to the outcome of the 0870 termination rate dispute. Ofcom accepted that, in light of the responses received, it was appropriate to await the judgment of the Competition Appeal Tribunal in the above appeals before issuing a final determination to resolve this dispute.
- 3.16 On 18 December 2007 Ofcom therefore announced its view that exceptional circumstances had arisen since the 0870 termination rate dispute was accepted for resolution and that the requirement to resolve this dispute in four months, in accordance with section 188(5) of the Act, would not therefore apply in this case.

Disputes – performance against targets

Number of disputes	01/04/07 to 30/09/07	01/10/07 to 31/03/08
Total opened	4	0
Completed within deadline	3 (100%)	N/A
Missed deadline	N/A	N/A
Ongoing as at 31/03/08	1	0

- 3.17 During the reporting period Ofcom issued final determinations to resolve two disputes accepted for resolution between 1 October 2005 and 31 March 2006. These related to referrals made by The Number and Conduit against BT about BT's charges for directory enquiry information (OSIS). Ofcom had previously announced its view that exceptional circumstances had arisen under section 188(5) of the Communications Act 2003, since the acceptance of the disputes meaning that the disputes would not be resolved in four months. Ofcom's decision to consider BT's obligations under General Condition 19 as part of these disputes is currently the subject of a pending appeal to the Competition Appeal Tribunal. This appeal was lodged by BT on 8 May 2006.

Communications Act investigations**Analysis of Communications Act investigations by type**

Number of investigations	01/04/07 to 30/09/07	01/10/07 to 31/03/08
Total opened	4	6
Emergency calls numbers	0	2
ADR schemes	0	1
Sales & Marketing	3	1
Other	1	2

Communications Act investigations by outcome

Number of investigations	01/04/07 to 30/09/07	01/10/07 to 31/03/08
Total opened	4	6
Closed without breach	0	0
Closed following formal intervention	2	0
Closed following change in behaviour	1	2
Withdrawn/stopped	0	0
Ongoing as at 31/03/08	1	4

Formal intervention

- 3.18 The previous report outlined the formal intervention taken by Ofcom in closing one of the investigations opened between 1 April and 30 September 2007 that had been closed by 30 September 2007. As can be seen one further case was closed following formal intervention by Ofcom since then. This was:

Own-initiative investigation into Economy Calls about adherence to its Code of Practice governing sales and marketing activity

Ofcom's investigation concluded that there were reasonable grounds for believing that since 1 April 2006 Economy Calls had failed, and was continuing to fail, to comply with the provisions of its Sales and Marketing Code of Practice ("the Code") by:

- failing to offer only factual and accurate information about Economy Calls services and misrepresenting the services offered by Economy Calls and other service providers;
- failing to ensure that customers fully understand contract terms and want to transfer;
- failing to offer clear and straightforward explanations; and
- failing to provide adequate training of sales staff and agents in the content and interpretation of the Code.

Further, Ofcom concluded that there were reasonable grounds for believing that, from 1 April 2006 to 1 June 2007, Economy calls had failed to comply with the provisions of the Code by:

- failing to inform customers of the right to cancel a contract within 7 days of an agreement being made.

From 1 June 2007, Economy Calls made changes to its processes which appeared to address Ofcom's concerns about informing customers of their right to cancel.

On 14 November 2007 Ofcom issued a notification of contravention under section 94 of the Communications Act 2003 to Economy Calls regarding its past and ongoing contraventions of Ofcom's rules concerning sales and marketing as set out in General Condition 14.5(b).

Economy Calls had until 17 December 2007 to comply with the requirements of General Condition 14.5(b). In particular Ofcom expected that the steps Economy Calls would take to comply with the requirements of General Condition 14.5 (b) may include, but not limited to:

- ensuring that, on making contact with customers or potential customers, Economy Calls' representatives provide only factual and accurate information and do not misrepresent its services or those of other service providers;
- ensuring that, on making contact, representatives provide only factual and accurate information about Economy Calls services and contracts;
- ensuring that customers entering into a contract fully understand the terms of the contract, in particular whether a connection fee of £50 per line is applied as an administration charge, the length of the minimum contract term and that an early termination charge of at least £500 per line is payable in specified circumstances (those circumstances to be explained clearly at the time of entering into the contract); and
- ensuring that all sales and marketing staff are trained thoroughly on the Code, and that its content and interpretation are explained fully; and that a copy of the Code is provided to all employees, agents and representatives.

Economy Calls had until 17 December 2007 to remedy fully any consequences arising from its contravention of General Condition 14.5(b).

Ofcom expected that the steps Economy Calls would take to remedy the consequences may include, but not limited to, refunding in full and/or waiving all 'breach of contract' or other termination charges paid and/or otherwise payable by a customer:

- to whom any misrepresentation was made by Economy Calls or one of its employees, agents or representatives;
- to whom any inaccurate and misleading information was provided by Economy Calls or one of its employees, agents or representatives;
- who was not clearly informed during the sales verification and/or compliance process of the fact that early termination fees would be payable where a customer seeks to transfer away from Economy Calls to another Communications Provider during the minimum contract period;
- who was not clearly informed during the sales verification and/or compliance process of the method of calculating the early termination fee;

during the period 1 April 2006 to the date of the notification, and/or

- who was not clearly informed of the right to cancel a contract within 7 days and how to exercise that right during the sales process

during the period 1 April 2006 to 1 June 2007.

Alternatively, the notification provided that by 17 December 2007 Economy Calls could make a proposal to Ofcom concerning the remedying of consequences by a specified date to be agreed by Ofcom (although Ofcom would not be bound to accept such a proposal),

Economy Calls had until 17 December 2007 to make representations to Ofcom about the matters contained in the notification and explanatory statement. This case has now been closed (see paragraph 3.33).

Other enforcement action

- 3.19 On 19 March 2008, as part of its ongoing programme of monitoring and enforcement of rules preventing annoyance caused to consumers by silent and abandoned calls, Ofcom imposed financial penalties on Abbey National plc ("Abbey") and Complete Credit Management Limited ("CCM") under section 130 of the Communications Act 2003. This action followed notifications issued to both companies on 29 November 2007 for contravening section 128 of the Communications Act 2003 by making an excessive number of abandoned calls.

The maximum financial penalty Ofcom can impose under section 130 of the Communications Act 2003 is £50,000. The levels of the penalties which were imposed in these cases are as follows:

- Abbey - £30,000
- CCM - £5,000

In the notifications of 29 November 2007 Ofcom set out its findings that there were reasonable grounds to believe that between October 2006 and April 2007, both Abbey and CCM had repeatedly exceeded the abandoned call rate set out in Ofcom's statement of policy on the persistent misuse of an electronic communications network or service, published on 1 March 2006¹¹; that is no more than 3% of live calls on each individual campaign over any 24 hour period.

Abbey and CCM were given until 7 January 2008 to make representations in relation to the matters set out in the notifications. Ofcom decided to impose a penalty on both companies having applied the relevant legal framework and having carefully considered the representations made.

- 3.20 On 21 December 2007, Ofcom issued a notification of contravention to Virgin Media under sections 94 and 98 of the Act in relation to General Condition 4 (emergency call numbers). Under General Condition 4 Virgin Media is required to ensure that its customers can access Emergency Organisations by using emergency call numbers, including the "999" number. Virgin Media is also required, to the extent technically feasible, to make Caller Location Information for all 999 calls available to the Emergency Organisations handling those calls.

The notification set out that there were reasonable grounds to believe that Virgin Media had failed to make Caller Location Information for all 999 calls available to the Emergency Organisations handling those calls.

The notification therefore required Virgin Media to take the following actions by 11 January 2008 :

- to ensure data on its customer databases indicates the geographic location of the customer;
- to ensure that, to the extent technically feasible, there are no discrepancies between its customer databases and those available to emergency organisations;
- and

¹¹ Available at <http://www.ofcom.org.uk/consult/condocs/misuse/statement/>

- to make any relevant representations to Ofcom about the matters contained in the notification and explanatory statement.

Ofcom had reasonable grounds to believe that this was an urgent case and it was therefore appropriate to require these actions to be completed sooner than the normal deadline (which would be one month after a notification is issued).

- 3.21 As part of Ofcom's ongoing own-initiative investigation to address conduct relating to the transfer of customers between Communications Providers, on 25 January 2008, Ofcom issued a notification of contravention to Telecom Plus PLC, trading as The Utility Warehouse Discount Club ("The Utility Warehouse"), under section 94 of the Communications Act 2003.

Ofcom considered that there were reasonable grounds for believing that since at least 1 January 2007, The Utility Warehouse had contravened, and was contravening, General Condition 1.2 (information obtained during negotiations for network access) Specifically:

- The Utility Warehouse is a Communications Provider offering telephony services to end-users;
- where an end-user arranges to transfer the provision of their telephony services from The Utility Warehouse to another Communications Provider, The Utility Warehouse as the 'losing' provider acquires information (the Calling Line Identity ("CLI") of the transferring end-user) from another Communications Provider, the 'gaining' provider, in connection with this transfer process; and
- the Utility Warehouse had used and was using this information (the CLI of the transferring end-user) which is acquired from another Communications Provider in connection with the provision of Carrier Pre-selection ("CPS") and/or Wholesale Line Rental ("WLR") or Local Loop Unbundling ("LLU") for a purpose other than that for which that information was supplied (facilitating the transfer), namely:
 - preventing the customer transfer through the unauthorised use of the Cancel Other process (i.e. without the customer's express consent).

The Utility Warehouse had until 26 February 2008 to comply with General Condition 1.2 and make representations to Ofcom about the matters contained in the notification.

In response to the notification The Utility Warehouse wrote to Ofcom setting out its proposals to comply with General Condition 1.2 and remedy the notified contraventions. The Utility Warehouse has modified its internal procedures so that it will:

- no longer make the assumption on receipt of a request to transfer that the customer has been slammed. Orders will no longer be automatically rejected if the customer has failed to give advance notice of their intention to transfer;
- issue notification of transfer letters, which do not contain marketing material, to all customers seeking to transfer to another Communications Provider; and
- only apply Cancel Other where it has the express permission of the customer to do so.

- 3.22 On 9 November 2007 Ofcom imposed a penalty of £30,000 on Prodigy Internet Ltd ("Prodigy") following the failure of Prodigy to comply with requirements to provide

information to Ofcom. As part of its ongoing enforcement programme into compliance with General Condition 22 (service migrations), Ofcom issued a notice to Prodigy under section 135 of the Act requiring the provision of specified information. As Prodigy failed to comply with this notice, a notification under section 138 of the Communications Act 2003 was issued to Prodigy on 31 May 2007. Prodigy also failed to comply with this notification. Ofcom considered that Prodigy failed to provide all the required information. Given Prodigy's failure to comply with the section 135 notice and having followed the procedures set out in the Communications Act 2003, Ofcom decided to impose a financial penalty on Prodigy.

Communications Act investigations - outcome in terms of parties affected

Number of investigations	01/04/07 to 30/09/07	01/10/07 to 31/03/08
Resolved in favour of complainant ¹²	3	2
Resolved in favour of company subject to complaint	0	0
Not applicable	0	0
Ongoing as at 31/03/08	1	4

Communications Act investigations – performance against targets

Number of investigations	01/04/07 to 30/09/07	01/10/07 to 31/03/08
Total opened	4	6
Completed within deadline	3 (100%)	2 (100%)
Missed deadline	0	0
Ongoing as at 31/03/08	1	4

Competition Act investigations

- 3.23 Competition Act cases are usually amongst the most complex and contentious investigations undertaken by Ofcom. We are committed to using the Competition Act where appropriate.
- 3.24 The Competition Act was amended as of 1 May 2004 in order to implement EC Regulation 1/2003 (the "Modernisation Regulation") into UK law. Since then Ofcom has had the power under the Act to apply Article 81 and Article 82 of the EC Treaty in full, in addition to the Chapter I and Chapter II prohibitions of the Competition Act.

¹² These numbers include investigations opened on Ofcom's own-initiative.

3.25 No new Competition Act investigations were opened during the reporting period. Two Competition Act investigations opened prior to the reporting period were ongoing at 31 March 2008 and each had exceeded completion targets. These relate to:

- **Complaint from Freeserve (now Orange Home) about BT's residential broadband pricing**

Ofcom is investigating whether BT has abused a dominant position in relation to its residential broadband pricing policies contrary to the Chapter II prohibition and Article 82. In particular, Ofcom is assessing whether BT has operated a margin squeeze through the pricing of its residential broadband services from June 2002. To date this investigation has resulted in three statements of objections being issued to BT.

- **Complaint from Energis Communications Ltd about BT's charges for NTS call termination**

This investigation is considering whether BT's charges for termination of certain types of NTS calls, effective from 1 May 2004, constitute an abuse of a dominant position. Ofcom issued its draft decision to the parties for consultation on 23 July 2007. Ofcom has considered the comments received and expects to issue its final decision shortly.

Ofcom did not close any Competition Act cases during the reporting period but as stated above, continued to progress two ongoing investigations.

Investigations under the Enterprise Act and Unfair Terms in Consumer Contract Regulations 1999

3.26 No investigations were opened during the reporting period under the Enterprise Act or the Unfair Terms in Consumer Contract Regulations 1999.

Summary of investigation and dispute resolution outcomes

3.27 Taking all types of complaint investigation and disputes together, the following picture emerges.

Number of cases	01/04/07 to 30/09/07	01/10/07 to 31/03/08
Total opened	9	6
Dispute determinations	3	0
Communications Act notifications	2	0
Closed for other reasons (i.e. company altered behaviour)	1	2
Other	1	0
Ongoing as at 31/03/08	2	4

Summary of investigation and dispute resolution performance

Number of cases	01/04/07 to 30/09/07	01/10/07 to 31/03/08
Total opened	9	6
Completed within deadline	7 (100%)	2 (100%)
Missed deadline	0	0
Ongoing as at 31/03/08	2	4

3.28 Overall, between 29 December 2003 when Ofcom assumed its powers and 31 March 2008, Ofcom opened 127 investigations within the Investigations Programme. As at 31 March 2008, 115 of these investigations had been closed with 12 ongoing. Of the closed cases, 102 (89%) were completed within Ofcom's target for completion but the target was exceeded in 13 cases¹³. Previous reports have commented on the reasons for targets being missed for the eleven cases closed during those periods. Two cases closed during the current period exceeded Ofcom targets. These were:

- **Disputes referred by each of The Number and Conduit against BT about BT's charges for directory enquiry information (OSIS)**

On 7 March 2008, Ofcom issued a determination resolving these disputes that were accepted for resolution in December 2005 and January 2006 respectively. Ofcom had previously (on 14 March 2006) announced its view that exceptional circumstances had arisen under section 188(5) of the Communications Act 2003 since the acceptance of the disputes meaning that the disputes would not be resolved in four months. Ofcom's decision to consider BT's obligations under General Condition 19 (provision of directory information) as part of this dispute is currently the subject of a pending appeal to the Competition Appeal Tribunal. This appeal was lodged by BT on 8 May 2006.

3.29 Of the 12 ongoing cases as at 31 March 2008, Ofcom's completion targets have been exceeded in four cases. These are:

- **Freeseerve.com plc (now Orange Home) complaint about BT's residential broadband pricing**

Ofcom has yet to reach a final decision in this investigation which involves a detailed analysis of margin squeeze issues and has to date resulted in three statements of objections being issued to BT.

- **Complaint from Energis Communications Ltd about BT's charges for NTS call termination**

Ofcom's consultation with interested parties on its draft decision closed on 8 October 2007. Ofcom has considered the responses received and a final decision will be made shortly.

¹³ Includes disputes where exceptional circumstances applied.

- **Thomson Directories complaint about access to data on BT's central directory information database**

In dealing with matters relevant to the two disputes between BT and The Number/Conduit about BT's commercial charges for information used by them for their directory enquiry services (see paragraph 3.28), Ofcom recognised that certain matters were relevant to dealing with the complaint against BT by Thomson for the use of similar data for the provision of its directory products. Ofcom issued final determinations to resolve these disputes on 7 March 2008 and is in the process of considering the specific issues raised by Thomson in its complaint in light of the dispute determinations.

Appeals

3.30 No Ofcom decisions made during the reporting period were appealed to the Competition Appeals Tribunal (CAT). However, one dispute that was resolved during the preceding period was appealed during this reporting period.

- On 17 October 2007 T-Mobile appealed Ofcom's Determination of the dispute between Hutchison 3G and T-Mobile relating to donor conveyance charges (DCC). On 12 February 2008 Ofcom announced its decision not to contest this appeal. This decision was reached on the basis that the explanatory statement accompanying the DCC Determinations reflected a misinterpretation of General Condition 18 and, contrary to paragraph 5.33 of the explanatory statement, it was open to Ofcom to exercise its powers to ensure industry-wide compliance with General Condition 18.

In determining the disputes, Ofcom carried out a full assessment of the efficient costs of donor conveyance. This assessment, which was based on independent analysis, established that the costs that would be incurred by an average efficient operator are 0.2 pence per minute (split equally between the donor and recipient networks).

Ofcom wrote to all relevant operators subject to General Condition 18 on 8 February 2008 informing them that, as from that date, Ofcom expects their donor conveyance charges to be set at 0.2pence per minute (split equally between the donor and recipient networks) in accordance with General Condition 18. This has now been confirmed by all operators.

3.31 There are a number of other appeals ongoing with respect to Ofcom decisions made prior to the reporting period: These are:

- Independent Media Support Limited appealed against Ofcom's decisions in relation to two Competition Act/Article 81 & 82 EC Treaty complaints regarding BBC Broadcast (now Red Bee Media) involving the provision of *media access services* to Channel 4 and the BBC respectively. The appeal was lodged with the CAT on 5 July 2007. The hearing on admissibility of the appeal regarding the BBC case closure decision was held on 8 October 2007 and although outside of the current reporting period the judgment was handed down on 31 October 2007 that the BBC case closure decision is not a decision falling within section 46(3) of the 1998 Act which means that it is not an appealable decision. The main hearing in relation to the Channel 4 contract no grounds for action decision took place on 7 and 8 April 2008. The Tribunal's judgment is awaited.

- A number of Communications Providers appealed against Ofcom's final determinations to resolve regulatory disputes in relation to *blended mobile call termination rates*. These appeals were lodged with the CAT on 6 and 7 September 2007. A hearing of the main issues in the appeals was held between 24 January and 5 February 2008. The Tribunal's judgment on these main issues is awaited.
 - BT appealed to the CAT on 8 May 2006 against the extended scope of two disputes between BT and The Number and between BT and Conduit about BT's commercial charges for information used by (among others) providers of services known as 'directory enquiries', which disputes Ofcom resolved during this reporting period. These appeals have been adjourned to a date to be notified by the Registrar.
 - Following the CAT's judgment of 31 August 2006 in *Floe Telecom v Ofcom*, on 22 November 2006 Ofcom applied to the CAT for permission to appeal the judgment to the Court of Appeal. The CAT issued its Order in that case on 18 January 2006 and, on 15 March 2007, rejected Ofcom's application for permission to appeal. Ofcom therefore applied to the Court of Appeal for permission to appeal the judgment and the Order on 29 March 2007. The Court of Appeal granted permission on 19 June 2007 and the hearing was held between 3 and 6 March 2008. The Court's judgment is awaited.
 - The main hearing in the *VIP Communications v Ofcom* appeal has been stayed until the Court of Appeal judgment in the *Floe Telecom v Ofcom* appeal.
 - *BT's residential broadband pricing*. Oftel's reassessment of certain pricing issues raised by Freeserve (now Orange Home) in a letter of 26 March 2002 was concluded by way of a non-infringement decision on 20 November 2003. Wanadoo appealed this decision on 20 January 2004. The CAT has postponed this appeal to a date to be fixed.
- 3.32 Two judgments were handed down by the CAT during the reporting period relating to appeals of Ofcom's decisions:
- On 5 April 2007 Orange appealed Ofcom's decision taken on 9 February 2007 to open an investigation into a dispute between Orange and BT concerning *charges for call termination on Orange's network*. The CAT's judgment rejecting the appeal was handed down on 21 December 2007.
 - On 9 May 2007 Rapture TV appealed the findings contained in Ofcom's final determination of 9 March 2007 to resolve its dispute regarding *BSkyB's EPG charges*. The CAT's judgment rejecting the appeal was handed down on 31 March 2008.

Cases in compliance

- 3.33 When an investigation is complete, there may be a need to monitor ongoing compliance. One investigation that Ofcom closed during the reporting period was subject to compliance monitoring.
- **Own-initiative investigation into Economy Calls Limited – adherence to its code of practice governing sales and marketing activity**
See entry at paragraph 3.18. Following the issue of the notification of contravention to Economy Calls, Ofcom undertook monitoring of Economy Calls'

compliance in order to ensure that it became compliant and continued to comply with the requirements of General Condition 14.5(b). This specific action was undertaken in addition to Ofcom's ongoing industry-wide compliance monitoring.

Although outside of the reporting period, Ofcom has been informed by Economy Calls that it has sold its customer base to another service provider and we understand that they are no longer operating as a Communications Provider. On this basis Ofcom has ceased its monitoring activity.

3.34 Three further cases closed prior to 1 October 2007 were subject to ongoing monitoring during the reporting period. These were:

- **Own initiative investigation into Tesco Stores Limited (trading as Tesco Telecoms)** in which Ofcom considered whether Tesco Telecoms had complied with obligations under relevant consumer protection legislation and the requirement to have and adhere to a Code of Practice for Sales and Marketing activity. During the investigation, Ofcom examined the processes by which Tesco Telecoms transferred customers to its Homephone service from other Communications Providers.

As a result of Ofcom's investigation, a number of operational flaws in these Tesco Telecoms processes were identified. Ofcom considered that these problems were the main reason for the large numbers of cancellations recorded through the 'Cancel Other' process and the complaints about Tesco Telecoms to the OAT.

As part of its investigation, Ofcom expressed concern about these failures to Tesco Telecoms. Ofcom also considered that the company should take immediate steps to resolve its operational problems.

After Ofcom opened its investigation, there was a sharp decline in recorded instances of 'Cancel Other' as well as complaints to Ofcom. Ofcom therefore considered that the steps taken by Tesco to resolve its operational problems appeared to be working effectively, reducing the likelihood of further harm to consumers as a result.

The information examined by Ofcom did not suggest that the company or agents working for Tesco Telecoms had been engaged in systematic or widespread mis-selling of telephony services to consumers.

On this basis Ofcom concluded its investigation in August 2007. Ofcom has since been monitoring Tesco Telecoms' compliance for an initial term of six months to ensure that these improvements are sustained.

- **Own-initiative investigation into Universal Utilities plc (trading as Unicom) about adherence to its Code of Practice governing sales and marketing activity**

In response to the notification issued to Unicom on 18 July 2007, Unicom wrote to Ofcom setting out its proposals to remedy the notified contraventions. Unicom will refund in full and/or waive all early termination fees paid or payable by any verbal telesales customer (i.e. a customer who was sold the service by a Unicom telephone sales operator):

- to whom any misrepresentation whatsoever was made by Unicom or one of its employees or representatives during the sales and/or sales verification process; and/or

- who was not informed during the sales process that the agreement was for three years; and/or
- who was not informed during the sales process that an early termination fee may apply; and/or
- who requested or appears to have requested further information from Unicom or one of its employees or representatives during the sales process as to the applicability and/or the level or method of calculating early termination fees, but was not provided with a full and accurate response

and who entered into a verbal sales agreement with Unicom between 8 August 2006 and 18 July 2007.

Unicom has also undertaken to make changes to its verbal telesales process and sales, marketing and training materials in order to address the concerns outlined by Ofcom in the notification. Ofcom welcomes the initiatives put in place by Unicom.

- **Own-initiative investigation into Just Telecomms UK Ltd (JTUK) trading as Lo-Rate Telecom regarding allegations of misconduct in selling and marketing of telecommunications services**

In August 2005 Ofcom launched an investigation following complaints from small business customers of JTUK. The evidence gathered in the course of the investigation appeared to show that JTUK had engaged, and was engaging, in conduct which included:

- misleading potential customers into believing that JTUK was part of, or otherwise affiliated with, British Telecommunications plc (BT);
- demanding early termination charges of up to £395 + VAT per line when customers realised they had been misled and sought to cancel the transfer of their phone lines to JTUK or to revert to their original service provider; and
- disconnecting or threatening to disconnect services if those termination charges were not paid.

On 14 March 2006 Ofcom therefore notified JTUK, under section 94 of the Act, that Ofcom had reasonable grounds for believing that JTUK was contravening, and had contravened, General Conditions 13.1 and 14.3 of the General Conditions of Entitlement. Under the terms of that notification, JTUK was required to take action itself to: (a) bring any such contraventions to an end; (b) remedy the consequences of any such contraventions; and (c) make any representations to Ofcom that it wished to make in response to the notification. The opportunity period specified for taking actions (b) and (c) was one month.

Following issue of the section 94 notification Ofcom reviewed the available evidence and the representations made by JTUK. Ofcom was satisfied that JTUK had been in contravention of General Condition 14.3 and, furthermore, had failed to take all appropriate steps to remedy the consequences of that contravention. On 23 June 2006 Ofcom therefore served an enforcement notification on JTUK under section 95 of the Act setting out the steps which JTUK was required to take without delay to remedy the consequences of its contravention. In addition, Ofcom also decided to impose a penalty on JTUK

under section 96 of the Act. Ofcom regarded the circumstances of JTUK's contravention as being so serious that the maximum level of penalty was appropriate: 10% of JTUK's relevant turnover.

The steps which the enforcement notification required JTUK to take included:

- refunding termination charges to customers who were mis-sold to;
- providing weekly reports to Ofcom on customers contacted and refunds paid; and
- fully co-operating with, and complying with the adjudications of, the Telecommunications Ombudsman scheme (Otelco).

Ofcom is continuing to monitor JTUK's compliance with the enforcement notification.

3.35 Four cases that had been subject to monitoring were closed during the reporting period. They were:

- **BT complaint about an alleged breach of General Condition 18 by Spacetel;**
- **Own-initiative investigation against Telecom Billing Services Limited (TBS) about unsolicited text messages inducing telephone calls;**
- **Own-initiative investigation against Switch Call Limited and Switch Services Limited about misuse of 070 numbers; and**
- **Own-initiative investigation against Platinum Telecom about breaches of consumer protection obligations**