Enforcement guidelines for regulatory investigations

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About this document

Ofcom is the independent regulator, competition authority and designated enforcer of consumer law for the UK communications industries for the UK communications industries. In this role, we may need to take enforcement action in the interests of citizens and consumers, and where appropriate to promote competition.

These Guidelines set out how Ofcom will investigate compliance with and approach enforcement of regulatory requirements relating to electronic communications networks and services, postal services and consumer protection legislation.

However, they do not apply to the following:

- Complaints from individual consumers about communications services or postal services
- Enforcement of the Competition Act 1998
- Enforcement in relation to broadcasting licences, the BBC or on-demand programme services

If you have a complaint you wish to make as a consumer, viewer or listener about a telecoms provider, broadcaster or postal services provider, these Guidelines are unlikely to be relevant to you. Details of how to make a complaint can be found on the Ofcom website at https://www.ofcom.org.uk/complain-to-ofcom.
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Section 1

Introduction

1.1 Ofcom is the independent regulator, competition authority and designated enforcer of consumer law for the UK communications industries. In this role, we may need to take enforcement action in the interests of citizens and consumers, and where appropriate to promote competition.

What do these Guidelines cover?

1.2 These Guidelines set out how Ofcom will approach enforcement in cases relating to electronic communications networks and services and postal services, and some cases relating to breaches of wireless telegraphy licences. They apply to all of Ofcom’s enforcement processes, except where otherwise stated or where Ofcom has good reason to depart from them.

1.3 These Guidelines apply in particular when Ofcom is investigating compliance with or enforcing any of the following regulatory requirements (we call these ‘regulatory investigations’ in the rest of this document):

- compliance with regulatory conditions and directions imposed or given by Ofcom under sections 45 or 49 of the Communications Act 2003 (the “Communications Act”), such as general conditions (including numbering conditions), access-related conditions, universal service conditions, significant market power (SMP) conditions, privileged supplier conditions and SMP apparatus conditions;

- compliance with regulatory conditions and directions imposed or given by Ofcom under the Postal Services Act 2011 (the “Postal Services Act”) or other postal legislation;¹

- compliance with restrictions or conditions applicable to companies with powers under the electronic communications code, as set out in the Electronic Communications Code (Conditions and Restrictions) Regulations 2003;²

- compliance with requirements under sections 105A to 105C of the Communications Act relating to the security of public electronic communications networks and services;³

¹ Such as section 89A or 116(2A) of the Postal Services Act 2000 (schemes as to terms and conditions for provision of postal services, and the Postcode Address File), or under section 25(5) of the Consumers, Estate Agents and Redress Act 2007 (requirements to give information to Citizens Advice, etc.).

² Note that Ofcom does not have powers to enforce compliance with the Electronic Communications Code itself.

³ Section 105A requires network providers and service providers to take technical and organisational measures appropriately to manage risks to the security of public electronic communications networks and services, and network providers to take all appropriate steps to protect, so far as possible, the availability of the provider’s public electronic communications network; section 105B requires network providers and service providers to notify Ofcom of certain security breaches; section 105C requires
• failure to comply with a direction of the Phone-paid Services Authority (previously known as PhonepayPlus) relating to compliance with the Code of Practice for Premium Rate Services; 

• compliance with requirements under section 124S of the Communications Act, which places a duty on mobile phone providers to enable their customers to specify a billing limit in their contract; 

• Ofcom’s powers to take action against persistent misuse of electronic communications networks and services under sections 128 to 130 of the Communications Act; 

• compliance with the requirements of the EU Mobile Roaming Regulation and the Mobile Roaming (European Communities) Regulations 2007 (the “Mobile Roaming Regulations”); 

• compliance with the requirements relating to net neutrality under Articles 3, 4 and 5 of the EU Open Internet Access Regulation and the Open Internet Access (EU Regulation) Regulations 2016 (the “Open Internet Access Regulations”); 

network providers and service providers to submit to an audit of their security measures. Pursuant to section 105D enforcement action can be taken against a failure to comply with the requirements under sections 105A to 105C in accordance with the process set out in sections 96A to 96C of the Communications Act.

4 Under sections 120 to 124 of the Communications Act, Ofcom has responsibility for the regulation of premium rate services. Day-to-day regulation of such services is carried out by the co-regulatory agency the Phone-paid Services Authority (previously known as PhonepayPlus), which has issued a Code of Practice that has been approved by Ofcom in accordance with section 121 of the Communications Act. Providers of controlled premium rate services are required to comply with this Code of Practice. While any breach of that Code will be dealt with initially in accordance with the procedures set out in the Code, if an operator fails to comply with a Phone-paid Services Authority sanction direction, it can refer the matter to Ofcom for enforcement action under section 123 of the Communications Act, in accordance with the process under sections 94 to 96 of the Communications Act.

5 Under section 124T of the Communications Act, Ofcom can enforce against breaches of such requirements in accordance with sections 96A to 96C, but Ofcom can only impose a financial penalty of up to £2 million and has no power to issue directions under sections 100 and 100A of the Communications Act.

6 Ofcom has powers to take enforcement action against ‘persistent misuse’ of an electronic communications network or service under sections 128 to 130 of the Communications Act. These Guidelines explain the enforcement procedures we will generally follow where we take action against such misuse. Ofcom’s statement of general substantive policy on how we use our persistent misuse powers is available here: https://www.ofcom.org.uk/__data/assets/pdf_file/0024/96135/Persistent-Misuse-Policy-Statement.pdf

7 Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13th June 2012 on roaming on public mobile communications networks within the Union (as amended). Ofcom has powers to enforce the EU Mobile Roaming Regulation under the Mobile Roaming (European Communities) Regulations 2007 (as amended), available on www.legislation.gov.uk.

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• compliance with statutory information requests made under the Communications Act, the Postal Services Act, the Wireless Telegraphy Act 2006 (the "Wireless Telegraphy Act"), the Mobile Roaming Regulations and the Open Internet Access Regulations;

• compliance with conditions of wireless telegraphy licences in connection with our powers to impose financial penalties under sections 42 to 44 of the Wireless Telegraphy Act; and

• compliance with restrictions or conditions of dynamic spectrum access registrations in relation to our powers to take enforcement action under sections 53E to 53I of the Wireless Telegraphy Act.

1.4 They also apply to enforcement of consumer protection legislation, specifically:

• consumer protection legislation in relation to which Ofcom has concurrent powers with other regulators under Part 8 of the Enterprise Act 2002 (the "Enterprise Act"), including the Consumer Protection from Unfair Trading Regulations 2008; and

• requirements relating to unlawful or unfair terms in consumer contracts under the Consumer Rights Act 2015 (the "Consumer Rights Act").

1.5 These Guidelines do not apply in the following circumstances, which are dealt with in accordance with different processes and procedures:

• complaints from individual consumers about communications services or postal services;

• investigations under the Competition Act 1998 (the "Competition Act");

9 This includes enforcement action under sections 138 to 139A for breach of information gathering requirements imposed under sections 135, 136 or 191 of the Communications Act, and enforcement action under section 198ZA of the Communications Act for breach of information gathering requirements conferred on Ofcom under the BBC Charter and Agreement relating to our BBC functions, by persons other than the BBC. Breaches of information gathering requirements by the BBC are covered by our Procedures for enforcement of requirements in the BBC Agreement and compliance with Ofcom enforcement action: https://www.ofcom.org.uk/__data/assets/pdf_file/0024/99420/bbc-agreement.pdf.

10 This includes enforcement action under sections 32C to 32E for breach of information gathering requirements imposed under section 32A, and enforcement action under sections 53K to 53M of the Wireless Telegraphy Act for breach of information gathering requirements relating to dynamic spectrum access under section 53J of the Wireless Telegraphy Act.

11 Ofcom has powers to enforce these provisions under Part 8 of the Enterprise Act. Alternatively, Ofcom may enforce those provisions under Schedule 3 to the Consumer Rights Act 2015.

12 If you want to make a complaint to Ofcom as a consumer, viewer or listener about a communications provider, broadcaster or postal services provider, please visit our website for advice on how to make a complaint: https://www.ofcom.org.uk/complain-to-ofcom.

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- enforcement in relation to broadcasting licences (including compliance with conditions in Broadcasting Act licences relating to broadcast content or fair and effective competition) or on-demand programme service providers (ODPS);\(^{14}\)

- enforcement of BBC requirements;\(^{15}\)

- enforcement of statutory information requests made under the Competition Act\(^{16}\) or under legislation which gives an enforcement role solely to the courts rather than to Ofcom;

- how Ofcom will resolve disputes under the Communications Act, Schedule 3 of the Postal Services Act\(^ {17}\) or under the Communications (Access to Infrastructure) Regulations 2016\(^ {18}\);

- enforcement of regulatory obligations relating to interference with radio spectrum or radio equipment, including criminal enforcement relating to breaches of wireless telegraphy licences;\(^ {19}\) or

- compliance with undertakings given to Ofcom under Part 4 of the Enterprise Act.

Our objectives

1.6 We take enforcement action in respect of non-compliance with statutory or regulatory requirements in order to prevent harm to consumers and competition, and to remedy this where we can. We may also impose a penalty to deter non-compliance.

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\(^{14}\) Guidance on Ofcom’s procedures for broadcasting and ODPS enforcement may be found here: https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/guidance/procedures. Ofcom has also published separate procedures for investigating breaches of competition-related conditions in Broadcasting Act licences available here: https://www.ofcom.org.uk/__data/assets/pdf_file/0017/102518/Procedures-for-investigating-breaches-of-competition-related-conditions-in-Broadcasting-Act-licences.pdf

\(^{15}\) Guidance on Ofcom’s procedures for enforcement of BBC requirements may be found here: https://www.ofcom.org.uk/consultations-and-statements/ofcom-and-the-bbc. The exception to this is enforcement action under section 198ZA of the Communications Act for breach of information gathering requirements conferred on Ofcom under the BBC Charter and Agreement relating to our BBC functions, by persons other than the BBC, which is covered by these Guidelines.

\(^{16}\) Ofcom’s powers to enforce statutory information requests made under the Competition Act are discussed in Ofcom’s Enforcement Guidelines for Competition Act investigations: https://www.ofcom.org.uk/__data/assets/pdf_file/0014/102515/Enforcement-guidelines-for-Competition-Act-investigations.pdf


\(^{18}\) Ofcom has published separate procedures relating to these: see our Guidance under the Communications (Access to Infrastructure) Regulations 2016: https://www.ofcom.org.uk/__data/assets/pdf_file/0025/95191/Guidance-under-the-Communications-Access-to-Infrastructure-Regulations-2016.pdf.

\(^{19}\) See the relevant information on our website about our spectrum enforcement powers: https://www.ofcom.org.uk/spectrum/interference-enforcement
1.7 We seek to ensure that enforcement action is conducted in a fair, transparent, efficient and timely way.

Status of these Guidelines

1.8 These Guidelines take effect from [28] June 2017. They set out Ofcom’s general approach to enforcement in the areas covered by the Guidelines and they are designed to be flexible. Where we depart from the approach set out in these Guidelines, we will explain our reasons for doing so.

1.9 These Guidelines are not a substitute for any regulation or law and are not legal advice.

1.10 While we have sought to outline the types of enforcement processes which would and would not be covered by these Guidelines, Ofcom’s powers and responsibilities may change over time. Were Ofcom to gain new enforcement powers, we would be likely to use the process which appears to us most closely analogous in terms of the statutory framework. Depending on the nature of any new enforcement powers, we would also consider whether these Guidelines needed to be reviewed and/or amended.
Section 2

Why and how Ofcom opens cases

Why Ofcom opens cases

2.1 Ofcom’s principal duties in carrying out our functions, as set out in section 3 of the Communications Act, are:

    a) to further the interests of citizens in relation to communications matters; and

    b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

2.2 Taking action in respect of non-compliance with statutory and regulatory requirements is usually likely to further the interests of citizens and consumers by preventing or remediying consumer harm. It is also important that we take action in an efficient and effective way, that is evidence-based, proportionate, consistent, accountable and transparent, and targeted only at cases where action is needed.

2.3 We make decisions about whether to open investigations on a case-by-case basis, having regard to our statutory duties and having considered all the matters that appear to us to be relevant to whether or not we should do so. In doing so, we seek to exercise our discretion to target our action at the cases we think are most likely to produce good outcomes for citizens and consumers.

2.4 We cannot necessarily pursue every possible issue that comes to our attention and must make decisions about whether to open investigations by weighing up the likely benefits of conducting an investigation against the resources that would be required, and the comparative benefits of using those resources in other ways.

2.5 The matters we will generally consider include the following, so far as they are relevant to the case concerned:

    a) The risk of harm arising from/seriousness of the alleged conduct. For example:

        • the risk to the interests of citizens or consumers resulting from the alleged contravention (including whether that risk is immediate or not and whether it is direct or indirect), and conversely the direct and indirect benefit to consumers of our taking action (e.g. to deter similar conduct by others);

        • whether the conduct is on-going;

        • whether the allegation concerns conduct that is, or that appears to be, a repeated, intentional or particularly flagrant contravention or infringement;

        • whether the business which is under investigation has a history of similar contraventions or infringements, or a demonstrated record of poor compliance;

    b) The strategic significance of addressing the alleged conduct and whether alternative proceedings are likely to achieve the same ends. For example:
• whether an investigation would help clarify the regulatory or legal framework for stakeholders;

• whether the issue that has been identified directly relates to Ofcom’s broader strategic goals or priorities (including those within Ofcom’s Annual Plan);

• whether there are other alternative proceedings that are likely to achieve the same ends, or deal with the same issues, as the potential investigation. This could include, for example, whether other agencies may be better placed to investigate the complaint or whether planned market reviews may address the potential harm; and

  c) The resource implications of our conducting an investigation, for example, what resources (in particular what specialist resources) are required to conduct an investigation, given the need to do justice to the interests of all parties likely to be affected.

2.6 Where appropriate we will also consider other factors as well.20

2.7 Before exercising our enforcement powers under sections 94 or 96A of the Communications Act or under Schedule 7 to the Postal Services Act, we must consider if a more appropriate way of proceeding would be under the Competition Act. Where we decide that it is more appropriate to proceed under the Competition Act, we will state our reasons for doing so.

Sources of information

2.8 Information which could trigger an investigation into compliance with a requirement can come to Ofcom’s attention from a number of different sources. For example, Ofcom may consider opening an investigation:

• where a business comes to us to let us know that they believe they have or may have breached a requirement;

• in response to a complaint by an industry stakeholder or whistleblower;

• in response to information provided to us by other bodies (for example, where other regulatory bodies, MPs, consumer organisations or the press draw our attention to complaints they have received about a particular issue);

• where routine monitoring by us gives rise to a concern about compliance, for example where our Consumer Contact Team has received large numbers of complaints from consumers relating to a particular issue; and/or

• where we identify a particular concern through other areas of our work, for example, as a result of considering a regulatory dispute under the Communications Act or Postal Services Act.

20 For example, any relevant matters set out in statutory policies such as that relating to the exercise of our powers in relation to persistent misuse, which we are required by section 131 of the Communications Act to publish and have regard to in the exercise of those powers.
2.9 Sometimes we receive information, including complaints, that suggests there is an industry wide issue causing harm to the interests of citizens and consumers. In such cases, we may use consumer research, mystery shopping or detailed analysis of complaints to determine on which business(es), if any, we should focus our resources. However, it may not always be possible to prioritise our work effectively without further information from those we regulate, and in such cases we may open an enforcement programme and use our information gathering powers to gather further evidence from relevant businesses in order to determine where the problem lies, and the appropriate, proportionate response to tackle the harm. When the evidence gathered indicates the need to investigate a particular entity, we will handle the opening of that investigation as for any other investigation under these Guidelines.

Complaints and whistleblowing

2.10 As noted above, some of our investigations begin because we have received a specific complaint about potential non-compliance by a business with a relevant legal or regulatory requirement from another business or a trade association. Guidance for stakeholders who wish to make a complaint is set out in the document “Advice for complainants: Submitting a complaint to Ofcom”, available here: https://www.ofcom.org.uk/__data/assets/pdf_file/0013/102514/Advice-for-complainants.pdf.

2.11 In addition, Ofcom has published guidance on how individuals working in the communications sector may contact us if they have concerns about possible wrongdoing at their own organisation (or their former organisation) and where they have been unable to raise or resolve those concerns internally. Such disclosures can be made in confidence to Ofcom’s Corporation Secretary. Further guidance for potential whistleblowers is set out in our Advice for complainants document.

Initial assessment

2.12 Prior to opening an investigation, Ofcom will first carry out an initial assessment of the issue(s) to ascertain whether there is sufficient concern to warrant committing our resources to an investigation of the relevant matters, having considered all relevant factors. We do not make a substantive decision on whether or not there has been a breach of a requirement during this initial assessment phase.

2.13 As part of our initial assessment, we will normally give the business whose conduct we are considering the opportunity to comment on the relevant issue(s) and to provide information to assist us in deciding whether to open an investigation. Where we are carrying out an initial assessment following receipt of a complaint, we will also generally tell the subject of the possible investigation that we are doing so on the basis of a complaint, and will generally share a non-confidential version of the complaint submission with the subject for comment.

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21 An example of where we might do this is in relation to the exercise of our powers to take action against persistent misuse under sections 128 to 130 of the Communications Act. We have an ongoing enforcement programme against such misuse and may use our information gathering powers to help us identify where to take action.

22 https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines/procedure-for-making-a-disclosure
2.14 However, we may decide not to provide the subject with the opportunity to comment and provide information if we consider that we already have sufficient information to conduct our initial assessment and decide whether to open an investigation. This could be, for example, where we have been carrying out an enforcement programme and have identified an issue from the information provided in response to a formal information request served in that context, or where we have obtained information about potential non-compliance as a result of routine compliance monitoring (e.g. about quality of service targets) or through more informal engagement.

2.15 We may also decide not to provide an initial opportunity for comment and to provide information where there are reasons to proceed to an investigation more quickly. This could be, for example, due to the risk of particular consumer harm or where we consider this may prejudice the conduct of any subsequent investigation, such as in cases where we may need to use our information gathering powers to obtain and preserve evidence prior to alerting the subject of the investigation.

2.16 Where we are assessing a complaint, there may also be cases in which we consider that it is not appropriate to provide the subject of the complaint with the opportunity to comment on the complaint submission. This could be, for example, for one or more of the reasons explained in paragraphs 2.14 and 2.15 above. There may also be cases where it is important to safeguard the anonymity of the complainant such that it is not appropriate to share a copy of the complaint at this stage. In such cases, where we decide to open an investigation, we would (subject to anonymity concerns) share a non-confidential version of the complaint submission with the subject once we have opened the investigation (or at an appropriate point of time after we have done so, i.e. after we have exercised our information gathering powers).

2.17 Where we have sufficient information to decide that we should not open an investigation without obtaining comments or further information from the subject of the complaint (for example, because the scale of any possible consumer harm appears too low to merit the resource required to investigate), we will normally only inform the complainant of our decision not to open an investigation and would not invite any further comment.

2.18 We aim to complete our initial assessment as quickly as reasonably possible, but the length of time that this will take is likely to vary on a case-by-case basis based on the issues under consideration. For example, where we are also considering whether it is more appropriate to open a case under the Competition Act, it is likely to take longer for us to decide whether to open an investigation.

2.19 In cases where we decide that it is appropriate to give the subject of the possible investigation an initial opportunity to comment and to provide information on the issues under consideration (including in response to a complaint), we will write to the subject setting out how long it will have to comment, and how soon after considering any comments or information received we aim to take our decision on whether to

23 An example may be where we have served a statutory information request under our ongoing enforcement programme in relation to persistent misuse under sections 128 to 130 of the Communications Act, and have obtained the information we need to decide to proceed with our investigation.

24 Ofcom will consider requests from complainants to remain anonymous. However, it may not be feasible to carry out our initial assessment, or open or conduct an investigation, without revealing the identity of the complainant to the subject. This does not apply to whistleblowers.
open an investigation. We will also provide contact details for the case leader who will act as the main point of contact while we are making our initial assessment. We will provide the same information to a complainant where we are completing our initial assessment of a complaint we have received. In those cases, we expect to keep the subject and any complainant updated should our initial assessment take longer than expected.

2.20 We do not generally exercise our statutory information gathering powers prior to opening an investigation, although we expect businesses we are considering investigating to ensure that the information they provide to Ofcom during our initial assessment is accurate, including where the information has not been requested using our information gathering powers. We may also ask complainants to provide further information, and also expect complainants to ensure that the information they provide to Ofcom during our initial assessment is accurate. In some cases, we may meet the subject of the possible investigation and/or a complainant where we consider this will assist us in reaching a decision on whether to open an investigation.

2.21 We do not publish details of, or comment publicly on, the matters we are considering during our initial assessment phase.

**Resolution through means other than formal enforcement action**

2.22 In some cases, Ofcom may be able to resolve an issue without the need for formal enforcement action. For example, we may be satisfied that the business has taken, or has offered assurances that it will take, appropriate steps to address any concerns we have identified such that there is no need for further action (although there may be a period of compliance monitoring).

2.23 In such cases, we will normally write to the business whose conduct we have been considering and any complainant to explain the basis on which we have decided not to proceed to formal enforcement action, and the circumstances in which we might reconsider the need to take formal enforcement action in future if relevant (for example, in the event that the organisation did not take the steps which it had said that it would or we received further evidence of a potential compliance issue).

2.24 Such informal action will generally not involve Ofcom taking any decision about whether, or not, any regulatory or legal provision has been breached.

2.25 Where Ofcom has decided not to pursue formal enforcement action in relation to an issue as a result of informal resolution, but we later become aware of further issues relating to the same or a similar issue, we may take formal enforcement action at that stage. If we did so, we would generally take into account any failure on the part of the relevant business to abide by assurances previously given to us relating to this conduct.

2.26 We may publish details of assurances that have been given about the steps the relevant business has taken and/or will take to address the issue, for example where we consider this would be in the interests of potentially affected customers or consumers more generally. We will usually inform the business concerned shortly

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25 An exception to this is where we are carrying out a general enforcement programme, such as our ongoing enforcement programme in relation to persistent misuse under sections 128 to 130 of the Communications Act. In such cases, we may make requests for information using our statutory powers.
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before (and no more than one working day before) publication on Ofcom’s website that we will be doing so, and provide them with a copy of the intended text for information only at that stage.

Next steps following Ofcom’s decision on whether to open an investigation

2.27 A senior member of Ofcom’s executive with appropriate Board-delegated authority will decide whether to open an investigation. Typically, this will be the person who will be responsible for overseeing the investigation.

2.28 Where we decide not to open an investigation following our initial assessment, we will normally inform the business whose conduct we have been considering, and any complainant, but will not usually give them the opportunity to comment before we take our decision.

2.29 Ofcom will not usually publicise a decision not to open an investigation unless the fact that a complaint has been made has been made public by either the complainant or the business that we were considering investigating, or a potential investigation is the subject of press speculation, and we consider we should clarify the position. In such cases, we would usually inform the subject of the investigation shortly before (and no more than one working day before) publication on Ofcom’s website that we will be doing so, and provide them with a copy of the intended text for information only at that stage.

2.30 In most cases, when Ofcom decides to open an investigation, we will inform the subject and any complainant by sending them each a case opening letter explaining the scope of Ofcom’s investigation, who the case leader and case supervisor are (as discussed further at paragraph 3.6 below) and next steps. However, there may be some cases where we delay doing so if we consider it may prejudice our ability to carry out an investigation, for example in cases where we may need to use our information gathering powers to obtain and preserve evidence prior to alerting the subject.

2.31 Shortly after sending the case opening letter(s), we will generally also announce that we have opened an investigation on the Competition and Consumer Enforcement Bulletin (CCEB) section of our website 26 (although we may delay doing so if we consider it may prejudice our ability to carry out an investigation). The case opening announcement will typically include the following details:

a) the identity of the subject of the investigation;

b) the identity of any complainant; 27

c) the regulatory or legal provisions to which the investigation relates;

d) the scope of the investigation; and

26 https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins

27 If a complainant has concerns about being publicly identified on Ofcom’s website, the complainant should raise this concern with us, ideally at the time of making its complaint submission. For the avoidance of doubt, Ofcom will not publish a copy of the complaint submission itself.
e) the case leader’s contact details.

2.32 Announcing the beginning of an investigation does not imply that Ofcom has formed any view about whether or not any regulatory or legal provision has been breached.

2.33 In some cases, Ofcom may have sufficient information to reach a provisional decision on compliance with a relevant requirement without needing to obtain any more information using our statutory information gathering powers. In such cases, we are likely to send the subject a provisional breach notification at the same time as we send our case opening letter. We might do this, for example, in a case where we are considering non-compliance with a statutory information request, as such cases typically focus on whether or not the relevant organisation has provided the requested information by the required deadline, and we do not typically need to request any further information from them before deciding whether there are grounds for action.\(^{28}\)

\(^{28}\) For example, in a case relating to potential non-compliance with a statutory information request under section 135 of the Communications Act, we may issue a notification under section 138 of the Act without having previously told the subject that we were taking enforcement action. Further information about the process for issuing a provisional breach notification is set out at paragraphs 4.8 to 4.14 below.
Section 3

Investigating

Introduction

3.1 This section sets out how Ofcom is likely to conduct an investigation. This includes guidance on Ofcom’s likely engagement and contact with the subject of the investigation, complainants and third parties, and how we will gather information, publish information and deal with confidential information.

3.2 Although the statutory framework for each different type of investigation may differ, the initial process in broad outline will be the same for each. This section therefore applies to all the kinds of enforcement covered by these Guidelines.

Engagement with Ofcom during the investigation

3.3 We seek to ensure that enforcement action is conducted in a fair, transparent, efficient and timely way. As set out in the relevant sections of this document, Ofcom may request representations from, and engage with, complainants and other relevant third parties.

3.4 We will endeavour to keep the subjects of our investigations up-to-date on the progress of the investigation. If we receive a request to meet to discuss the case, we will consider it. We will be prepared to meet with the subject of an investigation and complainants or other third parties, and/or provide written or verbal updates, where we consider it to be appropriate for reasons of fairness and transparency. We will decide whether and when it is appropriate to do so on a case-by-case basis depending on the nature of the investigation and the stage that we have reached in our analysis.

3.5 We explain in the following sections of these Guidelines the type of engagement that businesses we are investigating, complainants and third parties can generally expect to have with Ofcom at key points during the investigation.

Case team

3.6 At the outset of the investigation, Ofcom will usually\(^\text{29}\) inform the subject of the investigation, and any complainant, of:

- the case leader - this is the person who will be their main contact at Ofcom for the case during the course of the investigation; and

\(^{29}\)As noted above, there may be circumstances in which we decide not to do this until a later point in the investigation, for example where we consider this could prejudice the conduct of the investigation, such as in cases where we may need to use our information gathering powers to obtain and preserve evidence prior to alerting the subject about our investigation.
• the case supervisor - this is the person who will be overseeing the investigation.30

3.7 We will also explain how the Procedural Officer can be contacted – see further paragraph 3.35 and Section 9.

3.8 At the same time, Ofcom may ask the subject and any complainant to each nominate a principal point of contact for communications about the investigation.

3.9 If the case leader or the case supervisor changes during the course of the investigation, we will update the subject, and any complainant.

3.10 Details of the case leader for an investigation will also be set out on the CCEB section of our website.

**Timescales**

3.11 Ofcom recognises that it is important for all stakeholders that if we open an investigation we progress it in a timely manner and conclude it as soon as reasonably possible. We will give the subject, and any complainant, an indication of the likely timescale involved in completing an investigation – this will normally be at the point when we open the investigation.31

3.12 We will provide updates to the subject and any complainant on the progress of investigations, including when we expect to reach a specific milestone, and will also provide updates where this changes.

3.13 We will also aim to publish on the CCEB section of our website details of how long we expect to take to reach key milestones in an investigation.

**Changing the scope of an investigation**

3.14 We may widen the scope of an investigation if we become aware of new issues that warrant investigation, or reduce the scope if we decide that it is no longer appropriate to pursue particular aspects of the case. When we change the scope of an investigation, we will inform the subject of the investigation and any complainant, and will update the CCEB entry on our website. Where we consider it necessary for reasons of fairness, we will give the subject and/or the complainant the opportunity to comment prior to deciding to change the scope of the investigation.

**Information gathering**

3.15 Ofcom relies on accurate information, provided in a timely manner, to carry out efficient investigations. We have a number of statutory information gathering powers which we would expect to use in order to obtain information for the purposes of investigations covered by these Guidelines.

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30 As explained at paragraph 4.6 below, the case supervisor would typically be the person responsible for deciding whether there are grounds for action and whether to issue a provisional breach notification.

31 Although we may delay doing so where we consider this may prejudice the conduct of the investigation, such as in cases where we may need to use our information gathering powers to obtain and preserve evidence prior to alerting the subject about our investigation.
We set out below where our statutory powers to gather information come from:

<table>
<thead>
<tr>
<th>Type of suspected breach</th>
<th>Information gathering power</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any regulatory requirement imposed under section 45 or 49 of the Communications Act</td>
<td>Section 135 Communications Act</td>
</tr>
<tr>
<td>Requirements under section 105A to 105C of the Communications Act relating to network security</td>
<td>Section 135 Communications Act</td>
</tr>
<tr>
<td>Any regulatory requirement imposed under the Electronic Communications Code (Conditions and Restrictions) Regulations 2003</td>
<td>Section 135 Communications Act</td>
</tr>
<tr>
<td>Failure to comply with a direction of the Phone-paid Services Authority</td>
<td>Section 135 Communications Act</td>
</tr>
<tr>
<td>Compliance with requirements under section 124S of the Communications Act, relating to billing limits in mobile phone provider contracts</td>
<td>Section 135 Communications Act</td>
</tr>
<tr>
<td>Persistent misuse</td>
<td>Section 135 Communications Act</td>
</tr>
<tr>
<td>Any regulatory condition/direction imposed under Part 3 of the Postal Services Act or other postal legislation</td>
<td>Section 55 and Schedule 8 Postal Services Act</td>
</tr>
<tr>
<td>EU Mobile Roaming Regulation and the Mobile Roaming Regulations</td>
<td>Regulation 2B Mobile Roaming Regulations</td>
</tr>
<tr>
<td>EU Open Internet Access Regulation and the Open Internet Access Regulations</td>
<td>Regulation 17 Open Internet Access Regulations</td>
</tr>
<tr>
<td>Compliance with conditions of wireless telegraphy licences in connection with our powers to impose financial penalties under sections 42 to 44 of the Wireless Telegraphy Act</td>
<td>Section 32A of the Wireless Telegraphy Act</td>
</tr>
<tr>
<td>Compliance with restrictions or conditions of dynamic spectrum access registrations under Part 2A of the Wireless Telegraphy Act</td>
<td>Section 32A of the Wireless Telegraphy Act</td>
</tr>
</tbody>
</table>

32 Including any direction under section 89A or 116(2A) of the Postal Services Act 2000 (schemes as to terms and conditions for provision of postal services, and the Postcode Address File) or section 25(5) of the Consumers, Estate Agents and Redress Act 2007 (enforcement of requirements to give information to Citizens Advice, etc.).
Consumer protection legislation falling within Part 8 of the Enterprise Act or enforcement of unfair contract terms under Schedule 3 of the Consumer Rights Act

Part 3 of Schedule 5 Consumer Rights Act

3.17 Ofcom’s statutory information gathering powers are a critical tool in obtaining the information necessary to take appropriate enforcement action in the interests of citizens and consumers. We expect recipients to provide correct and complete information in response to formal information requests by the given deadline. Ofcom may take enforcement action against failures to respond properly to statutory information requests, and may impose sanctions for non-compliance, including the imposition of financial penalties. Failure to respond properly to a statutory information request can also constitute a criminal offence.33

3.18 Alternatively, where we consider it may be more appropriate to do so, rather than taking formal enforcement action against a failure to comply, Ofcom may instead take into account the failure to co-operate with Ofcom’s information request as part of our assessment of the appropriate level of penalty to impose for a breach of the regulatory requirement.34

Confidentiality

3.19 In accordance with our duties under the Communications Act, we are required to investigate and enforce in a transparent and accountable manner. Those duties must be balanced against the restrictions on disclosure contained in sections 26 and 393 of the Communications Act, section 56 of the Postal Services Act, section 111 of the Wireless Telegraphy Act and section 237 of the Enterprise Act, and the legitimate interests of parties in ensuring that confidential and commercially sensitive information is protected.

3.20 Ofcom may consider it appropriate to disclose information notwithstanding that a party has asserted confidentiality over it. Ofcom will always consider whether disclosure of information about a particular business is necessary for the purpose of facilitating the carrying out of our enforcement functions. In particular, Ofcom may judge that it is necessary to disclose information gathered from complainants or other third parties to the subject of the investigation in order to allow the subject to respond to Ofcom’s case. Similarly, Ofcom may judge that disclosure of information gathered from the subject to a complainant and other third parties is justified in order to facilitate the carrying out by us of our functions. We will decide on the best means of dealing with confidential information on a case by-case basis, in accordance with the

33 Sections 138 to 144 of the Communications Act, Part 2 of Schedule 8 to the Postal Services Act, sections 32C to 33 of the Wireless Telegraphy Act and regulations 3 to 5A of the Mobile Roaming Regulations and regulations 19 to 23 of the Open Internet Access Regulations provide for Ofcom to impose financial penalties and give directions to secure compliance with a statutory information request, as well as criminal sanctions. Failure to comply with a request to provide information under Schedule 5 of the Consumer Rights Act is enforceable on an application to the court for a court order requiring the person who is subject to the notice to comply. The court can also require the recipient of the notice to pay the costs of making the application.

relevant statutory framework, having regard to the respective interests of the party that has provided the confidential information, and of the subject.

3.21 If Ofcom is proposing to disclose information which a party considers to be confidential, we will take reasonable steps to inform that party and will give it a reasonable opportunity to make representations on our proposal, before making a final decision on whether to disclose the information. This decision will be made by the case team and/or the case supervisor and will be communicated to the party concerned in advance of the disclosure being made. Where the decision is to disclose the information despite the party whose information it is continuing to object to such disclosure, we would give that party the opportunity to escalate its concerns to the Procedural Officer (in accordance with Section 9). We would expect to delay disclosing the information until the Procedural Officer has reached his/her decision. If we intended to proceed to disclose the information after taking these steps, we would inform the party concerned in advance.

3.22 We may request that we are provided with a non-confidential version of a submission if needed for the purposes of publication and/or disclosure. Such a non-confidential version should normally include suggested non-confidential summaries of information (for example “confidential details of contracts”) or ranges of numbers, rather than simply removing the confidential information.

Publicising cases

3.23 Ofcom is required to have regard to the principle under which regulatory activities should be transparent and accountable. Publicising the action we take can also usefully draw it to the attention of parties who have relevant information, can help deter non-compliance in future and educate others about what can go wrong. Consequently, publicising the investigations we are carrying out and our final decisions is an important part of carrying out our functions.

3.24 As explained at paragraph 2.31 above, when we open an investigation we will typically publicise it on the CCEB section of our website.35

3.25 We will also publish updates regarding the progress of an investigation on the CCEB when we reach key milestones (such as when we issue a provisional breach notification, when we change the scope of an investigation, when we issue a final enforcement decision or when we close a case). This is explained in more detail in the relevant sections of these Guidelines.

3.26 We may also issue media releases regarding the outcome of our investigations, for example where we consider this would be in the interests of potentially affected customers or consumers more generally.

3.27 We do not agree the text of CCEB updates or media releases with the subject of the investigation, or any complainant.

3.28 We will ordinarily inform the subject of the investigation shortly, and no more than one working day, before publication on Ofcom’s website that we will be doing so, and

35 https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins. Stakeholders who are interested in following the progress of our investigations can also subscribe to receive email notifications of changes to the CCEB.
provide it with a copy of the intended text of the CCEB update for information only at that stage.

3.29 Where we consider an announcement to be potentially market sensitive, we will generally inform the subject after markets have closed, with publication at 7.00am on Ofcom’s website and via the Regulatory News Service, just before markets open. Where the subject is a listed company in other jurisdictions, we will, where possible, seek to avoid publication during stock exchange hours in those jurisdictions.

3.30 There may be certain cases which we consider it would be inappropriate to publicise, for example because they are particularly sensitive and/or publicity could have a detrimental impact on third parties. We would inform the subject and any complainant if we intend to take this approach to an investigation. We expect these cases to be exceptional.

**Involvement of third parties**

3.31 Ofcom recognises that in some cases third parties may be directly affected by the outcome of an investigation and can play a valuable role by drawing issues to our attention and by providing us with relevant information during the course of an investigation.

3.32 Ofcom may seek input from relevant third parties, for example, from trade associations, competitors or customers of the subject of the investigation, in order to assist us in reaching a decision on the case.

3.33 Ofcom will involve third parties in an investigation to the extent we consider appropriate in order to carry out our functions fairly, transparently and effectively.

**How to raise concerns with Ofcom**

3.34 If a subject of an investigation, a complainant or third party (where relevant) is dissatisfied with the way in which Ofcom is proceeding, they should usually raise their concerns in writing with the case leader or case supervisor in the first instance.

3.35 Where engagement with the case leader/case supervisor does not resolve a party’s concerns about a significant procedural issue, it may contact the Procedural Officer. The process for doing so is set out in Section 9.
Section 4

Outcomes of regulatory investigations and the decision-making process

Introduction

4.1 Ofcom’s processes for making decisions covered by these Guidelines vary depending on the type of decision being made. This section covers how Ofcom decides on the outcome of a regulatory investigation and who will make key decisions during an investigation.

4.2 Ofcom is not the final decision maker in cases relating to enforcement of consumer protection legislation (i.e. cases under Part 8 of the Enterprise Act or Schedule 3 of the Consumer Rights Act). Ofcom’s role there is to prepare a case for Court, and the possible outcomes and decision-making in those cases is discussed in Section 7 below.

4.3 In a regulatory investigation:

- We may decide that there are grounds for action. In such cases, we will first provide the subject of the investigation with a provisional decision explaining the reasons why we are minded to find a contravention of the relevant regulatory requirement(s) and the action that we propose to take as a result. We will give the subject the opportunity to make representations before proceeding to take a final decision. This may result in a final enforcement notification, which may also include the imposition of a financial penalty and/or a direction requiring steps to be taken to remedy a contravention and/or comply with a regulatory requirement. In other cases, we may find that there has been a contravention but that there is no need to impose a formal sanction.

- We may decide that there is insufficient evidence of a contravention, and close the case on that basis (potentially subject to a period of compliance monitoring).

- We may decide to close a case without having taken a final decision on the merits of a case.36

4.4 In some cases, we may be able to reach a settlement with the subject of an investigation as a way of resolving a case, in circumstances where we have grounds

36 For example, we may decide to close the case for administrative reasons, or where we are satisfied that the conduct we were concerned about has now ceased and the subject of the investigation has taken appropriate action to remedy any harm or has given appropriate assurances that it will be remedied, and we judge that there is no further purpose to be served by continuing with the investigation in the particular circumstances of the case.
to reach an enforcement decision. The process for settlement is discussed in Section 5 below.

**Decision making in regulatory investigations**

4.5 The decision on whether there are grounds for pursuing formal enforcement action (in other words, whether to issue a provisional breach notification) will be taken by a senior member of Ofcom’s executive with appropriate Board-delegated authority. Typically, this would be the person who is responsible for overseeing the investigation (the case supervisor).

4.6 Following the issue of a provisional breach notification and the receipt of any written submissions from the subject of the investigation, Ofcom will nominate a final decision maker who will be responsible for deciding on the final outcome of the investigation. This will be a senior member of Ofcom’s executive with appropriate Board-delegated authority, who will not have been involved in the investigation and/or the preparation of the provisional breach notification.

**Provisional breach notifications**

4.7 In cases where the decision is taken that there are reasonable grounds for believing that the subject of the investigation is contravening or has contravened the relevant regulatory requirement(s), Ofcom will notify the subject of the investigation of this provisional finding, and our reasons for provisionally concluding the requirement has been breached, by providing it with a provisional breach notification. This provisional view may change in light of subsequent representations made, or material provided by, the subject of the investigation (or complainants or other third parties where relevant), or any further evidence which comes to light.

4.8 For some types of cases, where Ofcom is minded to impose a financial penalty, we are required by statute to include a provisional determination of penalty in any provisional breach notification. For other types of cases, the matter is left to Ofcom’s discretion. Ofcom will, as a general rule, include with any provisional

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37 These include: notifications of contravention under section 96A of the Communication Act; notifications under section 110 of the Communications Act setting out Ofcom’s determination that there are reasonable grounds for believing that a Code operator has contravened a requirement of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003; notifications of contravention of information requirements under section 138 of the Communications Act or under section 32C of the Wireless Telegraphy Act; notifications under regulation 3 of the Mobile Roaming Regulations and notifications under regulation 19 of the Open Internet Access Regulations.

38 These include, in relation to postal services, notifications under paragraph 2 of Schedule 7 or paragraph 5 of Schedule 8 to the Postal Services Act determining there are reasonable grounds for believing, respectively, that a person has failed to comply with a relevant regulatory requirement or to comply with an information requirement under section 55 of that Act. These also include notifications under section 128 of the Communications Act where Ofcom determines there are reasonable grounds to believe that a person has persistently misused an electronic communications network or service, notifications under section 94 of the Communications Act in respect of an alleged contravention of an SMP apparatus condition and enforcement action relating to contravention of the Code of Practice for Premium Rate Services under section 123 of the Communications Act and notifications under section 42 of the Wireless Telegraphy Act.
breach notification a provisional determination of penalty. In determining penalties, Ofcom will have regard to Ofcom's Penalty Guidelines.39

4.9 We would generally expect the subject of an investigation to take steps to bring itself into compliance and to remedy the consequences of any breach to the fullest extent possible. For some types of cases, Ofcom is also required by statute to specify in the notification the steps that we think should be taken by the subject in order to comply with the relevant regulatory requirement(s) and/or remedy the consequences of the contravention.40 Again, for other types of cases the matter is left to Ofcom's discretion41 but Ofcom will as a general rule include with any provisional breach notification a provisional view of the steps the subject should take. Similarly, the notification will include details of any direction Ofcom is minded to give, where Ofcom has powers to give directions.

4.10 If the subject of the investigation is a company, Ofcom will deliver the notification in hard copy to the Company Secretary42, copied by email to our main contact, unless it has agreed otherwise with us.

4.11 When we issue the provisional breach notification, we will also provide the subject of the investigation with copies of, or access to, the evidence that we have considered during the course of the investigation and which we have taken into account in reaching our provisional view, excluding any internal Ofcom documents or any routine administrative documents (e.g. routine correspondence). Wherever possible and appropriate, we will provide the subject with copies of or access to the relevant documents in electronic form, but in some cases we may provide hard copies (for example where requested by the subject in a particular case). Where we have relied upon evidence provided to us by the subject itself, rather than providing copies of the relevant documents, we may instead list these in a schedule so that it is easy for the subject to cross-refer to its own copies.

4.12 Confidential information in the provisional breach notification and any accompanying documents will be marked. We will redact (or withhold as relevant) confidential third party information where appropriate in accordance with the relevant statutory framework (although as noted in paragraph 3.20 above, we may consider that it is necessary to disclose information provided by a third party to the subject of the investigation in order to be fair to it).

4.13 Ofcom will not publish provisional breach notifications but we will generally publish an update on the CCEB section of our website. Our update will normally explain that we have issued a provisional breach notification, include a summary of the proposed contraventions that we are minded to find and, where relevant, of the steps we propose the subject should take to comply and/or remedy the proposed

39 These are available here: https://www.ofcom.org.uk/__data/assets/pdf_file/0032/49685/penalty_guidelines_2015.pdf
40 These include all the types of cases listed in footnote 37.
41 For example, a notification under section 128 of the Communications Act, where Ofcom determines there are reasonable grounds to believe that a person has persistently misused an electronic communications network or service, may include a provisional view of the steps Ofcom would be minded to impose in an enforcement notification under section 129 of that Act.
42 In most cases, it is a statutory requirement to serve notice on the Company Secretary of a company.
contraventions. The CCEB update will also state that the subject will have the opportunity to make representations on our proposed findings before we make our final decision.

**Written representations**

4.14 The subject of the investigation will have the opportunity to make written representations to Ofcom on the proposed finding and on any proposed penalty, proposed required steps and/or proposed direction. Typically, Ofcom will give the subject a period of at least 20 working days for making written representations. Ofcom will give a longer period in more complex cases.

4.15 Where we consider it to be appropriate for reasons of fairness, we may provide complainants or relevant third parties with the opportunity to comment on a non-confidential copy of the provisional breach notification. This will typically be where they may have further information relevant to the proposed decision and therefore could provide informed comments on the provisional breach notification. Another example may be where Ofcom’s provisional findings could have a direct impact on the economic interests of a third party, such as where we comment in the notification on the conduct of an agent of the subject of our investigation which we consider has given rise to the potential breach.

4.16 In such cases, Ofcom would expect the complainant or the third party to enter into appropriate agreements with us limiting its use of and onward disclosure of the document. We will set deadlines for representations depending on the circumstances of the case.

4.17 We will not usually provide a complainant or third parties with copies of, or access to, the underlying evidence relied on, but may do so where appropriate for reasons of fairness.

**Oral hearings**

4.18 Ofcom will offer the subject of the investigation the opportunity to attend an oral hearing to make oral representations on matters referred to in the provisional breach notification. The oral hearing provides the subject with an opportunity to highlight directly to the final decision maker issues of particular importance to its case and/or to clarify the detail set out in its written representations.

4.19 Ofcom will normally ask the subject to confirm by a given date if it wishes to make oral representations, and will then set a date for the oral hearing, which will normally be held 10 to 20 working days after the deadline for written representations has elapsed.

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43 In relation to notifications under the Postal Services Act or section 94 of the Communications Act, we are required to give a period of at least one month, beginning with the day after the one on which the notification was given, for representations to be made. In relation to persistent misuse cases, under section 128 of the Communications Act we are required to give a period of at least one month for representations to be made, except in urgent cases when the period must be at least 7 days.

44 However, if the subject provides its written representations prior to the deadline and requests that the oral hearing takes place earlier, in that case the oral hearing may be earlier.
4.20 The oral hearing will usually be held at the Ofcom offices in which the investigating case team is based and will be chaired by the final decision maker. The case supervisor, case leader and other members of the case team may also be present and may comment during the course of the hearing. Other personnel from Ofcom may attend as appropriate, for example, legal advisers, economic advisers and/or technical experts, depending on the circumstances of the case.

4.21 The subject may bring legal advisers or other relevant expert advisers to the oral hearing to assist in presenting its oral representations, although Ofcom may ask that the subject limits the number of persons attending the oral hearing on its behalf to a reasonable number.

4.22 Complainants and other third parties will not usually be invited to attend the oral hearing.

4.23 Ofcom will agree an agenda with the subject in advance of the oral hearing, which will include reasonable periods of time for the subject to make oral representations and for the Ofcom personnel present to ask the subject questions on its representations.

4.24 The hearing will be transcribed and the transcript will be provided to the subject of the investigation, giving an opportunity for comment on its factual accuracy.

**Further provisional breach notification**

4.25 In some cases, new information or evidence may come to Ofcom’s attention after we have issued a provisional breach notification and given the subject of the investigation the opportunity to comment on it. We will adopt an appropriate process to deal with such evidence which ensures fairness to the subject of the investigation.

4.26 Where such new information or evidence leads us to consider making a material change to the nature of the proposed contravention findings and/or increase the proposed level of penalty, we will withdraw the initial provisional breach notification and issue a new provisional breach notification. The subject would have the opportunity to comment on the new provisional breach notification as described above, before we proceed to reach a final decision.

**Process for reaching a final decision**

4.27 Following the oral hearing (if there is one) and, having considered all of the relevant evidence and any representations, the final decision maker will take a final decision on the case.

4.28 The possible outcomes at this stage are:

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45 Such as evidence of a different or more serious contravention or a material change in our reasoning for proposing to find a contravention.
• Ofcom issues a final decision confirming a finding of contravention. 46 The final decision will set out Ofcom’s reasons for concluding there has been a contravention of the relevant requirement(s), and the evidence that Ofcom has relied on. It will also (as relevant):

  o set out any financial penalty imposed and the deadline for paying the penalty. Any penalty imposed will be no greater than that set out in the provisional breach notification; and/or

  o set out any required action to be taken to comply with the relevant regulatory requirement(s) (either immediately or by a given deadline); and/or

  o set out any required action to be taken to remedy the consequences of the contravention (either immediately or by a given deadline); and/or

  o confirm a proposed direction.

• A decision is taken that, in light of the representations received and/or review of further evidence, a finding of contravention of the relevant regulatory requirement(s) cannot be maintained, and therefore the case should be closed with no further action.

• A decision is taken that the case should be closed without Ofcom having reached a decision on the merits of the case. 47

4.29 Ofcom will notify the subject of the investigation of our final decision. If the subject is a company, Ofcom will deliver the notification in hard copy to the Company Secretary, copied by email to our main contact, unless it has agreed otherwise with us.

46 This would include, under the Communications Act, confirmation decisions imposing a financial penalty or giving a direction under section 96C(2)(a) (relating to contraventions of regulatory requirements), section 111(2)(a) (relating to contraventions of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003) or section 139A (relating to contraventions of information requirements under section 135), or enforcement notifications under section 129 (relating to persistent misuse) or section 95 (relating to contraventions of SMP apparatus conditions or enforcement action relating to contraventions of the Code of Practice for Premium Rate Services under section 123 of the Communications Act). This would also include enforcement notifications under paragraphs 5 and 6 of Schedule 7 and paragraph 7 of Schedule 8 to the Postal Services Act, enforcement notifications under section 32E(2)(a) of the Wireless Telegraphy Act, penalty notifications under section 42(2) of the Wireless Telegraphy Act, enforcement notifications under regulation 4A of the Mobile Roaming Regulations and enforcement notifications under regulation 22 of the Open Internet Access Regulations.

47 For example, we may decide to close the case: (i) for administrative reasons, such as where significant further investigation would be needed to decide whether to issue a final contravention decision and we consider that, due to other urgent or important work, our resources could be targeted more appropriately at other cases; or (ii) where we are satisfied that the conduct we were concerned about has now ceased and the subject of the investigation has taken appropriate action to remedy any harm or has given appropriate assurances that it will be remedied, and we judge that there is no further purpose to be served by continuing with the investigation in the particular circumstances of the case.
4.30 Ofcom will also normally inform any complainant that we have reached a final decision on the investigation.

Publication of final contravention decisions

4.31 Once the final decision has been taken and notified to the subject of the investigation, Ofcom will close the case and update the details of the case on the CCEB section of Ofcom’s website. This will generally include a summary of the contraventions Ofcom has found and details of any penalty and/or other measures imposed, such as any requirements imposed on the subject to take action to bring itself into compliance and/or remedy the consequences of the contravention(s).

4.32 Ofcom will publish a non-confidential version of the final contravention decision on the CCEB section of our website once we have finalised the relevant redactions of any confidential information. We will generally inform the subject and any complainant in advance of the intended date of publication of the final decision.

Case closure without a final contravention decision

4.33 If the relevant decision maker[^48] concludes that Ofcom should not take any further action, we will close the case. As noted above this might be on the basis that:

- we do not have sufficient evidence to find a contravention; or
- we no longer consider it to be appropriate to pursue further enforcement action without having come to a decision on the merits of a case.

4.34 In both cases, we would typically follow the same process.

4.35 In the majority of cases, a case closure decision of this type is likely to be a brief statement indicating case closure and the basis on which we have closed the case, which we would expect to publish on the CCEB section of our website. In some cases, if there is a good reason to do so, we may also publish a reasoned case closure document setting out Ofcom’s reasons for taking no further action – for example if we think it would be helpful for stakeholders to clarify our interpretation of a particular regulatory requirement or if we have accepted assurances about the steps the subject of the investigation will take to address the issue and we consider it would be in the interests of potentially affected customers or consumers to publicise these.

4.36 In certain cases, we may consider that fairness requires that we provide an opportunity for relevant stakeholders to comment before we finalise our decision to close the case. An example might be where the investigation was initiated following a complaint from a stakeholder, which may have further information relevant to the proposed decision.

4.37 In cases where we do not provide the opportunity to comment in advance of the final case closure decision being taken, we will inform the subject of the case closure

[^48]: Depending on the stage at which this decision is reached, this may be the person responsible for deciding whether there are grounds for action (i.e. whether to issue a provisional breach notification), who, as noted above, will typically be the person responsible for overseeing the investigation, or it may be the final decision maker.
decision in advance of publishing the case closure notice on the CCEB section of our website. Ofcom will also normally inform any complainant that we have reached a final decision on the investigation.

4.38 A non-confidential version of a reasoned case closure decision will be published on the CCEB section of our website once we have finalised the relevant redactions of any confidential information, and we will generally inform the subject and any complainant in advance of the intended date of publication.

Compliance monitoring

4.39 Where Ofcom has taken enforcement action or closed a case having accepted assurances, we may decide to “put it into compliance”. The purpose of the compliance phase is to ensure that the subject of an investigation does not repeat behaviour that Ofcom has deemed to breach regulatory rules, that it complies with any direction, undertakings or assurances given, and/or that it implements any remedies required by Ofcom (for example, paying affected customers compensation).

4.40 The process that we follow during the compliance phases will differ from case to case. We may use our information gathering powers in order to obtain information to assess compliance.

4.41 The length of the compliance phase will depend on the circumstances of the case and the measures that are to be monitored. Generally, Ofcom will not grant extensions to any deadline set for compliance with a direction or notification, unless we receive an application prior to the expiry of the deadline together with an explanation of why the deadline should be extended, including supporting evidence.

4.42 The CCEB section of Ofcom’s website includes a section for cases in compliance, where we will publish details of significant developments.49

4.43 Once we consider that compliance has been established, we will close the case and update the CCEB section of Ofcom’s website accordingly.

49 See: https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/cases-in-compliance
Section 5

Settlement procedure

Introduction

5.1 In some cases, Ofcom may consider that it is appropriate to settle a regulatory investigation. Settlement is a voluntary process for resolving a regulatory investigation which leads to a formal, legally binding regulatory decision. It involves the subject of the investigation admitting it has breached a relevant regulatory requirement(s) and accepting that the remainder of the investigation will follow a streamlined administrative procedure. In such cases, Ofcom will apply a discount to the level of the penalty imposed on the subject in light of the resource savings involved in following a streamlined administrative procedure.

5.2 Those who we are investigating are not under any obligation to enter into a settlement process or to settle, and Ofcom has broad discretion to decide whether a case is appropriate for settlement or to agree to settlement.

5.3 Where the settlement process is successful, the legally binding regulatory decision will refer to the fact that settlement has been agreed and will reflect the substance of any admissions made by the subject of the investigation for the purposes of the settlement.

5.4 In the event that the settlement process is unsuccessful, the case will revert to the usual process and the content of any settlement discussions will not be revealed to the final decision maker. However, any additional documentary evidence provided during the settlement process would go onto the case file and could be taken into account by Ofcom for the purposes of our final enforcement decision. In addition, Ofcom may follow up any new issues of regulatory concern which come to light during the settlement process.

5.5 For the avoidance of doubt, settlement is not a negotiation with Ofcom about what contraventions Ofcom might be prepared to find or not to find. Nor is it a negotiation about the level of the penalty which Ofcom would impose, nor is it equivalent to the type of discussions which take place between parties to litigation or potential litigation on a “without prejudice” basis for the purposes of seeking to resolve or avoid litigation.

Requirements for settlement

5.6 As a minimum, Ofcom will require the subject of the investigation to:

- Make a clear and unequivocal admission of liability in relation to the nature, scope and duration of the contravention. This would need to reflect Ofcom’s

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50 Settlement is therefore not the same as resolving a case by giving assurances to change conduct which could lead to case closure without resulting in a final enforcement decision (as described in Section 4).
position on the nature of the contraventions we are minded to find and the appropriate level of penalty (as explained further below);

- Cease the contravening behaviour immediately from the date it enters into a settlement process with Ofcom and refrain from engaging again in the same or similar contravening behaviour;

- Confirm that it accepts that there will be a formal and published finding of contravention against it, will pay a penalty and will take any steps required to comply with the relevant regulatory requirement(s) and to remedy the consequences of the contravention (if relevant); and

- Confirm that it will accept a streamlined administrative process. This will be decided on a case-by-case basis depending on the stage at which the settlement process is commenced, but may include no written representations (except in relation to manifest factual inaccuracies)\textsuperscript{51}, and will include no oral hearing. The person responsible for deciding whether to issue a provisional breach notification will also be responsible for the final decision in a settlement case.

**How does Ofcom decide whether a case is suitable for settlement?**

5.7 Ofcom may consider settlement for any investigation in which we have reached a stage where we believe that we have a sufficient basis to make a provisional finding of contravention and come to a preliminary view on an appropriate level of penalty.

5.8 Ofcom will have regard to its statutory duties in deciding on whether it should settle a case. In determining whether a case is suitable for settlement, Ofcom will also consider other factors such as the likely procedural efficiencies and resource savings that can be achieved through settlement.\textsuperscript{52} We may decide that a case is not suitable for settlement due to public policy reasons (for example due to the nature of the harm caused by the breach), or due to the previous conduct of the subject during the course of the investigation (for example, where the subject has been obstructive or failed to co-operate).

**Settlement discounts**

5.9 Where the settlement process results in a final enforcement decision being issued, that decision will contain the penalty amount, which will include a settlement discount. Our aim will be to conclude the settlement process as swiftly as possible. In line with this aim, the earlier the settlement process is commenced, the greater the discount available, as the resource savings that Ofcom could achieve would be greater.

5.10 The discount will be considered on a case-by-case basis. We would normally expect this discount to be:

\textsuperscript{51} We expect this to be a requirement in cases set out in paragraphs 5.19 to 5.27 below.

\textsuperscript{52} Taking into account, among other things, the stage at which settlement is initiated, whether settlement would result in shortening the case timetable and a reduction in resources, and whether settlement is likely to be reached in a reasonable timeframe.
• up to 30% where a successful settlement process is commenced before the provisional breach notification is issued;

• up to 20% where a successful settlement process is commenced after the provisional breach notification is issued but prior to written representations being received; or

• up to 10% where a successful settlement process is commenced after the provisional breach notification is issued and after written representations are received.

5.11 Where we are concerned that the process is not progressing as swiftly as possible due to delays or inefficiencies caused by the subject of the investigation or that it is not showing its full co-operation with the settlement process, Ofcom is likely to bring the settlement process to an end or reduce the available discount on account of the time taken and resources used. We would give the subject notice that we are minded to do so at that point.

5.12 Ofcom also recognises that in some cases businesses may proactively contact us to let us know about a potential breach of a regulatory requirement, may voluntarily take significant steps to address compliance following a breach of a regulatory requirement and/or to remedy the harm caused, and may provide us with significant co-operation in advancing our investigation.\textsuperscript{53} In such cases, we would expect to take this co-operation into account in deciding on an appropriate level of penalty, in accordance with our Penalty Guidelines. The settlement discount is a separate matter, intended to reflect resource savings achieved by Ofcom as a result of following the settlement process, and is applied after such other mitigating factors have already been taken into account in determining the appropriate level of the penalty.

**Decision making in a settlement case**

5.13 The decision maker in a settlement case will typically be the person responsible for deciding whether there are grounds for action and to issue a provisional breach notification, and therefore will usually be the person responsible for overseeing the investigation (the case supervisor). The relevant decision maker will then typically oversee the settlement process. In contrast to our usual process, we would expect this decision maker also to be responsible for taking the final decision on the case in the event that the settlement process is successful.

**Process**

5.14 If the subject of an investigation wishes to discuss the possibility of exploring settlement, it should approach the case leader and/or case supervisor in the first instance.

5.15 While we will engage positively with a subject that indicates an early willingness to settle, we will need to have reached a stage in our analysis where we are able to

\textsuperscript{53} For example, providing us with relevant documents and evidence as a result of having undertaken their own internal investigations.
come to a provisional view on the nature of the contraventions and appropriate level of penalty.

5.16 The settlement process will be conducted by the case supervisor and members of the case team.

5.17 As noted at paragraph 5.10 above, the level of discount on the level of penalty as a result of settlement will depend on the stage at which a successful settlement process is commenced. There are three main stages at which a settlement process may be commenced:

- prior to a provisional breach notification being issued;
- following a provisional breach notification being issued, but prior to the subject of the investigation making written representations in response; or
- following a provisional breach notification being issued, and after the subject of the investigation has made written representations in response.

5.18 If the settlement process is unsuccessful and the subject wishes to enter into a further settlement process at a later stage of the investigation, it remains open for it to do so. However, as noted above, it is at Ofcom’s discretion whether and on what bases to enter into a settlement process at any stage.

Settlement prior to a provisional breach notification

5.19 If the subject of the investigation approaches Ofcom about settlement prior to a provisional breach notification being issued, and Ofcom considers it to be an appropriate case in which to consider settlement, we will normally provide details of our initial thinking on the case in general terms to the subject where we consider this will be of assistance in order for the subject and Ofcom to decide whether to engage in a settlement process.

5.20 Following this, if Ofcom and the subject wish to continue with the settlement process, we will send to the subject a statement of facts, setting out Ofcom’s provisional findings and the evidence on which we are relying. We will also provide an indication of the provisional level of penalty that Ofcom would be minded to impose, including the settlement discount.\(^5\) We will also provide access to key documents we are relying on, if appropriate for reasons of fairness and transparency.

5.21 The subject will be asked if it would be prepared in principle to agree to make admissions on the basis of the statement of facts. The timeframe for doing so will be set on a case-by-case basis having regard to possible resource savings through the settlement process. If the subject wishes to pursue settlement on the basis set out in the statement of facts, it will be asked to make written representations on manifest factual inaccuracies in the statement of facts. If its representations appear to go beyond this (for example into the merits of Ofcom’s provisional findings or on the

\(^5\) That discount would reflect the discount that Ofcom would be minded to apply to the penalty were the settlement process successful and concluded swiftly. Were Ofcom minded to reduce the available discount at any point on account of the time taken and the resources used during the settlement process, we would give the subject of the investigation notice of our intention to do so.
level of the penalty), we would reassess whether the case remained appropriate for settlement at this stage.

5.22 If the subject is not prepared to agree to a settlement on the basis of the position set out in the statement of facts, it is unlikely to be appropriate to pursue settlement at this stage and Ofcom would normally expect to proceed to issue a provisional breach notification in accordance with its usual process. If the subject wishes to enter into a further settlement process at a later stage of the investigation, it remains open for it to do so (subject to Ofcom also considering this to be appropriate), although a lower settlement discount would then apply.

5.23 If the subject indicates that it does wish to pursue settlement on the basis set out in the statement of facts, we would proceed to issue a provisional breach notification, which would contain the proposed penalty amount. If the subject indicates that it does wish to pursue settlement on the basis set out in the statement of facts, we would proceed to issue a provisional breach notification, which would contain the proposed penalty amount.55

5.24 As noted above, one of the settlement requirements would be that the subject agrees not to make written representations on the provisional breach notification, except in relation to manifest factual inaccuracies. As the provisional breach notification will take account of representations made on manifest factual inaccuracies in the statement of facts, we would not expect to receive any further representations at this stage and would expect the subject to provide written confirmation of admissions and its acceptance of the settlement requirements, as discussed further below.

Settlement following a provisional breach notification and prior to written representations

5.25 If the subject of the investigation is in principle prepared to agree to the settlement requirements and admit to the contraventions as set out in the provisional breach notification, it may inform Ofcom that it wishes to enter into a settlement on that basis. In such a case, one of the settlement requirements would be that the subject agrees not to make written representations on the provisional breach notification except in relation to manifest factual inaccuracies.

5.26 We will provide the subject with an indication of the level of the settlement discount on the penalty which we would be minded to apply if a successful settlement process is commenced at this stage. We expect to set a deadline for the subject to indicate its willingness to settle the case and will provide a short period of time for representations on manifest factual inaccuracies in the provisional breach notice.

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55 This is generally a statutory requirement. For example, in a case relating to enforcement of a regulatory requirement imposed under section 45 of the Communications Act (with the exception of SMP apparatus conditions), this would be a notification under section 96A of the Act.

56 This would not typically include the settlement discount because, as discussed further below, we would not typically expect settlement to be formally agreed until after we have issued the provisional breach notification. We would, however, expect to confirm the level of the available settlement discount at this stage which would, for example, be the same amount as previously proposed to the subject were the settlement process successful and concluded swiftly. The available discount may be reduced in the event the settlement process takes longer, as set out above.

57 In some cases, such as under the Postal Services Act, section 94 of the Communications Act and section 128 of the Communications Act, we are usually required to give a period of at least one month for representations. However, we would expect the subject of the investigation to agree to respond before the statutory deadline as part of the settlement requirements.
notification. The timeframe for doing so will be set on a case-by-case basis having regard to possible resource savings through the settlement process.

5.27 We then expect the subject to provide written confirmation of admissions and its acceptance of the settlement requirements as discussed further below.

Settlement following a provisional breach notification and following written representations

5.28 If the subject of the investigation wishes to make written representations on the provisional breach notification (which are more extensive than identifying manifest factual inaccuracies), it may nonetheless indicate to Ofcom that it wishes to enter into a settlement process after doing so.

5.29 Ofcom would consider any written representations made to it in line with our usual process, including any representations as to the level of any penalty, before deciding whether or not to engage in a settlement process and on what basis. As noted above, settlement is not a negotiation. Therefore, in the event that we consider it appropriate to engage in a settlement process after considering the subject’s written representations, we would expect to provide it with a written statement of our revised position. This would set out:

• the contraventions we are minded to find; and

• an indication of the level of penalty we would be minded to impose, taking into account our revised assessment of the nature of the contraventions and after having applied the settlement discount on the penalty at that stage of the process.58

5.30 We would expect to set a deadline for the subject to indicate to Ofcom its willingness to settle the case on the basis of the written statement. The timeframe for doing so will be set on a case-by-case basis having regard to possible resource savings through the settlement process.

5.31 Ofcom would not expect to receive any further representations at this stage, and will expect the subject to provide written confirmation of admissions and its acceptance of the settlement requirements as discussed further below. As set out above, one of the requirements for settlement would be that the subject agrees that there would not be an oral hearing.

Successful conclusion of the settlement process

5.32 If the settlement process is successful and the subject of the investigation has indicated to Ofcom that it is prepared to agree to the settlement requirements and to make admissions on a basis which reflects Ofcom’s position, it must provide written confirmation of its admissions and acceptance of the settlement requirements. That

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58 That discount would reflect the discount that Ofcom would be minded to apply to the penalty were the settlement process successful and concluded swiftly. Were Ofcom minded to reduce the available discount at any point on account of the time taken and the resources used during the settlement process, we would give the subject notice of this at that point.
letter should be sent by its Chief Executive Officer or another senior member of its executive.

5.33 Before the subject provides its written confirmation letter, we will provide the subject with a draft of the terms of the decision we would expect to take, reflecting the subject's admissions and having taken into account any representations from the subject on manifest factual inaccuracies:

- Where settlement is agreed prior to the subject making substantive written representations on the provisional breach notification, this will normally be in the form of the provisional breach notification. We normally expect in such cases that the final enforcement decision would be in the same terms as the provisional breach notification (subject to any corrections of factual inaccuracies). We therefore expect the subject to provide its written confirmation of its admissions and acceptance of the settlement requirements following receipt of the provisional breach notification.

- Where settlement is agreed after the subject has made substantive written representations on the provisional breach notification, this will normally be in the form of a draft of the final enforcement decision. In practice, this is likely to be the written statement setting out Ofcom’s position following consideration of the subject's written representations (as set out in paragraph 5.29 above), as we would normally expect in such cases the final enforcement decision would be in the same terms as that written statement (subject to any corrections of factual inaccuracies). We would therefore expect the subject to provide its written confirmation of its admissions and acceptance of the settlement requirements following receipt of Ofcom’s written statement of position.

5.34 Once we have received the subject’s written confirmation of its admissions and acceptance of the settlement requirements, the relevant decision maker will then formally make Ofcom’s final decision, reflecting the position agreed during the settlement process and the subject’s admissions.

What happens if the settlement process is unsuccessful?

5.35 The subject of the investigation may withdraw from the settlement process at any time before confirming that it has accepted the requirements for settlement and confirming its admission in writing (in accordance with paragraph 5.32 above). Ofcom may also withdraw from the settlement process at any stage, though prior to doing so, we would notify the subject and give it the opportunity to respond.

5.36 If settlement is unsuccessful then the case will revert to the usual procedure.

5.37 The subject of the investigation would not have entered into the settlement agreement and therefore would not have made any formal admissions.

5.38 The final decision maker may be aware of the fact that the possibility of settlement has been discussed between Ofcom and the subject. However, neither the substance of any oral discussions between the subject and Ofcom, nor any correspondence relating to, or written records of, such discussions would be disclosed to the final decision maker, so that the decision could be taken impartially on the basis of the relevant evidence.

5.39 As noted above, settlement is not akin to "without prejudice" negotiations for the purposes of seeking to resolve litigation. Any additional documentary evidence
provided during the settlement process would be placed on the case file and could be taken into account by Ofcom for the purposes of its final enforcement decision even if the settlement process is unsuccessful. In addition, Ofcom may follow up any new issues of regulatory concern which come to light during the settlement process.

Publicity in settlement cases

5.40 Ofcom’s standard practice is not to comment publicly on the fact that settlement discussions are taking place, or that settlement discussions have been unsuccessful.

5.41 Following the conclusion of a successful settlement process, Ofcom will close the case and update the details of the case on the CCEB section of Ofcom’s website. This will generally refer to the fact that a settlement has been agreed and include a summary of the contraventions Ofcom has found and details of the penalty (including the level of the settlement discount) and any other measures imposed (such as any requirements imposed on the subject of the investigation to take action to bring itself into compliance and/or remedy the consequences of the contravention(s)). Ofcom may also publicise the outcome of the case in a media release relating to the case. Ofcom will normally share in advance a copy of the CCEB update with the subject for information only shortly (and no more than one working day) before publication.

5.42 Ofcom will also publish a non-confidential version of final contravention decision, in accordance with our standard practice.  

59 See paragraph 4.32 above.
Section 6

Urgent action

6.1 Ofcom has the power to take urgent action in relation to the following types of enforcement action:

- under section 98 of the Communications Act in relation to a breach of a regulatory requirement imposed under section 45 of the Communications Act (except an SMP apparatus condition);

- under section 111A of the Communications Act in relation to a breach of a requirement under the Electronic Communications Code (Conditions and Restrictions) Regulations 2003; or

- under paragraphs 8 to 10 of Schedule 7 to the Postal Services Act in relation to a breach of a regulatory requirement imposed under the Postal Services Act or other postal legislation.  

6.2 In accordance with those provisions, we can make a direction suspending or restricting a communications provider’s or postal operator’s activities or suspending the application of powers granted in respect of the Electronic Communications Code, as applicable. We can only do so if:

- we have reasonable grounds to believe that the relevant business is contravening or has contravened a relevant regulatory requirement; and

- we have reasonable grounds to suspect that the contravention has resulted in, or creates an immediate risk of:

  o a serious threat to the safety of the public, to public health or to national security;

  o serious economic or operational problems for persons (other than the contravening provider) who are communications providers or persons who make associated facilities available, or who provide postal services (as applicable); or

60 Such as a direction given under section 89A or 116(2A) of the Postal Services Act 2000 (schemes as to terms and conditions for provision of postal services, and the Postcode Address File), or under section 25(5) of the Consumers, Estate Agents and Redress Act 2007 (requirements to give information to Citizens Advice, etc.).

61 See section 98(4) of the Communications Act. More specifically, ‘a direction that [the provider’s] entitlement to provide electronic communications networks or electronic communications services, or to make associated facilities available, is suspended (either generally or in relation to particular networks, services or facilities; or a direction that that entitlement is restricted in the respects set out in the direction.’ Sections 98(5) to (8) also apply to such a direction. See also paragraph 8(4) and 9 of Schedule 7 to the Postal Services Act.

62 See section 111A of the Communications Act
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- serious economic or operational problems for persons who make use of electronic communications networks, electronic communications facilities or associated facilities, or for users of postal services (as applicable); and

- we consider it is appropriate to take action given the urgency of the case.

6.3 Ofcom may exercise these powers following a request to do so by an applicant, or on its own initiative. For guidance on making a request for Ofcom to take urgent action, see our document “Advice for complainants: Submitting a complaint to Ofcom”.  

6.4 We would expect to use these powers rarely, since the statutory criteria impose a high threshold for exercising them.

Process for deciding whether to take urgent action

6.5 We will assess requests from applicants for urgent action against the relevant statutory criteria. If we consider the test is met then we may take urgent action at our discretion. In exercising this discretion, we will have regard to other relevant considerations including the impact on the person who would be subject to the direction and any relevant third party interests, as well as on the interests of citizens and consumers.

6.6 The decision on whether to give a direction suspending or restricting the activities of the relevant provider/operator, or suspending the application of powers granted in respect of the Electronic Communications Code, will be taken by a senior member of Ofcom’s executive with appropriate Board-delegated authority.

6.7 In most cases where we are considering whether to take urgent action in response to a third party request, where time allows, Ofcom will inform the provider or operator about which the request for urgent action has been made that we have received a request to restrict or suspend its activities and will give it the opportunity to make representations to Ofcom on a non-confidential version of the request.

6.8 Where we are minded to give a direction suspending or restricting the provider’s/operator’s activities (whether on our own initiative or in response to a third party request), where time allows, we would also normally expect to inform the provider/operator of this and provide it with an opportunity to comment on our provisional decision. Given the circumstances in which we would normally be considering taking urgent action, Ofcom will normally give the provider/operator only a short period to comment. This may include written and/or oral representations as appropriate in the circumstances, having regard to the urgency of the case. We may also allow the applicant to do so if we consider it appropriate.

6.9 In the event that Ofcom is minded not to grant a third party request for urgent action, where time allows, Ofcom will normally inform the applicant and the relevant provider/operator and provide them with a brief opportunity to comment and submit any further information or evidence before reaching our final decision.

6.10 In cases where Ofcom is satisfied that the statutory criteria are met and that due to the nature of the risk of serious harm there is a need to take immediate action, we may decide to give a direction suspending or restricting a provider’s or operator’s

63 https://www.ofcom.org.uk/__data/assets/pdf_file/0013/102514/Advice-for-complainants.pdf
activities without first consulting the provider/operator or giving it the opportunity to comment.\footnote{As noted below, in accordance with the relevant statutory requirements, in such a case the operator/provider would have an opportunity to make representations to Ofcom as soon as reasonably practicable after the direction has been given.} We will decide what is necessary and appropriate in the circumstances on a case-by-case basis.

6.11 Where Ofcom decides to make a direction suspending or restricting the provider/operator’s activities, or suspending the application of powers granted in respect of the Electronic Communications Code, we will notify the relevant provider/operator and the applicant of our decision. We will also normally publish an update on the CCEB section of our website stating that we have issued such a direction and would publish a non-confidential version of our decision. As one of the statutory criteria for taking urgent action is that we must have reasonable grounds for believing that the provider/operator is contravening or has contravened a relevant regulatory requirement, typically we will issue a provisional breach notification alongside the decision to give a direction suspending or restricting the subject’s activities (the process for issuing a provisional breach notification is explained in more detail in Section 4).\footnote{For example, if we were taking urgent action under section 98 of the Communications Act, we would expect to issue such a direction alongside issuing a notification under section 96A of the Communications Act.}

6.12 Ofcom is required, as soon as reasonably practicable after giving a direction to restrict or suspend a provider’s or operator’s activity, or suspending the application of powers granted in respect of the Electronic Communications Code, to give the provider/operator an opportunity of making written representations to Ofcom about the grounds on which it was given and its effect and an opportunity of proposing steps to remedy the situation.\footnote{See sections 99(1) and 111B(1) of the Communications Act and Schedule 7, paragraph 10(1) of the Postal Services Act} Given the need to decide whether to confirm the direction as soon as reasonably practicable, we may set a short timeframe for representations. The provider/operator may also request an oral hearing.

6.13 As soon as reasonably practicable after the period for representations has ended (and, in respect of a direction under the Communications Act, in any event within 3 months of the date of giving the direction\footnote{This may be extended by up to a further 3 months if Ofcom requires additional time to consider the representations received or decides that it is necessary to obtain additional information from the provider to make the relevant determination.}), and after taking into account any representations, Ofcom must determine whether the relevant contravention did occur and whether the circumstances made it an urgent case justifying the direction. If Ofcom decides that the contravention occurred and the direction was justified, we may confirm the direction, but if not, we must revoke it (or in respect of a direction given under the Postal Services Act, modify the conditions).\footnote{See sections 99(2) to (4) and 111B(2) to (5) of the Communications Act and paragraph 10(2) to (6) of Schedule 7 to the Postal Services Act} We will follow the same process for reaching our final decision as set out in Section 4 of these Guidelines.\footnote{For example, if we had issued a direction under section 98 of the Communications Act, we would expect to issue a decision as to whether to confirm or revoke the direction under section 99 of the...}
6.14 We will inform the relevant provider/operator (and the applicant if relevant) as soon as reasonably practicable of the outcome of our decision and will normally publish details of our decision and a non-confidential version of it on the CCEB in line with our usual process (see Section 3 of these Guidelines).
Section 7

Consumer protection law enforcement

Part 8 of the Enterprise Act

7.1 Ofcom is a ‘designated enforcer’ under Part 8 of the Enterprise Act.\textsuperscript{70} This means we are empowered to take action to enforce certain consumer protection legislation in the communications sector, such as the Consumer Protection from Unfair Trading Regulations 2008 and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. We exercise these powers concurrently with a number of other regulatory bodies, including the Competition and Markets Authority (CMA). We may only take action where we consider the potential infringements may harm the collective interests of consumers in the UK.

7.2 In relation to cases brought under Part 8 of the Enterprise Act, Ofcom does not have powers to notify breaches or issue penalties. Instead, Ofcom can seek undertakings from a party under investigation under Part 8 of the Enterprise Act to cease the conduct, or can apply for a court order to put a stop to the harmful conduct.\textsuperscript{71}

7.3 Before opening a case, we are likely to engage with the CMA (as the central co-ordinator of enforcement) to discuss who is best placed to take an investigation forward. We have entered into a Memorandum of Understanding with the CMA about how we will co-ordinate with them in respect of our concurrent powers to enforce consumer protection legislation.\textsuperscript{72}

7.4 Except where urgent action is needed (as discussed in paragraph 7.12 below), in the event that we receive a complaint about allegations of contraventions of relevant consumer protection legislation, or where we are considering exercising powers on our own initiative, we will generally follow the same initial assessment process as set out in paragraphs 2.12 to 2.21 of Section 2. We will also follow the same decision making process in deciding whether or not to open an investigation, usually following consultation with the CMA. As with other regulatory investigations, when we open an investigation, we will normally inform the subject, and any complainant, by sending a case opening letter explaining the scope of Ofcom’s investigation and next steps. We will also normally announce the opening of the case on the CCEB section of our website\textsuperscript{73} and will enter the required information on the Trading Standards Sanctions Information Database.

7.5 We have powers to gather information for the purposes of exercising our functions under Part 8 of the Enterprise Act under paragraph 14 of Schedule 5 to the Consumer Rights Act. This involves Ofcom issuing a written notice to the person

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\textsuperscript{70} Under the Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003, as amended

\textsuperscript{71} See section 219 and sections 215 to 217 of the Enterprise Act.


\textsuperscript{73} See: [https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins](https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins)
from whom the information is required, specifying the nature of the information required and the purpose for which the information is required.\textsuperscript{74} We will also generally specify the time within which the information is required and the form in which the information must be provided. Such a notice may require the creation of documents and the provision of those documents to Ofcom. Where the recipient of an information request fails to comply with it, we can apply to court for an order requiring the recipient to comply with the notice, and can require the recipient to meet the costs or expenses of such an application.\textsuperscript{75}

7.6 We also have powers to take other forms of action to obtain information during our investigation in some cases, for example, the power to enter premises.\textsuperscript{76} We would not expect to use these powers frequently.\textsuperscript{77}

7.7 Decisions on how to progress the case will be taken by a senior member of Ofcom’s executive with appropriate Board-delegated authority. Typically, this will be the person who is responsible for overseeing the investigation.

7.8 Where we consider that there is a potential infringement of the relevant consumer protection legislation, we are likely in most cases\textsuperscript{78} to engage with the subject of the investigation and seek to secure undertakings to ensure that the harmful conduct stops and is not repeated.\textsuperscript{79} Undertakings may also include commitments to taking consumer redress measures, such as measures offering compensation or redress to consumers who have suffered a loss as a result of the harmful conduct, measures intended to prevent or reduce the risk of the harmful conduct recurring and measures enabling consumers to choose more effectively between suppliers of goods and services.\textsuperscript{80}

7.9 If undertakings cannot be agreed, or if the undertakings are subsequently broken, Ofcom can take action through the courts to enforce compliance by way of an enforcement order.\textsuperscript{81} Where we do so, we will follow the statutory requirements for appropriate consultation.\textsuperscript{82} Except where the CMA considers that an order should be sought without delay, we will consult the CMA and the subject of our investigation for a minimum of 14 days\textsuperscript{83} to see if we can ensure the harmful conduct is stopped and

\textsuperscript{74} Paragraph 15 of Schedule 5 to the Consumer Rights Act
\textsuperscript{75} Paragraph 16 of Schedule 5 to the Consumer Rights Act
\textsuperscript{76} As set out in Schedule 5 to the Consumer Rights Act
\textsuperscript{78} Unless we consider that urgent action is required.
\textsuperscript{79} These would reflect the provisions of section 219 of the Enterprise Act.
\textsuperscript{80} These would reflect the provisions of section 219A to 219B of the Enterprise Act.
\textsuperscript{81} Section 215 of the Enterprise Act
\textsuperscript{82} Section 214 of the Enterprise Act
\textsuperscript{83} 7 days if we consider that an application for an interim order may be appropriate (see paragraph 7.12 below).
not repeated. For example, we may at that stage make a further attempt to obtain undertakings from the subject.\textsuperscript{84}

7.10 At whatever stage we obtain undertakings, we will notify the CMA by entering the required information on the Trading Standards Sanctions Information Database. We will also generally publish undertakings on the CCEB section of our website.

7.11 The court may grant an enforcement order requiring the cessation of the conduct and that it is not repeated, and may also require consumer redress measures to be taken or that the subject of the investigation publishes details of the order or a corrective statement.\textsuperscript{85} Alternatively, the court may itself accept an undertaking from the subject of the investigation to cease and not repeat the conduct in question. It is a contempt of court to breach the terms of an enforcement order and can lead to a fine or imprisonment.

7.12 We may seek an interim enforcement order from the court if we consider that the infringing conduct should be prohibited or prevented immediately.\textsuperscript{86} This is a temporary order which remains in force until the court determines whether to make an enforcement order. Alternatively, the court can accept undertakings from the subject of the investigation in lieu of making such an interim enforcement order. We must give the CMA notice of our intention to apply for an interim enforcement order and, in most cases, we are required to engage in a period of consultation with the subject for a minimum of 7 days, unless the CMA considers that the application should be made without delay.\textsuperscript{87}

7.13 We will announce on the CCEB section of our website the outcome of any application to the court and publish the terms of any enforcement order or interim enforcement order, or any undertakings given to the court, and will notify the CMA by entering the required information on the Trading Standards Sanctions Database.

7.14 In the event that we decide to close the investigation without obtaining undertakings or making an application for a court order, we will follow a similar process to that set out in paragraphs 4.33 to 4.38 above and will announce the closure of the case on the CCEB section of our website.

**Unfair terms in consumer contracts**

7.15 The provisions of the Consumer Rights Act relating to unfair terms in consumer contracts\textsuperscript{88} are amongst the provisions of general consumer law which Ofcom may enforce under Part 8 of the Enterprise Act, as set out above. Alternatively, Ofcom may enforce those provisions under Schedule 3 of the Consumer Rights Act. Under that Schedule, Ofcom has powers to consider complaints about allegedly unfair terms included, or proposed to be included, in consumer contracts, or in consumer notices. If we intend to consider a relevant complaint, we must notify the CMA that

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\textsuperscript{84} Under sections 219 and 219A to 219B of the Enterprise Act
\textsuperscript{85} Section 217 of the Enterprise Act
\textsuperscript{86} Section 218 of the Enterprise Act
\textsuperscript{87} Section 214 of the Enterprise Act
\textsuperscript{88} Which apply to terms in contracts between traders and consumers entered into from 1 October 2015. Contract terms entered into prior to that date remain subject to the Unfair Terms in Consumer Contracts Regulations Act 1999. Ofcom may also take action in respect of those terms under that legislation directly or under Part 8 of the Enterprise Act.
we intend to do so. We may also investigate on our own initiative where we consider terms of consumer contracts or consumer notices may be unlawful under the provisions of Part 1 or Part 2 of the Consumer Rights Act.

7.16 If we consider such a term to be unlawful or unfair within the meaning of Part 1 or Part 2 of the Consumer Rights Act (as relevant), we may seek undertakings from the person against whom the complaint has been made, or who we are investigating on our own initiative. If we are unable to secure such undertakings, and consider further action is required, we may make an application for an injunction (or interdict in Scotland) preventing the party from using the term in its consumer contract or consumer notice. We are required to notify the CMA prior to making such an application, and must also inform the CMA of any undertakings we obtain and the outcome of any application to court for an injunction (which we would do by entering the required information on the Trading Standards Sanctions Information Database).

7.17 We have powers to obtain information for the purposes of exercising our functions under Schedule 3 of the Consumer Rights Act under paragraph 14 of Schedule 5 to that Act (as explained above).

7.18 As with our enforcement powers under Part 8 of the Enterprise Act, decisions on how to progress the case would be taken by a senior member of Ofcom’s executive with appropriate Board-delegated authority. When considering whether to take enforcement action under Schedule 3 to the Consumer Rights Act, we will follow the same process as for enforcement action under Part 8 of the Enterprise Act, as described at paragraph 7.4 above.

7.19 We would normally expect to publish any undertakings we obtain on the CCEB section of our website as well announcing the outcome of any application to court and the terms of any injunction obtained (if relevant). 89

7.20 In the event that we decide to close an investigation without obtaining undertakings or making an application for a court order, we also expect to follow the same process as with our enforcement powers under Part 8 of the Enterprise Act, as described at paragraph 7.14 above.

89 The CMA also has obligations under paragraph 7 of Schedule 3 to the Consumer Rights Act to publish details of any undertakings or injunctions we obtain and notify to it.
Section 8
Directions under General Condition 20.3

Introduction

8.1 This section of these Guidelines explains the process that Ofcom will usually follow when it issues a direction under GC20.3 requiring communications providers (“CPs”) to block access to telephone numbers and/or public electronic communications services (PECS) on the basis of fraud or misuse.

8.2 GC20.3 states that:

“The Communications Provider shall, where requested by or on behalf of Ofcom on the basis of fraud or misuse, block access to Telephone Numbers and/or Public Electronic Communications Services and in such cases withhold revenue associated with such Telephone Numbers and/or Public Electronic Communications Services.”

8.3 GC20.3 was introduced to implement Article 28(2) of the Universal Service Directive, which requires Member States to ensure that:

“… the relevant authorities are able to require undertakings providing public communications networks and/or publicly available electronic communications services to block, on a case-by-case basis, access to numbers or services where this is justified by reasons of fraud or misuse and to require that in such cases providers of electronic communications services withhold relevant interconnection or other service revenues.”

8.4 This section explains:

• the types of cases in which Ofcom may consider issuing a direction under GC20.3;

• the steps Ofcom will usually take before issuing a direction; and

• how affected stakeholders can request that Ofcom amend or withdraw a direction.


92 It does not cover the action Ofcom will take against persistent misuse pursuant to section 128 of the Communications Act; requirements in relation to blocking and retaining revenue under the Phone-paid Services Authority's Code of Practice; or action taken by a CP to block access to numbers on a voluntary basis (for example, where they consider that a number is being used unlawfully or where requested by a customer).
Circumstances in which will Ofcom consider issuing a direction under GC20.3

8.5 Directions under GC20.3 may have significant consequences for stakeholders and are likely to be focussed on serious cases of suspected fraud or misuse. Ofcom considers that ‘fraud or misuse’ in this context may include the following types of conduct:

- **Call-back scams** – for example, where missed or short duration calls are made with a presentation CLI\(^{93}\) that is associated with a premium rate, non-geographic or other revenue sharing number, so that where the called party seeks to return the call they incur a cost which, in the circumstances, is inappropriate (and often a cost that is not included in the called party’s monthly call allowance). This is also known as ‘Wangiri fraud.’

- **Other artificial inflation of traffic schemes or scams.** These generally include where calls:
  - are made, generated, stimulated and/or prolonged for the direct or indirect benefit of any body operating, hosting or otherwise connected with a telecommunication service as a result of any activity by or on behalf of such a body; and
  - result in a calling pattern which is disproportionate to the overall amount, duration and/or extent of calls which would be expected from good faith usage or from an acceptable and reasonable commercial practice relating to the operation of a telecommunication system.

  These can include use of Private Automatic Branch Exchange (PABX) software modified by hackers to transit foreign fixed, mobile and satellite premium rate numbers, and scams that generate calls or texts from the customer without their direct action and/or knowledge (such as dialler scams, smartphone applications, virus or other mobile malware and texts generated without the user’s permission).

- **Use of false or malformed CLIs\(^{94}\) contrary to Ofcom published policies or other misuse of a CLI facility such as:**
  - the withholding of CLIs by those making marketing calls, in breach of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (‘PECRs’);
  - presenting a CLI which is unreturnable such that, when called,\(^{95}\) the number does not connect to an agent or an automated message; or

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\(^{93}\) CLI is a facility by which the telephone number of a calling party is presented to the call recipient. For example, on a handset display screen prior to a call being established or where the recipient dials 1471 after receiving a call.

\(^{94}\) For example, it is a false, ‘spoofed’, or random number which does not dial or where a connection cannot be established or it does not connect to the person or organisation calling.

\(^{95}\) And although there may be a dialling tone.
Enforcement Guidelines for regulatory investigations

- displaying a CLI which is a controlled premium rate service number.96

- Calls made following the use of services which were obtained by providing false information in the subscription or provision of electronic services, identity theft (or other kinds of theft), payment card cloning or manipulation of network parameters.

- Use of numbers in breach of the requirements set out in the National Telephone Numbering Plan97 or GC17 (such as failing to provide necessary information about costs to callers/consumers or failure to comply with numbering conditions regarding use of non-geographic numbers).

- Use of a number to make calls or send messages which are in breach of the PECRs – for example, making unsolicited direct sales/marketing calls to recipients who have opted out of receiving them or leaving recorded messages without the recipient’s consent; calls/messages which conceal the sender’s identity; calls where, on request, the caller does not provide contact details; and marketing calls that fail to present accurate and authorised CLI numbers.

- Use of a number by a third party to whom the number was not allocated, without the consent of the allocatee (e.g. spoofing, PBX hijacking or phone hacking).

8.6 This is a non-exhaustive list, however, and Ofcom will assess whether or not particular conduct constitutes ‘fraud or misuse’ on a case-by-case basis. Some of the activities that may warrant the use of Ofcom’s GC20.3 powers are motivated by a desire for unscrupulous or dishonest gain, and these Guidelines do not fully describe them so as not to encourage their perpetration. In addition, Ofcom may decide to use its GC20.3 powers to address a new technology or new use of technology that allows for the operation of a form of fraud or misuse not previously known to Ofcom.

Relationship with other forms of fraud or misuse

8.7 Some forms of fraud or misuse may also constitute ‘persistent misuse’ (see our Statement of policy on the persistent misuse of an electronic communications network or service98), and Ofcom may additionally or alternatively decide to take action using our powers under sections 128 to 130 of the Communications Act.

8.8 Given the breadth of the legislation, some forms of fraud or misuse may also represent contraventions of other consumer protection legislation, enforced by Ofcom or other authorities. Where such legislative overlap exists and Ofcom is faced by a particular instance of misuse, we expect to with the relevant competent authorities as to which set of legislative requirements is more appropriate and may be more effectively deployed.

96 As defined in the condition regulating premium rate services under section 120 of the Communications Act.
97 The National Telephone Numbering Plan is an Ofcom document which provides information about UK Telephone Numbers available for adoption, restrictions on the adoption of Telephone Numbers and Telephone Numbers which are not available for adoption. The latest version of the National Telephone Numbering Plan (published on 1 July 2015) is available via this link: https://www.ofcom.org.uk/__data/assets/pdf_file/0016/36070/numbering_plan_july2015.pdf.
When Ofcom will consider issuing a direction under GC20.3

8.9 When Ofcom has reasonable grounds to suspect that fraud or misuse is occurring in connection with the use of a number or a PECS and that this conduct has caused or has the potential to cause consumer harm, we will consider whether it may be appropriate and proportionate to issue a direction under GC20.3 requiring CPs to block access to that number or that service and to withhold associated revenue.

8.10 In doing so, Ofcom will consider all relevant evidence, which may include:

- complaints data (including complaints made to Ofcom’s Consumer Contact Team and the Telephone Preference Service);
- information requested from CPs about CLI numbers generating the greatest number of customer complaints;
- information provided to Ofcom using its information gathering powers under section 135 of the Act – for example, information requested from CPs about CLIs generating the most traffic to numbers which display characteristics that suggest potential fraud or misuse (e.g. large numbers of very short calls presenting premium rate or revenue-sharing CLI numbers); and
- individual reports to Ofcom provided by the ten CPs who are parties to the Nuisance Calls (Technical Measures) Memorandum of Understanding published on 8 February 2016 – these reports are in the form of a monthly network monitoring and call volume measurement exercise.99

8.11 In appropriate cases, Ofcom may also liaise with, among others, the Information Commissioner’s Office (ICO), which has primary responsibility for taking enforcement action against breaches of the PECRs, and the Phone-paid Services Authority, the enforcement authority with responsibility for enforcing the Premium Rate Services Code of Practice.100

8.12 A GC20.3 direction is an extraordinary measure, use of which is more likely to be appropriate and proportionate in cases where:

- there is evidence that there has been fraud (i.e. dishonest conduct) or misuse has occurred or is occurring deliberately and/or recklessly;
- there is evidence of ongoing serious or widespread consumer harm or a risk of such harm; and
- there appears to be a need to bring the conduct in question to an end to prevent ongoing harm.

8.13 Other relevant considerations may include whether:

- there is evidence of previous conduct indicating repeat behaviour on the part of a CP or end-user of a number;

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• relying only on other types of enforcement action may be inappropriate or ineffective given the harm or risk of harm involved and/or relevant parties previous conduct; and/or

• a new serious form of misuse or fraud has come to light and Ofcom needs to act quickly in order to stop the misuse or fraud and deter others from engaging in it.

8.14 Ofcom will usually take these considerations into account and make a judgment about whether we have reasonable grounds to suspect fraud or misuse within GC20.3 has occurred and it is reasonable and proportionate to issue a direction. We may issue directions at different points in time, depending on the circumstances of the particular case. These include:

• Where there is evidence of sufficiently serious and/or widespread harm that we judge it appropriate to act immediately pending further investigation, we may issue a direction to stop that harm while we carry out our investigation. Exceptionally, in the most serious cases a direction may be issued without notice to the party or parties whose use of numbers or services is blocked;

• In other cases, where we judge it appropriate to issue a direction alongside other measures. For example, where we impose a penalty under section 130 of the Act in a case of persistent misuse that also falls within GC20.3, we may decide that we should also issue a direction under that condition if there is a risk of repetition of the behaviour and of future harm that justifies that measure.

The process

8.15 In most cases (see the exceptions in paragraphs 8.19 and 8.20 below), before issuing a direction, we will usually issue a provisional notification to the originating CP/number range-holder, the terminating CPs and the relevant end-user of the number(s)/PECS provider setting out details of our proposal to issue a direction.\(^{101}\) This will explain the proposed scope of the direction, including:

• details of the numbers to be blocked and whether this includes both calls to and from those numbers;

• whether the originating CP is also required to withhold revenues and, if so, the nature of the revenues to be withheld;

• a summary of the reasons why Ofcom is proposing to issue the direction, including details of any service or conduct considered relevant to the alleged fraud or misuse;

• the proposed duration of the direction (which may be time-limited or until further notice from Ofcom as appropriate); and

• how long Ofcom proposes that CPs have to bring the direction into effect.

The notification will also set out a period in which representations can be made on the proposed direction. Where relevant, it may also request that the originating

\(^{101}\) Where we propose to issue a direction alongside other measures such as a penalty under section 130 of the Communications Act in a case of persistent misuse that also falls within GC20.3, the notification of the proposed direction may be in the same document as the proposed penalty.
CP/number range-holder supplies Ofcom with a list of the range of numbers it has allocated to the relevant sub-allocatee or end-user/PECS provider.

8.16 The period in which parties have the opportunity to make representations may vary depending on the circumstances but is likely to be within 10 working days. In exceptional circumstances Ofcom may set a shorter period, but it will not usually be less than 1 working day. Representations should usually be made in writing but parties may request an oral hearing.

8.17 Ofcom will take into account any representations we receive on the proposed direction before deciding whether we have reasonable grounds to believe fraud or misuse has occurred and it is reasonable and proportionate to issue it (or an amended direction). If we decide to do so, we will issue the direction to the relevant CPs and copy it to the other recipients of the provisional notification. If not, we will inform the recipients of the provisional notification that no further action will be taken under GC20.3 at that stage.

8.18 Any direction will set out the nature, scope and duration of the obligations imposed on the relevant CPs, together with Ofcom’s reasons for making it. It will also inform affected parties about the next steps and their rights to request a review of the direction (this is discussed further in paragraphs 8.24 to 8.29 below). We will normally publish the directions on our website.

8.19 Exceptionally, some cases may require Ofcom to act very quickly and issue a direction without first giving notice to the end-user and/or service provider whose use of numbers and/or services would be the subject of the direction. We are only likely to do so in the most serious of all cases, where giving notice would defeat the object of issuing the direction and we judge this to be the appropriate and proportionate course of action. In particular, where it appears to us that:

- the fraud or misuse is causing such serious or widespread harm, or presents a serious risk of such harm, to consumers or the general public that it requires immediate corrective action and it would not be practicable or would cause undue delay to seek representations first; and

- it would not be in the public interest to give the relevant end-user/service provider prior notice (for example, because of a risk of serious prejudice to the investigation and/or the effectiveness of any action if they were 'tipped off').

8.20 Issuing a direction without advance notice may also be the appropriate course where we have not been able to identify and/or contact the relevant end-user or service provider (despite reasonable efforts to do so).

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102 In most cases, we would still seek to give advance notice to the CPs who will be subject to the direction and allow them an opportunity to make representations, although we would be likely to set a very short deadline for responses (i.e. no more than one working day). In some cases, this may not be practicable, but we would still seek to give CPs an appropriate time to comply with the direction.

103 Although it is usually possible to identify the CP which has been allocated a telephone number, in some cases it can be very difficult to identify the end-user of a telephone number (i.e. the person who is in fact using the number to make calls). For example, sometimes presentation CLIs are spoofed (i.e. are being used without the permission of the allocatee of the number) and it can be very difficult to trace the call, particularly in the case of a VoIP call as only the (spoofed) presentation CLI will have
8.21 In such cases:

- Ofcom will take into account the need to ensure that any interim measure is limited to the minimum scope required to address the relevant harmful conduct;

- Ofcom will consider all available facts material to our assessment, including any information or evidence which we consider might reasonably have been relied upon by the relevant end-user/service provider;

- Once a decision has been made to issue a direction without notice, Ofcom will use reasonable endeavours to provide the relevant party(ies), as soon as reasonably possible following the decision, with a copy of the direction.

8.22 A direction issued without notice will generally take the same form as one made with notice, setting out the nature, scope and duration of the obligations imposed as well as Ofcom’s reasons for making it and the rights relevant parties have to request review of the decision. Such directions will also usually be published on our website.

8.23 Any direction, whether made giving advance notice or not, may be for a specified time or apply indefinitely. Prior to the expiry of any period set out in the direction, Ofcom will consider whether it is appropriate to extend it (for example, pending further investigation). Ofcom will at that time normally seek to give CPs and the relevant end-user of the number/the service provider the opportunity to make representations as to the appropriate course of action.

Rights of review

8.24 Following the issuing of a GC20.3 direction by Ofcom, an affected party (which includes the end-user of a number, an affected service provider, a CP subject to the direction, the allocatee of the number in question or other relevant party) may apply to Ofcom to have the direction varied or lifted.

8.25 Such a request may be made in the following circumstances:

- the direction was issued without prior notice to the relevant end-user and/or service provider which is the subject of the direction and the request for review is made by that party;

- new facts, evidence or circumstances have subsequently come to light which mean that access to the number/service should no longer be blocked and/or that revenues should no longer be withheld (as relevant); or

- a CP wishes for the direction to be lifted for the purpose of reallocating the number to a new end-user.

8.26 A request must be made in writing and include all relevant supporting information and/or evidence, including setting out how the applicant is an affected party. It should set out the grounds on which the relevant party considers that the direction should not remain in place and any relevant new facts, evidence or circumstances. The affected party may also request an oral hearing.


been carried with the call, rather than the underlying network CLI. This can be a particular issue where the calling party may be located abroad and is using a UK presentation CLI.
8.27 The application of the direction will not usually be automatically suspended by an application for a review. In most cases, it is likely to remain in place pending the outcome.

8.28 Where Ofcom is satisfied that the applicant for the review is an affected party, it will write to the applicant to inform the applicant that its application for a review has been accepted and explaining any next steps. The applicant may also be asked to provide additional information for the purposes of the review.

8.29 Admissible applications for review will be considered by a review decision maker, who will be different from the person who decided to issue the direction. Subject to any requirement for further information, Ofcom’s review decision maker will aim to consider the matter within five working days of receipt of an application for review or any oral hearing (if later) and will determine whether there are reasonable grounds for the direction to remain in force and, if so, in what form.
Section 9

Procedural complaints about investigations

Introduction

9.1 If the subject of an investigation, any complainant or a third party (where relevant) is dissatisfied about any aspect of the investigation procedure, it should usually raise its concerns in writing with the case leader in the first instance, and then with the person overseeing the investigation (i.e. the case supervisor).

9.2 If a party does not consider that its concerns have been satisfactorily resolved by the case leader and/or the case supervisor then, if an investigation has been formally opened, it may refer certain procedural complaints to Ofcom’s Procedural Officer.

The Procedural Officer

9.3 A number of appropriately experienced Ofcom staff have Board-delegated authority to act as the Procedural Officer for the purposes of an investigation. The relevant Procedural Officer will be appointed on a case-by-case basis, if a relevant procedural complaint is made.

9.4 The Procedural Officer will be independent from the investigation, case team and decision makers, and will not have been involved in the investigation (other than as the Procedural Officer). The role of the Procedural Officer is intended to ensure that procedural issues can be addressed quickly, efficiently and cost effectively, and independently of the case team.

Types of complaint which can be made to the Procedural Officer

9.5 Complaints about the procedure followed by Ofcom when conducting an investigation can be made to the Procedural Officer by the subject of the investigation, complainant or a third party (where relevant) once the investigation has been formally opened.

9.6 The Procedural Officer will deal with complaints which relate to the following:
   a) deadlines for parties to respond to information requests, submit documents or provide representations;
   b) requests for redaction of confidential information in documents that Ofcom proposes to publish or disclose;
   c) requests for disclosure or non-disclosure of certain documents or information on Ofcom’s case file;
   d) issues relating to the process for oral hearings; or
   e) other significant procedural issues that may arise during the course of an investigation.
9.7 The Procedural Officer is not able to deal with complaints which relate to decisions taken by Ofcom relating to substantive issues, for example decisions on the scope of information requests or decisions relating to the scope and substance of an investigation.

Making a complaint to the Procedural Officer

9.8 If a party is not satisfied with the decision of the case supervisor regarding the procedural issue it has raised, then it may refer its concerns to the Procedural Officer. If it wishes to do so, it should make an application to the Procedural Officer as soon as possible after receiving the decision from the case supervisor, and in any event within five working days.

9.9 The application should be no longer than five sides of A4 paper and should include:

a) the name and contact details of the applicant;

b) the name and contact details of the lawyers acting for the applicant (where relevant);

c) the Ofcom case name and reference number;

d) the date of decision made by the case supervisor; and

e) a short summary of the issues including a summary of the case team’s original decision, the decision of the case supervisor, the reason the applicant wants a review of that decision and the outcome the applicant is seeking.

9.10 The applicant should also provide copies of relevant correspondence between it and Ofcom relating to the issue in question and copies of any relevant information or documents which the applicant holds.

9.11 The application should be submitted by email to Procedural.Officer@ofcom.org.uk

9.12 The Procedural Officer will provide members of the case team and the case supervisor, and the applicant, the opportunity to present their arguments to the orally on the telephone or at a meeting.

The Procedural Officer’s decision

9.13 The Procedural Officer will deal with the application as quickly as possible, and will aim to take a decision in most cases within 10 working days from receipt of the application. In any event the Procedural Officer will reach a decision within 20 working days from receipt of the application. The Procedural Officer may extend this timeframe by no more than 20 working days if there are special reasons to do so.

9.14 The Procedural Officer’s decision will be submitted in writing to the applicant, and it will be binding on the case team and decision makers. A non-confidential version of the Procedural Officer’s decision, or a summary of it, will be published on Ofcom’s website, generally at the time the decision is made or at the end of Ofcom’s investigation.
Annex 1

Overview of a regulatory enforcement case

This flow chart describes a ‘typical’ case but is indicative only and an individual case may vary. See the relevant section of the Guidelines for a fuller description of the process.

NOTE: At any stage we may close a case without reaching a decision on the merits (i.e. where we consider we should no longer dedicate resources to the investigation)

Settlement can occur during this phase either:
- Pre-provisional breach notification
- Post-provisional breach notification, pre-written representations
- Post-provisional breach notification, post-written representations

Update notice on CCEB section of Ofcom’s website Non-confidential version of reasoned case closure document published

Update on outcome of investigation on CCEB section of Ofcom’s website Non-confidential version of final enforcement decision/reasoned case closure document published

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INITIAL ASSESSMENT
(Assessment of whether to open investigation)

INVESTIGATIVE PHASE
(Information gathering and analysis of evidence)
Investigation overseen by case supervisor

FINAL DECISION MAKING PHASE
Process overseen by final decision maker

NOTE: In a settlement case the final decision will be taken by the Stage 1 decision maker (typically the case supervisor)
Annex 2

Overview of a consumer protection enforcement case

This flow chart describes a ‘typical’ case but is indicative only and an individual case may vary. See the relevant section of the Guidelines for a fuller description of the process.

NOTE: At any stage we may close a case without reaching a decision on the merits (i.e. where we consider we should no longer dedicate resources to the investigation).

*Ofcom will normally notify the CMA by entering the required information on the Trading Standards Sanctions Information Database.