making communications work
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Ofcom's approach to enforcement

Revising the Enforcement Guidelines and related documents

Statement

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About this document

Ofcom is the independent regulator and competition authority 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. We also have concurrent powers with the Competition and Markets Authority to investigate suspected infringements of competition law.

In this document, we set out our decision on changes to our Enforcement Guidelines, which explain how we investigate compliance with and approach enforcement of regulatory requirements relating to electronic communications networks and services, postal services, consumer protection legislation, competition law and certain competition-related conditions in broadcast licences.

We are publishing alongside this statement final versions of the documents setting out our new enforcement procedures. These are the *Enforcement Guidelines for regulatory investigations*, the *Enforcement Guidelines for Competition Act investigations*, the *Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences*, and a document providing advice to complainants and whistleblowers: *Advice for complainants: Submitting a complaint to Ofcom*.

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Section 1

Executive summary

1.1 Ofcom is the independent regulator and competition authority for the UK communications industries. Ofcom takes enforcement action across a number of industry sectors and is able to use a range of administrative powers granted by, amongst others, the Communications Act 2003 (the "**Communications Act**"), the Postal Services Act 2011 (the "**Postal Services Act**"), the Competition Act 1998 (the "**Competition Act**") and consumer protection legislation.

1.2 We take enforcement action for the benefit of citizens and consumers to:

- promote and/or protect competition;
- prevent consumer harm and enforce consumer protection law; and
- encourage compliance.

1.3 We also have concurrent powers with the Competition and Markets Authority (**CMA**) to investigate suspected infringements of competition law. In carrying out such investigations, we are required to comply with The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014[1] (the "**CMA Rules**") which set out certain procedural requirements.

1.4 It is important that any such enforcement action is conducted fairly and transparently, and that cases are completed efficiently and as promptly as reasonably possible.

1.5 Ofcom's Enforcement Guidelines,[2] which were last updated in July 2012, applied to most investigations carried out by Ofcom into potential breaches of regulatory rules, consumer protection legislation and competition law.

1.6 We have reviewed our Enforcement Guidelines with the aim of:

- increasing transparency and clarity as to how our investigations and enforcement processes will be run;
- ensuring that our enforcement processes are fair, efficient and timely;
- ensuring clear, practical advice is available for stakeholders about how they can make a complaint about potential breaches of regulatory conditions, competition law or consumer protection law;
- clarifying the procedures we will follow in respect of investigations under the Competition Act and ensuring that our guidelines reflect the most recent changes to the relevant statutory requirements; and

[1] http://www.legislation.gov.uk/uksi/2014/458/schedule/made

[2] https://www.ofcom.org.uk/__data/assets/pdf_file/0034/79846/enforcement_guidelines.pdf. These procedures were not applicable to dispute resolution, investigations into complaints about broadcast content, on-demand programme services, compliance with Broadcasting Act licence conditions or the BBC, investigations into interference with radio spectrum, or complaints from individual consumers.

- clarifying the procedures we will follow in relation to investigations for breaches of competition-related conditions in Broadcasting Act licences.

1.7 On 23 January 2017, we consulted on proposed changes to our Enforcement Guidelines (the "**Consultation**").[3] We proposed to revise and update our Enforcement Guidelines. Our substantive proposed changes included, in particular:

- updating the scope of our guidelines to cover a number of new enforcement powers we have taken on since 2012;
- giving clearer guidance on how we expect decisions will be taken on the progress and outcome of investigations;
- giving clearer guidance on how we expect to publicise cases; and
- giving guidance on a new procedure for the settlement of regulatory investigations.

1.8 We also proposed to rationalise the suite of documents that cover our enforcement procedures, with a view to making it clearer as to where a reader should look for the information they need. We published the following draft documents alongside our Consultation:

- Draft Enforcement Guidelines for regulatory investigations;[4]
- Draft Enforcement Guidelines for Competition Act investigations;[5]
- Draft Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences;[6] and
- Draft Advice for complainants: Submitting a complaint to Ofcom.[7]

1.9 The Consultation closed on 6 March 2017. We received 14 responses to the Consultation.[8] Having carefully considered the responses received, in this Statement we set out our decisions regarding revising our Enforcement Guidelines.

1.10 As explained above, our key objectives in reviewing our Enforcement Guidelines include increasing transparency about how we enforce, and ensuring that our investigations are carried out in a fair, efficient and timely way. In deciding upon our revised procedures, we have balanced our clear intention to conduct fair and transparent investigations with the need for timeliness, efficiency, flexibility and practicability.

1.11 A number of responses to the Consultation suggested that we should be more prescriptive and provide more specificity as to our approach to issues such as the

[3] https://www.ofcom.org.uk/__data/assets/pdf_file/0024/96810/enforcement-consultation.pdf
[4] https://www.ofcom.org.uk/__data/assets/pdf_file/0028/96805/Draft-main-enforcement-guidelines.pdf
[5] https://www.ofcom.org.uk/__data/assets/pdf_file/0025/96802/Draft-CA98-enforcement-guidelines.pdf
[6] https://www.ofcom.org.uk/__data/assets/pdf_file/0026/96803/Draft-fair-and-effective-competition-guidelines.pdf
[7] https://www.ofcom.org.uk/__data/assets/pdf_file/0029/96806/Draft-advice-for-complainants.pdf
[8] See Annex 1 for a full list of respondents. Non-confidential versions of the responses are available on our website here: https://www.ofcom.org.uk/consultations-and-statements/category-2/ofcoms-approach-to-enforcement.

length of time we expect to take in considering whether to investigate/completing an investigation, and how we engage with the parties at various stages of the enforcement process. We have considered these responses carefully and, where appropriate, have made amendments with a view to increasing transparency and ensuring procedural fairness. For example, we have decided to make Procedural Officers available to deal with significant procedural issues in regulatory investigations (as well as in Competition Act investigations), and we intend to carry out regular internal monitoring of our enforcement activity and to publish regular updates on our enforcement action. However, we have sought to avoid being overly prescriptive in our procedures, and we have not implemented all the suggested changes. This is because it is important that we can act flexibly on a case-by-case basis to ensure we meet our stated objectives of carrying out fair, transparent, timely and efficient enforcement action, which is in the interest of all affected parties.

1.12 The new procedures have been published today alongside this Statement, and take effect immediately. They will be applied to future investigations and to current ongoing investigations, as relevant.

General impact assessment

1.13 The analysis presented in our Consultation represented an impact assessment, as defined in section 7 of the Communications Act.

1.14 We consider that the changes to our procedures set out in this Statement will either have no impact, or will tend to reduce the costs of our enforcement action by streamlining our administrative processes (and therefore reducing the level of our administrative fees overall) and/or by making it easier for our stakeholders to find information without having to ask us.

Equality impact assessment

1.15 We have considered what (if any) impact the decisions in this Statement may have on equality. Having carried out this assessment, we are satisfied that our decisions are not detrimental to any group defined by the protected characteristics identified in the Equality Act 2010.

Section 2

Summary of responses and our decisions

Introduction

2.1 This section sets out a summary of the main issues which were raised in responses to the Consultation and our decisions on our enforcement procedures, having carefully considered and taken account of stakeholder comments.

2.2 A full list of respondents is set out at Annex 1.[9]

2.3 In this Statement, we generally distinguish between:

- what we term Ofcom's "regulatory investigations" – namely investigations into non-compliance with regulatory requirements which are specific to the sectors that Ofcom regulates as the communications regulator, which for these purposes usually includes investigations into breaches of competition-related requirements in Broadcasting Act licences;[10] and
- investigations into non-compliance with competition law or consumer protection legislation[11], in relation to which Ofcom has concurrent enforcement powers with the CMA and other regulators.

2.4 Unless otherwise specified, the discussion below relates to our *Enforcement Guidelines for regulatory investigations* (the "**Regulatory Guidelines**"), our *Enforcement Guidelines for Competition Act investigations* (the "**Competition Act Guidelines**") (together, the "**Guidelines**") and our *Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences* (the "**Procedures**"). We also discuss our document providing advice for complainants and whistleblowers (the "**Complaints Guidance**") as relevant below.

2.5 Having considered stakeholder comments in response to the Consultation, we have made a number of changes to the Guidelines, the Procedures and the Complaints Guidance, in particular in relation to:

- our initial assessment phase, where we have clarified our approach;
- timing and transparency in conducting our enforcement work, where we have also clarified our approach;
- information gathering, where we have explained in more detail how we would expect to use our Competition Act powers;

[9] Non-confidential responses are available on our website here: https://www.ofcom.org.uk/consultations-and-statements/category-2/ofcoms-approach-to-enforcement

[10] However, we have set out our process for investigating breaches of competition-related requirements in Broadcasting Act licences in a separate document (i.e. the Procedures).

[11] We note that investigations into non-compliance with consumer protection legislation are covered under our Regulatory Guidelines, as some of the same procedural considerations apply to these types of cases as with the regulatory investigations falling under the scope of these Guidelines. Specific guidance on consumer protection law investigations is set out in Section 7 of the Regulatory Guidelines.

- confidentiality, where we have explained in more detail what we expect to do where we intend to disclose information which a party considers to be confidential;

- dealing with procedural complaints, as we are now intending to adopt a new procedure in regulatory investigations where complaints about significant procedural matters can be referred to a Procedural Officer, as in Competition Act investigations;

- decision-making in Competition Act investigations, as we now intend that there will be three persons acting as final decision makers, consistent with the CMA's practice; and

- oral hearings, where we have given more detail about our expected procedure;

- settlement, where we have clarified our approach to certain issues, in particular in relation to the process for reaching a settlement agreement depending on when a successful settlement process is commenced.

2.6 We have also made some changes to the scope of the Regulatory Guidelines to make express reference to new powers to take enforcement action under the Digital Economy Act 2017, which received Royal Assent on 28 April 2017.[12] These are:

- enforcement of breaches of 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;[13]

- enforcement of breaches of conditions of wireless telegraphy licences in connection with our powers to impose financial penalties under sections 42 to 44 of the Wireless Telegraphy Act 2006 (the "**Wireless Telegraphy Act**") under amendments introduced by the Digital Economy Act 2017;

- enforcement action under sections 53E to 53I of the Wireless Telegraphy Act in respect of breaches of restrictions or conditions of dynamic spectrum access registration 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; 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[14].

[12] We note that not all of these powers are yet in force.
[13] Under section 124T of the Communications Act, Ofcom can enforce failure to comply with such requirements in accordance with sections 96A to 96C, but Ofcom can only impose a financial penalty of up to £2 million and Ofcom has no power to issue directions under section 100 and 100A of the Communications Act.
[14] Breaches of information gathering requirements conferred on Ofcom under the Charter and Agreement relating to our BBC functions, 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.

2.7 We have also made a number of clarificatory changes to other aspects of our Guidelines, Procedures and Complaints Guidance.

2.8 We have published the final versions of our new Regulatory Guidelines,[15] Competition Act Guidelines,[16] Procedures,[17] and Complaints Guidelines[18] separately alongside this Statement, and they take effect immediately.

Complaints

Summary of comments

2.9 Some stakeholders[19] suggested that Ofcom should make changes to our Complaints Guidance, including clarifying that complainants should confirm that all information they provide is complete and accurate, clarifying the type of evidence Ofcom expects to receive in a complaint submission and clarifying our guidance on the need for commercial negotiations between the complainant and the subject of the complaint before referring a complaint to Ofcom.

Ofcom's decision

2.10 In our Complaints Guidance, we have sought to provide practical guidance to stakeholders while acknowledging that it is not possible to cover all potential issues.

2.11 We consider that our guidance provides an appropriate level of detail for complainants so that they can understand the process for submitting a complaint to Ofcom, the type of information and evidence we expect to receive from them when they make a complaint submission, and how we will handle their complaint initially. In particular, at Annex 1 of the Complaints Guidance we have explained the information we expect to be provided in a complaint submission.

2.12 Where we consider we need further information from the complainant in order to fully consider its submission, we will advise the complainant and set out what else is needed. We may also ask complainants to provide further information during our initial assessment. We expect complainants – and subjects of possible investigations – 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, and have clarified this in the Guidelines and the Procedures.

2.13 As explained in the Guidelines and the Procedures, we may issue requests for information using our statutory powers during the course of an investigation – this is discussed further below. Whether or not we may need to exercise our information gathering powers in relation to matters raised by a complainant in its complaint submission, or by the subject in any initial comments or information they provide, will depend on the circumstances of the particular case. However, we note that, where we are intending to rely on information provided to us by the subject or a complainant

[15] https://www.ofcom.org.uk/__data/assets/pdf_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf;
[16] https://www.ofcom.org.uk/__data/assets/pdf_file/0014/102515/Enforcement-guidelines-for-Competition-Act-investigations.pdf
[17] https://www.ofcom.org.uk/__data/assets/pdf_file/0017/102518/Procedures-for-investigating-breaches-of-competition-related-conditions-in-Broadcasting-Act-licences.pdf
[18] https://www.ofcom.org.uk/__data/assets/pdf_file/0013/102514/Advice-for-complainants.pdf
[19] Royal Mail, Baker & McKenzie and CLLS

informally prior to opening an investigation, for the purposes of the investigation, we may request the provision of that information using our statutory powers during the course of the investigation, in order to verify that such information is complete and accurate, and we have clarified this in our Guidelines and Procedures.

2.14 We have explained in our Complaints Guidance that, as we recognise that some stakeholders, particularly smaller companies and individuals, may need help in formulating complaints, and we will provide guidance to less experienced complainants. It is also always open to stakeholders to approach us with compliance concerns on an informal basis prior to submitting a formal complaint. We cannot give a view on whether the conduct is likely to amount to a breach of a relevant requirement but may be able to refer a stakeholder to previous policy decisions or investigations that have dealt with similar issues or explain the type of information we may need in order to investigate a complaint.

2.15 We remain of the view that stakeholders should try to resolve matters through commercial discussions wherever possible, and we may not take a complaint forward if the complainant has not made appropriate attempts to resolve problems directly with the subject of the complaint. This does not mean that we would expect stakeholders to have sought to resolve issues through commercial negotiations in every case. We recognise that there may be cases where this is not possible or appropriate, depending on the circumstances of the relationship between the complainant and the subject of the complaint, and the nature of the relevant concern. However, we normally expect the complainant to explain to us why they had not sought to resolve the matter with the subject of the complaint prior to coming to us, if relevant. We have added wording clarifying this in the Complaints Guidance.

Leniency

2.16 We have agreed as part of the concurrency arrangements that in the first instance applications for leniency in relation to infringements of competition law should be made to the CMA (not Ofcom). We have reflected this change in the Competition Act Guidelines.

Initial assessment phase

Summary of comments

2.17 The ERG, Royal Mail and Verastar were concerned that the draft Guidelines and Procedures said that Ofcom may not always carry out an initial assessment phase (previously described in our Consultation, draft Guidelines and draft Procedures as an 'enquiry phase'). They considered that the initial assessment phase was important for Ofcom to consider whether an investigation was necessary, and to develop and scope the basis for an investigation, and that Ofcom should always carry out an initial assessment phase, save for in exceptional circumstances.

2.18 Royal Mail also considered that we should always be prepared (except in exceptional circumstances) to provide the subject with an opportunity to comment on a complaint, and to meet with the subject and complainant, during our initial assessment phase.

2.19 Ashurst objected to Ofcom's proposal in the draft Competition Act Guidelines usually not to allow the complainant the right to comment on a decision by Ofcom not to open an investigation following the initial assessment phase.

2.20 A number of respondents also made comments about target timescales for completing the initial assessment phase, which are addressed at paragraphs 2.27 to 2.32 below.

Ofcom's decision

2.21 Before proceeding to open an investigation, we will first carry out an initial assessment of the issue to ascertain whether there is sufficient concern to warrant committing our resources to an investigation of the relevant matters.

2.22 As part of our initial assessment, we will normally give the business whose conduct we are considering the opportunity to comment and provide relevant information to assist us in deciding whether to open an investigation. We agree with stakeholders that giving the business we are considering investigating an initial opportunity to provide comments on the relevant issues is often helpful – both to Ofcom and to those we regulate – in ensuring that we have the information we need to decide whether to investigate and that we target investigations into appropriate cases.

2.23 However, we remain of the view that this will not be necessary or appropriate in every case. As noted in the Guidelines and the Procedures, in some cases we may consider that we have sufficient information to conduct our initial assessment and decide whether to open an investigation based on previous engagement with the subject of the possible investigation about the relevant issues. 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 an information request served in that context, where we have obtained information about potential non-compliance as a result of routine compliance monitoring (for example about quality of service targets), or through more informal engagement. We may also decide not to provide an initial opportunity for comment where we think there are reasons to proceed to an investigation more quickly (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.

2.24 When we are carrying out our initial assessment following a complaint we have received, we will normally tell the subject of the complaint we are doing so and will normally share a non-confidential version of the complaint with the subject for comment. However, there also may be cases where we consider that it is not appropriate to do this. This could be for one of the reasons set out in paragraph 2.23 above. There may also be cases where we consider it is important to safeguard the anonymity of the complainant such that it is not appropriate to share a copy of the complaint at that stage. Where we consider that we already have sufficient information to decide that we should not open an investigation without obtaining comments 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.

2.25 In relation to Royal Mail's suggestion that we should always meet with the subject of a possible investigation and any complainant prior to deciding whether to open an investigation, we will consider stakeholder requests to meet to discuss potential enforcement issues and will be prepared to meet with the subject of a possible investigation and any complainant where we consider this will assist us in reaching a

decision on whether or not to open an investigation. However, we do not consider that it will be necessary or appropriate to do so in all cases.

2.26 As regards Ashurst's suggestion that the complainant should be provided with the opportunity to make representations prior to Ofcom taking a decision not to open a Competition Act investigation, we do not consider this would usually be necessary.[20] Ofcom recognises the role of a complainant is important as they may bring to our attention a possible infringement of competition law by one of our stakeholders, and Ofcom will assess, and investigate where appropriate, a complaint based on the issues raised. Complainants have the opportunity to put forward their submissions when making a complaint, and as stated in our Complaints Guidance, we expect complainants to make adequate, well-reasoned submissions backed up by evidence. We also explain in the Competition Act Guidelines that in some cases we may meet with the complainant during the initial assessment phase, and we expect to do so where it would assist us in deciding whether or not to open an investigation. We therefore consider our procedures give complainants a fair opportunity to put forward their submissions on an alleged infringement.

Transparency on timing

Targets for completing our initial assessment

Summary of comments

2.27 npower was supportive of our proposal to set targets for completing our initial assessment on a case-by-case basis, provided that every effort was made to give the subject an indicative outline of how long the initial assessment phase would take.

2.28 However, most respondents opposed our proposal.[21] A number of respondents[22] suggested that we should retain, as the default position, a 15 working day target for enquiries under the Regulatory Guidelines, but retaining our flexibility to require more or less time in a particular case. Ashurst agreed that 15 working days would not be sufficient to complete the initial assessment phase in many regulatory cases, but suggested that we should adopt as standard a 20 working day period for completing enquiries, which could be extended to up to four months (or possibly longer) in more complicated cases.

2.29 A number of respondents[23] also opposed the removal of the eight-week target for completing Competition Act enquiries.

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[20] We note that Ashurst considers that this is in line with the CMA's processes. However, the CMA does not provide complainants with the opportunity to make representations on a decision not to open an investigation. Indeed the CMA explains, at paragraph 4.2 of the CMA CA98 Guidance that *"[d]ue to resources constraints the CMA may not be able to respond to all complaints it receives" – see the CMA's "Competition Act 1998: Guidance on the CMA's investigations procedures in Competition Act 1998 cases", March 2014,* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537006/CMA8_CA98_Guidance_on_the_CMA_investigation_procedures.pdf ("**CMA Guidance**"). In support of its argument, Ashurst refers to paragraph 10.3 – 10.4 of the CMA's guidance, and *Pernod Ricard v OFT,* both of which relate to the opportunity to make representations on a decision by the CMA to close an investigation (as opposed to not open one in the first place).

[21] Ashurst, Baker & McKenzie, CLLS, the ERG, Royal Mail, TalkTalk, Verastar and Which?

[22] The ERG, Royal Mail and Verastar. TalkTalk also considered that 15 working days should be sufficient to complete an enquiry in most cases.

[23] Ashurst, Baker & McKenzie, CLLS, the ERG, Royal Mail and Verastar

Ofcom's decision

2.30 We are committed to following transparent enforcement processes. We acknowledge stakeholder concerns that if we remove an internal target for completing our initial assessment, this risks giving rise to delays in completing an initial assessment. In line with our aim to complete the end-to-end process in a fair, timely and efficient manner, we will aim to complete our initial assessment as quickly as reasonably possible given the circumstances of the particular case.

2.31 In cases where we decide that it is appropriate to give the subject of the possible investigation an initial opportunity to comment and 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 have taken our decision on whether to open an investigation. We will also 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 of the investigation and any complainant updated should our initial assessment take longer than initially expected.

2.32 We consider this approach is appropriate in regulatory investigations and Competition Act investigations, although we expect that our initial assessment of whether to open a Competition Act investigation is likely to take longer than in most regulatory cases.

Targets for completing investigations

Summary of comments

2.33 Some respondents[24] agreed that a six-month timescale for completing a regulatory investigation may not be appropriate in all cases. However, most respondents[25] were concerned that removing internal targets for completing investigations would decrease transparency and certainty for stakeholders and reduce incentives for case teams to complete investigations in a timely manner.

2.34 Most respondents[26] also considered that Ofcom should, in both regulatory and Competition Act cases, provide an indicative timetable for completing an investigation at the outset of the investigation.

2.35 Some respondents[27] also argued that we should publish an indicative timetable on our website.

2.36 Which? suggested that if Ofcom considered that the use of the existing targets was unhelpful, it should consider alternative ways to ensure that casework is conducted efficiently, for example putting in place a monitoring framework that reports on and reviews progress with case timescales over time.

Ofcom's decision

2.37 As we have explained above, we remain committed to transparency in our enforcement processes. We also recognise that it is important for all stakeholders

[24] The ERG, npower and TalkTalk

[25] Ashurst, BT, the ERG, npower, RM, TalkTalk, Verastar and Which?

[26] Ashurst, BT, CLLS, the ERG, npower, Royal Mail, TalkTalk and Verastar

[27] Ashurst, BT and Royal Mail

that if we open an investigation we progress the investigation in a timely manner and conclude it as soon as reasonably possible. We remain of the view that it is not appropriate to focus on a specific six-month target for completing our regulatory investigations, as we think that we will be able to complete some investigations more quickly, whereas others will take longer due to the need to undertake more detailed evidence gathering and analysis. We also do not consider it to be helpful to impose a target for completing Competition Act investigations for the same reason.

2.38 We have therefore decided to set targets for completing investigations under the Guidelines and the Procedures on a case-by-case basis. 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. We will also provide the subject, and any complainant, with updates on the progress of investigations, including when we expect to reach a specific milestone, and will also provide them with updates where this changes. 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.

2.39 As noted above, we also intend to carry out regular internal monitoring of our enforcement activity and to publish regular updates on our enforcement action, including, among other things, information about the length of time it takes to complete relevant enforcement activity.

Engagement

Engagement with subjects of investigations

Summary of comments

2.40 A number of respondents[28] considered that the draft Guidelines would result in an undesirable reduction in the level of engagement between Ofcom and subjects of our investigations. In particular, they opposed our proposals that:

- we would be prepared to meet with the subject of an investigation and/or provide written or verbal updates, where it would assist the investigation, rather than committing to providing regular updates on the progress of investigations; and
- we would no longer as a matter of general practice seek comments from the subject of an investigation prior to deciding to change the scope of an investigation.

2.41 These respondents considered our proposals on engagement with subjects of investigations gave Ofcom too much discretion and were focused incorrectly on Ofcom's needs, rather than keeping the subject of the investigation informed, helping it to understand the case against it and to prepare its defence.

2.42 Some respondents[29] opposed our decision to remove reference in the draft Competition Act Guidelines to holding at least two state of play meetings during a Competition Act investigation and considered that at least three state of play meetings should be offered in line with current CMA practice. Some respondents[30]

[28] Ashurst, BT, the ERG and Royal Mail

[29] Ashurst, Baker & McKenzie and CLLS

[30] BT, the ERG and Royal Mail

suggested that we should consider offering 'state of play' meetings during regulatory investigations too.

2.43 Royal Mail considered that Ofcom should reinstate in the Competition Act Guidelines references to formal 'stop/go' reviews (in which Ofcom would consider whether an investigation continues to be a priority or whether to change the scope of any investigation) at key stages of the investigation, and that these reviews would also be appropriate in regulatory investigations.

2.44 TalkTalk supported Ofcom's proposal to make decisions to widen or reduce the scope of investigations without taking comments from affected parties. It considered that in most situations the opportunity to comment is of little benefit to either Ofcom or the parties, and acts to slow down the process and consume resources needlessly.

2.45 However, BT, the ERG and Royal Mail considered that Ofcom should continue to invite representations from the subject of the investigation before deciding to widen the scope of the investigation.

Ofcom's decision

2.46 While we will endeavour to engage constructively with the subjects of our investigations and keep them updated on progress, we have sought to avoid being overly prescriptive about exactly how often and when we expect to contact or meet with those we are investigating. As explained above, it is important we can act flexibly on a case-by-case basis to ensure that the process we follow is fair in the circumstances of each case,[31] transparent, timely and efficient, and we do not consider it would assist us in achieving these objectives to commit to holding meetings (whether 'state of play meetings' or otherwise) at fixed points in an investigation. If we receive a request to meet to discuss the case, we will consider it. Whether it will be beneficial to Ofcom and the subject to meet will depend on a number of considerations, including the nature of the investigation and the stage that we have reached in our analysis.

2.47 In view of the above considerations, and having taken account of stakeholder responses, we have clarified in the Guidelines and the Procedures that we will be prepared to meet with the subject of an investigation where we consider it to be appropriate to do so for reasons of fairness or transparency. We consider this approach should ensure an appropriate level of engagement with the subject of the investigation in the particular circumstances of each case.

2.48 We also note stakeholder comments that we should invite representations from the subject of the investigation before changing the scope of the investigation. We recognise that in some circumstances it may be appropriate for reasons of fairness to provide the subject (and potentially complainants or other relevant third parties) with the opportunity to comment prior to deciding to change the scope of the investigation. This may be, for example, if we were minded to widen the scope of the investigation

[31] In this context, we note that in *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 A.C. 531 the principle of fairness under administrative law was outlined in the following terms: "*The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.*" In a similar vein, in *R v Monopolies and Mergers Commission, ex parte Elders IXL Ltd* [1987] 1 WLR 1221, it is noted that: "*[f]airness is a flexible concept, whose content is dependent on the situation which is under consideration"* and that there is *"no set of rules of fairness which is applicable to all investigative procedures".*

on the basis of new evidence that we have received and on which the subject has not yet had the opportunity to comment. However, we remain of the view that this should not be seen as the routine practice, as in many cases it will not be necessary for reasons of fairness. We have amended the drafting in the Guidelines and the Procedures to reflect this approach.

2.49 We note Royal Mail's comments about "stop/go" reviews. Ofcom will of course regularly review the progress of an investigation. We explain in the Guidelines and the Procedures the process we expect to follow when deciding on how to proceed with an investigation. We are clear, in that context, that we may decide to close the case on the basis that we consider there is insufficient evidence to find a contravention or without having made a decision on the merits (for example, for administrative reasons). Rather than holding "stop/go" reviews at fixed points in an investigation, our assessment of whether there continue to be grounds for action and to pursue the case will depend on the circumstances of a particular case.

Engagement with third parties

Summary of comments

2.50 Some respondents[32] agreed with our proposal to seek to simplify our guidance on the involvement of third parties in investigations.

2.51 Other respondents[33] expressed concerns that our proposed Guidelines did not make it sufficiently clear when and what level of engagement third parties could expect. They also considered that the Guidelines did not recognise that involvement of complainants and third parties may be appropriate because there was an affected interest at stake that would warrant third party involvement, rather than a party simply holding information which Ofcom would find helpful to its investigation.

Ofcom's decision

2.52 We recognise that complainants and 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. While we will involve complainants and third parties in an investigation to the extent we consider appropriate in order to carry out our functions fairly, transparently and effectively, we do not consider it helpful to seek to specify in detail exactly how much involvement complainants and third parties can expect in an investigation. This is because what is required for fairness and transparency reasons will vary from case to case, depending on the nature of the investigation and the circumstances of the complainant or relevant third party.

2.53 However, we have sought to provide clarity about the type of involvement that complainants can typically expect in an investigation where relevant. For example, we explain that we will normally:

- write to the complainant when we open an investigation informing them of the identity of the case leader and the case supervisor and how they can raise concerns with the Procedural Officer where relevant;

[32] CCP/ACOD, npower and TalkTalk
[33] Ashurst (in relation to our Competition Act Guidelines), the ERG and Verastar.

- inform a complainant of the likely timescale involved in completing an investigation and updates on progress, including when we expect to reach a particular milestone in the investigation;
- inform a complainant when we change the scope of an investigation; and
- inform a complainant that we have reached a final decision on the outcome of the investigation.

2.54 As regards the provision of a non-confidential copy of the provisional breach notification/statement of objections to complainants or third parties for comment, we remain of the view that it may be appropriate in some cases to provide complainants or other third parties with the opportunity to make written representations. We have decided to clarify that we will do this in cases where we consider it would be appropriate for reasons of fairness. This would typically be where they may have further information relevant to the proposed decision and therefore could make informed comments on it, such as where we have opened an investigation following a complaint and the complainant is likely to be able to comment on the relevant factual matters at issue in the provisional breach notification/statement of objections. It may also be appropriate to do so where Ofcom's findings in relation to a potential breach of a regulatory requirement could have a direct impact on the economic interests of a third party, such as where we comment in the notification/statement of objections on the conduct of an agent of the subject which we consider has given rise to the potential breach.

2.55 We have also explained that we would not typically expect to provide complainants or third party stakeholders access to the underlying documentary evidence, as it will not normally be necessary in order for them to be able to make informed comments on the proposed findings set out in the provisional breach notification/statement of objections. However, this may depend on the particular circumstances of the case and we will consider on a case-by-case basis whether we should do so for reasons of fairness. We also will not normally invite complainants or other third party stakeholders to attend an oral hearing.

2.56 In Competition Act cases, we have also explained that we will normally provide the complainant with an opportunity to comment on a proposed no grounds for action decision or proposed decision to close an investigation without taking a decision on the merits, in advance of Ofcom proceeding to take our final decision. This is in line with relevant case law[34] and the CMA's practice[35].

2.57 In respect of our regulatory investigations, we explain that we may consider that fairness requires that we provide an opportunity for relevant stakeholders to comment before we finalise a decision to close the case without finding an infringement or without having taken a decision on the merits – for example, where the investigation was initiated following a complaint from a stakeholder, which may have further information relevant to the proposed decision.

[34] Such as *Pernod Ricard v Office of Fair Trading* [2004] CAT 10

[35] See the CMA's Guidance at paragraphs 10.3 and 10.13

Information gathering

Summary of comments

2.58 A number of respondents[36] objected to our proposals to change the wording in the Regulatory Guidelines such that it no longer referred to Ofcom normally issuing statutory information requests in draft.

2.59 Some respondents[37] considered that we should send information requests in draft for comment as our standard practice, and we should only depart from this in particular circumstances, for example where there is a specific risk of evidence destruction or if the amount of information requested was so small as to make the process unnecessary. They considered that this should be made clear in the Regulatory Guidelines.

2.60 Royal Mail considered that Ofcom should commit to always raising concerns about failure to comply with a formal information request informally in the first instance and should add wording to the Regulatory Guidelines on this point.

2.61 Some respondents[38] also considered that the Competition Act Guidelines did not contain sufficient detail on how Ofcom will exercise its information gathering powers in Competition Act investigations, particularly in relation to our powers to conduct interviews, and enter and/or search premises. Ashurst and Royal Mail said that the Competition Act Guidelines should include the same detail as the CMA's Guidance or alternatively, Ofcom should confirm that it will follow the CMA's Guidance in this regard.

Ofcom's decision

2.62 Our statutory information gathering powers are a critical regulatory tool which enables us to obtain the information we need for the purposes of taking robust, appropriately evidenced decisions on enforcement. Our current policy statement on information gathering explains that we will consider on a case-by-case basis whether it may be appropriate to first issue an information request in draft. [39] We think it is important to be clear that, in the context of all investigations, there should be no presumption that we will send an information request out in draft for comment prior to issuing it in final form. It may often be appropriate in the context of an investigation, having regard to the nature of the information requested, and the purpose for which it is requested, to issue an information request without first providing a draft. In particular:

- in our investigations, where we are examining potential wrongdoing, there may be risks of evidence destruction; and
- the context of our investigations is different to that which applies to our regulatory policy work – in the latter we will often be seeking a significant amount of detailed information about a business (e.g. as to costs) to inform our policy decisions, in

[36] Ashurst, BT, the ERG, Royal Mail, TalkTalk and Vodafone

[37] Ashurst, BT, the ERG, Royal Mail and Vodafone

[38] Ashurst, Baker & McKenzie, CLLS and Royal Mail

[39] https://www.ofcom.org.uk/consultations-and-statements/category-1/info_gathering. This policy currently states (at paragraph 3.3): "Where timescales allow and it is appropriate to do so, Ofcom will send a draft of a statutory information request to the person holding the relevant information and offer three working days for comment" (emphasis added).

relation to which there will often be an asymmetry of information between Ofcom and the relevant stakeholder. In these circumstances, issuing an information request first in draft may allow us to better understand what information the relevant stakeholder holds and ensure we are asking for the right type of information for our purposes.

2.63 We are currently carrying out a review of our end-to-end processes for how we use our information gathering powers across Ofcom's functions, which we expect to conclude later this year. If appropriate we will revisit this issue following this review. In the meantime, we will consider on a case-by-case basis whether to issue a statutory information request in draft, and will only do so where we consider that it is appropriate in the particular circumstances of the case, having regard to the nature of the information requested and the nature of the investigation.

2.64 We note concerns from respondents that the draft Competition Act Guidelines did not contain sufficient detail on how Ofcom exercises our powers to conduct formal interviews, and to enter and search premises, and we have provided further practical detail in the Competition Act Guidelines, in line with the approach taken by the CMA, as to how we expect to use these powers.[40] We have also explained that we expect to have regard to the CMA's guidance when exercising these powers.

2.65 We also note Royal Mail's comment regarding first raising concerns about failure to comply with formal information requests through informal contact with the party initially. The action we will take where we are concerned that a party has not complied with a formal information request will depend on a range of factors such as the nature of the breach, when we discover it and the urgency for us obtaining the relevant information. Depending on the circumstances of the case, it may or may not be appropriate to raise concerns informally prior to taking formal enforcement action for failure to comply with such requirements.

Confidentiality

Summary of comments

2.66 Baker & McKenzie, CLLS and Royal Mail considered that Ofcom should provide more detail in the Competition Act Guidelines on how we would use confidentiality rings and data rooms.[41] Royal Mail suggested that alternatively Ofcom should explain that it will follow the CMA's Guidance.

2.67 The ERG suggested that Ofcom should consider the use of confidentiality rings in complex regulatory investigations involving third party confidential information, rather than redacting third party confidential information from documents when disclosed to the subject of the investigation/complainant or third party, as relevant.

2.68 A number of respondents[42] supported Ofcom's proposal only to require non-confidential versions of submissions when we considered they were needed.

2.69 Royal Mail considered that if there is a dispute about confidentiality, the information should not be disclosed until the person adjudicating on the complaint has made their decision. If, following this, the disclosure is to go ahead, the Guidelines should

[40] See paragraphs 3.18-3.29 of the Competition Act Guidelines

[41] Baker & McKenzie and CLLS referred to the guidance given by the CAT in *BMI Healthcare Ltd v Competition Commission* [2013] CAT 24

[42] The ERG, Royal Mail and TalkTalk

provide a sufficient window of time so that the party can take action (for example apply for an injunction) before disclosure is made.

Ofcom's decision

2.70 We recognise the legitimate interests of parties in ensuring that confidential information is protected and are mindful of our duties relating to the restrictions on disclosure of information under section 393 of the Communications Act[43] and under Part 9 of the Enterprise Act. We also recognise that, in some cases, there may be a tension between the interests of a party which has provided Ofcom with confidential information, and the need to ensure fairness to other parties (for example, the need to ensure that the subject of an investigation can respond to the case against it) and/or to ensure that we are able to carry out our enforcement functions in an effective way. This is most likely to arise where multiple parties are involved in an investigation (such as in a Chapter I Competition Act investigation) or where we are relying on third party information.

2.71 We note that the CMA has set out guidance on how it deals with confidentiality in the context of Competition Act investigations. This explains that the CMA would decide which methods were appropriate and proportionate on a case-by-case basis, and may in some cases use methods such as confidentiality rings and data rooms.[44] We will take into account the CMA's guidance as appropriate in the context of a Competition Act investigation.

2.72 In respect of regulatory investigations, in our experience to date, we have not found it necessary to use confidentiality rings to deal with third party confidential information, and expect we will normally be able to do so in future cases in a way that ensures fairness to the subject of the investigation (and other relevant parties) without the use of disclosure methods such as confidentiality rings.

2.73 Ofcom will determine, in both Competition Act investigations and in regulatory investigations, the best means to deal with confidential information on a case by-case basis, in accordance with the relevant statutory framework.[45] In deciding on the most appropriate way of dealing with confidential information in a particular case, we will have regard to the respective interests of the party that has provided the confidential information, and of the subject of the investigation in understanding the case against it.

2.74 We note that respondents generally supported our proposal only to ask stakeholders to prepare non-confidential versions of their submissions where necessary for the

[43] Ofcom is required to ensure that information in respect of a particular business which has been obtained in exercise of our powers under the Communications Act or Broadcasting Acts is not disclosed without the consent of the person carrying on the business, except for certain permitted purposes, including for the purpose of facilitating the carrying out by Ofcom of any of their functions. It is a criminal offence, under section 393(10) of the Communications Act, to disclose information in contravention of those requirements. Similar restrictions apply under section 55 of the Postal Services Act and section 111 of the Wireless Telegraphy Act.

[44] CMA Guidance, paragraphs 7.6 to 7.16

[45] We note in the context of a Competition Act investigation that where information is disclosed to another person for a permitted purpose in accordance with section 241(1) of the Enterprise Act, it must not be further disclosed other than with the agreement of the regulator for the relevant permitted purpose (s.241(2)) and may only be used by that person for that purpose (s.241(2A)). It is a criminal offence under section 245(3) of the Enterprise Act to use such disclosed information for a purpose which is not permitted. Regulatory investigations are subject to a different statutory scheme in relation to restrictions on the disclosure of information, as described above.

purposes of disclosure. We have adopted this approach in the Guidelines and the Procedures.

2.75 We note Royal Mail's suggestion that, in the event of a dispute about confidentiality, we should delay disclosing the relevant information until the dispute has been resolved. Prior to disclosing information that 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. In Competition Act investigations, we note this is a requirement under the CMA Rules. The purpose of this practice is to allow the party in question to express concerns about such a disclosure. In most cases, we expect the case team to be able to resolve the matter with the party concerned without the need for further action. In the event that the case team is unable to resolve the issue, the party would be entitled to escalate their concerns to the Procedural Officer. We 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 in advance.

Publicising cases

Summary of comments

2.76 Which? said it would like to see greater transparency of Ofcom's enforcement actions, including better information about cases (formal or informal) when they are opened, updates on case progress, and findings and results (including informal arrangements reached) when they are closed, regardless of whether any action is taken.

2.77 Royal Mail said that it would not be appropriate to publicise a decision by Ofcom not to open an investigation at all, even where this was in the public domain. Royal Mail also said that Ofcom should clarify the situations where it would not discuss publicity at all in relation to an investigation.

2.78 Some respondents[46] noted that publicly announcing an investigation has been opened into a particular business can have a harmful impact on that business. These respondents suggested that Ofcom should consider following the CMA's approach of identifying the subject of an investigation only where it was clear that there was a provisional case to answer, and that any public announcements prior to the final decision should be kept to a minimum.

2.79 ITV considered it to be unreasonable for Ofcom to provide the subject with only one working day's notice of an announcement, as the subject may want to correct factual errors, while Royal Mail said that the subject of the investigation should always (rather than "ordinarily") be given at least one working day's notice of a proposed announcement.

Ofcom's decision

2.80 We remain of the view that publicising the investigations we are carrying out (and our final decisions) is an important part of carrying out our functions transparently and ensuring accountability. Publicising the action we take can also usefully draw it to the

[46] Baker & McKenzie, CLLS, the ERG and Royal Mail

attention of parties who have relevant information, can help deter non-compliance in future and educate others about what can go wrong.

2.81 We note Which?'s suggestion that there should be greater transparency about the outcome of cases, even when no formal action has been taken. We remain of the view that it is preferable not to publicise that we are undertaking an initial assessment of issues raised, or to comment publicly prior to opening an investigation. There are many issues which arise and which we may explore prior to taking a decision on whether to investigate. We do not consider that it would strike the right balance to publicise details of all such cases. This is because during our initial assessment we have not taken a decision about whether or not there is a case to answer and whether it is appropriate to dedicate resources to pursuing enforcement action. In addition, we are mindful that publicising that we are considering compliance issues in connection with a specific business can have a reputational impact on that business. However, as noted above, we intend to carry out regular internal monitoring of our enforcement activity and to publish regular updates on our enforcement action.

2.82 We note Royal Mail's suggestion that we should never publicise a decision not to open an investigation. As indicated in the Guidelines and the Procedures, and discussed above, we would not normally expect to do so. However, there may be cases in which it is appropriate to do so, such as where the fact that a complaint has been made has been put into the public domain by either the complainant or the business whose conduct we were considering investigating, or a potential investigation is the subject of press speculation, and we consider we should clarify the position. In line with our usual practice, in such cases we will 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.

2.83 We note Royal Mail's request for further clarity about the circumstances in which we may not publicise an investigation. As stated in the Consultation, there may be cases which we consider it would be inappropriate to discuss publicly, for example because a case is particularly sensitive and/or publicity could have a detrimental impact on third parties. We expect such cases to be rare and such instances would need to be considered on a case-by-case basis.

2.84 In terms of our general approach to publicising an investigation we have opened, we recognise that publicly stating that we are investigating the activities of a particular business has the potential to cause reputational harm. We also note that the CMA in Competition Act investigations does not publish the identity of the subject of an investigation when the investigation is opened. However, we consider that in the context of the sectors that we regulate it is important that we are transparent about how we are targeting our enforcement activities. In our view, it would decrease the transparency of our enforcement activities in a way which would not best achieve our regulatory objectives if we did not give details of the nature of the case and the identity of the subject of the investigation in a case opening notice[47], or if we delayed publicising investigations until we had issued a provisional breach notification/statement of objections. We therefore consider that our proposed

[47] We note, in this context, that in some cases it may be possible to identify the relevant provider based on the nature of the alleged infringement (for example, an SMP condition or a condition imposed only on the universal postal service provider). Even where this is not the case (for example, an investigation into the potential breach of a general condition which applies to all telecoms providers) there may still be the risk that this could lead to speculation about the identity of the subject of the investigation.

approach best ensures an appropriate balance between the need to be transparent about our enforcement activities and the risk of potential harm those we are investigating.

2.85 However, we are mindful of the need to minimise the reputational impact on the subject of the investigation. We will therefore make clear that opening an investigation or issuing a provisional breach decision does not mean that we have, or will necessarily, find a contravention of a requirement. In addition, in line with our usual practice, we will usually inform the subject of the investigation shortly before publication and provide them with a copy of the intended text to be included in the case opening notice on the CCEB section of our website for information.

2.86 We note ITV's comments regarding the period of notice given before publication. Our proposal in the Consultation sought to reflect our current practice when we publish details of our investigations. We consider that ordinarily informing the subject shortly before (and no more than one working day before) is sufficient notice of publication in order for the relevant business to prepare its own communications for their stakeholders. We provide advance notice for information only and would not expect stakeholders to need to make factual corrections on the proposed text.

2.87 We have also clarified in the Guidelines and the Procedures that in some cases, for example where we consider this would be in the interests of potentially affected customers or consumers more generally, we may issue a media release as well as an update on the CCEB section of our website. We will not normally share the text of media releases with the subjects of our investigations or complainants in advance of publication.

Procedural complaints

Summary of comments

2.88 Some respondents[48] argued that procedural complaints in regulatory investigations should be resolved by a Procedural Officer, in line with the process in Competition Act investigations. BT argued that this process should also apply to procedural disputes about settlement in regulatory investigations.

2.89 Royal Mail considered more detail was needed on the process that would be followed by the Procedural Officer, in particular that the Guidelines should clarify that the Procedural Officer will always offer the applicant the chance to make oral representations (not just when the Procedural Officer considers this to be appropriate).

Ofcom's decision

2.90 Although we are only required to appoint a Procedural Officer to handle procedural complaints in Competition Act investigations, having considered stakeholder comments, we have decided that procedural complaints in cases covered by the Regulatory Guidelines and the Procedures will also be dealt with by a Procedural Officer.

2.91 We note that, in addition to dealing with procedural complaints, the CMA Rules require that in Competition Act investigations the Procedural Officer also chairs (and prepares a report on) the oral hearing. We consider that the fundamental value in

[48] The ERG, Royal Mail and Verastar

having a Procedural Officer in regulatory investigations is to allow procedural complaints to be resolved promptly during an investigation, avoiding the need for an application for judicial review to be made to deal with such procedural issues at that stage. We expect that a Procedural Officer will be called on to resolve procedural complaints only in a small proportion of our regulatory investigations, and we do not consider there would be significant benefit in appointing a Procedural Officer in a regulatory investigation specifically to chair the oral hearing, which would have efficiency and administrative resource implications. We therefore consider that it would be more appropriate for the final decision maker, rather than a Procedural Officer, to chair the oral hearing in regulatory investigations. We note that it would remain open for subjects of our investigations to raise a procedural complaint regarding the conduct of the oral hearing with the Procedural Officer and, should a Procedural Officer become involved at that stage, he/she would have the benefit of a transcript of the oral hearing to resolve any complaint about the conduct of the proceedings (see paragraph 2.130 below).

2.92 In future there will be a number of Ofcom staff who will have appropriate Board-delegated authority to act as the Procedural Officer in a particular case. The relevant Procedural Officer will be appointed on a case-by-case basis, where a relevant procedural complaint is made (and in Competition Act investigations, in any event when the oral hearing takes place). As the Procedural Officer will be someone who will not have been involved in the investigation, we consider he/she will be sufficiently experienced and sufficiently independent to take a fair and objective decision on procedural issues. We also note that there is no requirement under the CMA Rules for the Procedural Officer to be an independent body.

2.93 We have decided (in line with the approach taken by the CMA in Competition Act investigations) that it is appropriate for the Procedural Officer to deal with complaints relating to the following issues in all investigations covered by the Guidelines and the Procedures:

- deadlines for parties to respond to information requests, submit documents or provide representations;
- requests for redaction of confidential information;
- requests for disclosure or non-disclosure of certain documents or information on Ofcom's case file;
- issues relating to the process for oral hearings; and
- other significant procedural issues that may arise during the course of an investigation.

2.94 We do not consider that the remit of the Procedural Officer should extend to procedural issues arising before Ofcom has decided whether to open an investigation. Prior to opening an investigation, Ofcom will be carrying out its initial assessment as to whether it is appropriate to open an investigation. We therefore consider it to be unlikely that any significant procedural issues would arise at this stage. We also note that for Competition Act investigations, the CMA Rules provide that the Procedural Officer's remit is to deal with complaints about procedures followed during the course of an investigation, and that the CMA does not provide in its guidance that the Procedural Officer will deal with complaints before an investigation is opened.

2.95 Procedural issues in the context of settlement should be raised with the case supervisor in the first instance. If this does not resolve the complaint, it remains open for a significant procedural matter to be referred to the Procedural Officer. However, depending on the nature of the complaint and time taken to resolve it, this may lead Ofcom to reassess whether or not the case remains appropriate for settlement.

2.96 We also note Royal Mail's comments regarding the additional detail it would like to see in the guidance on the process for complaints to be handled by the Procedural Officer. As regards the opportunity to make oral representations, we have updated our guidance to clarify that the applicant and the case team will be given the opportunity to make oral representations by telephone or at a meeting, consistent with the CMA's approach in Competition Act cases. Having also considered Royal Mail's other comments, we have concluded that the current process is fair and that our existing guidance is sufficiently clear and transparent.[49]

Decision making

Summary of comments

2.97 A number of respondents[50] supported our proposal to have one single person acting as decision maker for decisions in regulatory investigations up to the provisional breach notification on the basis that this would help expedite cases.

2.98 Some respondents[51] supported our proposal to have a single member of Ofcom's executive taking the final decision in a regulatory investigation. TalkTalk considered that this change would reduce the burden on senior resources within Ofcom, and should help to expedite cases.

2.99 However, most respondents[52] disagreed with this proposal, and considered that there should normally be at least two persons taking the final decision in regulatory investigations, in line with Ofcom's current practice, with some arguing there should be three persons. Ashurst, BT, the ERG and Verastar considered that a second decision maker would bring a level of rigour and quality control that no single decision maker could bring, and the ERG also noted that the CMA, FCA and Ofgem all have an external panel with three decision makers. BT and Royal Mail suggested that Ofcom should follow the CMA's practice in Competition Act cases (and that of other concurrent regulators) and should have at least three people acting as the final decision maker in regulatory investigations.

2.100 Respondents did not object to our proposal to have one single person to decide whether to open a Competition Act investigation and whether to issue a statement of objections, with the CLLS agreeing it was appropriate for this person to be a member of Ofcom's executive with Board-delegated authority.

2.101 Some respondents[53] did not agree with Ofcom's proposal to have two individuals taking decisions in Competition Act investigations after the issue of a statement of

[49] See Section 9 of the Regulatory Guidelines, Section 7 of the Competition Act Guidelines and Section 6 of the Procedures

[50] CCP/ACOD, the ERG, TalkTalk and Which?

[51] CCP/ACOD, TalkTalk and Which?

[52] Ashurst, BT, the ERG, Royal Mail, Verastar and Vodafone

[53] Ashurst, BT, CLLS and Royal Mail

objections, and suggested that Ofcom should have three final decision makers in line with CMA's practice and that of other regulators.[54] Royal Mail considered this represented best practice, and both Royal Mail and Ashurst considered it avoided a potentially split decision.

2.102 Ashurst was concerned that final decision makers would be full time Ofcom personnel who would be heavily involved in, and well informed about, Ofcom's Competition Act enforcement work. CLLS agreed that it was appropriate for the final decision makers to be members of Ofcom's executive with board-delegated authority. However, CLLS said that Ofcom should consider moving towards the CMA's practice, and that of other regulators,[55] in appointing two of the three final decision makers from an external panel.

2.103 Ashurst, CLLS and Royal Mail considered that one of the final decision makers should be legally qualified, in line with the CMA's practice.

2.104 Some respondents[56] said that there needed to be internal scrutiny on decision making in investigations from outside the case team and suggested that internal checks and balances, in line with those set out the CMA Guidance, should be applied to Ofcom's investigations. Royal Mail also considered that all infringement decisions should be ratified by the Ofcom Board to ensure the right level of scrutiny.

Ofcom's decision

2.105 As explained in paragraph 1.3 above, Ofcom is bound by the CMA Rules, which set out certain procedural requirements we must follow when conducting Competition Act investigations. The CMA Rules provide that in Competition Act investigations the final decision maker must be at least two persons who have not previously been involved in the investigation. We consider that our proposals in the draft Competition Act Guidelines for two final decision makers will provide for a robust and fair decision making process, in line with the statutory requirements. However, we note that the CMA has three final decision makers, and in light of the responses put to us, we are content to reflect the CMA's practice in this area. We have therefore decided that final decisions in Competition Act investigations will be taken by three senior members of Ofcom's executive[57] with Board-delegated authority, and have set this out in the Competition Act Guidelines.

2.106 Our regulatory investigations differ in many respects in their nature and complexity to Competition Act investigations. The CMA Rules only apply to Ofcom's Competition Act investigations, and we have discretion to develop and adopt appropriate procedures for our regulatory investigations. In exercising that discretion, we have had regard to our objectives of ensuring fair, transparent, timely and efficient investigations. We have decided that it is appropriate to appoint one single person to act as the final decision maker in regulatory investigations. While we note that other sectoral regulators have chosen to adopt different models for their enforcement powers, including panels of more than two individuals, we consider that the process we have adopted is fair and will result in robust decisions in regulatory investigations.

[54] For example, Ashurst noted that the CMA, the Civil Aviation Authority (CAA), the FCA and the Payment Systems Regulator (PRS) have three-person decision making panels.

[55] CLLS referred to the FCA

[56] Ashurst, Baker & McKenzie, CLLS and Royal Mail

[57] Ashurst asked Ofcom to explain what is meant by "Ofcom's executive" for these purposes. These persons will be senior Ofcom employees who have Board-delegated authority to make decisions in the relevant investigations.

We consider that adopting a model under which there were two or more final decision makers in each regulatory investigation (whether as part of an external panel or comprised of Ofcom executives) would be unduly resource intensive, risks a less timely process and is unlikely to result in better decisions overall.

2.107 Final decision makers will have Board-delegated authority and be sufficiently senior and experienced to take an appropriate view on the case. They will continue to have available to them specialist legal advisers and other specialist advisers (such as technical experts or economists) and will take the final decision in light of the evidence and having taken account of any written or oral representations.

2.108 We consider that, taken as a whole, the process we will follow will involve appropriate checks and balances and will ensure that the final outcome is reached fairly and independently in light of the evidence. In particular, we consider that having a different final decision maker (or decision makers in Competition Act investigations), who has not been involved in the investigation or in the preparation of the provisional breach notification, will act as an appropriate check against the risk of confirmation bias and ensure that the final decision is made objectively.

Setting out the provisional penalty amount in the provisional breach notification

Summary of comments

2.109 Some respondents[58] agreed with Ofcom's proposal, in regulatory investigations, to include a provisional penalty within a provisional breach notification, on the basis that this will reduce the administrative burden on Ofcom and enables the investigative timescale to be shortened, provided the subject of the investigation is given sufficient time to respond to all aspects.

Ofcom's decision

2.110 We have decided to implement our proposal to set out a provisional penalty amount in our provisional breach notification in regulatory cases, even where we are not required to do this by statute (for example in persistent misuse cases under sections 128 to 130 of the Communications Act, or in investigations into breaches of postal conditions).

Providing access to documents relied on in the provisional breach notification/statement of objections

Summary of comments

2.111 Some respondents[59] expressed support for Ofcom's proposals to no longer provide subjects with a hard copy version of the documents we have relied on in the provisional breach notification in favour of an electronic version, and providing subjects with a schedule of their own documents.[60]

2.112 The ERG and Royal Mail argued that certain clarifications were needed to our guidance as to what evidence we would be providing access to. These respondents

[58] Royal Mail and TalkTalk
[59] The ERG and TalkTalk
[60] The ERG suggested, however, that we should confirm the receiving party consents to this.

queried whether we would be providing access only to directly relevant evidence and not extraneous or irrelevant material (which the ERG said would increase the burden on subjects of investigations to understand the case against them). They also queried whether we would be providing the subject access to all evidence in the file, including evidence which might undermine Ofcom's case (which Royal Mail said would be consistent with Ofgem's approach).

2.113 Royal Mail also said that the Competition Act Guidelines should contain more detail on the access to file process, or alternatively we should confirm that we would follow the CMA Guidelines.

Ofcom's decision

2.114 We have decided to implement our proposal to provide copies of or access to the relevant documents in electronic form (for example, by providing access to a secure data transfer system or by email) wherever possible and appropriate, rather than in hard copy form by default. We will inform the subject of the investigation in advance of our intention to provide a copy of the documents in electronic form and the proposed arrangements for doing so in order to ensure that this will be practicable in the circumstances. If the subject indicates that it does not wish to receive the documents in electronic form and would prefer a hard copy, we would provide these in hard copy form instead. However, we anticipate that in most cases providing the documents in electronic form will be more efficient for both Ofcom and those we investigate.

2.115 We have decided to clarify that, in regulatory investigations, where we have relied upon evidence provided to us by the subject itself, we may list the relevant documents in a schedule (so that it is easy for the subject to cross-refer to its own copies) rather than providing copies of such documents. We note the ERG's concerns but we consider that this exercise should not increase the burden on subjects of investigations to understand the case against them. We will continue to refer in the provisional breach notification itself to the evidence that we have relied on and taken into account in reaching our provisional view, and therefore it should continue to be clear to the subject what evidence we have taken into account and how.

2.116 We note Royal Mail's suggestion that the Regulatory Guidelines should expressly say that we will also provide copies of any evidence which undermines our case. We have clarified in the Regulatory Guidelines and the Procedures that we will provide copies of, or access to, the evidence that we have considered during the course of the investigation and that we have taken into account in reaching our provisional view, excluding any internal Ofcom documents or any routine administrative documents (for example routine correspondence).

2.117 In relation to Royal Mail's suggestions on the access to file process in Competition Act investigations, Ofcom is required under the CMA Rules to provide access to all documents on its file save for any confidential information contained in those documents, and internal documents.[61] Our guidance on access to file in our Competition Act Guidelines[62] is consistent with the relevant statutory provisions and we consider it is sufficiently clear to allow stakeholders to understand the process that we will follow.

[61] CMA Rules, Rule 6(2)
[62] Paragraphs 4.11-4.13 of the Competition Act Guidelines

2.118 Access to file will usually be given at the same time as we issue a statement of objections. However, we recognise that there may be circumstances in which this may not be possible, for example, in investigations involving more than one party or where the documents on Ofcom's file contain large amounts of confidential information relating to a third party. In these circumstances, Ofcom considers it may be appropriate, in the interests of transparency and clarity for the subject of the investigation, not to delay issuing the statement of objections until the file is ready for disclosure, and have therefore decided to implement our proposals. We note that in these circumstances, the deadline for submitting representations would not start to run until access to file has been granted so as to ensure fairness to the subject.

Making written representations

Summary of comments

2.119 There was some support for our proposal that we would normally give at least a four-week period for representations in regulatory investigations, with longer periods for more complex cases. However, some respondents[63] considered that this would only be appropriate in the simplest of cases and/or that more guidance should be provided on the factors Ofcom would consider in deciding whether the case is complex and warrants a longer period for representations. For example, Royal Mail considered that Ofcom should provide more transparency by setting out in the Guidelines indicative timetables for responding to a provisional breach notification or statement of objections (in line with CMA, FCA and Ofgem guidance[64]).

Ofcom's decision

2.120 In our Consultation, we explained that we proposed to clarify in the Regulatory Guidelines that we will normally give a period of at least four weeks (20 working days) for the subject of the investigation to make written representations, and longer in more complex cases. We remain of the view that this is appropriate. In line with the CMA's practice, we have also set out in the Competition Act Guidelines that we will normally give a period of at least 40 working days for the subject of the investigation to make written representations on the statement of objections.

2.121 We do not consider that it is helpful to seek to provide guidance on an upper limit for how long may be necessary for written representations in a more complex regulatory investigation or in Competition Act investigations, as this will depend on the circumstances of the case, taking account of the need to progress investigations in a timely manner while ensuring the subject of the investigation has sufficient time to respond. We therefore consider this should be assessed on a case-by-case basis in light of what is fair and appropriate in the particular circumstances.

[63] The ERG, npower and Royal Mail
[64] Royal Mail referred to the fact that the CMA Competition Act guidance refers to a period of at least 40 working days and no more than 12 weeks, the FCA refers to 8-12 weeks for responding to an SO and Ofgem refers to 28 days to respond to a Statement of Case in regulatory investigations.

Oral hearings

Summary of comments

2.122 A number of respondents[65] said they supported our proposal to clarify that we would offer an oral hearing in regulatory investigations where we were not proposing to impose a financial penalty, as well as those in which we would do so. However, some respondents[66] said that more detail should be included on the conduct of oral hearings – for example, as to who would attend the hearing, when the oral hearing would take place and whether subjects would have the opportunity to comment on the transcript.

2.123 We received comments from Royal Mail and BT raising concerns about the final decision maker chairing the oral hearing in regulatory investigations.

2.124 The ERG suggested that it should be clarified in the Regulatory Guidelines that the oral hearing would not take place until after the deadline for written representations is received.

Ofcom's decision

2.125 The oral hearing provides the subject with an opportunity to highlight directly to the final decision maker(s) issues of particular importance to its case and/or to clarify the detail set out in its written representations. The oral hearing will take place after we have had sufficient time to consider the subject's written representations. It will therefore usually take place 10 to 20 working days after the deadline for written representations. We have updated the Guidelines and the Procedures to clarify this.

2.126 We remain of the view that it is appropriate for the final decision maker to chair the oral hearing in regulatory investigations for the reasons explained at paragraph 2.92 above. In relation to Competition Act investigations, we have clarified that the final decision makers will attend the oral hearing, which will be chaired by the Procedural Officer as required under the CMA Rules.

2.127 We note Royal Mail's suggestion that we should clarify, in line with the CMA's practice, who else would attend the oral hearing from Ofcom's side. As we proposed in the Consultation, and as set out in the Guidelines and the Procedures, the case supervisor and members of the case team will usually be present at the hearing, and may comment during the hearing. Other personnel from Ofcom may attend as appropriate, for example, legal advisers and/or economic or technical experts, depending on the circumstances of the case. The subject will normally be advised of the attendees ahead of the hearing.

2.128 In terms of the ERG's concern about the limits we might place on attendees on behalf of the subject of the investigation, we recognise that the subject may wish to bring a number of different advisers, depending on the circumstances of the case (for example legal advisers, economic or other technical advisers), and would not intend to impose unreasonable limits on the number of attendees. We will typically discuss in advance with the subject who they are expecting to bring and expect to deal with any concerns that arise on a case-by-case basis.

[65] The ERG, Royal Mail and TalkTalk

[66] The ERG and Royal Mail, and Baker & McKenzie and CLLS in relation to Competition Act investigations specifically

2.129 Ofcom will agree an agenda with the subject in advance of the hearing taking place, 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. We have clarified these points in the Guidelines and the Procedures.

2.130 A transcript of the hearing will be taken and provided to the subject of the investigation, as explained in the Guidelines and the Procedures. We do not consider that it is necessary to 'agree' the transcript with the subject of the investigation, however we will consider comments on the factual accuracy of the transcript. In regulatory investigations, we do not consider that it will normally be necessary for the subject to comment on confidentiality in the transcript, as it will not normally be shared with any third parties and will not be published. However, we would ask the subject for representations on confidentiality in the event that we considered this was necessary in the circumstances of the case – for example, to the extent multiple parties are given access to file in a Competition Act investigation, we will ask the subject for representations on the confidentiality of the transcript, and have explained this in the Competition Act Guidelines.

Providing the subject an opportunity to comment on further evidence

Summary of comments

2.131 Some respondents suggested that Ofcom should give additional guidance on the approach Ofcom would take in allowing the subject of the investigation the opportunity to comment on new evidence which comes to Ofcom's attention following the provisional breach notification/statement of objections. For example, the ERG and Royal Mail suggested that, in regulatory investigations, Ofcom should put any new evidence to the subject in a letter of facts in line with the CMA's procedure in Competition Act cases.[67] Ashurst and CLLS considered that, in Competition Act investigations, Ofcom should (not "may") put any new evidence that we wish to rely on to the subject of the investigation in a letter of facts.

Ofcom's decision

2.132 We have clarified in our Competition Act Guidelines that, in accordance with our on-going obligation to provide access to file to the subject of the investigation, where we acquire new evidence which supports the case contained in the statement of objections, and we propose to rely on it to establish that an infringement has been committed, we will put this evidence to the subject and provide it with the opportunity to respond.

2.133 We proposed to adopt a consistent approach to the CMA in issuing a supplementary statement of objections. We explained that we will normally do so where new information or evidence comes to Ofcom's attention after we have issued the statement of objections which leads us to consider making a material change to the nature of the proposed infringement (such as evidence of a different or more serious infringement). We note Ashurst's suggestion that we should clarify that a supplementary statement of objections might also be required where there is no change in the nature of the infringement but a change in Ofcom's reasoning, and we have amended the Competition Act Guidelines to clarify that we may also issue a

[67] CMA Guidance, paragraph 12.27

supplementary statement of objections where there is a material change in our reasoning for proposing to find a breach of competition law.

2.134 In respect of regulatory investigations, if new information or evidence comes 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. Where such new information or evidence leads us to consider making a material change to the nature of the proposed contravention findings[68] (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 will have the opportunity to comment on the new provisional breach notification as described above, before we proceed to reach a final decision.

Draft penalty statement in Competition Act investigations

Summary of comments

2.135 In Competition Act investigations, CLLS considered that Ofcom should provide a detailed calculation of the provisional penalty in its draft penalty statement. CLLS considered the Competition Act Guidelines should make it clear that Ofcom will set out key aspects of the calculation in accordance with the calculation method in the CMA's Penalty Guidance.[69]

Ofcom's decision

2.136 In Competition Act investigations, we are required by the CMA Rules to provide the subject of the investigation with a notice of proposed penalty.[70] In accordance with these requirements, we consider it appropriate to implement our proposal to issue a draft penalty statement after the statement of objections (or supplementary statement of objections) in cases where we are minded to find an infringement and impose a financial penalty. We are required by statute[71] to have regard to the CMA's Penalty Guidance when setting the penalty amount. We will therefore calculate any provisional penalty amount in accordance with this guidance and set out our reasons in the draft penalty statement for reaching our provisional penalty amount, and have retained wording in this regard in the Competition Act Guidelines.

Closing a case without making a breach finding

Summary of comments

2.137 The ERG supported our proposal that, in regulatory investigations, we would only provide parties an opportunity to comment on a proposed decision to close a case without making a final contravention decision, where necessary for reasons for fairness. However, Royal Mail said that they did not think that complainants should be able to provide more information at this stage at all, as complainants should be required to provide all evidence in their possession when making a complaint.

[68] Such as evidence of a different or more serious contravention or a material change in our reasoning for proposing to find a contravention

[69] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf

[70] CMA Rules, Rule 11

[71] Competition Act, section 38(8)

Ofcom's decision

2.138 We remain of the view that, in some cases, it may be appropriate for fairness reasons to provide parties with the opportunity to comment on a proposed decision to close a case without issuing a final contravention decision. An example might be where the investigation has been initiated following a complaint, and we consider that the complainant may have further information relevant to the proposed decision. We expect to assess this on a case-by-case basis.

Settlement

Guidance on a settlement procedure

Summary of comments

2.139 Most respondents[72] welcomed Ofcom providing clarity in the Regulatory Guidelines about the approach we would adopt when settling a regulatory investigation. Baker & McKenzie and CLLS welcomed the inclusion of guidance on settlement in Competition Act investigations.

Ofcom's decision

2.140 We have decided to implement our proposals to provide guidance on the settlement procedure we will follow in regulatory and Competition Act investigations. Our specific guidance on this process is set out in Section 5 of the Regulatory Guidelines, of the Competition Act Guidelines and of the Procedures.

Requirements for settlement

Summary of comments

2.141 There were a number of comments on our proposed requirements for settlement. In particular:

- Some respondents[73] disagreed that admitting liability should be a requirement in order to reach a settlement. The ERG and Vodafone noted our proposed approach was different to the approach taken by other regulators (for example the FCA). The ERG also highlighted the risk of follow on damages claims. Verastar said it was unclear why the subject could not settle by making admissions on only part of the alleged breaches.

- Royal Mail said that Ofcom should acknowledge in the Regulatory Guidelines that the subject of an investigation may not be able to commit to refrain from engaging in the same/similar contraventions, as compliance with some regulatory obligations may be beyond its control.

- The ERG disagreed with Ofcom's proposal that a subject should not benefit from the settlement discount if it appeals the decision. They said that it may be appropriate to settle (based on agreeing on the facts) but dispute the contravention as a matter of law and therefore appeal on the point of law, and questioned the basis on which Ofcom could 're open' a settlement decision and

[72] BT, the ERG, Royal Mail, Verastar and Vodafone

[73] The ERG, Royal Mail and Verastar

impose a higher penalty in the event of an appeal. They said that in any event an unsuccessful appellant would face paying Ofcom's costs.

Ofcom's decision

2.142 We remain of the view that it is important that a party wishing to settle is prepared to admit to the contravention, which should reflect Ofcom's position on the nature of the contraventions we are minded to find and the appropriate level of penalty. We also note that this is consistent with the CMA's practice in Competition Act investigations, and which we also consider is appropriate for the purposes of settling Competition Act investigations which we undertake as a concurrent regulator.

2.143 We note Verastar's suggestion that we should allow settlement on the basis of an admission to only part of the contraventions we are investigating. We think that this would be unlikely to meet the objective of securing administrative savings, as we would still continue to investigate the other potential contraventions and therefore would continue to incur the costs of doing so.

2.144 We note the ERG's concern that an admission of liability could give rise to the risk of follow-on damages claims. Under section 104 of the Communications Act, it is possible for a person affected by a contravention of a relevant condition or requirement to seek to bring a claim for loss or damage sustained by them as a consequence of the contravention. Such a claim can only be brought with Ofcom's permission. We think it is important that the subject of an investigation who wishes to settle a case is prepared to take steps to remedy the consequences of a contravention, which may involve, if relevant, compensating affected customers for loss and damage.[74] We therefore expect that the risk of civil damages actions under section 104 would be limited in practice. We also note that this risk is also present where Competition Act cases are settled, and that successful settlements have been reached in such cases.

2.145 We expect those we regulate to comply with their regulatory obligations at all times, and where a contravention arises in connection with a third party acting on behalf of a regulated business, we expect that business to take prompt action to bring the contravention to an end and bring itself into compliance. We therefore consider it remains appropriate for this to be a requirement for settlement.

2.146 We note the ERG's argument that there may be cases where it would be appropriate for a settlement to be reached on the basis of agreement on the facts, but for the subject of the investigation to bring an appeal on the basis of a point of law. As noted above, we consider it important for the subject of the investigation to be prepared to admit to the contravention for the purposes of settlement. Should the subject of the investigation consider that it is not in breach of the relevant requirement on the basis of a point of law, which it considers should be clarified on appeal, it is likely that the case concerned would not be suitable for settlement.

2.147 We also note the ERG's comments regarding the proposed requirement for settling a regulatory case that the subject acknowledges it will no longer benefit from the settlement discount in the event that it appeals against the decision. In practice, we expect it to be very rare that a subject would decide to appeal against the final enforcement decision following settlement – in particular since the subject must be

[74] See paragraph 5.6 of the Regulatory Guidelines which explains that the settlement requirements include taking any steps required to comply with relevant regulatory requirements and to remedy the consequences of the contravention, if relevant.

prepared to make an admission that it has breached the relevant regulatory requirement(s), as discussed above. If they did appeal, the settlement discount may be a relevant factor for Ofcom to bring to the Tribunal's attention.

How Ofcom decides whether a case is suitable for settlement

Summary of comments

2.148 Royal Mail considered that it would be useful to clarify the types of cases which would be suitable for settlement.

Ofcom's decision

2.149 In terms of how we will decide whether a case is suitable for settlement, as explained in the Regulatory Guidelines and the Procedures, we will have regard to our statutory duties. We also explain in the Guidelines and the Procedures that we will also consider other factors such as the likely procedural efficiencies and resource savings that can be achieved through settlement.[75] In addition, 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 of the investigation during the course of the investigation (for example, where they have been obstructive or failing to co-operate).

Nature of the settlement process

Summary of comments

2.150 The ERG noted that the draft Guidelines stated that settlement would not be a negotiation. They suggested that Ofcom should reconsider this approach, as it would leave little scope for discussion and could have a chilling effect on settlements.

Ofcom's decision

2.151 We note the concern that stakeholders may be more reluctant to consider settlement if there is no scope for negotiation over the nature of the contravention that Ofcom is minded to find, or the level of penalty. However, we remain of the view that it would not be appropriate to seek to enter into a negotiation with the subject of the investigation about the contraventions that Ofcom may be prepared to find. We consider that it is important to be clear that expressing a willingness to consider settlement should not be used by subjects of our investigations as a way to seek to persuade Ofcom to find a lesser contravention (when the evidence indicates otherwise), or simply as an opportunity to make early written or oral submissions to us and seek to influence the outcome of the case in that way. We therefore consider that it is appropriate for the settlement process to be as structured as possible and to provide clarity to subjects about what it would and would not involve.

2.152 We consider that there should be appropriate incentives on stakeholders to consider settlement, in that Ofcom will impose a reduced penalty in light of the resource savings involved in following a streamlined administrative procedure. In addition, we

[75] 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.

consider that settlement is likely to result in resource savings for the subject as a result of the more streamlined and expedited procedure followed.

Discounts

Summary of comments

2.153 A number of respondents[76] expressed concern that there was a lack of clarity about how Ofcom would apply the discount structure proposed for regulatory investigations in practice. In particular they considered there was a lack of clarity as to when Ofcom would be likely to provide a discount below the maximum level in the Guidelines and the Procedures, and how subjects would be able to assess the value of the discount offered.

2.154 Royal Mail also said that Ofcom should clarify whether, in giving the subject notice that Ofcom is minded to end the settlement discussions or reduce the discount, it would give the subject the opportunity to remedy the issue and continue with discussions and retain the maximum discount.

Ofcom's decision

2.155 As explained in the Regulatory Guidelines and the Procedures, for the purposes of the settlement process, Ofcom will provide the subject of the investigation with an indication of the provisional level of penalty which Ofcom is minded to impose in the relevant case, including the settlement discount.[77]

2.156 The level of the discount will be considered on a case-by-case basis and will depend on the level of resource savings Ofcom considers may be achieved if settlement were agreed at the relevant stage of the investigation. As explained in the Regulatory Guidelines and the Procedures, the settlement discount is applied after any other relevant mitigating factors (such as any other forms of co-operation) have already been taken into account in determining the appropriate level of the penalty.

2.157 We explain that this will normally be:

- 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.

[76] BT, the ERG, npower, Royal Mail, Verastar and a confidential response

[77] We would also do this in a Competition Act investigation, as set out in the Competition Act Guidelines, however we are proposing a different discount structure for settlement in those cases, in line with the CMA's practice. Namely up to 20% where a successful settlement process is commenced before the statement of objections is issued and up to 10% where a successful settlement process is commenced after the statement of objections is issued. See paragraph 5.11 of the Competition Act Guidelines.

2.158 We have made some clarificatory changes to the wording in the Guidelines and the Procedures relating to the way we will approach discounts in order to make our position clear. We had proposed that the maximum discount available at the relevant stage in the process would depend on the point at which settlement discussions were "successfully concluded". However, based on our experience of settlement to date, we consider that the key factor in setting an upper limit on the likely amount of the discount is the point in time when the settlement process is commenced – as the earlier the process is begun the greater the possible resource savings that could be achieved.

2.159 We acknowledge for example, as discussed further below, that where the settlement process is commenced prior to the issue of the provisional breach notification (or statement of objections in Competition Act investigations), the process will not be concluded until after the provisional breach notification/statement of objections has been issued (as that is the point in time at which we expect the subject to provide its written confirmation of its admissions and acceptance of the settlement requirements). However, in such cases, it would still be possible for the subject to obtain the maximum discount of up to 30% (or 20% in Competition Act investigations) provided that we considered that we had achieved sufficient resource savings from the subject providing an early indication of its willingness to consider settlement and its agreement in principle to settle on the basis of the position set out in the statement of facts.

2.160 We also note, as explained in the Guidelines and the Procedures, that where we are concerned that the process is not progressing as swiftly as possible due to delays or inefficiencies caused by the subject, 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 will give the subject notice that we are minded to do so at that point. In the event that the settlement process is unsuccessful at an earlier stage (for example, where we have brought the process to an end due to the subject's lack of co-operation or where the subject is not prepared to agree to settle on the basis of the position set out in the statement of facts), 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 will then apply.

2.161 We intend to update our Penalty Guidelines in order to reflect this approach in regulatory investigations. We have published at Annex 2 for information the wording we intend to include in the Penalty Guidelines, which is consistent with the Regulatory Guidelines (and the Procedures). We intend to publish the revised Penalty Guidelines once we have consulted the Secretary of State in accordance with the requirements under section 392(4) and (5) of the Communications Act.

2.162 We will normally indicate the level of settlement discount applied in the published final enforcement decision, which will provide a level of transparency on how the settlement discount has been applied in particular cases.

Decision making in a settlement case

Summary of comments

2.163 Which? did not agree with Ofcom's proposal that the person responsible for overseeing a regulatory investigation and for deciding to issue a provisional breach

notification would also take the decision to issue the final breach notification following settlement.

2.164 Royal Mail and Which? considered that, in line with the process in Competition Act investigations, Ofcom should ensure that in regulatory investigations more than one person makes a decision in relation to settlement (including whether to engage in settlement discussions) or that a single decision maker is at least required to get the approval of at least two other senior people.

Ofcom's decision

2.165 We remain of the view that in a settlement case it is appropriate for the person responsible for overseeing the investigation and for deciding whether to issue a provisional breach decision to act as the final decision maker in a settlement case. We consider that this is appropriate in order to achieve our objective of obtaining resource savings through the administrative process.

2.166 While we note that it is a requirement under the CMA Rules that a decision to settle in a Competition Act investigation is approved by two other persons, we do not consider this is necessary in regulatory investigations and we consider that the process we have adopted is fair and will result in robust decisions. The final decision maker in a settlement case will have Board-delegated authority and be sufficiently senior and experienced to take an appropriate view on the case. They will continue to have available to them legal advisers and other specialist advisers (such as technical experts or economists) and will take the final decision in light of the evidence.

Settlement prior to issue of a provisional breach notification/statement of objections

Summary of comments

2.167 A number of respondents[78] considered that it was not clear what the basis for settlement would be pre-provisional breach notification. BT considered that in regulatory investigations there should be a presumption that Ofcom will consider settlement at the earliest possible stage and should inform the parties as soon as we think settlement may be possible.

2.168 Baker & McKenzie and CLLS suggested (in relation to the draft Competition Act Guidelines) that where a party is not willing to agree to settle on the basis of the statement of facts, settlement should not automatically be ruled out. These respondents, and Ashurst, said that the subject should have the right to make representations on the statement of facts, and Ofcom should consider whether to continue with settlement on a case-by-case basis in light of those representations.

2.169 A number of respondents[79] said that Ofcom should clarify in the Competition Act Guidelines what a streamlined access to the file is likely to involve, and that the subject will have access to the key documents that Ofcom is relying on as part of the access to file process. Royal Mail also said that it should be made clear that subjects will have access to file during the settlement process in regulatory investigations.

[78] BT, the ERG and Verastar
[79] Ashurst, Baker & McKenzie, CLLS and Royal Mail

Ofcom's decision

2.170 As indicated in the Guidelines and the Procedures, we expect a subject that is in principle interested in settling to contact the case leader and/or case supervisor to inform us that it is willing to consider settling. That will enable us to take a view on whether we have reached a stage in our investigation where we think it is appropriate to consider entering into a settlement process.

2.171 In order to commence a settlement process, we will need to have reached a stage in our analysis where we are able to come to a provisional view on the nature of the contraventions and an appropriate level of penalty and can engage meaningfully with the subject about our position.

2.172 If we have not yet issued our provisional breach notification/statement of objections, we will normally provide details of our initial thinking on the case in general terms to the subject of the investigation where we consider this will be of assistance in order for the subject and Ofcom to decide whether to engage in a settlement process. 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 were relying. We will also provide an indication of the provisional level of penalty that Ofcom would be minded to impose on that basis, including the settlement discount.

2.173 Representations on manifest factual inaccuracies may be made in response to the statement of facts, and we have clarified this in the Guidelines and the Procedures. This is consistent with the approach adopted by the CMA and Ofgem, and the FCA in Competition Act investigations.

2.174 We have explained that 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 that stage. Instead we are likely to consider it to be more appropriate to proceed to issue the provisional breach notification/statement of objections. This is because we consider that accepting written or oral submissions on the substance of the case[80] as part of the settlement process could risk resulting in protracted correspondence and/or discussions between Ofcom and the subject. This could lead to additional delay in concluding an investigation in circumstances where the settlement process is not ultimately successful, which would undermine the objective of streamlining and expediting the administrative process. Therefore, to the extent that the subject of the investigation wishes to make representations to Ofcom on the substance of the statement of facts, beyond highlighting manifest factual inaccuracies, it is likely to be more appropriate for it to do so as part of the usual process after Ofcom has issued its provisional breach notification/statement of objections, so that Ofcom can take those representations into account in the usual way.

2.175 We expect to highlight in the statement of facts the key evidence we are relying on in support of our position on the nature of the contravention in sufficient detail for the subject of the investigation to understand the case against it, and similarly in respect of the level of penalty. We will also provide access to key documents we are relying on if appropriate for reasons of fairness and transparency, and have clarified this in the Guidelines and the Procedures.

[80] Beyond the identification of manifest factual inaccuracies

2.176 In Competition Act investigations, we explain we will require the subject of the investigation to accept a streamlined administrative process, in accordance with the requirements of the CMA Rules.[81] When deciding whether a case is suitable for settlement, Ofcom will have regard to the procedural efficiencies and resource savings which can be achieved through settlement. Access to file is generally a resource intensive exercise and will vary depending on the volume, nature and complexity of the evidence on the file, and the nature of the investigation itself. We therefore consider it is appropriate to decide the parameters for access to file during settlement on a case-by-case basis. However, as noted above, we are clear that we expect to provide the subject with access to the key documents we are relying on as appropriate for reasons or fairness and transparency.

Timing/timetable for settlement cases

Summary of comments

2.177 Royal Mail said that Ofcom should set out a timetable for settling the case (in line with the CMA's practice) and a minimum (reasonable) period that the subject of the investigation will have to confirm that it is willing to settle the case.

2.178 Royal Mail also considered that the Guidelines should confirm that Ofcom will delay publishing a provisional decision while discussions are on-going, and that the Guidelines should clarify that the subject of the investigation should not be penalised if discussions take longer through no fault of its own (such as due to resourcing issues within Ofcom).

Ofcom's decision

2.179 We have decided that it is appropriate to set a timeframe for the subject to confirm whether it is prepared to settle on a case-by-case basis, having regard to possible resource savings Ofcom considers it may achieve at that stage of the process.

2.180 We note Royal Mail's suggestion that we should delay issuing a provisional breach decision pending the outcome of the settlement process. As noted above, in the event the subject of the investigation is not prepared to agree to a settlement on the basis of the statement of facts within the timeframe set by Ofcom (which will be set on a case-by-case basis), it is unlikely to be appropriate to pursue settlement at that stage and we will normally proceed to issue the provisional breach notification (or statement of objections in Competition Act investigations).

2.181 We would also be concerned about delaying the usual course of our investigative process, as one of the key objectives of settlement is to save resources and streamline the administrative process. We have therefore decided not to include a statement indicating that we would delay issuing a provisional breach notification (or statement of objections) pending the outcome of the settlement process in the Guidelines or the Procedures.

[81] CMA Rules, Rule 9(1)(a)

Successful conclusion of the settlement process

Summary of comments

2.182 Royal Mail said that Ofcom should clarify that the settling party will receive a draft of the final enforcement decision in all cases or specify circumstances where this may not be appropriate.

Ofcom's decision

2.183 In a settlement case, we will normally publish a non-confidential version of our final decision once we have finalised the relevant redactions of any confidential information, in line with our usual process.

2.184 We note Royal Mail's view that we should clarify that the settling party will receive a draft of the final enforcement decision in all circumstances, or specify the circumstances where this may not be appropriate. Following our experience of settlement in recent cases, we have decided to clarify in the Guidelines and the Procedures the process we expect to follow when concluding a successful settlement process. We have clarified that 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 (or statement of objections), this will normally be in the form of that provisional decision, as we normally expect in such cases the final enforcement decision would be in the same terms as the provisional decision (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 at this point.

- Where settlement is agreed after the subject has made substantive written representations on the provisional breach notification (or statement of objections), 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 we 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 therefore expect the subject to provide its written confirmation of its admissions and acceptance of the settlement requirements at this point.

What happens if the settlement process is unsuccessful?

Summary of comments

2.185 Royal Mail said that Ofcom should specify the circumstances in which Ofcom may withdraw from settlement discussions.

2.186 The ERG considered Ofcom's proposals are ambiguous as to how the separation of the content of settlement discussions and final decision making will work, including as to whether communications between the case team and final decision maker(s) would be documented and disclosed.[82] It considered it essential that subjects can

[82] The ERG noted this was the approach taken by the FCA

discuss settlement in a way which does not compromise their position should settlement not be reached, and should be treated as akin to 'without prejudice' discussions for the purposes of seeking to resolve or avoid litigation.

2.187 BT said that Ofcom should state in the Guidelines that, if the subject of the investigation makes oral admissions which are documented, it will not rely on such statements in the event that settlement discussions collapse.

2.188 Royal Mail said that Ofcom should change the Regulatory Guidelines to say that additional evidence provided during settlement discussions will not go onto the file, if settlement discussions break down (as per Ofgem and the FCA).

2.189 Verastar considered that, if settlement discussions fail, there should be a new decision maker going forward as it was concerned that, under the draft Guidelines, any concessions made at an early stage would not be confidential or without prejudice and so could be used in the provisional breach and/or final breach notification.

Ofcom's decision

2.190 We note the concerns raised by respondents regarding the status of oral discussions between the subject of the investigation and Ofcom about the possibility of settlement and the basis on which the subject may be prepared to settle. We will put in place appropriate procedures to ensure that, should the settlement process be unsuccessful, the final decision making process will be fair and neither the fact that settlement had been explored between Ofcom and the subject of the investigation, nor the substance of any interaction between Ofcom and the subject of the investigation regarding settlement, would influence the final outcome of an investigation.

2.191 Should the settlement process ultimately be unsuccessful, as explained in the Guidelines and Procedures, the case will revert to our usual process. This means that a final decision maker (or decision makers in Competition Act investigations) will be appointed following the issue of a provisional breach notification or statement of objections, who would not have been involved in the investigation, and would also not have been involved in the settlement discussions. The final decision maker(s) will be responsible for deciding on the final outcome of the case on the basis of the evidence in the case file and having taken account of any written or oral representations made in response to the provisional breach notification or statement of objections.

2.192 The final decision maker(s) may be aware of the fact that the possibility of settlement had been discussed between Ofcom and the subject of the investigation. However, neither the substance of any oral discussions about settlement between the subject of the investigation and Ofcom, nor any correspondence relating to, or written records of, such discussions would be disclosed to the final decision maker(s), so that the decision could be taken impartially on the basis of the relevant evidence. In addition, the subject of the investigation would not have made any formal written admissions to Ofcom on which Ofcom could or would seek to rely (whether as part of the final decision making stage or subsequently, such as on appeal). We have clarified this in the Guidelines and the Procedures.

2.193 We consider it is important to be clear, however, that should documentary evidence relevant to the subject matter of the investigation come to light during the course of the settlement process, we expect to put it on the case file and it may be taken into

account for the purposes of the final decision. Similarly, we may follow up any new issues of regulatory concern which come to light during the settlement process. We note that this is consistent with the position adopted by the CMA in settlement of Competition Act cases.[83] This is important as we could not fetter our discretion or agree not to have regard to relevant evidence or potential non-compliance as a result of engaging in the settlement process. We therefore consider that the suggestion that we should treat settlement discussions as akin to 'without prejudice' discussions is misplaced.

Publicising a settlement case

Summary of comments

2.194 BT considered that Ofcom should state in the Guidelines that it will give the subject of the investigation a copy of the press release before publication and that it should also provide the subject with the opportunity to comment on it.

2.195 Royal Mail considered that Ofcom should not publish details of unsuccessful settlement discussions in any circumstances, or at least should set out in the Guidelines the circumstances in which it may need to publish these.

2.196 Royal Mail also said that Ofcom should publish a short form final decision (as per the Commission and the CMA) in order to limit the disclosure of admissions made during the settlement process which could be relied on by third parties against the subject.

Ofcom's decision

2.197 In line with our usual practice, we intend to provide the subject of the investigation with a copy of the intended text of the CCEB update before publication on Ofcom's website (and no more than one working day before). In certain circumstances, Ofcom may decide on a case-by-case basis to share the text of the proposed media release with the subject in advance of publication for information only. However, we think it is important to be clear that the settlement process does not involve any form of negotiation about the wording of a proposed media release, and therefore we do not intend to invite comments on the proposed wording, as this is a matter for Ofcom.

2.198 We note Royal Mail's comment that, to the extent we may publish details of an unsuccessful settlement process, we should explain the circumstances in which we would expect to do so. As explained in the Guidelines and the Procedures, our standard practice will be that we would not publish the fact that a settlement process is taking place or that it has been unsuccessful. However, there may be certain exceptional cases, where we may make public statements about the fact that a settlement process is ongoing or there has been an unsuccessful settlement process, for example, in the event that this fact is put into the public domain by the subject of the investigation[84] or has been the subject of significant public speculation and we consider it to be necessary to clarify the facts of the matter.

2.199 In terms of Royal Mail's suggestion that we should produce a 'short form' final decision in settlement cases, as noted above, the final published decision will refer to the fact that settlement has been agreed and reflect the substance of the admissions

[83] See the CMA's Guidance at paragraph 14.21.

[84] However, we would normally expect that the subject would not disclose information about settlement discussions taking place or the content of those discussions or any documents disclosed during those discussions to any third parties without our prior consent.

made by the subject. We also consider that it is important in line with our statutory duties, in particular in relation to transparency and accountability, to ensure that the final enforcement decision appropriately explains the nature of the contravention we have found, our reasons for finding a contravention and for decision to impose a financial penalty, and the level of the penalty. The level of detail which is included in any final enforcement decision, including in a settlement case, will depend on the circumstances of the case, in particular the nature of the contravention at issue and the complexity of the factual background.

Taking urgent action

Summary of comments

2.200 The ERG supported our proposals relating to the processes for taking urgent action in regulatory investigations. Royal Mail also said that it welcomed the proposals to provide additional clarity in relation to taking urgent action, but it suggested that there were a number of improvements that could be made to the Guidelines and our Complaints Guidance.

2.201 Baker & McKenzie and CLLS said they would welcome more clarity on the circumstances in which Ofcom considers it would be appropriate to impose interim measures in Competition Act investigations, following the approach in the CMA Guidance.

Ofcom's decision

2.202 We note respondents' suggestions that we should provide examples of situations in which Ofcom would or would not take urgent action. Ofcom may consider taking urgent action in any circumstances where the statutory conditions for taking urgent action are met, although we also have discretion not to take urgent action even where the statutory criteria are met. In exercising this discretion, we will have regard to other relevant considerations, including, where applicable, the impact on the person who would be subject to the direction and any relevant third party interests, as well as on the interest of citizens and consumers. We will consider taking urgent action based on all the relevant circumstances of a particular case and we do not consider it would be helpful to seek to specify in any greater detail examples of when we may or may not consider it to be appropriate to do so, since each case is fact sensitive.

2.203 We note Royal Mail's comments regarding the additional clarity it considered that Ofcom should provide on making a request for urgent action and what Ofcom expected from applicants who make a request for urgent action. We consider that our Complaints Guidance provides sufficient guidance to those who are considering making a request for urgent action.[85] In particular:

- We explain that we expect anyone making a request for urgent action to come to us with a well-reasoned submission, as soon as possible after the issue or conduct has arisen, and providing as much information and evidence in support of the application as possible.

- We also explain that we normally expect applicants to submit all the information we normally expect to receive from a complaint submission as set out in Annex 1

[85] See Section 4 of the Complaints Guidance

of the Complaints Guidance, along with their request for urgent action. This includes verification by a senior member of the organisation that the information provided is correct and complete to the best of their knowledge and belief.

- We explain that that we expect applicants to assist our consideration of their request by providing timely co-operation in responding to any requests for further information.

- We clarify that if we decide to open an investigation, to the extent that we have gathered information informally, rather than using our statutory information gathering powers, we expect to follow up with statutory information requests as relevant. Again, we will assess this on a case-by-case basis.

2.204 In terms of the process we expect to follow when considering whether to take urgent action:

- As explained in the Guidelines, 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, and will give it the opportunity to make representations to Ofcom on a non-confidential version of the request.

- In relation to the Regulatory Guidelines specifically, where we are minded to take urgent action in cases covered by our Regulatory Guidelines, where time allows, we also expect to inform the operator or provider of this and provide it with an opportunity to comment – this may include written and oral representations as appropriate in the circumstances (in particular having regard to the urgency of the case).

- However, in some regulatory investigations, we may decide that we should give a direction suspending or restricting a provider's or operator's activities without first consulting the provider/operator or giving it the opportunity to comment, because there is a need to take immediate action due to the nature of the risk of serious harm, such as safety concerns. We consider that such cases are specifically envisaged under the relevant statutory framework,[86] which provide for an opportunity for representations to be made on the direction "as soon as reasonably practicable" after the direction is given (but do not require that Ofcom gives the opportunity for representations to be made prior to Ofcom deciding to give an urgent action direction). We note in this context that the threshold for taking urgent action is high, and in general we expect to use these powers rarely. We will decide what is necessary and appropriate in the circumstances on a case-by-case basis.

- In relation to the Competition Act Guidelines, although we note that in some cases there may be a need to take action as quickly as possible, we are required by the statutory regime to provide the subject with the opportunity to make representations before doing so,[87] and have therefore set this out in the Competition Act Guidelines. In this regard, we note that the statute does not specify whether such representations are written and/or oral.

[86] Section 98-99 of the Communications Act, section 99(1) and 111A-111B of the Communications Act and Schedule 7, paragraphs 8-10 of the Postal Services Act

[87] Competition Act, section 35(3)(b)

- In relation to both regulatory and Competition Act cases, we also remain of the view that, in the event that Ofcom is minded not to grant a third party request for urgent action, it will usually be appropriate to inform the applicant and the relevant provider or operator and provide them with a brief opportunity for comment and to submit any further information or evidence before making our decision. We note that this is consistent with the CMA's procedures.

- We remain of the view that it is appropriate for the decision on whether to give an urgent action direction to be taken by a senior member of Ofcom's executive with appropriate Board-delegated authority. We do not consider that it would be necessary for reasons of fairness for two individuals to be responsible for taking this decision. We also consider that if we were to adopt two individuals to act as the decision makers in such cases, this could risk undermining our ability to act quickly and would be unduly resource intensive. In respect of requests for interim measures in Competition Act cases, we also note that our approach is consistent with the approach taken by the CMA.[88] We consider that our process will provide for effective and robust decision making in such cases.

Informal resolution

Summary of comments

2.205 Some respondents[89] considered that there should be a formal 'commitments' process for resolving regulatory investigations, similar to that which applies in Competition Act investigations. Respondents[90] also suggested that we should clarify the role of assurances and the practice of accepting assurances in closing a case without issuing a final enforcement decision, and expressed concerns about Ofcom potentially publicising details of informal assurances given during our initial assessment phase.

Ofcom's decision

2.206 It is always open to, and we would strongly encourage, those we are investigating to take steps to ensure they bring themselves into compliance and remedy the consequences of a contravention (such as by improving compliance processes, remedying any systematic issues, reimbursing any affected customers or other forms of voluntary redress such as making donations to charity where affected customers cannot be individually reimbursed). Therefore, it is already open to stakeholders to provide voluntary commitments/assurances to Ofcom to change their behaviour and provide redress to those affected by it.

2.207 Ofcom may discuss with businesses which we are investigating or considering investigating the steps that could be taken to comply with the relevant obligation or remedy the consequences of a breach, or any other form of voluntary redress (for example payments to charity). We expect to take into account any such action taken (or failure to take such action) when deciding whether formal enforcement action is appropriate and whether to continue to pursue such action at each stage in an investigation.[91]

[88] CMA Guidance, paragraph 9.10

[89] The ERG and Verastar

[90] The ERG, Royal Mail and Verastar

[91] As noted in the Penalty Guidelines, this may also be relevant to our determination of the appropriate level of penalty – see paragraph 12.

2.208 In some cases, we may decide not to pursue, or not to continue to pursue, formal enforcement action on the basis of such voluntary commitments/assurances, although this will depend on all the relevant circumstances. In particular, we would need to be satisfied that there is no other or further purpose to be served by commencing or continuing with the investigation in the particular circumstances of the case, in view of the steps taken by the subject.

2.209 Ofcom may also consider it important for reasons of transparency to publicise the steps that have been taken or informal assurances which have been given, in particular where it would be in the interests of consumers to do so. We will usually inform the business concerned 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.

2.210 The commitments regime under the Competition Act is underpinned by legislation[92] and where commitments are made and accepted in accordance with the statutory requirements, they are legally binding. There is no corresponding legislative framework which would provide for a 'commitments' style process in regulatory investigations.

2.211 Therefore, although we will have regard to voluntary commitments/assurances provided to us when considering how to proceed in relation to a particular compliance issue in a regulatory case, we do not consider that this is analogous to a formal 'commitments' regime as is applicable under the Competition Act, or that we have power to put such a regime in place for regulatory investigations.

Consumer protection law enforcement

2.212 We did not receive any specific comments regarding our proposed guidance in relation to consumer protection law enforcement, other than from the ERG which said that it supported our proposed guidance on enforcement of consumer protection legislation under Part 8 of the Enterprise Act on the basis that it appeared to reflect prevailing law.

2.213 We have decided to implement our proposals relating to enforcement of consumer protection legislation, subject to some minor clarificatory changes to the drafting of the Regulatory Guidelines. Our specific guidance on the processes we will follow in such cases is set out in Section 7 of the Regulatory Guidelines.

Directions under GC20.3

Summary of comments

2.214 The ERG and BT commented on our proposed process for issuing directions under GC20.3.

2.215 The ERG said the issues relating to GC20.3 are complex, involve multiple stakeholders and do not involve wrongdoing by providers. It said they raise 'policy-like questions' that would merit a separate consultation.

2.216 BT made similar points and it too advocated a separate consultation encompassing the commercial, operational and legal impacts of imposing and withdrawing the directions. It said there are often complex commercial arrangements involved and

[92] Sections 31A to 31E of the Competition Act

that any direction will not normally be addressed to the offending party. BT contended that these points can lead to a risk of confusion and delay in resolving disputes arising out of the directions and can leave innocent third parties at risk of financial loss.

Ofcom's decision

2.217 We have considered these responses carefully. The process we proposed set out clearly the detailed process we expect to adopt. The Consultation gave stakeholders the chance to comment on it and the kinds of steps it should involve. Neither of the responses made any such specific comments.

2.218 We acknowledge that issuing a direction could have implications for the provider(s) on whom it is served. It could also affect their relationship with third parties.

2.219 However, we note that such directions are likely to be issued in the kinds of extraordinary cases in which doing so is appropriate to protect consumers against serious harm (fraud or misuse). Moreover, we envisaged that, in most of those cases, we are likely to give providers the chance to make representations before issuing a direction. In those cases, the provider would be able to comment on the commercial, operational and legal implications and Ofcom would consider those.

2.220 Only exceptionally, for example where the harm to consumers justified doing so, might we issue a direction without giving notice to affected parties, including providers.

2.221 We also take into account that setting out the sort of procedure we expect to follow, and the circumstances in which we are likely to follow it, should facilitate the ability of providers to deal with the implications of directions under GC20.3 in their interconnection contracts.

2.222 In these circumstances, we judge the interests of providers to be appropriately protected and balanced against those of consumers in being protected against serious harm. We have therefore decided to adopt our proposed process. Our guidance is set out in Section 8 of the Regulatory Guidelines.

Annex 1

List of respondents to the Consultation

A1.1 We received responses to the Consultation from:

- Ashurst LLP
- Baker & McKenzie LLP
- BT
- Communications Consumer Panel (CCP) and Advisory Committee for Older and Disabled People (ACOD)
- Competition Law Committee of the City of London Law Society (CLLS)
- Enforcement Reform Group (joint submission made by BT, KCOM, Sky, O2, Virgin Media and Vodafone and supported by the UK Competitive Telecommunications Association (UKCTA))
- ITV plc
- npower
- Royal Mail
- TalkTalk
- Verastar
- Vodafone
- Which?

A1.2 We also received a confidential response.

A1.3 Non-confidential responses are available on our website: https://www.ofcom.org.uk/consultations-and-statements/category-2/ofcoms-approach-to-enforcement.

Annex 2

Draft revised Penalty Guidelines

A2.1 As explained in paragraph 2.161 of this Statement, we set out below, for information, a draft of the revised Penalty Guidelines. The new wording relating to settlement discounts is highlighted in red text.

Statutory background

1. Section 392 of the Communications Act 2003 ("the Act") requires Ofcom to prepare and publish a statement containing the guidelines it proposes to follow in determining the amount of penalties imposed by Ofcom under the Act or any other enactment apart from the Competition Act 1998. This statement contains Ofcom's penalty guidelines.

2. By virtue of section 392(6) of the Act, Ofcom must have regard to the statement for the time being in force when setting the amount of any penalty under this Act or any other enactment (apart from the Competition Act 1998).

Explanatory note

3. Ofcom has powers to punish those who act unlawfully or in breach of the relevant regulatory requirements. Ofcom has updated the penalty guidelines to clarify its approach to setting penalties. In particular, to ensure that we can impose penalties at the appropriate level effectively to deter contraventions of regulatory requirements, and to explain the weight to be attributed to any precedents set by previous cases in the process of deciding an appropriate and proportionate penalty. Decisions made under the previous penalty guidelines may be relevant to Ofcom's future decision making. However, they are likely to become less relevant to future enforcement work over time, and Ofcom may, in light of the circumstances of each case, impose higher penalties in future cases than in previous ones to secure effective deterrence.

4. All businesses should operate in compliance with the law, taking into account any relevant guidelines where appropriate. As such, the central objective of imposing a penalty is deterrence. The level of the penalty must be sufficient to deter the business from contravening regulatory requirements, and to deter the wider industry from doing so.

5. In particular, the level of the penalty must be sufficiently high to have the appropriate impact on the regulated body at an organisational level. It should incentivise the management (which is ultimately responsible for the conduct and culture of the regulated body) to change the conduct of the regulated body as a whole and bring it into compliance, achieving this, where necessary, by changing the conduct at different levels within the organisation. The level of the penalty should be high enough that the management recognises that it is not more profitable for a business to break the law and pay the consequences, than it is to comply with the law in the first instance, and that it should therefore discourage bad conduct and encourage good practices and a culture of compliance across the organisation.

6. A relevant factor in securing this objective of deterrence is the turnover of the regulated body subject to the penalty. Penalties should be set at levels which, having regard to that turnover, will have an impact on the body that deters it from

misconduct in future and which provides signals to other bodies that misconduct by them would result in penalties having a similar impact. That is, it must be at a level which can also change and correct any non-compliant behaviour, or potential non-compliant behaviour, by other providers.

7. In making this assessment, Ofcom will have regard to precedents set by previous cases where they are relevant. However, Ofcom may depart from them depending on the facts and context of each case. Our penalty decisions will therefore focus the discussion of precedents to cases we consider particularly relevant, if any.

8. If, in making our assessment in any particular case, we consider that the level of penalties set in previous cases is not sufficient effectively to enforce against the regulatory contravention concerned, and to deter future breaches, Ofcom may set higher penalties under these revised guidelines. Regulated bodies with a large turnover, for example, may be subject to higher penalties in order for a deterrent effect to be achieved. These revised guidelines provide Ofcom with the flexibility to impose higher penalties in appropriate cases and penalties Ofcom has previously imposed should not be seen as placing upper thresholds on the amounts of penalties we may impose.

9. This is not to say there is a direct linear relationship between the size and turnover of the regulated body and the level of the penalty. While a body with a larger turnover might face a larger penalty in absolute terms, a body with a smaller turnover may be subject to a penalty which is larger as a proportion of its turnover, for example. We will impose the penalty which is appropriate and proportionate, taking into account all the circumstances of the case in the round together with the objective of deterrence.

10. Amongst the other relevant considerations, we may take into account, Ofcom may consider the degree of harm caused by the contravention and/or any gain made by the regulated body as a result of the contravention. We may seek to quantify those amounts in appropriate cases. However, Ofcom will not necessarily do so in all cases and, even where it does, the calculation does not determine or limit the level of the penalty, which, as explained above, is to ensure that the management of the regulated body is incentivised to modify the behaviour of that body (and deter other regulated bodies accordingly). Any quantified harm/gain is only one of the factors in determining the appropriate and proportionate level of the penalty.

How Ofcom will determine the amount of a penalty

11. Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement. Ofcom will have regard to the size and turnover of the regulated body when considering the deterrent effect of any penalty.

12. The factors taken into account in each case will vary, depending on what is relevant. Some examples of potentially relevant factors are:

    - The seriousness and duration of the contravention;
    - The degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants;

- Any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention;
- Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention;
- The extent to which the contravention occurred deliberately or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur;
- Whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it;
- Any steps taken for remedying the consequences of the contravention;
- Whether the regulated body in breach has a history of contraventions (repeated contraventions may lead to significantly increased penalties); and
- The extent to which the regulated body in breach has cooperated with our investigation.

13. When considering the degree of harm caused by the contravention and/or any gain made by the regulated body as a result of the contravention Ofcom may seek to quantify those amounts in appropriate cases but will not necessarily do so in all cases.

14. Ofcom will have regard to any relevant precedents set by previous cases, but may depart from them depending on the facts and the context of each case. We will not, however, regard the amounts of previously imposed penalties as placing upper thresholds on the amount of any penalty.

15. Ofcom will have regard to any representations made to us by the regulated body in breach.

16. Ofcom will ensure that the overall amount of the penalty is appropriate and proportionate to the contravention in respect of which it is imposed, taking into account the size and turnover of the regulated body.

17. Ofcom will ensure that the overall amount does not exceed the maximum penalty for the particular type of contravention.

18. Ofcom will have regard to the need for transparency in applying these guidelines, particularly as regards the weighting of the factors considered.

Discount for settlement in a regulatory case

19. As set out in our *Enforcement Guidelines for regulatory investigations*,[93] and in our *Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences*,[94] Ofcom may consider that it is appropriate to settle a regulatory investigation falling within the scope of those Guidelines and

[93] https://www.ofcom.org.uk/__data/assets/pdf_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf

[94] https://www.ofcom.org.uk/__data/assets/pdf_file/0017/102518/Procedures-for-investigating-breaches-of-competition-related-conditions-in-Broadcasting-Act-licences.pdf

Procedures.[95] Settlement is a voluntary process in which the regulated body admits it has breached relevant regulatory requirements and accepts 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 in light of the resource savings involved in following a streamlined administrative procedure.

20. Our aim will be to conclude the settlement process as swiftly as possible. In line with this aim, the earlier the settlement, the greater the discount available, as the resource savings that Ofcom could achieve would be greater.

21. The settlement discount is a separate matter, intended to reflect resource savings achieved by Ofcom as a result of 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.

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

- 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.

23. Where we are concerned that the process is not progressing as swiftly as possible due to delays or inefficiencies caused by the regulated body or that it is not showing its full co-operation with the settlement process, Ofcom may reduce the available discount on account of the time taken and resources used. We will give the regulated body notice that we are minded to do so at that point.

Revision of the statement of policy

24. Section 392(2) of the Act provides that Ofcom may from time to time revise our statement as we think fit. Ofcom must first consult the Secretary of State and other such persons as we consider appropriate.

25. This statement will be reviewed in the light of experience in applying it over time.

Definitions and interpretation

26. In these guidelines, 'regulated body' means any person or body subject to regulation by Ofcom under any enactment apart from the Competition Act 1998.

[95] This excludes investigations into potential breaches of consumer protection legislation, which are covered separately in the Enforcement Guidelines for regulatory investigations.