



# Statement following consultation on draft Enforcement Guidelines

Statement

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## Section 1

# Introduction

- 1.1 Ofcom is the independent regulator and competition authority for the UK communications industries.
- 1.2 Ofcom has a number of roles and duties relating to identifying and responding to conduct which is unlawful, anti-competitive, or otherwise harms consumer interests. Responding to complaints filed by companies - or in some instances by consumers - our investigations teams ensure that we respond quickly, firmly and effectively to breaches of regulatory rules or relevant law and are able to act effectively in handling complaints.
- 1.3 Ofcom's investigations activities are conducted by the Competition Group Investigations Team and the Consumer Protection Team (part of the Consumer Group).
- 1.4 On 31 October 2011, we published a consultation seeking comments on our proposed updated guidance on competition and regulatory investigations following a number of significant changes to the way we work, in particular:
  - new enforcement powers that came into effect following implementation of the revised European Framework on Electronic Communications in May 2011;
  - changes to Ofcom's internal structure: the separation of our investigations programme into two separate teams dealing with competition and consumer issues;
  - development of separate guidelines on how we handle regulatory disputes, which were published for consultation on 17 December 2010 and confirmed on 7 June 2011; and
  - Ofcom assuming functions in relation to postal services under the Postal Services Act 2011 ("the Postal Services Act").
- 1.5 This statement follows the consultation, and sets out our response to the stakeholder comments received, together with an indication of whether, or not, we have accepted respondents' suggestions in the final guidelines (the "Guidelines"). We are today publishing the Guidelines as a separate document. Non-confidential versions of the stakeholder responses can be found on our website at the following link:  
<http://stakeholders.ofcom.org.uk/consultations/draft-enforcement-guidelines/?showResponses=true>.
- 1.6 Previous guidance on the handling of competition complaints and complaints about breaches of conditions imposed under the EU Directives dates from 2004<sup>1</sup>. We

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<sup>1</sup> Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives, published July 2004

<http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/other/guidelines.pdf>

published draft guidelines for consultation in 2006<sup>2</sup>, which until now remained the most up-to-date statement on the way we handle complaints made to us.

- 1.7 Since the conclusion of our consultation, the Government has published its response to its consultation “Growth, Competition and the Competition Regime”.<sup>3</sup> In the response the Department for Business Innovation & Skills confirmed that it considers that enforcement of competition law by the Office of Fair Trading (“the OFT”) and sectoral regulators needs to be improved. It identified the following concerns:
- Too few cases are brought by the competition authorities.
  - The cases that are brought take too long and cost too much.
  - Decisions by the competition authorities are the subject of too much litigation.
  - There is a perception of confirmation bias in decision-making.
  - The current scale of financial penalties may not be a sufficient deterrent.
- 1.8 Ofcom has reviewed its processes in light of the government’s concerns and the OFT’s consultation<sup>4</sup> following the Government’s response and, where appropriate, we have included in the Guidelines a number of measures aimed at addressing these concerns such as:
- Committing to publishing on our website a timetable on opening a competition law investigation and, where we fail to meet a published deadline, being prepared to publish an explanatory note on our website;
  - Holding at least two ‘state of play’ meetings with parties on the progress of the investigation; and
  - Formalising ‘stop/go’ reviews which will be held at key stages of Competition Act investigations and will consider whether an investigation continues to be a priority under our administrative priority framework.
- 1.9 Ofcom will continue to review its processes in light of emerging best practice.

## Next steps

- 1.10 The Guidelines published today take effect from the date of this statement and apply to all complaints we receive from this date.
- 1.11 The Guidelines will be kept under review and amended, as appropriate, in light of further experience and developing law and practice and any changes to Ofcom’s duties, powers and responsibilities.

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<sup>2</sup> Draft Enforcement Guidelines: Ofcom’s draft guidelines for the handling of competition complaints, and complaints and disputes concerning regulatory rules, published in July 2006  
<http://stakeholders.ofcom.org.uk/binaries/consultations/enforcement/summary/enforcement.pdf>

<sup>3</sup> <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/g/12-512-growth-and-competition-regime-government-response.pdf>

<sup>4</sup> Review of the OFT’s investigation procedures in competition cases, OFT1263con2,  
[http://www.ofg.gov.uk/shared\\_ofg/policy/OFT1263con2](http://www.ofg.gov.uk/shared_ofg/policy/OFT1263con2)

- 1.12 The Guidelines set out Ofcom's general approach to enforcement in the areas covered by the guidelines. They do not have binding legal effect. Where we depart from the approach set out in the Guidelines, we will be prepared to explain why.

## Section 2

# Comments on Ofcom's proposals

- 2.1 Ofcom received comments to its consultation from the following stakeholders (in order of receipt).
- The Direct Marketing Association
  - Consumer Focus
  - UK Mail (confidential response)
  - TalkTalk Telecom Group PLC ("TalkTalk")
  - Three
  - Virgin Media Limited ("Virgin Media")
  - Cable & Wireless Worldwide ("C&WW")
  - TNT Post UK Limited ("TNT")
  - UK Competitive Telecommunication Association ("UKCTA")
  - British Telecom ("BT") (part confidential)
  - Royal Mail Group Limited ("Royal Mail")
- 2.2 On the whole, stakeholders welcomed the issue of revised guidelines recognising that it was important to have clarity and transparency of Ofcom's enforcement powers and processes.
- 2.3 The main issues raised in stakeholders' responses, together with an indication of whether, or not, we have accepted respondents' suggestions in the final Guidelines are set out in this section. We are today publishing the final Guidelines as a separate document. It should be noted that, unless otherwise stated, the section and paragraph numbers referred to in the remainder of this document reflect the wording and paragraph numbers contained in the consultation.

## Section 2 Introduction

### Consistency with the OFT and other regulators

#### *Comments from respondents*

- 2.4 BT noted that paragraphs 2.18 to 2.20 setting out the status of the guidelines are a shorter version of paragraph 2.7 of the 2006 draft guidelines. BT suggested that it would be helpful if Ofcom were to include a short addition to the current paragraphs 2.18 to 2.20 which reaffirms Ofcom's intention to seek to ensure an appropriate degree of consistency with the OFT and other regulators.

*Ofcom's view*

- 2.5 In carrying out our functions and duties Ofcom follows best practice and, where appropriate, seeks to ensure consistency with the OFT and other regulators. As set out in paragraph 3.42 of the consultation (paragraph 2.43 of the Guidelines), we often refer to the OFT's guidance when carrying out our work. Ofcom also participates in the Concurrency Working Party (which is a forum designed to facilitate a consistent approach by the concurrent regulators and OFT in the exercise of their functions and powers under the Competition Act), the Joint Regulators Group (in which senior colleagues from the various regulators, meets four times a year to discuss issues of mutual concern and to report on recent developments in their own particular sector) and in the Consumer Concurrencies Group (which aims to improve clarity and share best practice on overlapping areas of responsibility especially in relation to enforcement). Ofcom has inserted a new paragraph at 1.20 of the Guidelines to reflect this.

**Section 3 Ofcom's investigation and enforcement powers****Concurrency***Comments from respondents*

- 2.6 UKCTA asked for guidance on when Ofcom is likely to use its concurrent powers and also justification for doing so. UKCTA also noted that Ofcom had issued Guidance on Additional Charges where Ofcom acted under the Unfair Terms in Consumer Contract Regulations, even though there was existing guidance from the OFT.

*Ofcom's view*

- 2.7 Ofcom will use its concurrent powers where it considers it appropriate to prevent consumer harm in the communications sector. Ofcom's guidance on Additional Charges was issued in order to set out how Ofcom considers the Unfair Terms in Consumer Contract Regulations 1999 are likely to apply to certain standard terms in contracts for the supply of communications services and on terms that, in our view, may be unfair (or potentially unfair). It is intended to help communications providers meet the requirements of the Regulations, as well as to assist Ofcom and any other bodies which have powers to enforce the Regulations. It complements OFT guidance on the Regulations.<sup>5</sup> As set out at paragraph 2.5 above, Ofcom also participates in the Consumer Concurrencies Group with the OFT and other agencies.

**Competition Law - Enforcement***Comments from respondents*

- 2.8 Royal Mail and Three noted the importance of the need for consistency with the OFT when Ofcom is concurrently exercising competition law powers. BT also asked us to revert to the wording of the 2006 Draft Guidelines which stated that Ofcom "*will follow the OFT's guidance in Competition Law cases*" instead of the text in paragraph 3.40 of the consultation which states that "*Ofcom must have regard to...*"

<sup>5</sup> See further paragraphs 3.13 – 3.17 of "Ofcom review of additional charges Including non-direct debit charges and early termination charges", statement, December 2008 <http://stakeholders.ofcom.org.uk/binaries/consultations/addcharges/statement/addchargestatement.pdf>

*Ofcom's view*

- 2.9 Ofcom recognises the importance of consistency with other regulators and, as set out at paragraph 2.5 above, we often refer to the OFT's guidance in carrying out work. With regard to the use of the phrase "*must have regard to*", we consider this wording more appropriate as it reflects the statutory requirement set out section 38(8) of the Competition Act 1998 (the "Competition Act").

**Use of regulatory powers rather than competition law powers***Comments from respondents*

- 2.10 UKCTA and C&WW asked that Ofcom articulate clearly in cases where we have decided to investigate complaints using our regulatory rather than competition law powers, the reasons why. TNT also suggested that, where possible, sectoral regulation should be imposed thereby enabling Ofcom to take regulatory action, which has a target time for completion of six months, rather than using its powers under competition law where investigations can take "*several years*".

*Ofcom's view*

- 2.11 Ofcom cannot exercise its sectoral enforcement powers under the Communications Act 2003, the Postal Services Act or the Broadcasting Acts for a competition purpose, if we consider that a more appropriate way of proceeding would be under the Competition Act. Our opening Competition and Consumer Enforcement Bulletin entry for new investigations states what legal instrument we are using. Where we decide it is more appropriate to use our sectoral powers in preference to our Competition Act powers, we will state our reasons for doing so. Ofcom has included additional text in the Guidelines to reflect this position.

**Section 4 Complaints and Whistleblowers****Submission requirements for a complaint***Comments from respondents*

- 2.12 C&WW, UKCTA and TNT suggested that Ofcom should be mindful of the limited resources and information available to stakeholders in preparing a complaint in accordance with the requirements set out in the guidelines. In particular, C&WW, while recognising the need for complainants to do what they can to demonstrate that a complaint is not "*frivolous*" and devote a sufficient amount of effort into the process, argued that Ofcom should not simply reject complaints on the basis of insufficient information if that information could not realistically be expected to be in the possession of the party referring the complaint. C&WW and UKCTA would like to see Ofcom making more use of its formal information gathering powers during the enquiry stage ahead of an investigation.
- 2.13 TNT were particularly concerned about the limited resources point and argued that it is not realistic to expect those considering making complaints to take legal advice and noted that it would be helpful if Ofcom could guide postal sector complainants to relevant guidance to reduce the need to spend limited resources on external legal advisers. It was also concerned at Ofcom's statement in paragraph 4.9 that it will not take further action in response to "*unsubstantiated allegations or inadequate submissions*" and requested that Ofcom take a less formal approach in respect of



those bringing a complaint for the first time and *“assist the would-be complainant in the formulation of a complaint in the manner which would be acceptable”*.

- 2.14 Three also argued that Ofcom should not apply the minimum requirements in too formulaic a manner noting that, in some circumstances, the legal basis for the complaint may not be entirely clear. Three suggested that in such circumstances Ofcom should decide, having regard to the submissions and its own experience, the correct legal basis rather than dismissing the complaint because the complainant did not comply with the minimum requirements.
- 2.15 C&WW also noted that there have been incidents where matters referred to Ofcom citing one legal instrument as a justification but Ofcom chose to resolve using another. Therefore, C&WW would like guidance on how Ofcom determines which powers to use to resolve a case.

#### *Ofcom's view*

- 2.16 Ofcom recognises the limited resources and information that may be available to complainants. As set out in the Guidelines, we will provide guidance to complainants, particularly less experienced ones, to ensure they understand the requirements and, where a complaint does not meet the requirements, will endeavour to help them identify what else they will need to do before Ofcom will consider opening an enquiry or, if appropriate, an investigation. Although we will not take action in response to unsubstantiated allegations or inadequate submissions, we note that the submission criteria will not be applied in a bureaucratic way and that we will consider the circumstances of each complaint we receive. This, along with our administrative priorities framework, enables us to target our resources at the most important issues. Therefore, we have not made any changes to the section on submission requirements in the final Guidelines.
- 2.17 Regarding TNT's comments on the need to take legal advice, due to the complexity of Competition Act cases, Ofcom considers it can be beneficial if complainants take legal advice on their submissions. Ofcom would again refer respondents to the Competition Pro-Bono Scheme (which is independent of Ofcom) which offers free independent legal advice. Paragraph 2.43 of the final Guidelines provides a link to guidance published by the OFT.
- 2.18 Regarding the use of our formal information gathering powers, although this is possible at the enquiry stage of an investigation under the Communications Act, we do not generally exercise these powers at this stage. In contrast, in the case of competition complaints, our formal information gathering powers are set out in section 26 of the Competition Act. We can only use those powers where we have opened a formal investigation (i.e. where we have reasonable grounds for suspecting that one of the competition law prohibitions has been infringed in an area falling within concurrent powers). We have amended paragraphs 7.4 and 7.23 of the final Guidelines to make it clear that our information gathering powers under the Competition Act only apply where we have opened an investigation.
- 2.19 Finally, with regard to Three's point on the correct legal instrument, Ofcom considers it appropriate to require complainants to set out the legal basis of their complaint. However, Ofcom is unlikely to reject a complaint solely on the basis that the stated legal instrument is incorrect. In such circumstances, where we consider the legal instrument to be incorrect, or another to be more appropriate, we will discuss this with the complainant and proceed accordingly.

- 2.20 With regard to C&WW's point on the choice of legal instrument, our opening Competition and Consumer Enforcement Bulletin entry for new investigations states what legal instrument we are using and parties will also be notified of the choice of legal instrument. Where during the course of an investigation we change the scope of the investigation to include an additional or an alternative legal instrument, we will notify the parties and publish a Competition and Consumer Enforcement Bulletin entry.

## Evidence

### *Comments from respondents*

- 2.21 TNT was concerned with what it describes as the requirement to provide cost data on other operators which it considered to be unrealistic. It argued that it should be recognised that Ofcom, who will have significant financial data about Royal Mail, should have the lead role in analysing that data/or securing additional data.

### *Ofcom's view*

- 2.22 With regard to the comments on the provision of cost data, we note that our Guidelines recognise that complainants may have little or no access to information on their competitors' costs and that where the information is not available, there may be alternatives such as costs based on a model or on the complainants' own costs. Although Ofcom has access to significant data on Royal Mail's costs, which Ofcom will use where appropriate, this does not remove the need for complainants to provide a reasoned submission.

## Section 5 Deciding whether to investigate

### Informal resolution

#### *Comments from respondents*

- 2.23 BT noted the current draft of section 5 of the consultation is focussed purely on the process to establish whether or not a breach may have occurred and, if so, whether action should be taken. BT suggested that it would help avoid certain risks (related to how the potential party will frame its dealings with Ofcom depending whether Ofcom was concerned simply with remedying the contravention or whether a fine was also on the table), if Ofcom could usefully provide an indication during the enquiry phase of whether the behaviour being considered might be capable of informal resolution, if the target is willing to give early commitments as an alternative to enforcement action, or if it is made clear that it would offer an opportunity for parties to discuss on a "without prejudice" basis the giving of commitments as an alternative to enforcement action.
- 2.24 Royal Mail questioned whether Ofcom would be flexible over the 15 working day target to resolve matters on an informal basis "*during periods of extreme pressure*" and suggests 20 working days would be preferable. Royal Mail also sought clarification as to whether the 15 working day period referred to in paragraph 5.2 of the consultation is in addition to the 15 working day period referred to in paragraph 5.9 of the consultation.

*Ofcom's view*

- 2.25 As set out in paragraphs 5.1 and 5.2 of the consultation (paragraphs 4.1 and 4.2 of the Guidelines), certain complaints may be resolved informally. As a result of the new enforcement powers that came into effect following implementation of the revised European Framework on Electronic Communications in May 2011, Ofcom now has the power to specify the financial penalty that it is minded to impose at the same time as it sets out its determination that there are reasonable grounds to believe that a CP has contravened or is contravening a condition. Therefore, in any case where Ofcom opens a formal investigation and finds it appropriate to issue a section 96A notification, such a notification will utilise these new powers, meaning that, where appropriate, it may include a penalty that Ofcom is minded to impose alongside any steps that should be taken to comply and/or remedy the consequences of the contravention.
- 2.26 For cases that Ofcom considers might be capable of being resolved on an informal basis we set ourselves an initial 15 working day target of doing so. If during this period there are positive signs from both parties that they are working towards a settlement, we may extend the deadline for the matter to be resolved.
- 2.27 With regard to whether the 15 working day period referred to in paragraph 5.2 is in addition to the 15 working day period referred to paragraph 5.9 of the consultation, we confirm that the period referred to in paragraph 5.9 of the consultation is not in addition to the period referred to in paragraph 5.2. This is because we do not open an enquiry in instances where we believe we might be able to resolve an issue informally with the parties concerned. If we are unable to resolve the matter informally in a reasonable timescale we will then carry out an administrative priority assessment in order to consider whether conducting an investigation would be consistent with our administrative priorities. We have updated the Guidelines to reflect this position.

**Ofcom's administrative priority framework***Comments from respondents*

- 2.28 A number of respondents welcomed Ofcom's administrative priority framework. However, UKCTA and C&WW questioned whether this should be expanded to also consider the impact on the complainant's business. C&WW noted that the ability to decline to investigate a complaint on the basis of administrative priorities is one of the most significant discretionary decisions Ofcom can take and therefore requested more transparency around the administrative priority framework. C&WW also requested that, in addition to the criteria listed, that Ofcom take due consideration of the impact of the behaviour on the complaining party's business and their ability to trade effectively. C&WW was particularly concerned that if Ofcom declined to open an investigation on the basis of administrative priorities and that decision ultimately led to a party exiting the market or ceasing to trade, this could lead to an increased likelihood of future poor conduct.
- 2.29 TNT was concerned that the extent to which the administrative priorities are based on harm to the individual, such harm may not be readily apparent in postal services resulting in such cases being de-prioritised. Therefore, TNT requested specific mention about the need to consider, as a priority case, any action by Royal Mail which has a harmful effect on efficient postal competition and/or on (business) customer choice.

- 2.30 C&WW also argued that when Ofcom decides not to open an investigation on the grounds of administrative priority, it should provide a reasonable level of justification to the complainant. C&WW also requested that if alternative administrative proceedings (such as a planned market review) are cited as the reason then a strict deadline should be given for completing those proceedings and that Ofcom should give some thought to how it might bring about prompt enforcement through the use of alternative means. Further, C&WW stated that once the alternative means are under way, Ofcom should make specific mention to the issue subject to the complaint in any published material so that it can be examined in the review and appropriate remedies put in place should they be required.
- 2.31 UKCTA requested more clarity on the relationship between policy and enforcement, in particular where Ofcom has declined to take enforcement activity as a result of a pending market review or policy initiative. UKCTA was concerned that this could lead to the complainant suffering greater harm and that Ofcom should try to avoid a situation where an investigation is delayed because of a policy review or vice versa.

#### *Ofcom's view*

- 2.32 Ofcom's principal duty in carrying out its functions is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition. One of the factors we will consider under our administrative priority framework relates to the level of resources required for an investigation "*given the need to do justice to the interests of all parties likely to be affected by an investigation*" and that includes the complainant. Therefore we do not consider it necessary to alter the administrative priority framework set out in the Guidelines.
- 2.33 With regard to TNT's point on prioritising action against Royal Mail, Ofcom regulates a number of sectors and does not consider it appropriate to prioritise one sector over others. Decisions on whether to open an investigation into any action by Royal Mail will be considered under the same administrative priority framework set out in the Guidelines as applies to all the sectors which Ofcom regulates.
- 2.34 With regard to C&WW's point that when Ofcom decides not to open an investigation on the grounds of administrative priority we should provide a reasonable level of justification to the complainant, we would note that, it has been our practice to explain our reasons for taking administrative priority decisions to complainants when investigations are not opened following a complaint. We intend to continue with this practice.
- 2.35 With regard to the relationship between policy and enforcement, Ofcom has to make the best use of its limited resources and we do not consider that running a parallel investigation and a market review on the same issue would achieve this. Whilst experience over time has shown this to be an infrequent issue, we will weigh-up all relevant matters in making our decision whether to prioritise an investigation or market review.

### **Closing an investigation on the basis of administrative priorities**

#### *Comments from respondents*

- 2.36 C&WW argued that the decision to close an open investigation on the basis of administrative priority should be based on different criteria and should be a rare event, reserved for the most exceptional cases. C&WW noted that even where the

conduct under investigation has ceased, it is important that the offending party is held to account and the incentive framework remains intact.

#### *Ofcom's view*

- 2.37 C&WW did not provide any suggested alternative criteria which we should use to consider whether to close a case. Ofcom notes that the purpose of our administrative priority framework is to ensure we use our resources effectively. We do this by weighing up the likely benefits of continuing with the investigation and the comparative benefits of using our resources in another way. We see no reason why this should be different in taking a decision to close a case. We would also note that whether the conduct is ongoing is just one of the factors we will consider in reaching a decision.

### **Own-initiative investigations**

#### *Comments from respondents*

- 2.38 C&WW and UKCTA argued that more information is needed on the reasons behind Ofcom decisions to launch own-initiative investigations and how competing priorities are considered. In particular, UKCTA noted that Ofcom has sought to provide more clarity on the factors it uses when deciding whether to accept a complaint and argued that the same level of detail should be provided for own-initiative investigations which in effect “compete” for the same Ofcom resources. For example, UKCTA noted that it understands that Ofcom takes consumer complaints into consideration but does not understand what the trigger points for action are or how these may be defined.
- 2.39 C&WW and UKCTA argued that own-initiative investigations should be used for wholesale industry matters, not only in cases where consumer harm may arise. Further, C&WW and UKCTA argue that an enquiry phase should be carried out for all own-initiative investigations. In particular, C&WW considers it a mistake not to have an enquiry phase for own-initiative investigations as it would be sensible to gather industry views before embarking on an investigation.

#### *Ofcom's view*

- 2.40 As set out in the Guidelines, the most common reason for taking own-initiative action is in response to complaints to Ofcom from consumers – either because we have received significant numbers of consumer complaints about a particular issue, or where the number of complaints is not particularly large but consumers are raising an issue that seems to be particularly serious, or may be affecting a large number of consumers or where the same issue has been raised by a number of stakeholders. In considering levels of consumer complaints, Ofcom will take complaints received by our Consumer Contact Team into account although there is no set threshold which will automatically trigger an investigation as much will depend on the nature as well as the number of complaints. The administrative priority framework is also generally applied to own-initiative investigations and it is through our consideration of that, that we will consider competing priorities. It is also our practice to set out the reasons for opening the investigation in the opening Competition and Consumer Enforcement Bulletin entry or in correspondence with the target of the investigation.
- 2.41 With regard to using own-initiative investigations for industry matters, Ofcom does not limit the opening of investigations on our own-initiative to matters directly relating to consumers. However, in all cases in carrying out our functions Ofcom will have regard to our principal duty which is to further the interests of citizens in relation to

communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.

- 2.42 Regarding the need for an enquiry phase, Ofcom uses this period to consider the information provided by complainants and to determine whether there is a case to answer. For investigations opened on our own-initiative as we will already have gathered information from consumer complaints and from industry monitoring. Further, during the enquiry phase following the receipt of a complaint, Ofcom does not consult industry - rather we generally only have contact with the complainant and the target. There may, however, be exceptions where it is both appropriate and necessary to discuss the matter with one or more industry stakeholders.

## **Enforcement programmes**

### *Comments from respondents*

- 2.43 Royal Mail sought clarification on whether industry-wide enforcement programmes will be applied to the postal sector, and if so, the legal basis for doing so.

### *Ofcom's view*

- 2.44 As explained in the Guidelines, enforcement programmes are own-initiative investigations to address compliance issues across a group or industry and are often used to ensure compliance with a new regulation when it is introduced or where we are assessing compliance with an existing regulation/obligation across industry. Where an enforcement programme reveals information or evidence that suggests it may be appropriate for Ofcom to open an investigation into a particular company or multiple investigations into individual companies, we will use the process set out section 5 of the consultation (section 4 of the Guidelines) to decide whether or not to open an investigation. As we have powers to enforce regulatory requirements under Schedule 7 of the Postal Services Act, we do not see any reason why enforcement programmes should not be applied to the postal sector. Paragraph 4.17 of the Guidelines has been amended accordingly.

## **Section 6 Conducting investigations**

### **Opening an investigation – publication of details in Competition and Consumer Enforcement Bulletin**

#### *Comments from respondents*

- 2.45 The Direct Marketing Association argued that Ofcom's practice of publishing a company's name before we have finished an investigation/ "pronounced guilt" is unfair given that reputational damage is a deterrent factor.

#### *Ofcom's view*

- 2.46 The purpose of the Competition and Consumer Enforcement Bulletin is to ensure that there is a transparent record of Ofcom's Investigations Programme which also provides other companies with guidance on the relevant rules and types of behaviour that are likely to breach those rules. We do not accept that the opening Bulletin entry gives anyone the impression that a particular company is, at that stage, guilty of conduct that breaches our rules. The Bulletin is a factual statement of the action that we are taking and furthers our duty to be transparent about the activities we are undertaking.

## Changing the scope of an investigation

### *Comments from respondents*

- 2.47 BT was concerned that, in considering whether to widen the scope of an investigation, Ofcom makes the decision based only on administrative priorities and does not follow the full framework set out in section 5 of the consultation. In particular, BT argues that the target of an investigation should be given details of any proposed widening of the investigation scope and be given the opportunity to make representations. BT suggests that whilst a target may not object to the original scope, they may wish to appeal against any decision to widen the scope.

### *Ofcom's view*

- 2.48 Ofcom may need to change the scope of an investigation if we become aware of new issues that warrant investigation. Ofcom does not consider it necessary to have a full enquiry phase in such circumstances as the decision is made on the basis of information available to Ofcom. We do, however, agree that it is appropriate to invite comments from the parties if we are thinking of changing the scope and have updated paragraph 5.5 of the Guidelines accordingly.

## Contact with the case team – identity of decision maker

### *Comments from respondents*

- 2.49 Royal Mail was of the view that all parties should be informed of the identity of the decision maker, not just the target as indicated in paragraph 6.17 of the consultation.

### *Ofcom's view*

- 2.50 Paragraph 6.17 of the consultation (paragraph 5.16 of the Guidelines) does provide that this information will be provided to both the complainant and target.

## Information gathering

### *Comments from respondents*

- 2.51 Three suggested that allowing three working days to comment on draft information requests is too short a time and that this should be extended to five working days. Alternatively Ofcom should be receptive to requests for extensions when legitimate reasons are provided.
- 2.52 Royal Mail requested Ofcom to take into account industry and company specific factors when deciding on 'reasonable' time limits for requiring responses to documents including formal requests for information.
- 2.53 UKCTA requested that Ofcom be mindful of resource implications of information requests and therefore asked that they are issued as early as possible in the investigation period so as to maximise the response time and to be mindful of issuing requests during holiday periods when key people are on leave.
- 2.54 Royal Mail was concerned by paragraph 6.27 of the consultation in which Ofcom said it may not send information requests in draft form where the request is straightforward or urgent. Royal Mail's view was that recipients of requests are best placed to determine whether a request is straightforward or not and therefore

considers that information requests should always be sent in draft form, except in the rare cases of “genuine urgency”.

#### *Ofcom's view*

- 2.55 Ofcom's experience of issuing information requests in advance, is that the three working day deadline for comments on the scope and the practicality of providing the information by the specified deadline has generally not been problematic for recipients. We therefore intend to retain the three day deadline. We will, of course, be receptive to requests to extend this on a case by case basis where strong arguments are put to us.
- 2.56 With regard to Royal Mail and UKCTA's point on taking specific factors into account in issuing and setting deadlines for the response, Ofcom's practice of sending out the information request in draft form for comment on timing will enable companies to make representations on industry or company specific issues that may make impact on its ability to provide the information by the date specified in the draft. In such circumstances, where timescales allow, Ofcom will consider all reasonable requests for the timeframe to be extended.
- 2.57 Ofcom notes Royal Mail's concern that Ofcom may not send out information requests in draft form where the request is straightforward or where the information is required quickly. However, our normal practice is to send out information requests in draft form. Therefore, it is likely to be rare that we do not issue an information request in draft form and Ofcom will take that decision based on the individual circumstances of that case.

### **Confidentiality**

#### *Comments from respondents*

- 2.58 Royal Mail questioned whether the different criteria that apply when assessing whether information is confidential under the Communications Act 2003 and competition law will apply to regulatory complaints made under the Postal Services Act. Further Royal Mail noted that it will only claim confidentiality on information after careful consideration and therefore does not consider that information should be disclosed without the consent of the party who supplies it.

#### *Ofcom's view*

- 2.59 Section 56 of the Postal Services Act contains a similar provision to that contained in section 393 of the Communications Act and it is this criterion that will apply to the assessment of whether information obtained as a result of Part 3 of the Postal Services Act can be disclosed. Ofcom has amended the Guidelines to reflect this position. Further, information gathered under our Competition Act powers will be subject to the requirements under Part 9 of the Enterprise Act 2002. See paragraphs 7.26 to 7.31 of the Guidelines for more information on this. On Royal Mail's point concerning consent, Ofcom notes that section 56(2) of the Postal Services Act expressly permits Ofcom to disclose information without a party's consent and before disclosing information without a party's consent, we will always consider whether disclosure is necessary for the purpose of facilitating the carrying out by Ofcom of its functions.



## Section 7 Closing cases

### Closing a case without enforcement action

#### *Comments from respondents*

- 2.60 Virgin Media suggested that when Ofcom closes a regulatory investigation with a finding that the target has not breached regulatory obligations, the complainant should have an opportunity to comment on Ofcom's reasoning.
- 2.61 BT explained that, even in seemingly minor matters, information on Ofcom's rationale provides a source of useful regulatory guidance. Therefore, BT suggested that the publication of reasoned case closure decisions should be the norm, rather than the exception.

#### *Ofcom's view*

- 2.62 Following a regulatory investigation, Ofcom may only notify a party where we have reasonable grounds to believe that a party is contravening, or has contravened, a regulatory condition. In circumstances where we do not have reasonable grounds to believe that a contravention has occurred, Ofcom's usual practice is to close the investigation rather than to prepare a non-infringement decision. Therefore, as noted in paragraph 7.2 of the consultation (paragraph 6.2 of the Guidelines), in the majority of cases, a case closure decision of this type is likely to be a brief statement indicating case closure. In a minority of cases, we may publish a reasoned case closure document setting out Ofcom's reasons for taking no further action, for example if we think it would be helpful for all stakeholders to clarify our interpretation of a particular regulatory condition. We do not consider it an appropriate use of our resources to make this practice our "norm", as it is difficult to see how in the majority of cases where we do not consider we have enough evidence to proceed, it would be an appropriate use of our resources to continue work on such an investigation so as to produce a finding of compliance. Further, were such a practice to become our "norm", it is likely that this would result in longer investigations (which is against the stated desire of respondents) and we would also have to take into account fairness to the target as, the time that it would take to prepare a compliance decision, would mean that they would spend longer under investigation by Ofcom. Ofcom has therefore decided not to amend our Guidelines in this respect.

### Representations

#### *Comments from respondents*

- 2.63 Virgin Media was concerned that the statutory framework fails to allow a party to make adequate representations on the level of the penalty where Ofcom chooses to issue a confirmation decision and requests that Ofcom provide targets with a second opportunity to make oral and written representations in regulatory investigations where we are minded to impose a financial penalty, including in situations where the confirmation decision confirms a different penalty from the one specified in the section 96A notification.
- 2.64 Royal Mail requested that Ofcom allow the target company in a regulatory investigation to make oral representations alongside any written representations. Royal Mail argued that certain aspects of its operations are easier to explain by way of oral presentation and believed that oral representations would be beneficial to all parties and could help resolve cases more quickly.

*Ofcom's view*

- 2.65 The statutory framework is clear. A person who receives a notification under section 96A must be given the opportunity to make representations. Where such a notification includes a penalty that Ofcom is minded to impose, Ofcom will also offer the person an opportunity to make oral representations. If, having considered the representations, Ofcom is satisfied that the person has been in contravention of a condition notified in the notification under section 96A, Ofcom may give the person a confirmation decision. A confirmation decision must be given without delay and the statutory framework does not provide for representations on the confirmation decision. Therefore, under the current statutory regime it is not possible for a party to have a second chance to make representations. Therefore, in making their representations on the notification under section 96A, it is a matter for the party to decide how best to make their representations at that stage.
- 2.66 Ofcom generally finds oral representations to be most useful in the context of considering a financial penalty. However, Ofcom will consider requests to provide oral representations at other stages of an investigation if it would be useful to Ofcom and/or the target. In considering whether to grant such requests, Ofcom will take account of all relevant factors, including the urgency of the case and the need for speed in carrying out investigations (which is the stated desire of most respondents to Ofcom's consultation).

**Access to the file in regulatory investigations***Comments from respondents*

- 2.67 BT asked that, in cases where Ofcom is considering imposing a penalty, targets in regulatory investigations be granted access to Ofcom's file in the same way that happens in competition law investigations. BT explained that as Ofcom has the power to impose fines of up to 10% of turnover if regulatory non-compliance is found, it is essential that Ofcom properly and thoroughly investigate compliance issues, with an appropriate respect for the parties' rights of defence built into the process and accordingly that should Ofcom fail to respect a party's rights of defence, it risks the determination (and any fine imposed) being overturned on appeal.

*Ofcom's view*

- 2.68 Where, following a regulatory investigation, Ofcom issues a notification under section 96A of the Communications Act 2003, the notification will generally be accompanied by copies of all evidence, except information which Ofcom is not permitted to disclose under section 393 of the Communications Act, that Ofcom has relied on in reaching its decision. This information is provided regardless of whether Ofcom is minded to impose a financial penalty. Ofcom considers this is sufficient to protect the rights of defence of the person notified and enables that person to make fully informed representations. Ofcom does not therefore consider it necessary to formalise the procedure to match that in competition law investigations.

**The compliance phase***Comments from respondents*

- 2.69 BT provided some suggested drafting for the section on "The compliance phase" in Section 7 to make it clear that this is intended to be an explanation of how Ofcom

may monitor compliance following enforcement action rather than a process which is an alternative to the making of an enforcement order.

*Ofcom's view*

- 2.70 Whilst Ofcom has not accepted BT's proposed drafting in full, we have taken account of these comments and amended paragraph 6.13 of the Guidelines to make it clear the types of cases which may be "put into compliance".

## **Section 8 Enforcing competition law**

### **Targets for Competition Act Investigations**

*Comments from respondents*

- 2.71 Several respondents (BT, C&WW, UKCTA and Three) commented on Ofcom not setting time targets for completing investigations under competition law and requested that we agree to providing periodic progress updates and what milestone might be expected next.
- 2.72 C&WW also expressed concern at the length it takes to complete competition law investigations and noted the need for complaining parties to have confidence that decisions will be taken as quickly as they can be.
- 2.73 BT also suggested that when Ofcom periodically reviews its investigations under competition law against our administrative priority framework, the outcome of such reviews should be shared with the parties to the investigation.

*Ofcom's view*

- 2.74 Due to the complexity of competition law investigations, Ofcom does not consider it appropriate to set generic deadlines that may be unrealistic. However, Ofcom recognises the concerns raised in the consultation responses and has decided that it will, at the outset of any new competition law investigations, publish an indicative timetable of key milestones expected up to the point that we issue a Statement of Objections or a draft no grounds for action decision. These timescales will be set on a case by case basis rather than having a 'one size fits all' timetable and be updated as the case progresses. We will also publish an explanatory note on our website if we fail to deliver a phase of our investigation on time. This change has been set out in the final Guidelines.
- 2.75 Whilst Ofcom aims to conduct all investigations in a timely manner, we recognise that some competition law investigations have taken longer to conclude than we would ideally like. We hope that some of the changes we have introduced in our final Guidelines will lead to improvements in this area.
- 2.76 Ofcom has considered BT's suggestion that the outcome of administrative priority reviews be shared with parties. It will be Ofcom's practice to share the outcome of its 'stop/go' periodic reviews only in circumstances where the review has led to a decision to close the case. If we did so on other occasions we feel that this could lead us into further correspondence putting the case timetable at risk going against stakeholders' desire for speedier competition law investigations. The final Guidelines have been amended to reflect this.

## Interim measures

### *Comments from respondents*

- 2.77 C&WW expressed the view that the threshold for lodging a successful request for interim measures is very high and that Ofcom should do all it can to accommodate such requests so as to ensure that no party is disadvantaged.

### *Ofcom's view*

- 2.78 Section 35 of the Competition Act provides that Ofcom can only impose interim measures in certain limited circumstances which are to (a) prevent serious, irreparable damage to a particular person or category of person, or (b) protect the public interest. However, in its March 2012 response to its consultation "Growth, Competition and the Competition Regime", the Government has decided to "*to lower the threshold before interim measures can be imposed, so that they would require there to be a perceived need to act for the purposes of preventing significant damage to a particular person or category of person.*"<sup>6</sup> Once the necessary legislation has been enacted and enters into force, Ofcom will amend its Guidelines accordingly.

## Information gathering

### *Comments from respondents*

- 2.79 Royal Mail requested that Ofcom include in the final guidelines an absolute minimum period of five days for allowing representations on the confidentiality of information that Ofcom proposes to disclose to third parties in competition law investigations.

### *Ofcom's view*

- 2.80 Rule 6(1) of the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 provides that when proposing to disclose information over which confidentiality has been claimed, Ofcom "*shall take all reasonable steps ... (b) to give that person a reasonable opportunity to make representations*" to Ofcom on Ofcom's proposed action. Ofcom does not consider it appropriate to set an absolute minimum period for allowing representations as what is considered a "*reasonable opportunity*" may vary depending on the specific circumstances of the case. However, we have amended paragraph 7.31 of the guidelines to make it clear that a person will be allowed a reasonable opportunity to make representations.

## Confidentiality and access to the file

### *Comments from respondents*

- 2.81 In relation to confidentiality of information submitted to Ofcom, particularly in competition law investigations, TalkTalk observed that it has found Ofcom's practice in relation to right of access to file "*somewhat ambiguous and in some respects unsatisfactory*". TalkTalk considered it necessary for Ofcom to ensure that sufficiently strong confidentiality undertakings with the target company are in place. These undertakings should list the names of individuals who will have access to the information and that each individual should sign a personal confidentiality

<sup>6</sup> <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/g/12-512-growth-and-competition-regime-government-response.pdf>

undertaking overseen by a suitable professional body as is normal when handling confidential information in the course of court proceedings.

#### *Ofcom's view*

- 2.82 TalkTalk appear to be suggesting the creation of confidentiality rings. As set out in paragraph 8.20 of the consultation, the Communications Act imposes significant duties of transparency on Ofcom in all its activities, including in the context of competition investigations and one of Ofcom's regulatory principles is to investigate and enforce in a transparent manner. Ofcom must therefore consider whether or not it is appropriate to disclose information which has been gathered during the course of its investigations. In the context of competition investigations, Ofcom must be mindful of the need to ensure that it does not disclose confidential information. However, section 239 to 244 of the Enterprise Act 2002 permits disclosure in certain circumstances. In the past, in the context of competition investigations, Ofcom has disclosed confidential information to parties under section 241 of the Enterprise Act which permits disclosure of confidential information for the purpose of facilitating the exercise by Ofcom of its statutory functions. In such circumstances, Ofcom has disclosed the information to named individuals in a company and had required that, in accordance with section 241(2), the information must not be disclosed to another person without the agreement of Ofcom. Further, the person to whom the information has been disclosed will have committed an offence under section 245(3) if they use the information for a purpose not permitted under Part 9 of the Enterprise Act 2002. Ofcom will consider requests to disclose confidential information in the course of competition investigations on a case-by-case basis and any disclosures are likely to be subject to the requirements set out above.<sup>7</sup>

### **Consulting complainants before deciding not to open an investigation**

#### *Comments from respondents*

- 2.83 Virgin Media argued that complainants should be consulted on occasions where we decide not to open an investigation following an enquiry into a complaint made under competition law. Virgin Media also referred Ofcom to the OFT's guidance<sup>8</sup> which provides that Formal Complainants will be given the opportunity to comment on the OFT's provisional view "*before the file is closed*" through the sending of a Provisional Closure Letter. Virgin Media argued that Note 6 in the OFT's guidance makes it clear that the policy applies to all file closures, not just those where a formal investigation has been opened. Virgin Media queries whether there is a good reason for this difference in policy noting that in the interests of procedural fairness Ofcom should act consistently with the OFT.

#### *Ofcom's view*

- 2.84 The practice referred to in the OFT's guidance note only applies where the party has requested, and been granted Formal Complainant status. Although Ofcom does not grant such status, we have decided that in the interests of procedural fairness, consistency and best practice, we will generally offer the complainant the opportunity

<sup>7</sup> This only applies to competition investigations. In the case of investigations under Ofcom's sectoral powers, Ofcom does not consider it has the power to set up, and more importantly, enforce confidentiality rings.

<sup>8</sup> Involving third parties in Competition Act investigations  
[http://www.ofcom.gov.uk/shared\\_ofcom/business\\_leaflets/ca98\\_guidelines/ofcom451.pdf](http://www.ofcom.gov.uk/shared_ofcom/business_leaflets/ca98_guidelines/ofcom451.pdf).

to comment on a decision by Ofcom not to open an investigation following the enquiry phase. Ofcom has amended the Guidelines accordingly.

## Access to file

### *Comments from respondents*

- 2.85 A respondent also requested inclusion in the final guidelines of a statement that Ofcom will provide access to file at the same time as issuing a Statement of Objections or if not, for Ofcom not to set a timescale for the submission of a response to the Statement of Objections until access to file has been given.

### *Ofcom's view*

- 2.86 Ofcom accepts this suggestion and has clarified this in the Guidelines.

## Types of decision

### *Comments from respondents*

- 2.87 Virgin Media drew Ofcom's attention to recent case law of the Court of Justice which clarifies the type of decisions which we can take under EU Competition Law as opposed to UK Competition Law.

### *Ofcom's view*

- 2.88 Ofcom has amended paragraph 7.39 of the Guidelines in order to make specific reference to Articles 101 and 102 of the Treaty of the Functioning of the European Union.

## Other issues raised by respondents in relation to section 8

- 2.89 C&WW stated that it would like to see Ofcom review how it communicates with interested parties or complainants during investigations as it considered this could be improved.

### *Ofcom's view*

- 2.90 C&WW did not suggest any specific proposals on how we could improve how we communicate with interested parties or complaints during the investigation. Ofcom is keen to ensure we communicate effectively with all parties and we have inserted additional paragraphs at 7.16 to 7.18 of the Guidelines to describe how contact with a case team will occur during an investigation. These paragraphs generally follow the framework we consulted on in paragraphs 6.17 and 6.18 of the consultation in relation to regulatory investigations. We have also included a commitment to generally hold at least two 'state of play' meetings with the parties on the progress of the investigation. These meetings will cover substantive issues as well as procedural issues. At these meetings the case team will update parties on progress in an investigation and, where appropriate, share emerging thinking. Parties will also have the opportunity to raise concerns or arguments they have. These meetings will take place early on in the investigation and close to Ofcom's decision on whether or not to issue a Statement of Objections. Where we issue a Statement of Objections, we will generally hold a further 'state of play' meeting after the parties have submitted their written representations and the oral hearing has been held.

## Section 9 Format for submitting a complaint to Ofcom

### *Comments from respondents*

- 2.91 BT suggested that, to aid clarity, it would be sensible to include a reminder in section 9 of the need for complainants to provide detailed evidence in support of their complaint.
- 2.92 BT also argued that the use of the phrase “Complainants may refer to relevant sections of Ofcom’s market reviews in support of a competition law complaint” in the heading of Section 9D gave it undue prominence and might suggest that Ofcom will be willing to “short-cut” the proper competition law market assessment process. BT therefore suggested the sentence is deleted from the heading and replaced with a new paragraph at the end of the section. BT provided suggested wording for that paragraph.

### *Ofcom’s view*

- 2.93 Ofcom does not believe the first point to be necessary. Ofcom considers that it is clear from section 9 of the consultation (section 8 of the Guidelines) that it is necessary to provide detailed supporting evidence. There are a number of references to the requirement to provide supporting evidence with complaints elsewhere in the Guidelines. We will consider the level of evidence provided on a case by case basis and we will advise complainants where we believe they should be able to provide more.
- 2.94 We note BT’s concerns regarding the heading of section 9D. Ofcom does not accept that this implies that Ofcom may “short cut” the proper competition assessment process. This heading is included to aid complainants, some of which may be inexperienced, and therefore we consider it helpful to note they may refer to relevant sections of Ofcom’s market reviews in support of their claim. However, we have given the heading less prominence in the final guidelines.

## Other issues raised in consultation

### **Non-compliance with a regulatory obligation alleged in the course of a dispute**

#### *Comments from respondents*

- 2.95 BT suggested that Ofcom include a statement in the final guidelines that where potential non-compliance with a regulatory obligation is alleged in the course of a dispute, we will consider whether it would be more appropriate to address that issue as a compliance investigation and if not, how Ofcom will ensure that the safeguards built into the enforcement regime will be maintained in the course of the resolution of a dispute.

#### *Ofcom’s view*

- 2.96 The issue of whether the possibility of a compliance investigation excludes Ofcom’s dispute jurisdiction has already been clearly resolved in June 2010 by the Competition Appeal Tribunal in BT’s appeal of Ofcom’s Partial Private Circuits dispute determination.<sup>9</sup> The Tribunal confirmed that there is substantial potential

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<sup>9</sup> Preliminary judgment of 11 June 2010 in Case 1146/3/3/09 BT v Ofcom (Partial Private Circuits) [2010] CAT 15

parallel jurisdiction between compliance investigations and disputes and the fact that the issues raised in a dispute could also be dealt with as a compliance complaint does not prevent them being considered as a dispute (see paragraph 104). This was re-confirmed on 22 March 2011, when the Competition Appeal Tribunal handed down its judgment.<sup>10</sup>

- 2.97 As noted by the Competition Appeal Tribunal, Ofcom's ability to decline to determine a dispute that has been referred to it under the dispute resolution process is very limited. Section 186(3) of the 2003 Act sets out that Ofcom has to decide that it is appropriate for it to handle the dispute unless there are alternative means for resolving the dispute that are likely to offer a prompt and satisfactory resolution of the dispute. Therefore, Ofcom does not consider it appropriate to accept BT's suggestion. Further, the operation of the dispute resolution regime is outside the scope of the consultation and therefore we do not consider it appropriate to respond to BT's final suggestion in this statement. We note that the Court of Appeal heard BT's appeal of the CAT judgment on 19 to 21 June 2012. The Court of Appeal's judgment is awaited and duly we will consider any changes needed to our Guidelines following that judgment.

## References to Postal Services Act

### *Comments from respondents*

- 2.98 TNT noted that the consultation makes reference to a number of sections of the Communications Act 2003 which are not applicable to postal services and that some sections give the situation in postal services. TNT considered it would be helpful to make it clear what provisions do and do not apply to postal services.

### *Ofcom's view*

- 2.99 Ofcom has noted TNT's suggestion and has revised the Guidelines, where appropriate.

## Status of guidelines

### *Comments from respondents*

- 2.100 TNT noted that it is anticipated that certain key areas of postal regulation will be addressed by way of guidelines and that such guidelines should be treated as regulatory conditions for the purpose of enforcement unless otherwise stated.

### *Ofcom's view*

- 2.101 Ofcom usually issues guidelines in matters where it considers it would be helpful to industry. Regulatory conditions are put in place following a detailed statutory process and can only relate to certain matters (paragraph 2.32 of the Guidelines sets out the types of conditions that we can set in respect of postal operators). In contrast, guidelines are issued where we consider it would be helpful to give guidance to stakeholders on our processes and procedures (for example the Enforcement Guidelines) or to assist stakeholders to understand their rights and obligations under a specific regulatory condition so as to assist them in achieving compliance.

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<sup>10</sup> Judgment of 22 March 2011 in case 1146/3/09 BT v Ofcom (Partial Private Circuits) [2011] CAT 5



Guidelines do not have the status of regulatory conditions and cannot be treated as such.

**Comments outside the scope of the consultation**

- 2.102 A number of postal operators made comments regarding disputes. The resolution of disputes is the subject of separate guidelines and is therefore outside the scope of this statement.
- 2.103 Finally, the Direct Marketing Association made a number of comments in relation to persistent misuse investigations. As set out at paragraph 1.10 of the Guidelines, investigations into the persistent misuse of an electronic network or service are also the subject of separate guidelines.