

**Ofcom**

making communications work  
for everyone

# Enforcement guidelines for Competition Act investigations

Guidelines

Guidelines

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## About this document

Ofcom is the independent regulator and competition authority for the UK communications industries. It has concurrent powers with the Competition and Markets Authority to investigate suspected infringements of competition law.

These Guidelines set out the procedures Ofcom will normally follow in Competition Act investigations.

Competition Act investigations are investigations into anti-competitive conduct and/or agreements under Chapter I and/or Chapter II of the Competition Act 1998, and/or Article 101 and/or Article 102 of the Treaty on the Functioning of the European Union.

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

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## Section 1

# Introduction

- 1.1 Ofcom is the independent regulator and competition authority for the UK communications industries. It has concurrent powers with the Competition and Markets Authority (the “**CMA**”) to investigate suspected infringements of competition law.

## What do these Guidelines cover?

- 1.2 These Guidelines set out the procedures Ofcom will normally follow in Competition Act investigations. Competition Act investigations are investigations into anti-competitive conduct and/or agreements under Chapter I and/or Chapter II of the Competition Act 1998 (the “**Competition Act**” or the “**Act**”) and/or Article 101 and/or Article 102 of the Treaty on the Functioning of the European Union (the “**TFEU**”).

## Our objectives

- 1.3 We take enforcement action in respect of non-compliance with competition law to prevent harm to competition and consumers, and to remedy this where we can. We may also impose a penalty to deter non-compliance.
- 1.4 We seek to ensure that Competition Act investigations are conducted in a fair, transparent, efficient and timely way.

## Status of these Guidelines

- 1.5 These Guidelines take effect from 28 June 2017. They set out Ofcom’s general approach to enforcement in Competition Act investigations and they are designed to be flexible. Where we depart from the approach set out in these Guidelines, we will explain our reasons for doing so.
- 1.6 These Guidelines are not a substitute for any regulation or law, and are not legal advice.
- 1.7 They will be kept under review and amended as appropriate in light of further experience and developing law and practice and any change to Ofcom’s powers and responsibilities.

## Section 2

# Why and how Ofcom opens cases

2.1 This section sets out why and how Ofcom decides whether to open a Competition Act investigation.

## How Ofcom decides whether to investigate

2.2 We cannot necessarily pursue every possible issue that comes to our attention and must make decisions about whether to open investigations by weighing up the likely benefits of conducting an investigation against the resources that would be required, and the comparative benefits of using those resources in other ways. We make decisions about whether to open investigations on a case-by-case basis, having considered all the matters that appear to us to be relevant to whether or not we should do so.

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

- a) The risk of harm arising from/seriousness of the alleged conduct. For example:
  - the risk to the interests of citizens or consumers resulting from the alleged contravention (including whether that risk is immediate or not and whether it is direct or indirect), and conversely the direct and indirect benefit to consumers of our taking action (e.g. to deter similar conduct by others);
  - whether the conduct is on-going;
  - whether the allegation concerns conduct that is, or that appears to be, a repeated, intentional or particularly flagrant contravention or infringement;
  - whether the business which is under investigation has a history of similar contraventions or infringements, or a demonstrated record of poor compliance;
- b) The strategic significance of addressing the alleged conduct and whether alternative proceedings are likely to achieve the same ends. For example:
  - whether an investigation would help clarify the regulatory or legal framework for stakeholders;
  - whether the issue that has been identified directly relates to Ofcom's broader strategic goals or priorities (including those within Ofcom's Annual Plan);
  - whether there are other alternative proceedings that are likely to achieve the same ends, or deal with the same issues, as the potential investigation. This could include, for example, whether other agencies may be better placed to investigate the complaint or whether planned market reviews may address the potential harm;
  - in the case of complaints in relation to the Chapter II prohibition and/or Article 102 of the TFEU, whether Ofcom has recently found (for example in a market review) that no communications provider (including the subject of the investigation)

occupies a position of significant market power in the market which appears relevant to the complaint; and

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

- 2.4 Where appropriate we will also consider other factors as well.
- 2.5 In addition, before opening an investigation, under section 25 of the Competition Act, Ofcom must be satisfied that there are reasonable grounds for suspecting that a competition law infringement has occurred.
- 2.6 Ofcom will also consider whether it is the best placed competition authority to handle the case under the concurrency rules.
- 2.7 Ofcom exercises its powers as the UK competition authority for the communications industries in accordance with the Concurrency Regulations<sup>1</sup> and the European Commission's Network Notice<sup>2</sup>. When considering whether to open a Competition Act investigation, we will consider whether Ofcom or the CMA is best placed to act on a case.<sup>3</sup> In certain circumstances, Ofcom may pass details on to the CMA (or vice versa) where the two regulators agree to the transfer and subject to notifying the subject of the investigation under Rule 7 of the Concurrency Regulations.<sup>4</sup>
- 2.8 Where a case raises issues under Article 101 and/or Article 102 of the TFEU, Ofcom will apply the case allocation principles set out in the Network Notice to decide whether we, the CMA, a national competition authority from another Member State or the European Commission is well placed to act.

## Sources of information

- 2.9 Information which could trigger a Competition Act investigation can come to Ofcom's attention from a number of different sources. For example, Ofcom may consider opening an investigation:
- where a business comes to us to let us know that they believe they have or may have breached competition law (a "self-referral");

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<sup>1</sup> The Competition Act 1998 (Concurrency) Regulations 2014 (SI 2014/536). These are available on [www.legislation.gov.uk](http://www.legislation.gov.uk).

<sup>2</sup> Commission Notice on cooperation within the Network of Competition Authorities (2004/C101/03) [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(02)&from=EN)

<sup>3</sup> See further *Guidance on concurrent application of competition law to regulated industries* (CMA10), published March 2014

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288958/CMA10\\_Guidance\\_on\\_concurrent\\_application\\_of\\_competition\\_law\\_to\\_regulated\\_industries.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288958/CMA10_Guidance_on_concurrent_application_of_competition_law_to_regulated_industries.pdf) and *Modernisation* (OFT442) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284432/oft442.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284432/oft442.pdf)

<sup>4</sup> Ofcom has entered into a Memorandum of Understanding with the CMA in relation to our exercise of concurrent powers. See *Memorandum of understanding between the Competition and Markets authority and the Office of Communications – concurrent competition powers* (2 February 2016) [https://www.ofcom.org.uk/data/assets/pdf\\_file/0021/83523/cma\\_and\\_ofcom\\_mou\\_on\\_use\\_of\\_concurrent\\_consumer\\_powers\\_webversion.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0021/83523/cma_and_ofcom_mou_on_use_of_concurrent_consumer_powers_webversion.pdf)

- in response to a complaint by an industry stakeholder or whistleblower;
- in response to information provided to us by other bodies (for example, where other regulatory bodies, MPs, consumer organisations or the press draw our attention to complaints they have received about a particular issue);
- where routine monitoring by us gives rise to a concern about compliance; and/or
- where we identify a particular concern through other areas of our work.

## Complaints and whistleblowing

- 2.10 As noted above, some of our investigations begin because we have received a complaint about a potential infringement of competition law by a business, from another business or a trade association. Guidance for stakeholders who wish to make a complaint is set out in the document *Advice for complainants: Submitting a complaint to Ofcom*, available here: [https://www.ofcom.org.uk/data/assets/pdf\\_file/0013/102514/Advice-for-complainants.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0013/102514/Advice-for-complainants.pdf).
- 2.11 In addition, Ofcom has published guidance on how individuals working in the communications sector may contact us if they have concerns about possible wrongdoings at their own organisation (or their former organisation) and where they have been unable to raise or resolve those concerns internally.<sup>5</sup> Such disclosures can be made in confidence to Ofcom's Corporation Secretary. Further guidance for whistleblowers is set out in *Advice for complainants* document.

## Self-referrals

- 2.12 An undertaking that considers it has or may have breached competition law may contact Ofcom with details.
- 2.13 In the context of suspected involvement in a cartel, this is known as an application for "leniency". By confessing, an undertaking could gain total immunity from, or a significant reduction in, any financial penalties Ofcom can impose if it decides that the arrangement breaches the Chapter I prohibition and/or Article 101. Confessing may also protect staff and senior individuals from criminal prosecution and/or competition disqualification orders against directors.
- 2.14 All initial applications for leniency should be made to the CMA in accordance with its published leniency process and procedure.<sup>6</sup>
- 2.15 The CMA's process for applying for leniency is not repeated here. Further information on the types of leniency which may be available, and the conditions which must be met to secure those benefits, is contained in the CMA's guidance on leniency applications and penalty guidelines.<sup>7</sup>

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<sup>5</sup> <https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines/procedure-for-making-a-disclosure>

<sup>6</sup> *Applications for leniency and no action in cartel cases* (OFT1495), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284417/OFT1495.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf)

<sup>7</sup> *Applications for leniency and no action in cartel cases* (OFT1495); and *OFT's guidance as to the appropriate amount of penalty* (OFT432) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284393/oft423.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf)

## Initial assessment

- 2.16 Prior to opening an investigation, Ofcom will first carry out an initial assessment of the issue(s) to ascertain whether there is sufficient concern to warrant committing our resources to an investigation of the relevant matters, having considered all relevant factors as explained in paragraph 2.3 above. We do not make a substantive decision on whether or not there has been a breach of competition law during this initial assessment phase.
- 2.17 As part of our initial assessment, we will normally give the business whose conduct we are considering the opportunity to comment on the relevant issue(s) and to provide information to assist us in deciding whether to open an investigation. Where we are carrying out an initial assessment following receipt of a complaint, we will also generally tell the subject of the possible investigation that we are doing so on the basis of a complaint, and will generally share a non-confidential version of the complaint submission with the subject for comment.
- 2.18 However, we may decide not to provide the subject with the opportunity to comment and provide information if we consider that we already have sufficient information to conduct our initial assessment and decide whether to open an investigation. This could be based on previous engagement with the subject about the relevant issues, for example, through informal engagement, which might in some cases explore issues similar to those we would explore during our initial assessment. We may also decide not to provide an initial opportunity for comment and to provide information where there are reasons to proceed to an investigation more quickly. This could be, for example, due to the risk of particular consumer harm or where we consider this may prejudice the conduct of any subsequent investigation, such as in cases where we may need to use our information gathering powers to obtain and preserve evidence prior to alerting the subject of the investigation.
- 2.19 Where we are assessing a complaint, there may also be cases in which we consider that it is not appropriate to provide the subject of the complaint with the opportunity to comment on the complaint submission. This could be, for example, for one or more of the reasons explained in paragraph 2.18 above. There may also be cases where it is important to safeguard the anonymity of the complainant such that it is not appropriate to share a copy of the complaint at this stage.<sup>8</sup> In such cases, where we decide to open an investigation, we would (subject to anonymity concerns) share a non-confidential version of the complaint submission with the subject once we have opened the investigation (or at an appropriate point of time after we have done so, i.e. after we have exercised our information gathering powers).
- 2.20 Where we 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.

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<sup>8</sup> Ofcom will consider requests from complainants to remain anonymous. However, it may not be feasible to carry out our initial assessment or open or conduct an investigation without revealing the identity of the complainant to the subject. This does not apply to whistleblowers.

- 2.21 We aim to complete our initial assessment as quickly as reasonably possible, but the length of time that this will take is likely to vary on a case-by-case basis based on the issues under consideration.
- 2.22 In cases where we decide that it is appropriate to give the subject of the possible investigation an initial opportunity to comment and to provide information on the issues under consideration (including in response to a complaint), we will write to the subject setting out how long it will have to comment, and how soon after considering any comments or information received we aim to take our decision on whether to open an investigation. We will also provide contact details for the case leader who will act as the main point of contact while we are making our initial assessment. We will provide the same information to a complainant where we are completing our initial assessment of a complaint we have received. In those cases, we expect to keep the subject and any complainant updated should our initial assessment take longer than expected.
- 2.23 We are not able to exercise our information gathering powers under the Competition Act prior to opening an investigation, although we expect businesses we are considering investigating to ensure that the information they provide to Ofcom during our initial assessment is accurate. We may also ask complainants to provide further information, and also expect complainants to ensure that the information they provide to Ofcom during our initial assessment is accurate. In some cases, we may meet the subject of the possible investigation and/or a complainant where we consider this will assist us in reaching a decision on whether to open an investigation.
- 2.24 We do not publish details of, or comment publicly on, the matters we are considering during our initial assessment phase.

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

- 2.25 In some cases, Ofcom may be able to resolve an issue without the need for formal enforcement action. For example, we may be satisfied that the business has taken, or has offered assurances that it will take, appropriate steps to address any concerns we have identified such that there is no need for further action (although there may be a period of compliance monitoring).
- 2.26 In such cases, we will normally write to the business whose conduct we have been considering and any complainant to explain the basis on which we have decided not to proceed to formal enforcement action, and the circumstances in which we might reconsider the need to take formal enforcement action in future if relevant (for example, in the event that the organisation did not take the steps which it had said that it would or we received further evidence of a potential breach of competition law).
- 2.27 Such informal action will generally not involve Ofcom taking any decision about whether or not competition law has been breached.
- 2.28 Where Ofcom has decided not to pursue formal enforcement action in relation to an issue as a result of informal resolution, but we later become aware of further issues relating to the same or a similar issue, we may take formal enforcement action at that stage. If we did so, we would generally take into account any failure on the part of the relevant business to abide by assurances previously given to us relating to this conduct.

- 2.29 We may publish details of assurances that have been given about the steps the relevant business has taken and/or will take to address the issue, for example where we consider this would be in the interests of potentially affected customers or consumers more generally. We will usually inform the business concerned shortly before (and no more than one working day before) publication on Ofcom's website that we will be doing so, and provide them with a copy of the intended text for information only at that stage.

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

- 2.30 A senior member of Ofcom's executive with appropriate Board-delegated authority will decide whether to open an investigation. Typically, this will be the person who will be responsible for overseeing the investigation.
- 2.31 Where we decide not to open an investigation following our initial assessment, we will normally inform the business whose conduct we have been considering and any complainant, but will not usually give them the opportunity to comment before we take our decision.
- 2.32 Ofcom will not usually publicise a decision not to open an investigation unless the fact that a complaint has been made has been made public by either the complainant or the business that we were considering investigating, or a potential investigation is the subject of press speculation, and we consider we should clarify the position. In such cases, we would usually inform the subject of the investigation shortly before (and no more than one working day before) publication on Ofcom's website that we will be doing so, and provide them with a copy of the intended text for information only at that stage.
- 2.33 In most cases, when Ofcom decides to open an investigation, we will inform the subject and any complainant by sending them each a case opening letter explaining the scope of Ofcom's investigation, who the case leader and case supervisor are (as discussed further at paragraph 3.5 below) and next steps. However, there may be some cases where we delay doing so if we consider it may prejudice our ability to carry out an investigation, for example in cases where we may need to use our information gathering powers to obtain and preserve evidence prior to alerting the subject.
- 2.34 Shortly after sending the case opening letter(s), we will generally also announce that we have opened an investigation on the Competition and Consumer Enforcement Bulletin (**CCEB**) section of our website<sup>9</sup> (although we may delay doing so if we consider it may prejudice our ability to carry out an investigation). The case opening announcement will typically include the following details:
- a) the identity of the subject of the investigation;
  - b) the identity of any complainant<sup>10</sup>;

<sup>9</sup> <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins>

<sup>10</sup> If a complainant has concerns about being publicly identified on Ofcom's website, the complainant should raise this concern with us, ideally at the time of making its complaint submission. For the avoidance of doubt, Ofcom will not publish a copy of the complaint submission itself.

- c) whether the case is being investigated under Chapter I and/or Chapter II of the Act (and/or Article 101 and/or 102 of the TFEU);
  - d) the scope of the investigation; and
  - e) the case leader's contact details.<sup>11</sup>
- 2.35 Announcing the beginning of an investigation does not imply that Ofcom has formed any view about whether competition law has been breached.
- 2.36 If the investigation raises issues under Article 101 and/or Article 102 of the TFEU, Ofcom will notify the European Commission before (or without delay after) using its powers of investigation. In such investigations, Ofcom will co-operate with the European Commission and other national competition authorities in the European Competition Network (**ECN**) following the Network Notice. This may include the exchange of information by Ofcom within the ECN subject to the confidentiality and disclosure provisions of the Modernisation Regulation<sup>12</sup> and Part 9 of the Enterprise Act 2002 (the "**Enterprise Act**").

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<sup>11</sup> Competition Act, section 25A(1)

<sup>12</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32003R0001>

## Section 3

# Investigating

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

## Engagement with Ofcom during the investigation

- 3.2 We seek to ensure that Competition Act investigations are conducted in a fair, transparent, efficient and timely way. As set out in the relevant sections of this document, Ofcom may request representations from, and engage with, complainants and other relevant third parties.
- 3.3 We will endeavour to keep the subjects of our investigations up-to-date on the progress of the investigation. If we receive a request to meet to discuss the case, we will consider it. We will be prepared to meet with the subject of an investigation and complainants or other third parties, and/or provide written or verbal updates, where we consider it to be appropriate for reasons of fairness and transparency. We will decide whether and when it is appropriate to do so on a case-by-case basis, depending on the nature of the investigation and the stage that we have reached in our analysis.
- 3.4 We explain in the following sections of these Guidelines the type of engagement that businesses we are investigating, complainants and third parties can generally expect to have with Ofcom at key points during the investigation.

## Case team

- 3.5 At the outset of the investigation, Ofcom will usually<sup>13</sup> inform the subject of the investigation, and any complainant, of:
- the case leader – this is the person who will be their main contact at Ofcom for the case during the course of the investigation; and
  - the case supervisor – this is the person who will be overseeing the investigation.<sup>14</sup>
- 3.6 We will also explain how the Procedural Officer can be contacted (see paragraph 3.50 and Section 7 of this document).
- 3.7 At the same time Ofcom may ask the subject and any complainant to each nominate a principal point of contact for communications about the investigation.

<sup>13</sup> As noted above, there may be circumstances in which we decide not to do this until a later point in the investigation, for example where we consider this could prejudice the conduct of the investigation, such as in cases where we may need to use our information gathering powers to obtain and preserve evidence prior to alerting the subject about our investigation.

<sup>14</sup> As explained at paragraph 4.4 below, the case supervisor is the person responsible for overseeing the investigation and for deciding whether to issue a statement of objections.

- 3.8 If the case leader or the case supervisor changes during the course of the investigation, we will update the subject and any complainant.
- 3.9 Details of the case leader for an investigation will also be set out on the CCEB section of our website.

## **Timescales**

- 3.10 Ofcom recognises that it is important for all stakeholders that if we open an investigation we progress it in a timely manner and conclude it as soon as reasonably possible. We will give the subject and any complainant an indication of the likely timescale involved in completing an investigation – this will normally be at the point when we open the investigation.<sup>15</sup>
- 3.11 We will provide updates to the subject and any complainant on the progress of investigations, including when we expect to reach a specific milestone, and will provide updates where this changes.
- 3.12 We will also aim to publish on the CCEB section of our website details of how long we expect to take to reach key milestones in an investigation.

## **Changing the scope of an investigation**

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

## **Information gathering**

- 3.14 Ofcom relies on accurate information, provided in a timely manner, to carry out efficient investigations. Ofcom has powers to gather information under the Competition Act, and we can use these information gathering powers once we have opened a Competition Act investigation.
- 3.15 We will usually use these powers, once we have opened an investigation, to obtain relevant information to help us establish whether a competition law infringement has been committed. However, we cannot require the production or disclosure of privileged communications<sup>16</sup> or require a party to provide responses that would require an admission that it has infringed the law.

## **Written information requests**

- 3.16 Ofcom has the power, under section 26 of the Competition Act, to issue written information requests requiring a person to produce specified documents or information which we consider relate to any matter relevant to the investigation. This

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<sup>15</sup> Although we may delay doing so where we consider this may prejudice the conduct of the investigation, such as in cases where we may need to use our information gathering powers to obtain and preserve evidence prior to alerting the subject of the investigation about our investigation.

<sup>16</sup> Competition Act, section 30

is the power we would expect to use most often to gather information during Competition Act investigations.

- 3.17 Ofcom will set a deadline by which the response to a written information request must be received. This will depend on the demands of the investigation timetable, and the nature and amount of the information we have requested.

### Other information gathering powers

- 3.18 Ofcom also has powers under sections 26A to 28A of the Act to:

- require an individual connected with the subject of the investigation to answer oral questions on any matter relevant to the investigation;<sup>17</sup> and
- enter, and in some instances to search, business and domestic premises.

- 3.19 We would expect to use these powers less frequently, and we would expect to have regard to the CMA's guidance in this regard when exercising these powers.<sup>18</sup>

### Power to require an individual to answer oral questions

- 3.20 Where we wish to question a connected individual, we will provide the individual with a formal written notice requiring them to answer questions at a specified place and time or immediately on receipt of the notice. The notice will explain what the investigation is about and give details of when and where the questions will be asked.<sup>19</sup>

- 3.21 Where the individual has a current connection with the subject of the investigation at the time the notice is given, Ofcom will also give a copy of the notice to the subject. We will take reasonable steps in the circumstances to provide the notice before the interview takes place, and in general Ofcom will provide a copy of the notice to the subject at the same time as, or as soon as reasonably practicable after, giving the notice to the individual.<sup>20</sup>

- 3.22 The individual may request to have their legal adviser present. Where an interview is to take place immediately on receipt of the notice, we may delay it for a reasonable time to allow the individual's legal adviser to attend.<sup>21</sup>

- 3.23 Ordinarily interviews will be recorded, but in circumstances where this is unnecessary or impracticable a contemporaneous note will be taken of the interview. The individual will be asked to read through and check any transcript or note of the

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<sup>17</sup> An individual has a connection with the subject of the investigation if they are or were concerned in the management or control of the subject or employed by, or otherwise working for the subject. An individual has a current connection with the subject if, at the time in question, they are so concerned, so employed or otherwise so working (Competition Act, section 26A(6)).

<sup>18</sup> CMA8, March 2014, *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (paragraphs 6.18 – 6.46) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/537006/CMA8\\_CA98\\_Guidance\\_on\\_the\\_CMA\\_investigation\\_procedures.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537006/CMA8_CA98_Guidance_on_the_CMA_investigation_procedures.pdf)

<sup>19</sup> Competition Act, section 26A(1), section 26A(5)

<sup>20</sup> Competition Act, section 26A(2), section 26A(3), section 26A(4)

<sup>21</sup> Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (SI 2014/458) (the "CMA Rules"), Rule 4(3), available at: [www.legislation.gov.uk/id/uk/si/2014/458](http://www.legislation.gov.uk/id/uk/si/2014/458)

interview and to confirm, in writing, that it is an accurate account of the interview. Ofcom will also normally ask the individual to identify any confidential information in the transcript.<sup>22</sup>

### **Powers to enter and search premises**

- 3.24 Ofcom has powers under the Act to enter a business premises (without a warrant),<sup>23</sup> and to enter and search a business or domestic premises (with a warrant).<sup>24</sup>
- 3.25 If Ofcom is entering and/or searching premises, Ofcom's authorised officers will normally arrive at the premises during office hours. If Ofcom intends to use its powers to enter business premises without a warrant we will give the premises' occupier at least two days' written notice of such arrival.<sup>25</sup> On entry, Ofcom's authorised officers will provide evidence of their identity, written authorisation by Ofcom, and a document setting out what the investigation is about and describing what criminal offences may be committed if a person fails to co-operate. Where Ofcom has obtained a warrant, Ofcom's authorised officers will also produce it on entry.
- 3.26 The occupier may ask legal advisers to be present during an inspection. If the occupier has not been given notice of the visit, and there is no in-house lawyer on the premises, Ofcom officers may wait a reasonable time for legal advisers to arrive.<sup>26</sup> During this time, Ofcom's officers may take necessary measures to prevent tampering with evidence or warning other businesses about the investigation.
- 3.27 Where possible, the person in charge at the premises should designate an appropriate person to be a point of contact for Ofcom authorised officers during the inspection.
- 3.28 When entering business premises without a warrant, Ofcom's officers may require any person to:
- produce any document which might be relevant to Ofcom's investigation, and Ofcom's officers may take copies of or extracts from any document produced;<sup>27</sup>

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<sup>22</sup> If the individual has a current connection with the subject of the investigation, we will also send a copy of the transcript or note to the subject, giving it the opportunity to make confidentiality representations. In addition, if appropriate, we may send a copy of the transcript to the subject if the individual has a former connection to it.

<sup>23</sup> Competition Act, section 27

<sup>24</sup> Competition Act, section 28, section 28A. See also Competition Act, section 29. For the procedure for making an application to the High Court for a warrant see *Civil Procedure Rules, Practice Direction – Application for a warrant under the Competition Act 1998* (May 2004) and the *Alternative Procedure for Claims* in Rule 8 CPR, as modified by the Practice Direction.

<sup>25</sup> Competition Act, section 27(2). Ofcom may enter business premises without giving notice if it reasonably suspects that the premises are or have been occupied by the subject of the investigation and we have taken all reasonably practicable steps to give written notice but have not been able to do so (Competition Act, section 27(3)).

<sup>26</sup> CMA Rules, Rule 4(1)

<sup>27</sup> Ofcom's officers may also require any relevant information electronically stored to be produced in a form that can be read and taken away, and they may also take steps necessary to preserve documents or prevent interference with them.

- provide any explanation of any document produced; and
- tell them where a document can be found if Ofcom's officers consider it to be relevant to the investigation.<sup>28</sup>

3.29 When entering a business or domestic premises with a warrant, in addition to the powers set out in paragraph 3.28 above, Ofcom's officers may also search the premises for documents which appear to be of the kind covered by the warrant. Ofcom may take away from the premises:

- copies or original versions<sup>29</sup> of documents which appear to be of the kind covered by the warrant;
- copies or original versions of documents to determine whether a document is relevant to the investigation, when it is not practicable to do so at the premises;
- any relevant documents, or copies, contained in something else where it is not practicable to separate out the relevant document at the premises; and
- copies of computer hard drives, mobile phones and other electronic devices.<sup>30</sup>

### **Non-compliance with Ofcom's information gathering powers**

3.30 Ofcom's information gathering powers under the Competition Act are a critical tool in obtaining information necessary to carry out a Competition Act investigation. We expect recipients to provide correct and complete information in response to written information requests by the given deadline, and to comply with Ofcom's other information gathering powers. Ofcom may take enforcement action against failures to respond properly to information requests, and to comply with its other information gathering powers.

3.31 Ofcom may impose a penalty on any person who fails, without reasonable excuse, to comply with a requirement imposed by our information gathering powers under the Competition Act. This may be either a fixed or daily penalty, or a combination of the two, depending on what is appropriate in the circumstances.<sup>31</sup> It is also a criminal offence punishable by fine and/or imprisonment to knowingly or recklessly provide false or misleading information, or to intentionally or recklessly destroy, dispose of, falsify or conceal documents, or to intentionally obstruct an officer exercising their information gathering powers to enter or search a premises.<sup>32</sup>

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<sup>28</sup> Competition Act, section 27(5)

<sup>29</sup> If we consider it is necessary to preserve the documents or prevent interference with them, or where it is not reasonably practicable to take copies on the premises.

<sup>30</sup> Competition Act, section 28(2), section 28A(2)

<sup>31</sup> Competition Act, section 40A. In setting the penalty we will have regard to *Administrative penalties: Statement of Policy on the CMA's approach (CMA4)*  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270245/CMA4 - Admin Penalties Statement of Policy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270245/CMA4_-_Admin_Penalties_Statement_of_Policy.pdf)

<sup>32</sup> Competition Act, sections 42 to 44

- 3.32 If we decide to impose a penalty for failure to comply with our information gathering powers, we will have regard to the procedure set out in the CMA's Statement of Policy on administrative penalties.<sup>33</sup>

## Confidentiality

- 3.33 Information provided to Ofcom during the course of a Competition Act investigation is often confidential. Ofcom will always consider whether disclosure of information about a particular business is necessary for the purpose of facilitating the exercise by Ofcom of our functions.<sup>34</sup> In particular, Ofcom may judge that it is necessary to disclose information gathered from complainants or other third parties to the subject of the investigation in order to allow the subject to respond to Ofcom's case. Similarly, Ofcom may judge that disclosure of information gathered from the subject of the investigation to a complainant and other third parties is justified in order to facilitate the carrying out by us of our functions.
- 3.34 When Ofcom is considering disclosing confidential information, we must consider the extent to which the disclosure of the information is necessary for the purpose for which we are permitted to make the disclosure. We must also consider the need to exclude from disclosure (as far as practicable):
- information whose disclosure we consider is contrary to the public interest;
  - commercial information whose disclosure we consider might significantly harm the legitimate business interests of the undertaking to which it relates; or
  - information relating to the private affairs of an individual whose disclosure Ofcom considers might significantly harm the individual's interest.<sup>35</sup>
- 3.35 If the subject of the investigation, any complainant or a third party provides us with information that they consider to be confidential, they should clearly identify this information and explain why they consider it to be confidential, in accordance with the relevant statutory definition.<sup>36</sup>
- 3.36 It is for Ofcom to determine what it is, and is not, appropriate to disclose in accordance with the statutory framework, and Ofcom may consider it appropriate to disclose information notwithstanding that a party has asserted confidentiality over it. We will decide on the best means of dealing with confidential information on a case by-case basis, in accordance with the relevant statutory framework, having regard to

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<sup>33</sup> *Administrative penalties: Statement of Policy on the CMA's approach (CMA4)*

<sup>34</sup> Under Part 9 of the Enterprise Act, we must not disclose information relating the affairs of an individual, or any business of an undertaking, unless it is permitted by one of the prescribed "gateways" under that Part. The gateway under section 241 of the Enterprise Act provides that a public authority may disclose such information for the purpose of facilitating the exercise of its functions. This gateway also provides that the recipient of information that is disclosed by Ofcom for these purposes may not disclose the information further without Ofcom's consent.

<sup>35</sup> Enterprise Act, section 244

<sup>36</sup> Confidential information is defined by Rule 1 of the CMA Rules as: (a) commercial information whose disclosure Ofcom considers might significantly harm the legitimate business interests of the undertaking to which it relates; (b) information relating to the private affairs of an individual whose disclosure Ofcom considers might significantly harm the individual's interests; or (c) information whose disclosure Ofcom considers is contrary to the public interest.

the respective interests of the party that has provided the confidential information, and of the subject of the investigation.

- 3.37 If Ofcom is proposing to disclose information which a party considers to be confidential, we will take reasonable steps to inform that party and will give it a reasonable opportunity to make representations on our proposal,<sup>37</sup> before making a final decision on whether to disclose the information. This decision will be made by the case team and/or the case supervisor, and will be communicated to the party concerned in advance of the disclosure being made. Where the decision is to disclose the information despite the party whose information it is continuing to object to such disclosure, we would give that party the opportunity to escalate its concerns to the Procedural Officer (in accordance with Section 7). We would expect to delay disclosing the information until the Procedural Officer has reached his/her decision. If we intended to proceed to disclose the information after taking these steps, we would inform the party concerned in advance.
- 3.38 We may request that we are provided with a non-confidential version of a submission if needed for the purposes of publication and/or disclosure. Such a non-confidential version should normally include suggested non-confidential summaries of information (for example “confidential details of contracts”) or ranges of numbers, rather than simply removing the confidential information.

## Publicising cases

- 3.39 Ofcom ensures that its regulatory activities are transparent and accountable. Publicising the action we take can also usefully draw it to the attention of parties who have relevant information, can help deter non-compliance in future and educate others about what can go wrong.
- 3.40 As explained at paragraph 2.344 above, when we open an investigation, we will typically publicise it on the CCEB section of our website.<sup>38</sup>
- 3.41 We will also publish updates regarding the progress of an investigation on the CCEB when we reach key milestones (such as when we issue a statement of objections, when we change the scope of an investigation, when we issue a final infringement decision or when we close a case). This is explained in more detail in the relevant sections of these Guidelines.
- 3.42 We may also issue media releases regarding the outcome of our investigations, for example where we consider this would be in the interests of potentially affected customers or consumers more generally.
- 3.43 We do not agree the text of CCEB updates or media releases with the subject of the investigation or any complainant.
- 3.44 We will ordinarily inform the subject of the investigation shortly, and no more than one working day, before publication on the CCEB that we will be doing so, and provide it with a copy of the intended text of the CCEB update for information only at that stage.

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<sup>37</sup> CMA Rules, Rule 7

<sup>38</sup> <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins>. Stakeholders who are interested in following the progress of our investigations can also subscribe to receive email notifications of changes to the CCEB.

- 3.45 Where we consider an announcement to be potentially market sensitive, we will generally inform the subject after markets have closed, with publication at 7.00am on Ofcom's website and via the Regulatory News Service, just before markets open. Where the subject is a listed company in other jurisdictions, we will, where possible, seek to avoid publication during stock exchange hours in those jurisdictions.
- 3.46 There may be certain cases which we consider it would be inappropriate to publicise, for example because they are particularly sensitive and/or publicity could have a detrimental impact on third parties. We would inform the subject and any complainant if we intend to take this approach to an investigation. We expect these cases to be exceptional.

### **Involvement of third parties**

- 3.47 Ofcom recognises that in some cases third parties may be directly affected by the outcome of an investigation and can play a valuable role by drawing issues to our attention and by providing us with relevant information during the course of an investigation.
- 3.48 Ofcom may seek input from relevant third parties – for example, from trade associations, competitors or customers of the subject of the investigation, in order to assist us in reaching a decision on the case. Ofcom will involve third parties in an investigation to the extent we consider appropriate in order to carry out our functions fairly, transparently and effectively.

### **How to raise concerns with Ofcom**

- 3.49 If a subject of an investigation, a complainant or third party (where relevant) is dissatisfied with the way in which Ofcom is proceeding, they should usually raise their concerns in writing with the case leader or case supervisor in the first instance.
- 3.50 Where engagement with the case leader/case supervisor does not resolve a party's concerns about a significant procedural issue, it may contact the Procedural Officer. The process for doing so is set out in Section 7.

## Section 4

# Outcomes of investigations and the decision-making process

- 4.1 This section sets out the possible ways in which Ofcom may conclude a Competition Act investigation. This includes reaching a decision that there has been an infringement of competition law, a decision that there is insufficient evidence to find an infringement, a decision to close the case without taking a decision on the merits, and accepting binding commitments from the subject of the investigation to address our competition concerns.
- 4.2 In some cases, we may be able to reach a settlement with the subject of an investigation as a way of resolving a case, in circumstances where we think we have grounds to find an infringement of competition law. The process for settlement is set out in Section 5 of these Guidelines.
- 4.3 This section also sets out who will make key decisions during an investigation.

## Decision makers

- 4.4 Ofcom will nominate a person to oversee the investigation and to decide whether to issue a statement of objections (the case supervisor), who will be a senior member of Ofcom's executive with appropriate Board-delegated authority.<sup>39</sup>
- 4.5 Following the statement of objections, Ofcom will nominate three different relevant persons to collectively make the following subsequent decisions:
- whether to issue a supplementary statement of objections;
  - whether to issue a draft penalty statement; and
  - whether to issue an infringement decision (including any penalty and/or directions).

These decision makers will comprise three senior members of Ofcom's executive with appropriate Board-delegated authority. They will not have been involved in the investigation nor be the person who is responsible for overseeing the investigation and making the decision to issue the statement of objections.<sup>40</sup>

## Investigation outcomes

### Statement of objections

- 4.6 Where Ofcom reaches the provisional view that the conduct under investigation amounts to an infringement of competition law, we will issue a statement of objections to the subject of the investigation.<sup>41</sup>

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<sup>39</sup> CMA Rules, Rule 3(1)

<sup>40</sup> CMA Rules, Rule 3(2)

<sup>41</sup> CMA Rules, Rule 5(1)

- 4.7 The statement of objections represents Ofcom’s provisional view, which may change in light of subsequent representations made, or material provided by, the subject of the investigation (or complainants or other third parties where relevant) or any further evidence which comes to light. It allows the subject of the investigation to know the full case against it, and if it chooses to do so, to formally respond in writing and orally.
- 4.8 The statement of objections will state:
- which of the competition law prohibitions Ofcom considers has been infringed;
  - Ofcom’s reasons for considering that the conduct under investigation amounts to an infringement of competition law;
  - the facts on which Ofcom has relied;
  - the action Ofcom proposes to take, such as imposing a financial penalty (although Ofcom will not include a provisional determination of the amount of the penalty) and/or issuing directions, and our reasons for the proposed action; and
  - the period in which the subject of the investigation may make written representations to Ofcom on the matters referred to in the statement of objections and on the confidentiality of the information contained in the statement of objections.<sup>42</sup>
- 4.9 If the subject of the investigation is a company, Ofcom will send the statement of objections in hard copy to the Company Secretary, copied by email to our main contact, unless it has agreed otherwise with us.
- 4.10 Ofcom will not publish the statement of objections, but we will generally publish an update on the CCEB section of our website. Our update will normally explain that we have issued a statement of objections and include a summary of the infringement which Ofcom is minded to find. The CCEB update will also state that the subject of the investigation will have the opportunity to make representations on the statement of objections before we make our final decision.

### Access to file

- 4.11 Ofcom will give the subject of the investigation a reasonable opportunity to inspect copies of disclosable documents on Ofcom’s investigation file (“**access to file**”).<sup>43</sup> We will usually give access to file at the same time as we issue the statement of objections. Access to file will usually be given by supplying the file by electronic means.
- 4.12 Disclosable documents are documents on Ofcom’s file which relate to the matters contained in the statement of objections.<sup>44</sup> Ofcom may withhold a document:
- a) to the extent that it contains confidential information;<sup>45</sup> or

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<sup>42</sup> CMA Rules, Rule 5(2), Rule 6(1)

<sup>43</sup> CMA Rules, Rule 6(2)

<sup>44</sup> CMA Rules, Rule 6(2)

<sup>45</sup> CMA Rules, Rule 6(1); see also Rule 1(1) for the definition of “confidential information”

b) if it is an Ofcom internal document.<sup>46</sup>

- 4.13 Ofcom may also exclude routine administrative documents<sup>47</sup> from the file and list these in a schedule which will be placed on the file. Ofcom will provide the subject with a schedule of external documents on its file which have not been disclosed as part of the access to file process.

### Written representations

- 4.14 The subject of the investigation will have the opportunity to make written representations to Ofcom on the proposed findings in the statement of objections.<sup>48</sup>
- 4.15 The deadline for submitting written representations will be set by Ofcom having regard to the circumstances of the case, and Ofcom will give a longer period in more complex cases. Usually the deadline for the subject to submit written representations will be at least 40 days from the issue of the statement of objections. If Ofcom is unable to give access to file at the same time as we issue the statement of objections, the time for submission of written representations will not start to run until access to file has been given.
- 4.16 Where we consider it to be appropriate for reasons of fairness, we may provide complainants or relevant third parties with the opportunity to comment on a non-confidential copy of the statement of objections. This will typically be where they may have further information relevant to the proposed decision and therefore could provide informed comments on the statement of objections. Another example may be where Ofcom's provisional findings may have a direct impact on the economic interests of a third party, such as where we comment in the statement of objections on the conduct of an agent of the subject of our investigation which we consider has given rise to the potential breach.
- 4.17 In such cases, Ofcom would expect the complainant or the third party to enter into appropriate agreements with us limiting its use of and onward disclosure of the document. We will set deadlines for representations depending on the circumstances of the case.
- 4.18 We will not usually provide a complainant or third parties with copies of, or access to, the underlying evidence relied on, but may do so where appropriate for reasons of fairness.
- 4.19 We will provide any written representations on the statement of objections received from the complainant or a third party to the subject of the investigation, providing it with an opportunity for comment.

### Oral hearings

- 4.20 Ofcom will offer the subject of the investigation the opportunity to attend an oral hearing to make oral representations on matters referred to in the statement of objections.<sup>49</sup> The oral hearing provides the subject with an opportunity to highlight

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<sup>46</sup> CMA Rules, Rule 6(1)

<sup>47</sup> Routine administrative documents will generally include correspondence setting up meetings and documents which do not relate to the substance of the matters set out in the statement of objections.

<sup>48</sup> CMA Rules, Rule 6(1)

<sup>49</sup> CMA Rules, Rule 6(3), Rule 6(4)

directly to the final decision makers issues of particular importance to its case and/or to clarify the detail set out in its written representations.

- 4.21 Ofcom will normally ask the subject to confirm by a given date if it wishes to make oral representations, and will then set a date for the oral hearing, which will normally be held 10 to 20 working days after the deadline for written representations has elapsed.
- 4.22 The oral hearing will be chaired by the Procedural Officer<sup>50</sup> and will usually be held at the Ofcom offices in which the investigating case team is based.
- 4.23 The case supervisor, case leader and other members of the case team may also be present and may comment during the course of the hearing. The final decision makers will also attend the oral hearing. Other personnel from Ofcom may attend as appropriate, for example, legal advisers, economic advisers and/or technical experts, depending on the circumstances of the case.
- 4.24 The subject may bring legal advisers or other relevant expert advisers to the oral hearing to assist in presenting its oral representations, although Ofcom may ask that the subject limits the number of persons attending the oral hearing on its behalf to a reasonable number.
- 4.25 Complainants and other third parties will not usually be invited to attend the oral hearing.
- 4.26 Ofcom will agree an agenda with the subject in advance of the oral hearing which will include reasonable periods of time for the subject to make oral representations and for the Ofcom personnel present to ask the subject questions on its representations.
- 4.27 The hearing will be transcribed and the transcript will be provided to the subject of the investigation, giving an opportunity for comment on its factual accuracy.<sup>51</sup>
- 4.28 The Procedural Officer will prepare a report following the oral hearing assessing the fairness of the procedure followed in the hearing and on any procedural issues that have been brought to his/her attention.<sup>52</sup>

#### **Disclosure of additional evidence**

- 4.29 Where Ofcom acquires new evidence at this stage which supports the case contained in the statement of objections, and Ofcom proposes to rely on it to establish that an infringement has been committed, as part of its on-going obligation to provide access to file, Ofcom will put this evidence to the subject of the investigation and give it the opportunity to respond. The timeframe for responding will depend on the volume and complexity of the new evidence.

#### **Supplementary statement of objections**

- 4.30 In some cases, new information or evidence may come to Ofcom's attention after we have issued the statement of objections, which leads us to consider making a

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<sup>50</sup> CMA Rules, Rule 6(5)

<sup>51</sup> To the extent multiple parties are given access to file, we will ask the subject of the investigation for representations on the confidentiality of the transcript.

<sup>52</sup> CMA Rules, Rule 6(6), Rule 6(7).

material change to the nature of the proposed infringement (such as evidence of a different or more serious infringement, or a material change in our reasoning for proposing to find a breach of competition law). In such circumstances, we would issue a supplementary statement of objections.

- 4.31 If we issue a supplementary statement of objections, we will provide the subject of the investigation with any new documents on the file in accordance with paragraphs 4.11 to 4.13, above. We would also provide the subject, and may provide the complainant and any interested third parties, with the opportunity to respond in accordance with paragraphs 4.14 to 4.28, above. The period of time for making written representations on any supplementary statement of objections would typically be shorter than the time given to respond to the statement of objections. We would also generally expect to publish a CCEB update as per paragraph 4.10, above.

### **Draft penalty statement**

- 4.32 If, following investigation, Ofcom finds that there has been an infringement of competition law, it may impose a financial penalty on the subject of the investigation of up to 10% of its turnover in a relevant market.<sup>53</sup> In determining penalties, Ofcom is required to have regard to the CMA's guidance on how it calculates the appropriate amount of a penalty,<sup>54</sup> including consideration of any grounds for leniency.<sup>55</sup> We must also have regard to the seriousness of the infringement and the desirability of deterring the subject and other stakeholders from infringing competition law.<sup>56</sup>
- 4.33 Where Ofcom has said it is minded to impose a penalty in the statement of objections or any supplementary statement of objections, it will issue a draft penalty statement to the subject on the level of that penalty after considering any written and oral representations on the statement of objections and any supplemental statement of objections.<sup>57</sup> The draft penalty statement will set out the level of the penalty Ofcom is minded to impose and its reasons.
- 4.34 The subject will be offered the opportunity to make written representations on the draft penalty statement. The deadline for submitting written representations on the draft penalty statement will be set on a case-by-case basis and will allow the subject the opportunity to inspect any new relevant documents on the file.<sup>58</sup> However, the deadline for submitting written representations will typically be shorter than the time given to respond to the statement of objections. The subject will also be given the opportunity to attend an oral hearing, chaired by the Procedural Officer and conducted in accordance with paragraphs 4.20 to 4.28 above.<sup>59</sup>

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<sup>53</sup> Competition Act, section 36(8), calculated in accordance with the Competition Act 1998 (Determination of turnover for penalties order) (SI 2000/309) (as amended by SI 2004/1259)

<sup>54</sup> *OFT's guidance as to the appropriate amount of penalty (OFT423)*, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284393/oft423.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf)

<sup>55</sup> Competition Act, section 38(8)

<sup>56</sup> Competition Act, section 36(7A)

<sup>57</sup> CMA Rules, Rule 11(a)

<sup>58</sup> CMA Rules, Rule 6(2), Rule 11(b)

<sup>59</sup> CMA Rules, Rule 6, Rule 11(b)

- 4.35 Ofcom will not publish the draft penalty statement and will not comment publicly about issuing a draft penalty statement.

### **The infringement decision**

- 4.36 After considering any written or oral representations on the statement of objections, any supplementary statement of objections and any draft penalty notice, if the final decision makers determine there is sufficient evidence to establish an infringement of competition law, Ofcom will issue a final infringement decision to the subject of the investigation.<sup>60</sup> If the subject is a company, we will deliver the infringement decision in hard copy to the Company Secretary, copied by email to our main contact, unless it has agreed otherwise with us.
- 4.37 Ofcom will also normally inform any complainant that we have reached a final decision on the investigation.
- 4.38 The infringement decision will state the facts on which Ofcom bases the decision and the reasons for our decision. It will also set out the reasons for any decision to impose a financial penalty on the subject and the level of penalty.<sup>61</sup> The infringement decision may also include directions setting out actions the subject must take to bring the infringement to an end, and the reasons for imposing these directions.<sup>62</sup>
- 4.39 Once the infringement decision has been issued, Ofcom will close the case and update the details on the CCEB section of our website. This will generally include a summary of the contraventions Ofcom has found and details of any penalty and/or directions imposed.<sup>63</sup>
- 4.40 Ofcom will also publish a non-confidential version of the infringement decision on the CCEB section of our website<sup>64</sup> once we have finalised the relevant redactions of any confidential information. We will generally inform the subject and any complainant in advance of the intended date of publication of the final decision.

### **Investigations that do not lead to an infringement finding**

- 4.41 Not all of Ofcom's Competition Act investigations result in a finding that the business under investigation has infringed competition law. Ofcom may decide that we do not have sufficient evidence to find a competition law infringement or that it is appropriate to close an investigation without making a finding on whether the subject of the investigation has infringed competition law. Alternatively, we may accept binding commitments as to future conduct from the subject of the investigation which address our competition concerns.

### **No grounds for action decision**

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<sup>60</sup> CMA Rules, Rule 10(1)(a)

<sup>61</sup> CMA Rules, Rule 12(2); Competition Act, section 36

<sup>62</sup> CMA Rules, Rule 12(1); Competition Act, section 32, section 33

<sup>63</sup> Competition Act, section 25A(4); CMA Rules, Rules 12(3), Rule 12(4)

<sup>64</sup> CMA Rules, Rule 10(1)(b)

- 4.42 Ofcom may decide, either before or after we issue a statement of objections, that we do not have sufficient evidence to find a competition law infringement.<sup>65</sup> In these circumstances Ofcom will issue a provisional “no grounds for action decision” to the subject of the investigation stating the facts on which we base our provisional decision and the reasons for this proposed decision. We will invite written representations from the subject of the investigation on the matters set out in our provisional decision.
- 4.43 We will usually provide the complainant with a non-confidential version of the provisional decision and invite written representations on it. We may also provide other relevant third parties with a non-confidential copy and the opportunity to make written representations, for example where we consider the relevant stakeholder(s) may have information which would assist us in reaching a decision on the outcome of the investigation. The deadline for written representations will depend on the circumstances of the case. We will not usually provide access to the underlying evidence.
- 4.44 Ofcom will consider any written representations and if our view is that we still do not have sufficient evidence to find a competition law infringement, we will issue a final no grounds for action decision to the subject.<sup>66</sup> Ofcom will also normally inform any complainant that we have reached a final decision on the investigation. If the representations change our view, we will continue the investigation.
- 4.45 If Ofcom decides to issue a no grounds for action decision, we will close the case and publish details of this on the CCEB section of our website.<sup>67</sup> Ofcom will also generally publish a non-confidential version of the decision<sup>68</sup> once we have finalised the relevant redactions of any confidential information, and we will generally inform the subject and any complainant in advance of the intended date of publication.

#### **Case closure without a decision on the merits**

- 4.46 Ofcom may close an investigation without taking a decision on the merits of the case and without making a finding on whether there has been a breach of competition law.<sup>69</sup>
- 4.47 If we decide to close an investigation on this basis, we will usually write to the subject of the investigation and the complainant in advance setting out the reasons why we are minded to make a decision to close the investigation, and invite comments from them. The timeframe for comment may be short, particularly where we consider there is limited scope for comment on the reasons underpinning our proposed decision to

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<sup>65</sup> Depending on the stage at which this decision is reached, the decision maker may be the person responsible for deciding whether to issue a statement of objections (who, as noted above, will typically be the person responsible for overseeing the investigation), or it may be the final decision makers referred to at paragraph 4.5 above.

<sup>66</sup> CMA Rules, Rule 10(4)

<sup>67</sup> Competition Act, section 25A(4)

<sup>68</sup> CMA Rules, Rule 10(5)

<sup>69</sup> Depending on the stage at which this decision is reached, the decision maker may be the person responsible for deciding whether to issue a statement of objections (who, as noted above, will typically be the person responsible for overseeing the investigation), or it may be the final decision makers referred to at paragraph 4.5 above.

close the investigation. We will also pass details onto the CMA for them to decide whether they wish to pursue the case further.

- 4.48 Ofcom will inform the subject that we have decided to close the case and will also normally inform the complainant that we have reached a final decision on the investigation.
- 4.49 In the majority of cases, a case closure decision of this type is likely to be a brief statement indicating case closure and the basis on which we have decided to close the case. We will publish details of our decision to close the case on the CCEB section of our website.<sup>70</sup>

## Commitments

- 4.50 Ofcom may accept binding commitments which fully address our competition concerns from the subject of an investigation in relation to its future conduct.<sup>71</sup>
- 4.51 The subject may offer binding commitments to Ofcom at any time during an investigation up until a final infringement decision is made. However, Ofcom is unlikely to consider it appropriate to accept commitments offered at a very late stage in an investigation, such as after considering representations on a statement of objections.
- 4.52 Ofcom is likely to consider it appropriate to accept commitments only in cases where the competition concerns are readily identifiable, will be fully addressed by the commitments offered, and the proposed commitments can be implemented effectively and, if necessary, within a short period of time. Ofcom is very unlikely to accept commitments in cases involving secret cartels between competitors or a serious abuse of a dominant position.
- 4.53 The fact that the subject of an investigation has approached us to discuss commitments, and the substance of commitments, is not relevant to our consideration of whether an infringement has occurred. We will therefore not use any offer of commitments as evidence in any subsequent decision about the agreement or conduct under investigation.
- 4.54 If a subject would like to discuss offering commitments, it should contact the case leader in the first instance. If, following that, Ofcom considers that commitments may be appropriate, then (if a statement of objections has not been issued) Ofcom will send a summary of its competition concerns to the subject. Ofcom may discuss with the subject the form and content of any commitments offered in order to reach an agreement as to what might be acceptable to Ofcom.
- 4.55 If Ofcom proposes to accept the commitments offered, we will consult those likely to be affected by them, including any complainant. We will give those persons an opportunity to make representations within a time limit of at least 11 working days.<sup>72</sup> Ofcom will then discuss these representations with the subject of the investigation and indicate whether Ofcom considers that changes are required to the commitments before we would consider accepting them.

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<sup>70</sup> Competition Act, section 25A(4)

<sup>71</sup> Competition Act, section 31A

<sup>72</sup> Competition Act 1998, Schedule 6A, paragraph 2

- 4.56 If the subject offers revised commitments with significant changes, we will consult affected persons and give them another opportunity to make representations, within a time limit of at least 6 working days.<sup>73</sup> We will discuss these representations with the subject.
- 4.57 The decision on whether to accept commitments will be taken by a senior member of Ofcom's executive with appropriate Board-delegated authority. Depending on the stage at which this decision is reached, this will generally be the person responsible for deciding whether there are grounds for action (who, as noted above, will typically be the person responsible for overseeing the investigation, i.e. the case supervisor), or the final decision makers referred to at paragraph 4.5 above.
- 4.58 If Ofcom decides to accept commitments, we will notify the subject of the investigation and publish the commitments on the CCEB section of our website.<sup>74</sup>

## Compliance monitoring

- 4.59 Where Ofcom has made an infringement decision or closed a case having accepted commitments or informal assurances, we may decide to put "it into compliance". The purpose of the compliance phase is to ensure that the subject of the investigation does not repeat behaviour that Ofcom has deemed to breach competition law, that it complies with any commitments or assurances given, and/or that it implements any directions imposed by Ofcom.
- 4.60 The process that we follow during the compliance phases will differ from case to case. The length of the compliance phase will depend on the circumstances of the case and the measures that are to be monitored. Generally, Ofcom will not grant extensions to any deadline set for compliance with a direction, unless we receive an application prior to the expiry of the deadline together with an explanation of why the deadline should be extended, including supporting evidence.
- 4.61 The CCEB section of Ofcom's website includes a section for cases in compliance, where we will publish details of significant developments.<sup>75</sup>
- 4.62 Once we consider that compliance has been established, we will close the case and update the CCEB section of our website accordingly.

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<sup>73</sup> Competition Act 1998, Schedule 6A, paragraph 3

<sup>74</sup> Competition Act 1998, Schedule 6A, paragraph 7

<sup>75</sup> <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/cases-in-compliance>

## Section 5

# Settlement procedure

## Introduction

- 5.1 In some cases, Ofcom may consider that it is appropriate to settle a Competition Act investigation. Settlement is a voluntary process for resolving a Competition Act investigation which leads to a formal, legally binding infringement decision.<sup>76</sup> It involves the subject of the investigation admitting it has breached competition law and accepting that the remainder of the investigation will follow a streamlined administrative procedure.<sup>77</sup> In such cases, Ofcom will apply a discount to the level of the penalty imposed on the subject<sup>78</sup> in light of the resource savings involved in following a streamlined administrative procedure.
- 5.2 Those who we are investigating are not under any obligation to enter into a settlement process or to settle, and Ofcom has broad discretion to decide whether a case is appropriate for settlement or to agree to settlement.
- 5.3 Settlement is distinct from leniency (as discussed at paragraph 2.13 above) and Ofcom’s power to accept commitments under section 31A of the Competition Act (as discussed at paragraphs 4.50 to 4.58 above). Leniency and the use of settlements are not mutually exclusive – it is possible for a leniency applicant to settle a case under the Competition Act and benefit from both leniency and settlement discounts.
- 5.4 Where the settlement process is successful, the legally binding enforcement decision will refer to the fact that settlement has been agreed and will reflect the substance of any admissions made by the subject of the investigation for the purposes of the settlement.
- 5.5 In the event that the settlement process is unsuccessful, the case will revert to the usual process and the content of any settlement discussions will not be revealed to the final decision makers. However, any additional documentary evidence provided during the settlement process would go onto the case file and could be taken into account by Ofcom for the purposes of our final infringement decision. In addition, Ofcom may follow up any new competition law issues which come to light during the settlement process.
- 5.6 For the avoidance of doubt, settlement is not a negotiation with Ofcom about what infringements Ofcom might be prepared to find or not to find. Nor is it a negotiation about the level of the penalty which Ofcom would impose, nor is it equivalent to the type of discussions which take place between parties to litigation or potential litigation on a “without prejudice” basis for the purposes of seeking to resolve or avoid litigation.

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<sup>76</sup> CMA Rules, Rule 9

<sup>77</sup> CMA Rules, Rule 9(1)

<sup>78</sup> See the CMA’s *Guidance as to the appropriate amount of penalty* (OFT423), paragraph 2.26

## Requirements for settlement

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

- make a clear and unequivocal admission of liability in relation to the nature, scope and duration of the infringement.<sup>79</sup> This would need to reflect Ofcom's position on the nature of the infringement(s) we are minded to find and the appropriate level of penalty (as explained further below);
- cease the infringing behaviour immediately from the date it enters into a settlement process with Ofcom and refrain from engaging again in the same or similar infringing behaviour;
- confirm that it accepts that there will be a formal and published finding of infringement against it, will pay a penalty and will comply with any directions imposed;
- confirm that it will accept a streamlined administrative process.<sup>80</sup> This will be decided on a case-by-case basis depending on the stage at which the settlement process is commenced, but would include streamlined access to file arrangements (for example we would expect to provide the subject with access to key documents we are relying on as appropriate for reasons of fairness and transparency), limiting written representations to manifest factual inaccuracies only, no oral hearing and no separate draft penalty statement after settlement has been reached. The person responsible for deciding whether to issue a statement of objections will also be the final decision maker in a settlement case,<sup>81</sup> and
- confirm that it accepts that it will no longer benefit from the settlement discount if it appeals the decision.<sup>82</sup>

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

5.8 Ofcom may consider settlement for any investigation in which we have reached a stage where we believe that we have a sufficient basis for giving notice of our proposed infringement decision and come to a preliminary view on an appropriate level of penalty.

5.9 In determining whether a case is suitable for settlement, Ofcom will have regard to a number of factors such as the likely procedural efficiencies and resource savings that can be achieved through settlement.<sup>83</sup> 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 infringement), or due to previous conduct of the subject during the

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<sup>79</sup> CMA Rules, Rule 9(1)(a)

<sup>80</sup> CMA Rules, Rule 9(1)(b)

<sup>81</sup> CMA Rules, Rule 9(4)

<sup>82</sup> The Competition Appeal Tribunal has full jurisdiction to review the appropriate level of penalty

<sup>83</sup> 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.

course of the investigation (for example, where the subject has been obstructive or failed to co-operate).

## Settlement discounts

- 5.10 Where the settlement process results in a final infringement decision being issued, that decision will contain the penalty amount, which will include a settlement discount. Our aim will be to conclude the settlement process as swiftly as possible. In line with this aim, the earlier the settlement process is commenced, the greater the discount available, as the resource savings that Ofcom could achieve would be greater.
- 5.11 Settlement discounts will be capped at the level of 20%. The discount will be considered on a case-by-case basis. We would normally expect this discount to be:
- 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.
- 5.12 Where we are concerned that the process is not progressing as swiftly as possible due to delays or inefficiencies caused by the subject of the investigation or that it is not showing its full co-operation with the settlement process, Ofcom is likely to bring the settlement process to an end or reduce the available discount on account of the time taken and resources used. We would give the subject notice that we are minded to do so at that point.

## Decision making in a settlement case

- 5.13 Typically, the decision maker in a settlement case will be the person responsible for overseeing the investigation and deciding whether to issue a statement of objections (the case supervisor). Before the settlement process can start in a particular case, the decision maker must obtain approval to engage in the settlement process from at least two senior members of Ofcom's executive with appropriate Board-delegated authority.<sup>84</sup> The relevant decision maker will then typically oversee the settlement process and, as noted above, in contrast to our usual process, we would expect this decision maker also to be responsible for taking the final infringement decision on the case in the event that the settlement process is successful.<sup>85</sup>

## Process

- 5.14 If the subject of an investigation wishes to discuss the possibility of exploring settlement, it should approach the case leader and/or the case supervisor in the first instance.
- 5.15 While we will engage positively with a subject that indicates an early willingness to settle, we will need to have reached a stage in our analysis where we are able to

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<sup>84</sup> Under the CMA Rules (Rules 9(2) – (3)), where a single individual, such as the case supervisor, is the decision maker in a settlement process, then they will need a mandate from at least two other individuals before taking a decision to follow a settlement procedure.

<sup>85</sup> CMA Rules, Rule 9(4)

come to a provisional view on the nature of the infringement(s) and appropriate level of penalty.

- 5.16 The settlement process will be conducted by the case supervisor and members of the case team.
- 5.17 As noted at paragraph 5.11 above, the level of discount on the level of penalty as a result of settlement will depend on the stage at which a successful settlement process is commenced. There are two main stages at which a settlement process may be commenced:
- prior to a statement of objections being issued; or
  - following a statement of objections being issued.
- 5.18 If the settlement process is unsuccessful and the subject wishes to enter into a further settlement process at a later stage of the investigation, it remains open for it to do so. However, as noted above, it is at Ofcom's discretion whether and on what bases to enter into a settlement process at any stage.

### **Settlement process prior to the issue of a statement of objections**

- 5.19 If the subject of the investigation approaches Ofcom about settlement prior to the issue of a statement of objections, and Ofcom considers this to be an appropriate case in which to consider settlement, we will normally provide details of our initial thinking on the case in general terms to the subject where we consider this will be of assistance in order for the subject and Ofcom to decide whether to engage in a settlement process.
- 5.20 Following this, if Ofcom and the subject wish to continue with the settlement process, we will send to the subject a statement of facts setting out Ofcom's provisional findings and the evidence on which we are relying. We will also provide an indication of the provisional level of penalty that Ofcom would be minded to impose, including the settlement discount.<sup>86</sup> We will also provide access to key documents we are relying on, if appropriate for reasons of fairness and transparency.
- 5.21 The subject will be asked if it would be prepared in principle to agree to make admissions on the basis of the statement of facts. The timeframe for doing so will be set on a case-by-case basis having regard to possible resource savings through the settlement process. If the subject wishes to pursue settlement on the basis set out in the statement of facts, it will be asked to make written representations on manifest factual inaccuracies in the statement of facts. If its representations appear to go beyond this (for example into the merits of Ofcom's provisional findings or on the level of the penalty), we would reassess whether the case remained appropriate for settlement at this stage.
- 5.22 If the subject is not prepared to agree to a settlement on the basis of the position set out in the statement of facts, it is unlikely to be appropriate to pursue settlement at this stage and Ofcom would normally expect to proceed to issue a statement of objections in accordance with its usual process. If the subject wishes to enter into a

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<sup>86</sup> That discount would reflect the discount that Ofcom would be minded to apply to the penalty were the settlement process successful and concluded swiftly. Were Ofcom minded to reduce the available discount at any point on account of the time taken and the resources used during the settlement process, we would give the subject of the investigation notice of our intention to do so.

further settlement process at a later stage of the investigation, it remains open for it to do so (subject to Ofcom also considering this to be appropriate), although a lower settlement discount would then apply.

- 5.23 If the subject indicates that it does wish to pursue settlement on the basis set out in the statement of facts, we would proceed to issue a statement of objections which would take account of any representations made on manifest factual inaccuracies in the statement of facts, and would contain the proposed penalty amount.<sup>87</sup> We would also provide a streamlined access to file process. We would expect to provide the subject with access to key documents we are relying on as appropriate for reasons of fairness and transparency, to the extent that access to such documents has not been provided following the statement of facts (as set out in paragraph 5.20 above).
- 5.24 As noted above, one of the settlement requirements would be that the subject agrees not to make written representations on the statement of objections, except in relation to manifest factual inaccuracies in the statement of objections. As the statement of objections will take account of representations made on manifest factual inaccuracies in the statement of facts, we would not expect to receive any further representations at this stage and we would expect the subject to provide written confirmation of admissions and its acceptance of the settlement requirements, as discussed further below.

### **Settlement process following the issue of a statement of objections**

- 5.25 If the subject of the investigation is in principle prepared to agree to the settlement requirements and admit to the contraventions as set out in the statement of objections, it may inform Ofcom that it wishes to enter into a settlement on that basis. In such a case, one of the settlement requirements would be that the subject agrees not to make written representations on the statement of objections except in relation to manifest factual inaccuracies.
- 5.26 We will provide the subject with an indication of the penalty and level of the discount on the penalty which we would be minded to apply if a successful settlement process is commenced at this stage. If access to file has not yet been given, we would expect to provide a streamlined access to file process, in accordance with paragraph 5.23 above.
- 5.27 We expect to set a deadline for the subject to indicate its willingness to settle the case and will provide a short period of time for representations on manifest factual inaccuracies in the statement of objections. The timeframe for doing so will be set on a case-by-case basis having regard to possible resource savings through the settlement process.
- 5.28 We then expect the subject to provide written confirmation of admissions and its acceptance of the settlement requirements as discussed further below.
- 5.29 If the subject wishes to make written representations on the statement of objections (which are more extensive than identifying manifest factual inaccuracies), it may

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<sup>87</sup> This would not typically include the settlement discount because, as discussed further below, we would not typically expect settlement to be formally agreed until after we have issued the statement of objections. We would, however, expect to confirm the level of the available settlement discount at this stage which would, for example, be the same amount as previously proposed to the subject were the settlement process successful and concluded swiftly. The discount may be reduced in the event the settlement process takes longer, as set out above.

nonetheless indicate to Ofcom that it wishes to enter into a settlement process after doing so. Ofcom would consider any written representations made to it in line with our usual process before deciding whether to or not to engage in a settlement process.

- 5.30 As noted above, settlement is not a negotiation. Therefore, in the event that we consider it appropriate to engage in a settlement process, after considering the subject's written representations, we would expect to provide it with a written statement of our revised position. This would set out:
- the infringement we are minded to find; and
  - an indication of the level of penalty we would be minded to impose, taking into account our revised assessment of the nature of the infringement and after having applied the settlement discount on the penalty at that stage of the process.<sup>88</sup>
- 5.31 We would expect to set a deadline for the subject to indicate to Ofcom its willingness to settle the case on the basis of the written statement. The timeframe for doing so will be set on a case-by-case basis having regard to possible resource savings through the settlement process.
- 5.32 Ofcom would not expect to receive any further representations at this stage, and will expect the subject to provide written confirmation of admissions and its acceptance of the settlement requirements as discussed further below. As set out above, one of the requirements for settlement would be that the subject agrees that there would not be an oral hearing.

### **Successful conclusion of the settlement process**

- 5.33 If the settlement process is successful and the subject of the investigation has indicated to Ofcom that it is prepared to agree to the settlement requirements and to make admissions on a basis which reflects Ofcom's position, it must provide written confirmation of its admissions and acceptance of the settlement requirements. That letter should be sent by its Chief Executive Officer or another senior member of its executive.
- 5.34 Before the subject provides its written confirmation letter, we will provide the subject with a draft of the terms of the infringement 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 statement of objections, this will normally be in the form of the statement of objections. We normally expect in such cases that the final infringement decision would be in the same terms as the statement of objections (subject to any corrections of factual inaccuracies). We therefore expect the subject to provide its written confirmation of its admissions and acceptance of the settlement requirements following receipt of the statement of objections.

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<sup>88</sup> That discount would reflect the discount that Ofcom would be minded to apply to the penalty were the settlement process successful and concluded swiftly. Were Ofcom minded to reduce the available discount at any point on account of the time taken and the resources used during the settlement process, we would give the subject notice of this at that point.

- Where settlement is agreed after the subject has made written representations on the statement of objections, this will normally be in the form of a draft of the final infringement decision. In practice, this is likely to be the written statement setting out Ofcom's position following consideration of the subject's written representations (as set out in paragraph 5.30 above), as we would normally expect in such cases the final infringement decision would be in the same terms as that written statement (subject to any corrections of factual inaccuracies). We would therefore expect the subject to provide its written confirmation of its admissions and acceptance of the settlement requirements following receipt of Ofcom's written statement of position.

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

### **What happens if the settlement process is unsuccessful?**

5.36 The subject of the investigation may withdraw from the settlement process at any time before confirming that it has accepted the requirements for settlement and confirming its admission in writing (in accordance with paragraph 5.33 above). Ofcom may also withdraw from the settlement process at any stage, though prior to doing so, we would notify the subject and give it the opportunity to respond.

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

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

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

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

### **Publicity in settlement cases**

5.41 Ofcom's standard practice is not to comment publicly on the fact that settlement discussions are taking place, or that the settlement process has been unsuccessful.

5.42 Following the conclusion of a successful settlement process, Ofcom will close the case and update the details on the CCEB section of Ofcom's website. This will generally refer to the fact that a settlement has been agreed and include a summary of the infringement(s) Ofcom has found and details of the penalty (including the level of the settlement discount) and any other directions imposed. Ofcom may also publicise the outcome of the case in a media release relating to the case. Ofcom will

normally share in advance a copy of the CCEB update with the subject for information only shortly (and no more than one working day) before publication.

- 5.43 Ofcom will also publish a non-confidential version of the infringement decision, in accordance with our standard practice.<sup>89</sup>

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<sup>89</sup> See paragraph 4.40 above.

## Section 6

# Taking urgent action

- 6.1 Once Ofcom has formally opened a Competition Act investigation, we have the power to require a person to comply with temporary directions (known as “interim measures”) while we complete our investigation.<sup>90</sup>
- 6.2 Where we consider that it is necessary to act as a matter of urgency for the purpose of:
- a) preventing significant damage to a particular person or category of person; or
  - b) protecting the public interest,
- we may impose such interim measures as we consider appropriate for that purpose.<sup>91</sup>
- 6.3 Ofcom may exercise these powers following a request to do so by an application or on its own-initiative. For guidance on making an application for Ofcom to take urgent action, see *Advice for complainants: Submitting a complaint to Ofcom*.<sup>92</sup>

## Process for considering a request for interim measures

- 6.4 We will assess requests for interim measures against the relevant statutory criteria (as set out above). If we consider the test is met then we may impose interim measures at our discretion. In exercising this discretion, we will have regard to other relevant considerations including the impact on the person who would be subject to the interim measures direction and any relevant third party interests.
- 6.5 The decision on whether to impose interim measures will be taken by a senior member of Ofcom’s executive with appropriate Board-delegated authority.
- 6.6 In most cases, where we are considering whether to grant interim measures in response to a third party request, where time allows, Ofcom will inform the undertaking about whom the request for interim measures has been made (the “subject”) that we have received such a request, and will give it the opportunity to make representations to Ofcom on a non-confidential version of the request.
- 6.7 In some cases, we may receive a request for interim measures before we have decided whether to open a Competition Act investigation (for example, we might receive a request with a complaint submission). As stated above, Ofcom does not have powers to impose interim measures until we have formally opened a Competition Act investigation. Therefore, in such cases, before we can make a

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<sup>90</sup> Competition Act, section 35(1)

<sup>91</sup> Competition Act, section 35(2)

<sup>92</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0013/102514/Advice-for-complainants.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0013/102514/Advice-for-complainants.pdf)

decision on whether to impose interim measures, we will need to decide whether the statutory test<sup>93</sup> for opening a Competition Act investigation has been met.

- 6.8 We will seek to do this expeditiously, but we may require information from the subject of the application in order to assess whether the statutory criteria to open a Competition Act investigation are met, and whether it is appropriate to take urgent action. In such cases, Ofcom may request information informally as we cannot use our statutory information gathering powers under the Competition Act until we have opened an investigation. Ofcom would expect timely co-operation from the subject in responding to such informal information requests. Assuming we decide that the statutory threshold for opening a Competition Act investigation has been met and we open an investigation, we would expect to follow up with information requests, using our statutory powers under the Act, as appropriate.
- 6.9 Before reaching a decision on whether to impose interim measures, the decision maker will first reach a provisional view based on the evidence set out in the applicant's request, any representations received from the subject of the application and any further information gathered during the course of the investigation up until that point.
- 6.10 Where we are minded to give a direction imposing interim measures, we will provide a provisional decision to the subject of the application<sup>94</sup> and the applicant, which will set out the proposed measures and Ofcom's reasons.<sup>95</sup> We will also allow the subject to inspect documents on the file which relate to the proposed measures, but may withhold confidential information and internal documents.<sup>96</sup> Ofcom will allow the subject the opportunity to make representations,<sup>97</sup> which may include written and/or oral representations as appropriate in the circumstances, having regard to the urgency of the case, and we may allow the applicant to do so if we consider it appropriate. Given the urgent nature of the interim measures process, we will normally set a short timeframe for representations.
- 6.11 Where our provisional decision is to reject an application for interim measures, we will normally inform the applicant and the subject and provide them with an opportunity to comment and submit any further information or evidence before reaching our final decision.
- 6.12 Ofcom will not publish the provisional decision, or any details of it.
- 6.13 As soon as reasonably practicable after the period for representations had ended, and after taking into account any representations, Ofcom will determine whether to impose interim measures. We will inform the subject of the application<sup>98</sup> and any applicant. Ofcom will publish details of our decision and a non-confidential version of it on the CCEB section of our website.<sup>99</sup>

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<sup>93</sup> In accordance with section 25 of the Competition Act, before opening a Competition Act investigation, we must be satisfied there are reasonable grounds for suspecting that a competition law infringement has occurred

<sup>94</sup> Competition Act, section 35(3)(a)

<sup>95</sup> Competition Act, section 35(4)

<sup>96</sup> CMA Rules, Rule 13(1), Rule 13(2)

<sup>97</sup> Competition Act, section 35(3)(b)

<sup>98</sup> CMA Rules, Rule 13(4)

<sup>99</sup> CMA Rules, Rule 13(4)

## Section 7

# Procedural complaints about investigations

- 7.1 If the subject of an investigation, any complainant or a third party (where relevant) is dissatisfied about any aspect of the investigation procedure, it should usually raise its concerns in writing with the case leader in the first instance, and then with the person overseeing the investigation (i.e. the case supervisor).
- 7.2 If a party does not consider that its concerns have been satisfactorily resolved by the case leader and/or the case supervisor then, if an investigation has been formally opened, it may refer certain procedural complaints to Ofcom's Procedural Officer.<sup>100</sup>

## The Procedural Officer

- 7.3 A number of appropriately experienced Ofcom staff have Board-delegated authority to act as the Procedural Officer for the purposes of a Competition Act investigation. The relevant Procedural Officer will be appointed on a case-by-case basis, if a relevant procedural complaint is made, and in any event when the oral hearing takes place.
- 7.4 The Procedural Officer will be independent from the Competition Act investigation, case team and decision makers, and will not have been involved in the investigation (other than as the Procedural Officer).<sup>101</sup> The role of the Procedural Officer is intended to ensure that procedural issues can be addressed quickly, efficiently and cost effectively, and independently of the case team.
- 7.5 The Procedural Officer will also chair any oral hearings in Competition Act investigations.<sup>102</sup>

## Types of complaint which can be made to the Procedural Officer

- 7.6 Complaints about the procedure followed by Ofcom when conducting a Competition Act investigation can be made to the Procedural Officer by the subject of the investigation, complainant or a third party (where relevant) once the investigation has been formally opened.
- 7.7 The Procedural Officer will deal with complaints which relate to the following:
- a) deadlines for parties to respond to information requests, submit documents or provide representations;
  - b) requests for redaction of confidential information in documents on Ofcom's case file, and in documents that Ofcom proposes to publish or disclose;

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<sup>100</sup> CMA Rules, Rule 8(1)

<sup>101</sup> CMA Rules, Rule 8(1)

<sup>102</sup> CMA Rules, Rule 6(5)

- c) requests for disclosure or non-disclosure of certain documents or information on Ofcom's case file;
  - d) issues relating to the process for oral hearings; or
  - e) other significant procedural issues that may arise during the course of an investigation.
- 7.8 The Procedural Officer is not able to deal with complaints which relate to decisions taken by Ofcom relating to substantive issues, for example decisions on the scope of information requests or decisions relating to the scope and substance of an investigation.

## **Making a complaint to the Procedural Officer**

- 7.9 If a party is not satisfied with the decision of the case supervisor regarding the procedural issue it has raised, then it may refer its concerns to the Procedural Officer. If it wishes to do so, it should make an application to the Procedural Officer as soon as possible after receiving the decision from the case supervisor, and in any event within five working days.
- 7.10 The application should be no longer than five sides of A4 paper and should include:
- a) the name and contact details of the applicant;
  - b) the name and contact details of the lawyers acting for the applicant (where relevant);
  - c) the Ofcom case name and reference number;
  - d) the date of decision made by the case supervisor; and
  - e) a short summary of the issues including a summary of the case team's original decision, the decision of the case supervisor, the reason the applicant wants a review of that decision and the outcome the applicant is seeking.
- 7.11 The applicant should also provide copies of relevant correspondence between it and Ofcom relating to the issue in question and copies of any relevant information or documents which the applicant holds.
- 7.12 The application should be submitted by email to [Procedural.Officer@ofcom.org.uk](mailto:Procedural.Officer@ofcom.org.uk).
- 7.13 The Procedural Officer will provide members of the case team and the case supervisor, and the applicant, the opportunity to present their arguments orally on the telephone or at a meeting.

## **The Procedural Officer's decision**

- 7.14 The Procedural Officer will deal with the application as quickly as possible, and will aim to take a decision in most cases within 10 working days from receipt of the application. In any event the Procedural Officer will reach a decision within 20 working days from receipt of the application.<sup>103</sup> The Procedural Officer may extend

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<sup>103</sup> CMA Rules, Rule 8(2)

this timeframe by no more than 20 working days if there are special reasons to do so.<sup>104</sup>

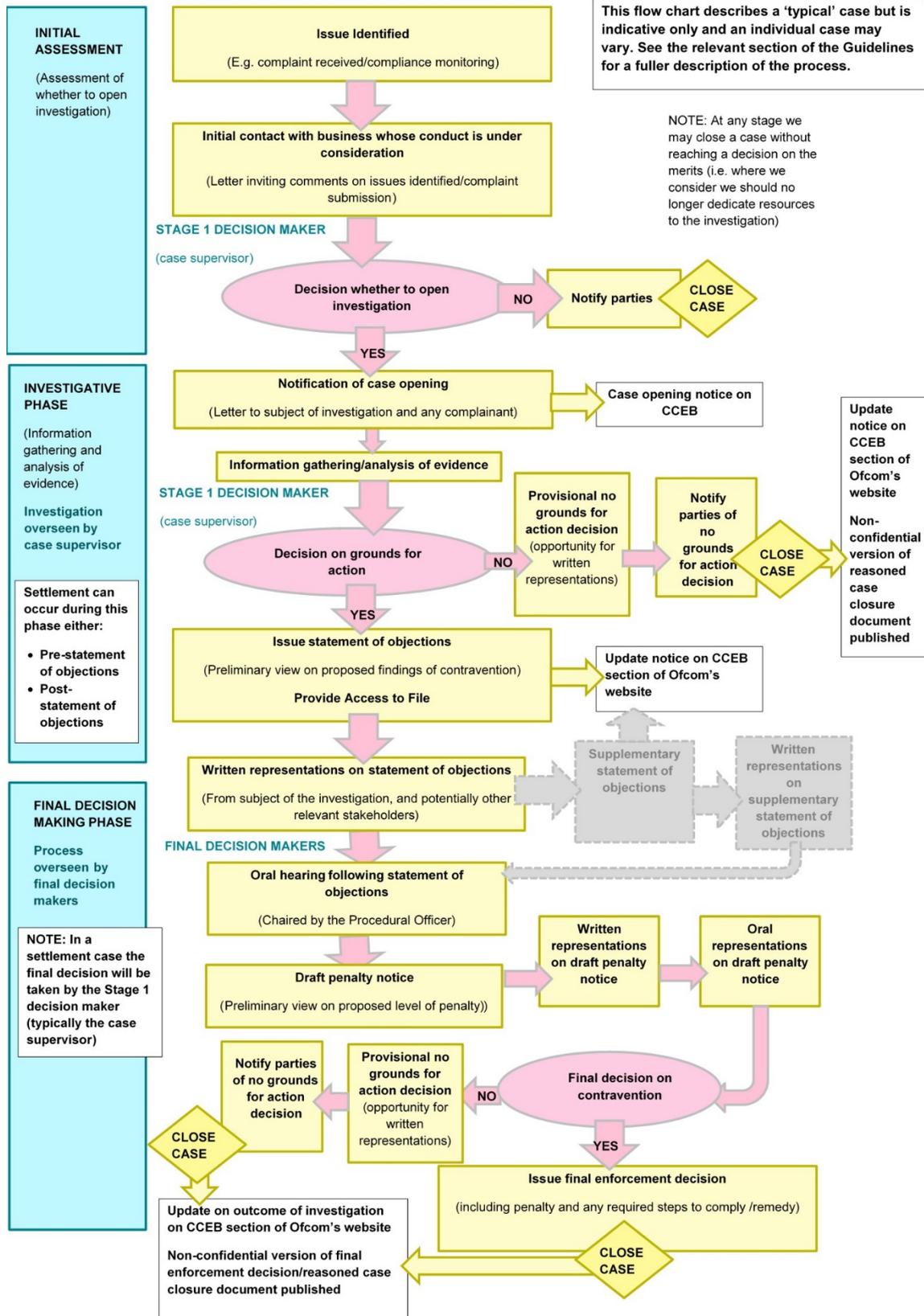
- 7.15 The Procedural Officer's decision will be submitted in writing to the applicant, and it will be binding on the case team and decision makers. A non-confidential version of the Procedural Officer's decision, or a summary of it, will be published on Ofcom's website, generally at the time the decision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

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<sup>104</sup> CMA Rules, Rule 8(3)

Annex 1

# Overview of a Competition Act case



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

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

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