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### **Draft Enforcement Guidelines**

Dear Keith,

Cable&Wireless Worldwide welcomes this opportunity to respond to Ofcom's consultation on its draft guidelines for the handling of competition complaints and complaints concerning regulatory rules. These guidelines are important for all stakeholders, providing clarity on how to engage on complaints and what to expect once the process is underway. This framework is a useful reference point for Ofcom, the complaining party and the target of the complaint.

The most important outcome of any revised guidelines should be to deliver a transparent and well understood framework that effectively prioritises matters, minimises the opportunity for delays and enables Ofcom to take enforcement action to fulfil its role effectively as the competition authority for our industry. In the past Ofcom has struggled to cope with Competition Act investigations in particular and we hope that these investigations will be handled more effectively in the future, as today raising a complaint isn't viewed as an effective mechanism to resolve issues within the communications market.

This situation has come about as a result of Ofcom often being reluctant to take on new investigations and even when a case is opened, then the length of time taken for the matter to conclude is far beyond the commercial needs of the complainant, with past experience indicating that the outcome will not result in any meaningful enforcement action.

This is not a satisfactory state of affairs for any regulator and Ofcom must use the publication of new guidelines as an opportunity to re-build lost confidence, demonstrating that it can and will investigate new complaints and undertake enforcement action where it is necessary to ensure that the correct behavioural incentives exist in order to prevent consumer harm .

### **Status of the Guidelines**

We note that the guidelines are not binding and we understand the reasons why this is the case. It is important for Ofcom to retain a degree of discretion when dealing with these matters, as however well intended the guidelines are; they may not cover every set of circumstances or eventuality.

Likewise Ofcom must retain a realistic attitude to what Communication Providers can provide and what resources are available within CPs when preparing a complaint. Given the significant amount of resource that a complaint investigation will require it is important that complaints are referred as a matter of last resort and confined to matters of importance. However CPs can only supply the material they have in their possession and much of the supporting context of the complaint may well be anecdotal, based on third party feedback (which is often provided off the record) or based on information gleaned about the target of the complaint's actions or behaviour. Often it is only the target of the complaint itself, or Ofcom through its formal information gathering powers

that will be able to categorically confirm matters of fact that would be pertinent to a future investigation. To expect a complainant to provide an unrealistic amount of material at the outset would not be in the consumer interest and no complaint should be rejected on the basis of insufficient information if that information could not realistically be expected to be in the possession of party referring the complaint.

For example while Ofcom provide examples where complainants making predatory pricing or margin squeeze allegations should provide substitute material such as costs model output, in the absence of more concrete information we believe Ofcom must be realistic about the ability of complainants to develop detailed costs models concerning a competitor's costs in what is often a near information vacuum, particularly if that competitor has non replicable infrastructure. CPs should of course provide what they can to demonstrate that their complaint is not frivolous, and devote a sufficient amount of effort into the process, but we would like to see Ofcom making much more use of its formal information gathering powers during the enquiry phase of any investigation.

#### **Administrative Priority Framework**

We would like to see Ofcom provide more transparency around its administrative priority framework. The ability to decline to investigate a complaint (which may have turned out to be entirely valid and end up being upheld) on the grounds of administrative priorities is one of the most significant discretionary decisions Ofcom can take.

As well as the criteria set out in the guidelines we would like to see Ofcom take due consideration of the impact of the alleged behaviour on the complaining party's business and their ability to trade effectively. We believe it would be entirely wrong for Ofcom to decline to open an investigation on the grounds of administrative priority if that decision ultimately led to the complaining party exiting the market concerned or ceasing to trade. That action in itself would increase the likelihood of future poor conduct,



however if the reasons for the initial complaint were to be repeated by a different complainant then the evidence relating to the first allegations would likely be lost or at the very least harder to obtain as no investigation took place.

If Ofcom does decline to investigate a complaint on the grounds of administrative priority then it is only right that a reasonable level of detailed justification is provided: the onus should be on Ofcom to justify why it should not be an administrative priority, rather than on the complainant to justify why it should be. If alternative proceedings are cited as the reason (such as a planned market review) then a strict timeline should be given for completing the review intended to cover the issue raised in the complaint. The target of the complaint should not be provided with an opportunity to further exploit any delay and Ofcom should give some thought to how it might bring about prompt enforcement through use of alternative means.

Once the alternative means were underway it is only right that Ofcom should make specific mention of the issue subject to the complaint in any published material so that it can be examined in the context of the review and appropriate remedies put in place should they be required.

We also understand that Ofcom can choose to close an investigation on the grounds of administrative priority while it is underway. We believe the criteria for such a move should be different and such an event should be a very rare occurrence, reserved for the most exceptional circumstance. Even in cases where the conduct under investigation may have ceased, it is important that the offending party is held to account and the incentive framework is intact.

### **Own-initiative investigations**

Given the level of resource required to commit to an investigation Ofcom's discretionary power to open an investigation is a powerful tool that should be used with care. In the same way as we need far greater transparency on decisions made by Ofcom on grounds of administrative priority, we also need more information on the reasons for undertaking own-initiative investigations. It would also be helpful to understand what issues Ofcom has prioritised in order to decide to open a particular investigation.

Own-initiative investigations should not only be used in cases where consumer harm may arise, they should also be considered for wholesale industry matters. We think it is a mistake not to have an enquiry phase for own-initiative cases and it would only be sensible to gather views before Ofcom embarks on a resource intensive investigation.

### **Competition Act Investigations**

While we understand first hand the complexities of a Competition Act investigation and Ofcom's reluctance to set out a target timescale, we would like to see more information provided on expected timescales (even on a stage-by-stage basis) while a case is ongoing. We would also like to see Ofcom review how it communicates with interested parties or complainants during Competition Act investigations as we believe the process could be improved. Ofcom must take all steps to try and speed up how quickly Competition Act cases are dealt with, as the timescales on the cases referred to date are unacceptably long. Complaining parties must have confidence that enforcement decisions will be taken as quickly as they can be and not allowed to drift.

Where delays are expected and potentially anti-competitive conduct is ongoing then Ofcom must seek to accommodate any requests for interim measures (with funds held in escrow if necessary until the case is resolved), it is our view that the current threshold

for lodging a successful interim measures request has been set very high and where they are reasonable, Ofcom should do what it can to accommodate these requests, to ensure that no one party is disadvantaged.

There have been examples of where matters have been referred to Ofcom citing one legal infringement as justification, but Ofcom chooses to resolve the matter using another. We'd like to see guidance on how Ofcom determines which powers to use to resolve a case.

The outcome of any new guidelines must be for stakeholders to regain trust in the complaints regime, ensuring it is viewed as an effective mechanism to address serious industry issues and protect the long term interests of consumers.

We would be happy to discuss any of the points raised about if further detail if you believe it would be helpful.

Yours sincerely,

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