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# Regulatory Enforcement Guidelines for investigations

Draft guidelines for consultation

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# 1. Overview

- 1.1 Ofcom is the independent regulator, competition authority and designated enforcer of consumer law for the UK communications industries. In this role, we may need to take enforcement action in the interests of citizens and consumers, and where appropriate to promote competition.
- 1.2 We have a set of overarching regulatory principles to guide how we operate, including that we:
  - a) operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required;
  - b) strive to ensure our interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome; and
  - c) always seek the least intrusive regulatory mechanisms to achieve our policy objectives.
- 1.3 These Regulatory Enforcement Guidelines set out how Ofcom will approach enforcement of regulatory requirements, including those relating to electronic communications networks and services, essential services in the digital infrastructure subsector, postal services and consumer protection legislation.

## 2. Introduction

### What do these guidelines cover?

- 2.1 These guidelines ('Regulatory Enforcement Guidelines') set out how Ofcom will approach enforcement with respect to compliance with regulatory requirements (we call these 'regulatory investigations') and consumer protection legislation ('consumer investigations'). Together these are referred to as 'investigations'. These Regulatory Enforcement Guidelines apply to all our enforcement processes, except where otherwise stated or where we have good reason to depart from them.
- 2.2 This is a non-exhaustive list of the regulatory investigations that these Regulatory Enforcement Guidelines apply to:<sup>1</sup>
- a) SMP, USO, General Conditions and other regulatory conditions and directions applicable to communications providers, Annex 1;
  - b) SMP, USO and other regulatory conditions and directions applicable to postal operators, Annex 2;
  - c) Network Security, Annex 3, which includes:
    - i) Compliance with requirements imposed by or under sections 105A to 105D, 105I to 105K, 105L(6), (7)(c) and (8), 105N(2)(a) and 105O of the Communications Act 2003 ('Communications Act'), as amended by the Telecommunications (Security) Act 2021, relating to the security and resilience of public electronic communications networks and services; and
    - ii) Compliance with requirements on Operators of Essential Services set out in the Network and Information Systems Regulations 2018;
  - d) Video Sharing Platforms ('VSPs'), Annex 4;
  - e) Compliance with mobile phone billing limit requirements under section 124S of the Communications Act, Annex 5;
  - f) Persistent misuse of electronic communications networks or services, Annex 6;
  - g) Mobile Roaming Regulations, Annex 7;
  - h) Net neutrality, compliance with the Open Internet Regulations, Annex 8;
  - i) Compliance with restrictions or conditions applicable to companies with powers under the Electronic Communications Code, Annex 9;

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<sup>1</sup> This list is non-exhaustive list and Ofcom may carry out regulatory investigations under other provisions. For example, the majority of the regulatory investigations in this list are carried out under section 96A – 96C. Ofcom also can carry out enforcement under the process set out in sections 94 – 96 of the Communications Act. This primarily applies to SMP apparatus conditions and Phone Paid Services.

- j) Radiocommunications licences, Compliance with the Wireless Telegraphy Act 2006 Annex 10; and
  - k) Directions to block access to a telephone number on the basis of fraud or misuse, Annex 11.
- 2.3 These Regulatory Enforcement Guidelines also apply to the enforcement of failures to respond properly to statutory information requests,<sup>2</sup> such as:
- a) failure to respond at all to a statutory information request;
  - b) failure to respond by the deadline set by Ofcom;
  - c) providing an incomplete response, e.g. failure to answer one or more questions or provide all information requested by a particular question; and
  - d) providing an inaccurate response, e.g. providing information which is proven to be wrong based on other information we have been, or are subsequently, provided with or made aware of.
- 2.4 These Regulatory Enforcement Guidelines also apply to enforcement of consumer protection legislation (Annex 12) which includes:
- a) requirements relating to unlawful or unfair terms in consumer contracts under the Consumer Rights Act 2015 (the ‘Consumer Rights Act’); and
  - b) other consumer protection legislation in relation to which Ofcom has concurrent powers with other regulators under Part 8 of the Enterprise Act 2002 (the ‘Enterprise Act’), including:
    - i) the Consumer Protection from Unfair Trading Regulations 2008; and,
    - ii) The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.
- 2.5 These Regulatory Enforcement Guidelines **do not** apply in the following circumstances, which are dealt with in accordance with different processes and procedures:
- a) complaints from individual consumers about communications services, including VSPs, or postal services;<sup>3</sup>
  - b) investigations under the Competition Act 1998 (the ‘Competition Act’);<sup>4</sup>

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<sup>2</sup> Statutory information requests are the means through which Ofcom can require certain persons to provide us with information that is necessary to carry out our functions. Ofcom issues information requests using a range of different statutory powers. We will enforce these different types of information requests in line with the Regulatory Enforcement Guidelines and the applicable legislation.

<sup>3</sup> Visit our website for advice on how to [make a complaint](#) to Ofcom as a consumer, viewer or listener about a communications provider, broadcaster or postal services provider.

<sup>4</sup> Ofcom, [Enforcement guidelines for Competition Act investigations](#), June 2017.

- c) enforcement in relation to broadcasting licences (including compliance with conditions in Broadcasting Act licences relating to broadcast content or fair and effective competition) and on-demand programme service providers ('ODPS');<sup>5</sup>
- d) enforcement of BBC requirements;<sup>6</sup>
- e) enforcement of statutory information requests made under the Competition Act<sup>7</sup> or under legislation which gives an enforcement role solely to the courts<sup>8</sup> rather than to Ofcom;
- f) how Ofcom will resolve disputes under the Communications Act, Schedule 3 of the Postal Services Act 2011 (the 'Postal Services Act')<sup>9</sup> or under the Communications (Access to Infrastructure) Regulations 2016;<sup>10</sup>
- g) criminal enforcement in relation to contraventions of the Wireless Telegraphy Act 2006; and
- h) compliance with undertakings given to Ofcom under Part 4 of the Enterprise Act.

## Status of these Regulatory Enforcement Guidelines

- 2.6 These Regulatory Enforcement Guidelines take effect from xxx 2022. They set out Ofcom's general approach to enforcement in the areas covered by these Regulatory Enforcement Guidelines and are designed to be flexible. Where we depart from the approach set out in these Regulatory Enforcement Guidelines, we will explain our reasons for doing so.
- 2.7 These Regulatory Enforcement Guidelines are not a substitute for any regulation or law and are not legal advice.
- 2.8 While we have sought to outline the types of enforcement processes covered by these Regulatory Enforcement Guidelines, Ofcom's powers and responsibilities may change over time. Were Ofcom to gain new enforcement powers, we would likely use the process which appears to us most closely analogous in terms of the statutory framework, with reference to these Regulatory Enforcement Guidelines. Depending on the nature of any new enforcement powers, we would also consider whether these Regulatory Enforcement Guidelines need to be reviewed and/or amended.

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<sup>5</sup> Guidance on Ofcom's procedures for broadcasting and ODPS enforcement, and separate procedures for investigating contraventions of competition-related conditions in Broadcasting Act licences, are available on [our website](#).

<sup>6</sup> Guidance on Ofcom's procedures for enforcement of BBC requirements is available on [our website](#). The exception to this is enforcement action under section 198ZA of the Communications Act for contravention of information gathering requirements conferred on Ofcom under the BBC Charter and Agreement relating to our BBC functions, by persons other than the BBC, which is covered by these Enforcement guidelines.

<sup>7</sup> As discussed in Ofcom's [Enforcement guidelines for Competition Act investigations](#).

<sup>8</sup> For example, under the Consumer Rights Act 2015 and Enterprise Act 2002.

<sup>9</sup> See our [Dispute Resolution Enforcement guidelines](#) and our [supplementary guidance on postal disputes](#).

<sup>10</sup> See our [Guidance under the Communications \(Access to Infrastructure\) Regulations 2016](#).

## 3. Why and how Ofcom opens cases

### Why Ofcom opens cases

- 3.1 Ofcom's principal duties in carrying out our functions, as set out in section 3 of the Communications Act, are:
- a) to further the interests of citizens in relation to communications matters; and
  - b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- 3.2 Acting to ensure compliance with statutory and regulatory requirements will usually further the interests of citizens and consumers by preventing or remedying consumer harm. It is also important that we take action:
- a) in an efficient and effective way;
  - b) that is evidence-based, proportionate, consistent, accountable and transparent; and
  - c) that is targeted only at cases where action is needed.
- 3.3 We make decisions about whether to open investigations on a case-by-case basis, having regard to our statutory duties and all the matters that appear to us to be relevant. In doing so, we exercise our discretion to target action at cases we think are most likely to produce good outcomes for citizens and consumers.
- 3.4 We cannot 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 required, and the comparative benefits of using those resources in other ways.
- 3.5 We will carry out an initial assessment of the issue(s) to explore whether: (i) the case is an administrative priority for Ofcom; and/or (ii) the evidence we have justifies opening an investigation, having considered all relevant factors.
- 3.6 The administrative priority matters we will generally consider, where they are relevant to the case concerned, include:
- a) The risk of harm or seriousness of the alleged conduct. For example:
    - i) 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);
    - ii) whether the conduct is on-going;
    - iii) whether the allegation concerns conduct that is, or appears to be, a repeated, intentional or particularly flagrant contravention or infringement; and

- iv) whether the business in question 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:
    - i) whether an investigation would help clarify the regulatory or legal framework for stakeholders;
    - ii) whether the issue directly relates to Ofcom’s broader strategic goals or priorities (including those within Ofcom’s Annual Plan of Work);
    - iii) whether there are other alternative proceedings that are likely to achieve the same ends or deal with the same issues as an 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.
  - c) The resource implications of conducting an investigation. For example, what resources (particularly specialist resources) are required to conduct an investigation, given the need to do justice to the interests of all parties likely to be affected.
- 3.7 Where appropriate we will consider additional factors, such as any relevant matters set out in statutory policies.

## Sources of information

- 3.8 Information which could trigger an investigation can come to Ofcom’s attention from several different sources. For example:
- a) where a business informs us that they have, or may have, contravened a requirement;<sup>11</sup>
  - b) in response to a complaint by an industry stakeholder or whistleblower;<sup>12</sup>
  - c) in response to information provided to us by other bodies (for example, where regulatory bodies, MPs, consumer organisations or the press draw our attention to complaints they have received about a particular issue);
  - d) where our routine monitoring gives rise to a concern about compliance; for example, where our Consumer Contact Team or online complaints portal has received large numbers of complaints from consumers relating to a particular issue;
  - e) where we identify a particular concern through other areas of our work, for example, as a result of considering a regulatory dispute under the Communications Act or Postal Services Act; and

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<sup>11</sup> Under certain legislation, businesses are required to report a contravention to Ofcom.

<sup>12</sup> Guidance on how to make a complaint (including as a whistleblower) is set out in our [Advice for complainants: Submitting a complaint to Ofcom](#).



- f) where we identify that a business has failed to respond properly to a statutory information request.<sup>13</sup>

## Initial assessment

- 3.9 We will carry out an initial assessment of the issue(s) to explore whether:
- a) the case is an administrative priority for Ofcom; and/or
  - b) the evidence we have justifies opening an investigation, having considered all relevant factors.
- 3.10 While we will take into account the evidence we have as one relevant factor, we do not make a substantive decision on whether or not there has been a contravention of a requirement during this initial assessment phase.
- 3.11 We will consider what level of detail and scope for the initial assessment is appropriate, taking into account the specific circumstances of a case.
- 3.12 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 from an industry stakeholder or whistleblower, 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 (subject to anonymity concerns) with the subject for comment. Further details about how we handle information from complainants is set out on Ofcom’s website.<sup>14</sup>
- 3.13 In some circumstances, we may decide not to provide the subject with the opportunity to comment and provide information. These include:
- a) if we consider that we already have sufficient information to conduct our initial assessment and decide whether to open an investigation;<sup>15</sup>
  - b) where there are reasons to proceed to an investigation more quickly;<sup>16</sup> or
  - c) where it is important to safeguard the anonymity of the complainant.<sup>17</sup>
- 3.14 Where we have sufficient information to decide that we should not open an investigation without obtaining comments or further information from the subject of the complaint – for

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<sup>13</sup> See paragraphs 4.12-4.15 which provides further information on the enforcement of statutory information requests.

<sup>14</sup> See Ofcom’s [General Privacy Statement](#).

<sup>15</sup> This could be, for example, where we have been carrying out an enforcement programme and identified an issue from the information provided in response to a statutory information request, or where we have obtained information about potential non-compliance as a result of either routine compliance monitoring or more informal engagement.

<sup>16</sup> 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 cases where we may need to use information gathering powers to obtain and preserve evidence prior to alerting the subject of the investigation).

<sup>17</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, where other guidelines are in place. See our [advice for complainants](#).

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 not invite any further comment.

- 3.15 In cases where we decide that it is appropriate to give the subject of the possible investigation an initial opportunity to comment and provide information on the issues under consideration (including in response to a complaint), we will write to the subject setting out how long it will have to comment and how soon after considering any comments or information received we aim to take our decision on whether to open an investigation. We will also provide contact details for the case team 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. In those cases, we expect to keep the subject and any complainant updated should our initial assessment take longer than expected.
- 3.16 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.
- 3.17 We do not generally exercise our statutory information gathering powers prior to opening an investigation.<sup>18</sup> However, it is not always possible to prioritise our work effectively without further information from those we regulate.
- 3.18 We expect all parties to ensure that the information they provide to Ofcom during our initial assessment is accurate, including where the information has not been requested using our statutory information gathering powers. We may also ask complainants to provide further information beyond that which they have provided in their complaint as part of our initial assessment.
- 3.19 Sometimes we receive information, including complaints, suggesting an industry wide issue is causing harm to the interests of citizens and consumers. In such cases, we may use consumer research, mystery shopping or detailed analysis of complaints to determine on which business(es), if any, we should focus our resources.
- 3.20 We may decide to open an enforcement programme and use our information gathering powers to gather evidence from relevant businesses to determine the appropriate, proportionate response to tackle the harm.
- 3.21 We aim to complete our initial assessment as quickly as reasonably possible, but the length of time that this takes will vary on a case-by-case basis depending upon the issues under consideration.
- 3.22 The outcome of our initial assessment can result in:

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<sup>18</sup> While Ofcom does not generally exercise its statutory information gathering powers in an enforcement context prior to opening an investigation, we may open an investigation as a result of information gained through use of our information gathering powers when exercising a different function e.g. an information request issued as part of routine monitoring of compliance with obligations imposed by sections 105A to 105D, 105I to 105K, 105L(6), (7)(c) and (8), 105N(2)(a) and 105O of the Communications Act 2003.

- a) Ofcom moving to open a formal investigation. If Ofcom is minded to open an investigation, this means that we are satisfied that the case is an administrative priority for Ofcom and that the evidence justifies opening an investigation.
  - b) Ofcom deciding not to open a formal investigation. Where Ofcom is minded not to open an investigation, our decision can be based: (i) solely on whether the case is an administrative priority for Ofcom; (ii) solely on whether the evidence justifies opening an investigation; or (iii) a combination of the two. Where Ofcom decides not to open a formal investigation, it can decide to:
    - i) take no further action; or
    - ii) take steps to resolve the issue without formal enforcement.
- 3.23 We may publish details of, or comment publicly on, the matters we are considering during our initial assessment phase, including the outcome of our initial assessment. We may alternatively decide not to publish any details at this stage, particularly where doing so may prejudice an investigation or where it is important to safeguard the anonymity of the complainant.

## Resolution through means other than formal enforcement action

- 3.24 In some cases, Ofcom may seek 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).
- 3.25 In such circumstances, 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 open an investigation, and the circumstances in which we might reconsider the need to open an investigation in future (for example, in the event that the organisation did not take the steps which it had said that it would or we received further evidence of a potential compliance issue).
- 3.26 Such cases will generally not involve Ofcom taking any decision about whether or not any regulatory or legal provision has been contravened.
- 3.27 We may publish details of assurances that have been given and 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 that we will be publishing such details no more than one working day before publication on Ofcom's website, and provide them with a copy of the intended text for information only at that stage.
- 3.28 Where Ofcom has decided not to open an investigation 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 open an investigation at that stage. If we do so, we would take into

account any failure on the part of the relevant business to abide by assurances previously given to us relating to this conduct.

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

- 3.29 A senior member of Ofcom’s staff 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.
- 3.30 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.
- 3.31 Ofcom will not usually publicise a decision not to open an investigation, unless the fact that a complaint has been made is publicised 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 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.
- 3.32 In most cases, when Ofcom decides to open an investigation we will inform the subject of our decision by sending them a case opening letter.<sup>19</sup> However, there may be some cases where we delay doing so if we consider it may otherwise 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.
- 3.33 Shortly after sending the case opening letter(s), we will generally also announce that we have opened an investigation on the Ofcom website, although we may delay doing so if we consider it may prejudice our ability to carry out an investigation.
- 3.34 The case opening announcement will typically include the following details:
- a) the identity of the subject of the investigation;
  - b) the regulatory or legal provisions to which the investigation relates;
  - c) the scope of the investigation; and
  - d) the identity of any complainant, if appropriate.<sup>20</sup>
- 3.35 Details of how to contact the case team will also be published on our website.

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<sup>19</sup> We will also contact the complainant to inform them of the decision where appropriate.

<sup>20</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.

- 3.36 Announcing the beginning of an investigation does not imply that Ofcom has formed any view about whether or not any regulatory or legal provision has been contravened.
- 3.37 In some cases, Ofcom may have sufficient information to reach a provisional decision on compliance without needing to obtain further information using our statutory information gathering powers. In such cases, we may send the subject a provisional decision at the same time that we send our case opening letter.<sup>21</sup>

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<sup>21</sup> We might do this, for example, in a case where we are considering non-compliance with a statutory information request, as such cases typically focus on whether or not the relevant organisation has provided the requested information by the required deadline, and we do not typically need to request any further information from them before deciding whether there are grounds for action.

## 4. Investigating

### Introduction

- 4.1 This section sets out how Ofcom is likely to conduct an investigation. It includes guidance on our 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.
- 4.2 Although the statutory framework for each different type of investigation may differ, the initial process will broadly be the same for each. This section therefore applies to all investigations covered by these Regulatory Enforcement Guidelines. Further detail on how these Regulatory Enforcement Guidelines apply specifically to each particular statutory power is set out in the Annexes to this guidance.

### Engagement with Ofcom during the investigation

- 4.3 We seek to ensure that enforcement action is conducted in a fair, transparent, efficient and timely way. As set out in the relevant sections of this document, Ofcom may request representations from, and engage with, complainants and other relevant third parties.
- 4.4 We will endeavour to keep the subjects of our investigations up-to-date on the progress of the investigation. 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.

### Case team

- 4.5 At the outset of the investigation, Ofcom will usually<sup>22</sup> inform the subject of the investigation, and any complainant, of:
- a) 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
  - b) the case supervisor (decision maker). This is the person who will be overseeing the investigation and would typically be responsible for deciding whether to issue a provisional decision.
- 4.6 We may also consider it necessary to disclose information to other enforcement authorities or government organisations to facilitate the exercise of our functions in the context of an investigation.

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<sup>22</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.

- 4.7 We will also explain how the Procedural Officer can be contacted, as set out in Section 9.
- 4.8 We may ask the subject and any complainant to each nominate a principal point of contact for communications about the investigation.
- 4.9 Details of how to contact the case team will also be published on our website.

## Timescales

- 4.10 When we open an investigation, we aim to progress it in a timely manner and conclude it as soon as reasonably possible. We will normally give the subject, and any complainant, an indication of the likely timescales involved in completing an investigation, typically when we open the investigation.<sup>23</sup>
- 4.11 We will generally provide updates to the subject and any complainant on the progress of investigations, including when we expect to reach specific milestones. We will also provide updates where this changes.

## Changing the scope of an investigation

- 4.12 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 ordinarily inform the subject of the investigation and any complainant, and will update 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

- 4.13 Ofcom relies on accurate information, provided in a timely manner, to carry out efficient investigations. We have a wide range of statutory information gathering powers which we would expect to use in order to obtain information for the purposes of investigations covered by these Regulatory Enforcement Guidelines.<sup>24</sup>
- 4.14 Ofcom’s statutory information gathering powers are a critical tool in obtaining the information necessary to take appropriate enforcement action in the interests of citizens and consumers. We expect recipients to provide accurate and complete information in response to statutory information requests by the given deadline. When exercising these powers, Ofcom must ensure:

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<sup>23</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 about our investigation.

<sup>24</sup> Ofcom also issues statutory information requests in exercising our other functions, for example in conducting market reviews to determine if a communications provider has significant market power. As noted at paragraph 2.3, we enforce statutory information requests in line with these Regulatory Enforcement Guidelines and the relevant legislation.

- a) requests are proportionate to the uses to which the information is to be put; and
  - b) persons to whom requests are made are given a reasonable period to provide the information.<sup>25</sup>
- 4.15 Ofcom may take separate enforcement action in relation to one or more failures to comply with the requirements of statutory information requests and may impose financial penalties for non-compliance. Failure to comply with the requirements of statutory information requests can also constitute a criminal offence.
- 4.16 Alternatively, where we consider it may be more appropriate to do so, rather than taking separate enforcement action for a failure to comply with a statutory information request, Ofcom may instead take that failure to comply into account as part of our assessment of the appropriate level of any penalty we may decide to impose for a contravention of the regulatory requirement.<sup>26</sup>

## Confidentiality

- 4.17 We often obtain confidential information in carrying out our functions. This may include commercially sensitive information as well as information relating to the private affairs of an individual.
- 4.18 In accordance with our duties under the Communications Act, we are required to investigate and enforce in a transparent and accountable manner. We will also take into account the rights of defence of the subject of an investigation and be mindful of the fact that information we obtain may be relevant to any defence they may want to put forward. As such, we will typically:
- a) disclose information we have obtained with the subject of our investigation; and
  - b) publish details about our investigations, including a non-confidential version of our final decision.
- 4.19 We may also consider it necessary to disclose information to other enforcement authorities or government organisations to facilitate the exercise of our functions in the context of an investigation.
- 4.20 We will only seek to disclose information if it is necessary for (among other things) taking enforcement action.
- 4.21 We must however balance our duty to be transparent against: (i) the restrictions against disclosure of confidential information contained in legislation we are operating under, as set out in the relevant Annexes; and (ii) the legitimate interests of parties in ensuring that confidential information is appropriately protected.

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<sup>25</sup> See, for example, sections 135(4) and 137(3)(b) of the Communications Act.

<sup>26</sup> We would take failure to comply with a statutory information request into account when assessing whether the recipient has cooperated with Ofcom's investigation. See our [Penalty Guidelines](#) and the factors listed in paragraph 12.



- 4.22 If Ofcom is proposing to disclose or publish information which a party considers confidential, we will take reasonable steps to inform that party and give it a reasonable opportunity to make representations on our proposal, before making a final decision on whether to disclose/publish. 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/publication being made. Where the decision is to disclose/publish the information despite the party whose information it is continuing to object to such disclosure/publication, we will give that party the opportunity to escalate its concerns to the Procedural Officer (in accordance with Section 9 below). We would expect to delay disclosing/publishing the information until the Procedural Officer has reached their decision. If we intend to disclose/publish the information after taking these steps, we will inform the party concerned in advance.
- 4.23 Ofcom will assess whether information is confidential and give regard to any representations made by the party. We may consider it appropriate to disclose information notwithstanding that a party has asserted confidentiality over it. We will always consider whether disclosure of information about a particular business is necessary to facilitate the carrying out of our enforcement functions. In particular, we 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 the investigation. Similarly, we may judge that disclosure of information gathered from the subject to a complainant and other third parties is justified in order for us to carry out our functions. 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 the respective interests of the party that has provided the confidential information and the subject of the investigation, and our duty to be transparent.
- 4.24 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

- 4.25 Ofcom is required to have regard to the principle under which regulatory activities should be transparent and accountable. Publicising the investigations we are carrying out and our final decisions is an important part of carrying out our functions, by:
- a) usefully drawing it to the attention of parties who have relevant information;
  - b) helping deter non-compliance in future; and
  - c) educating others about what can go wrong.

- 4.26 As explained above, when we open an investigation, we will typically publicise it on the Ofcom website. We will also publish updates on the website when we reach key milestones.<sup>27</sup>
- 4.27 We may 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. We do not agree the text of website updates or media releases with the subject of the investigation, or any complainant. Where appropriate, we will inform the subject of the investigation no more than one working day before publication on Ofcom’s website that we will be doing so, and provide it with a copy of the intended text of the update.
- 4.28 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.
- 4.29 There may be certain exceptional cases which we consider it would be inappropriate to publicise, for example because they are particularly sensitive or where 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.

## Involvement of third parties

- 4.30 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 providing us with relevant information during an investigation.
- 4.31 We may seek input from relevant third parties, for example trade associations, competitors or customers of the subject of the investigation, in order to assist us in reaching a decision on the case. We will involve third parties in an investigation to the extent we consider it appropriate in order to carry out our functions fairly, transparently and effectively.

## How to raise concerns with Ofcom

- 4.32 If a subject of an investigation, a complainant or third party (where relevant) is dissatisfied with the way in which Ofcom is dealing with an investigation, they should usually raise their concerns in writing with the case leader or case supervisor in the first instance.
- 4.33 Where engagement with the case leader or case supervisor does not resolve a party’s concerns about a significant procedural issue, it may contact the Procedural Officer. The process for doing so is set out in Section 9.

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<sup>27</sup> Such as when we issue a provisional decision, change the scope of an investigation, issue a final enforcement decision or close a case.

## 5. Outcomes of regulatory investigations and the decision-making process

### Introduction

- 5.1 Ofcom’s processes for making decisions covered by these Regulatory Enforcement Guidelines vary depending on the type of decision being made. This section covers how Ofcom decides on the outcome of a regulatory investigation and who will make key decisions during an investigation. Outcomes of consumer protection law investigations are set out in Section 8.
- 5.2 In a regulatory investigation, we may decide:
- a) to issue a provisional decision. We will normally give the subject the opportunity to make representations before proceeding to a final decision. Following consideration of those representations, we may:
    - i) issue a final decision which imposes a financial penalty and/or a direction requiring steps to be taken to remedy a contravention and/or comply with a regulatory requirement; or
    - ii) issue a final decision but decide not to impose a financial penalty and/or a direction requiring steps to be taken to remedy a contravention and/or comply with a regulatory requirement;
  - b) decide there is insufficient evidence of a contravention and close the case on that basis (potentially subject to a period of compliance monitoring); or
  - c) decide to close a case without having taken a final decision on the merits of a case.<sup>28</sup>
- 5.3 In some cases, we may be able to reach a settlement with the subject of an investigation as a way of resolving a case, in circumstances where we have grounds to take formal enforcement action (in other words, to issue a provisional decision). The process for settlement is discussed in Section 6 below.

### Decision making in regulatory investigations

- 5.4 The decision on whether to issue a provisional decision will be taken by an Ofcom nominated decision maker. This will be a senior member of Ofcom’s staff with appropriate Board-delegated authority. Typically, this would be the person who is responsible for overseeing the investigation (the case supervisor).

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<sup>28</sup> For example, we may decide to close the case for administrative reasons, or where we are satisfied that the conduct we were concerned about has now ceased and been remedied, and we judge that there is no further purpose to be served by continuing with the investigation in the particular circumstances of the case.

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

## Provisional decision

- 5.6 If the decision is taken that there are reasonable grounds for believing that the subject of the investigation is contravening or has contravened one or more relevant regulatory requirement(s), we will notify the subject of the investigation of this provisional finding with our reasons by providing it with a provisional decision. This provisional view may change in light of subsequent representations made, or material provided, by the subject of the investigation (or complainants or other third parties where relevant), or any further evidence which comes to light.
- 5.7 Where Ofcom is minded to impose a financial penalty, we will, as a general rule, include a provisional determination of penalty within the provisional decision.<sup>29</sup> In determining penalties, we will have regard to our Penalty Guidelines.
- 5.8 We generally expect the subject of an investigation to take steps to bring itself into compliance and remedy the consequences of any contravention to the fullest extent possible. Ofcom will as a general rule include with any provisional decision a provisional view of the steps the subject should take.<sup>30</sup> The decision will also include details of any direction Ofcom is minded to give, where such powers exist.
- 5.9 If the subject of the investigation is a company, Ofcom will send a soft copy to our main contact and, where required, deliver the decision in hard copy to the Company Secretary unless it has agreed to receive a soft copy.
- 5.10 When we issue the provisional decision, we will also provide the subject of the investigation with copies of, or access to, the evidence that we rely on in reaching our provisional view, excluding any internal Ofcom documents or any routine administrative documents (e.g. routine correspondence).
- 5.11 Wherever possible and appropriate, we will provide the subject with copies of or access to the relevant documents in electronic form, but in some cases we may provide hard copies (for example where requested by the subject in a particular case). Where we have relied upon evidence provided to us by the subject itself, rather than providing copies of the relevant documents, we may instead list these in a schedule so that it is easy for the subject to cross-refer to its own copies.

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<sup>29</sup> For some types of cases, we are required by statute to include a provisional determination of penalty in the provisional decision. For other types of cases, Ofcom has discretion.

<sup>30</sup> For some types of cases, Ofcom is required by statute to specify in the provisional decision the steps that we think should be taken by the subject in order to comply with the relevant regulatory requirement(s) and/or remedy the consequences of the contravention. In other cases, the matter is left to Ofcom’s discretion.

- 5.12 Taking into account the rights of defence of the subject of an investigation, we may consider it necessary to disclose information provided by a third party to the subject of the investigation. However, we will redact or withhold confidential third party information where appropriate in accordance with the relevant statutory framework, having regard to the respective interests of the party that has provided the confidential information and the subject of the investigation, and our duty to be transparent. Redacted confidential information in the provisional decision and any accompanying documents will be marked accordingly.
- 5.13 Ofcom will not publish provisional decisions, but we will generally publish an update on our website. The update will normally explain that we have issued a provisional decision, include a summary of the proposed contraventions that we are minded to find and, where relevant, the steps we propose the subject should take to comply and/or remedy the proposed contraventions. It will also state that the subject will have the opportunity to make representations on our proposed findings before we make our final decision.

## Written representations

- 5.14 The subject of the investigation will have the opportunity to make written representations to Ofcom on the proposed finding and on any proposed penalty, proposed required steps and/or proposed direction. Typically, we will give the subject a period of at least 20 working days for making written representations. The precise period will depend on the particular circumstances of the case, and more complex cases may require a longer period. There might also be circumstances where we require a more expedited process, for example where we are considering suspension or restriction of a service for inciting crime or disorder, or a failure to comply with a statutory information request.
- 5.15 Where we consider it to be appropriate for reasons of fairness, we may provide complainants or relevant third parties with the opportunity to comment on a non-confidential copy of the provisional decision.<sup>31</sup> 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.
- 5.16 We will not usually provide a complainant or third parties with copies of, or access to, the underlying evidence relied on, but may do so where appropriate for reasons of fairness.

## Oral hearings

- 5.17 Ofcom may offer the subject of the investigation the opportunity to attend an oral hearing, either in person or remotely, to make oral representations on matters referred to in the

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<sup>31</sup> This will typically be where they may have information relevant to the proposed decision and could provide informed comments on the provisional decision. Another example may be where Ofcom's provisional findings could have a direct impact on the economic interests of a third party.

provisional decision.<sup>32</sup> The oral hearing provides the subject with an opportunity to highlight directly to the final decision maker issues of particular importance to its case and/or to clarify details set out in its written representations.

- 5.18 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. This will normally be held 10 to 20 working days after the deadline for written representations has elapsed.<sup>33</sup>
- 5.19 Where appropriate, the oral hearing will usually be held at the Ofcom offices in which the investigating case team is based and will be chaired by the final decision maker.<sup>34</sup> The case supervisor, case leader and other members of the case team may also be present and may comment during the course of the hearing. Other personnel from Ofcom may attend as appropriate, for example legal advisers, economic advisers and/or technical experts, depending on the circumstances of the case.
- 5.20 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.
- 5.21 Complainants and other third parties will not usually be invited to attend the oral hearing.
- 5.22 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 officials present to ask the subject questions on its representations.
- 5.23 The hearing will be recorded and transcribed, and the transcript will be provided to the subject of the investigation, giving an opportunity for comment on its accuracy. Complainants and other third parties will not be provided with a copy of the transcript except in exceptional circumstances.

## Further provisional decision

- 5.24 In some cases, new information or evidence may come to Ofcom's attention after we have issued a provisional decision and given the subject of the investigation the opportunity to comment on it. We will adopt an appropriate process to deal with such evidence which ensures fairness to the subject of the investigation.
- 5.25 Where such new information or evidence leads us to consider making a material change to the nature of the proposed contravention findings<sup>35</sup> and/or alter the proposed level of penalty, we may withdraw the initial provisional decision and issue a new provisional

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<sup>32</sup> Parties may make oral representations on a provisional decision and/or a provisional determination of penalty. We expect any oral representations to be made at a single hearing, including in circumstances where Ofcom has exercised its discretion to issue separate contravention and penalty decisions.

<sup>33</sup> However, if the subject provides its written representations prior to the deadline, then the oral hearing may be earlier.

<sup>34</sup> Alternatively, a virtual oral hearing can be arranged.

<sup>35</sup> Such as evidence of a different or more serious contravention, or a material change in our reasoning for proposing to find a contravention.

decision. The subject would have the opportunity to comment on the new provisional decision, in the manner described above, before we proceed to reach a final decision.

## Process for reaching a final decision

- 5.26 Following the oral hearing (if applicable) and having considered all of the relevant evidence and any representations, the final decision maker will take a final decision on the case.
- 5.27 The possible outcomes at this stage are:
- a) Ofcom issues a final decision confirming a finding of all or some of the contraventions identified in the provisional decision. The final decision will set out our reasons for concluding there has been one or more contravention(s) of the relevant requirement(s), and the evidence that we have relied on. It will also:
    - i) set out any financial penalty imposed and the deadline for paying the penalty;
    - ii) set out any required action to be taken to comply with the relevant regulatory requirement(s) (either immediately or by a given deadline);
    - iii) set out any required action to be taken to remedy the consequences of the contravention(s) (either immediately or by a given deadline); and/or
    - iv) confirm any proposed direction(s);
  - b) A decision is taken that, in light of the representations received and/or review of further evidence, no finding of contravention of any of the relevant regulatory requirement(s) can be maintained, and therefore the case should be closed with no further action; or
  - c) A decision is taken that the case should be closed without Ofcom having reached a decision on the merits of the case.
- 5.28 We may decide to close the case without Ofcom having reached a decision on whether there has been a breach of a regulatory condition:
- a) for administrative reasons, such as where significant further investigation would be needed to decide whether to issue a final decision and we consider that, due to other urgent or important work, our resources could be targeted more appropriately at other cases; or
  - b) where we are satisfied that:
    - i) the conduct we were concerned about has now ceased; and
    - ii) the subject of the investigation has taken appropriate action to remedy any harm; or
    - iii) the subject of the investigation has given appropriate assurances that any harm will be remedied,
  - c) and we judge that there is no further purpose to be served by continuing with the investigation in the particular circumstances of the case.

- 5.29 Ofcom will notify the subject of the investigation of our final decision. If the subject is a company, Ofcom will send a soft copy to our main contact, where required, deliver the decision in hard copy to the Company Secretary unless it has agreed to receive a soft copy only. Ofcom will also normally inform any complainant that we have reached a final decision on the investigation.

## Final decision

- 5.30 Once the final decision has been taken and notified to the subject of the investigation, we will close the case and update the details of the case on our website. This will generally include a summary of the contraventions we have found and details of any penalty and/or other measures imposed, such as any requirements imposed on the subject to take action to bring itself into compliance and/or remedy the consequences of the contravention(s).
- 5.31 We will publish a non-confidential version of the final decision on our website once we have finalised the relevant redactions of any confidential information. We will generally inform the subject and any complainant in advance of the intended date of publication of the final decision.

## Case closure without a final decision

- 5.32 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 for doing so, which we would expect to publish on our website. If there is a good reason to do so, we may also publish a non-confidential version of the reasoned case closure document setting out Ofcom's reasons for taking no further action.<sup>36</sup> If we publish, we will generally inform the subject and, where appropriate, any complainant in advance of the intended date of publication.
- 5.33 In certain cases, we may consider that fairness requires us to provide an opportunity for relevant stakeholders to comment before we finalise our decision to close the case.<sup>37</sup>
- 5.34 Where we do not provide the opportunity to comment in advance of the final case closure decision being taken, we will inform the subject in advance of publishing the case closure notice on our website. Ofcom will also normally inform any complainant that we have reached a final decision on the investigation.

## Compliance monitoring

- 5.35 Where Ofcom has taken enforcement action or closed a case having accepted assurances, we may decide to continue to monitor compliance. The purpose of the compliance phase is to ensure that the subject of an investigation does not repeat behaviour that Ofcom has

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<sup>36</sup> For example, if we think it would be helpful for stakeholders to clarify our interpretation of a particular regulatory requirement, or if we have accepted assurances about the steps the subject will take to address the issue and we consider it would be in the interests of potentially affected customers or consumers to publicise these.

<sup>37</sup> For example, where the investigation was initiated following a complaint from a stakeholder, which may have further information relevant to the proposed decision.



considered may contravention regulatory rules, that it complies with any direction, undertakings or assurances given, and/or that it implements any remedies required by Ofcom (for example, paying compensation to affected customers).

- 5.36 The process that we follow during the compliance phase will differ from case to case. We may use our information gathering powers to obtain information to assess compliance.
- 5.37 The length of the compliance phase will depend on the circumstances of the case and the measures that are to be monitored. Generally, Ofcom will not grant extensions to any deadline set for compliance with a direction or notification, unless we receive an application prior to the expiry of the deadline together with an explanation of why the deadline should be extended, including supporting evidence.
- 5.38 Ofcom’s website includes a section for cases in compliance, where we will publish details of significant developments for those cases where we decide to monitor compliance after the completion of an investigation. Once we consider that compliance has been established, we will close the case and update Ofcom’s website accordingly.

## 6. Regulatory investigations: Settlement procedure

### Introduction

- 6.1 In some cases, Ofcom may consider that it is appropriate to settle a regulatory investigation. Settlement is a voluntary process which leads to a formal, legally binding regulatory decision.<sup>38</sup> It involves the subject of the investigation admitting it has contravened a relevant regulatory requirement(s) and accepting that the remainder of the investigation will follow a streamlined administrative procedure. In such cases, Ofcom will apply a discount to the level of the penalty imposed on the subject in light of the resource savings involved.
- 6.2 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.
- 6.3 For the avoidance of doubt, settlement is not a negotiation with Ofcom about what contraventions we might be prepared to find or not to find. Nor is it a negotiation about the level of the penalty which Ofcom would impose, or equivalent to the type of discussions which take place between parties to litigation or potential litigation on a ‘without prejudice’ basis for the purposes of seeking to resolve or avoid litigation.

### Requirements for settlement

- 6.4 Ofcom may consider settlement for any investigation in which we believe that we have a sufficient basis to make a provisional decision and come to a preliminary view on an appropriate level of penalty.
- 6.5 We will have regard to our statutory duties in deciding on whether we should settle a case, and will also consider other factors such as the likely procedural efficiencies and resource savings that can be achieved through settlement.<sup>39</sup> We may decide that a case is not suitable for settlement for public policy reasons (for example due to the nature of the harm caused by the contravention), due to the previous conduct of the subject during the course of the investigation (for example, where the subject has been obstructive or failed to co-operate) or due to limited resource savings from settlement (for example in some cases involving contraventions of statutory information request requirements).
- 6.6 As a minimum, Ofcom will require the subject of the investigation to:

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<sup>38</sup> Settlement is therefore not the same as resolving a case by giving assurances to change conduct which could lead to case closure without resulting in a final enforcement decision (as described in Section 5).

<sup>39</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.

- a) make a clear and unequivocal written admission of liability in relation to the nature, scope and duration of the contravention. This would need to reflect Ofcom’s position on the nature of the contraventions we are minded to find and the appropriate level of penalty (as explained further below);
- b) where applicable, cease the contravening behaviour immediately from the date it enters into a settlement process with Ofcom and refrain from engaging again in the same or similar contravening behaviour;
- c) confirm that it:
  - i) accepts that there will be a formal and published finding of contravention against it;
  - ii) will pay a penalty;
  - iii) will take any steps required to comply with the relevant regulatory requirement(s) and to remedy the consequences of the contravention (if relevant);
  - iv) will accept a streamlined administrative process;<sup>40</sup> and
  - v) will not challenge or appeal against any final decision.

## Settlement discounts

- 6.7 Where the settlement process is concluded successfully, the final decision will contain the penalty amount, including 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.
- 6.8 The settlement discount will be considered on a case-by-case basis and will be assessed on the basis of the potential administrative saving. We would normally expect this discount to be:
- a) up to a maximum of 30% where a successful settlement process is commenced before the provisional decision is issued;
  - b) up to a maximum of 20% where a successful settlement process is commenced after the provisional decision is issued, but prior to written representations being received; or
  - c) up to a maximum of 10% where a successful settlement process is commenced after the provisional decision is issued and after written representations are received.
- 6.9 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 providing

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<sup>40</sup> This will be decided on a case-by-case basis depending on the stage at which the settlement process is commenced, but may include no written representations (except in relation to manifest factual inaccuracies) and will include no oral hearing.

its full co-operation with the settlement process, we are 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.

- 6.10 Settlement discounts are separate from the application of the Penalty Guidelines, under which we may take into account a subject's co-operation with an investigation in setting the appropriate level of penalty imposed. The settlement discount is intended to reflect resource savings achieved by Ofcom as a result of following the settlement process, and is applied after other mitigating factors have already been taken into account in determining the appropriate level of the penalty.

## Decision making

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

## Settlement process

- 6.12 If the subject of an investigation wishes to discuss the possibility of exploring settlement, it should approach the case leader and/or case supervisor in the first instance at any time. Ofcom will consider initiating the settlement process at any point after Ofcom has reached a stage in our analysis where we could come to a provisional view on the nature of the contravention and the appropriate level of penalty. There are three main stages at which a settlement process may be commenced:
- a) prior to a provisional decision being issued;
  - b) following a provisional decision being issued, but prior to the subject of the investigation making written representations in response; or
  - c) following a provisional decision being issued, and after the subject of the investigation has made representations in response, but prior to Ofcom issuing a final decision.
- 6.13 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 basis to enter into a settlement process at any stage.

## Settlement prior to a provisional decision

- 6.14 We will normally provide details of our thinking on the case where we consider this will assist the subject and Ofcom in deciding whether to engage in a settlement process. If

Ofcom and the subject both wish to pursue the settlement process, we will then send to the subject a statement of facts, setting out our provisional findings and the evidence on which we propose to rely. We will also provide:

- a) an indication of the level of penalty that we would be minded to impose, and the level of settlement discount we would be likely to award;<sup>41</sup> and
- b) access to documents we rely on, if appropriate, for reasons of fairness and transparency.

6.15 Ofcom will ask the subject if it would be prepared in principle to make admissions on the basis of the statement of facts.<sup>42</sup> If the subject wishes to pursue settlement on the basis of the statement of facts, it will be asked to make written representations solely on any manifest factual inaccuracies contained therein.<sup>43</sup>

6.16 If the subject is not prepared to agree to a settlement on the basis of the statement of facts, it is unlikely to be appropriate to pursue settlement at this stage and Ofcom would normally proceed to issue a provisional decision in accordance with its usual process.

6.17 If the subject indicates that it wishes to pursue settlement on the basis set out in the statement of facts, we would proceed to issue a provisional decision, which would contain the proposed penalty amount.<sup>44</sup> As the provisional decision 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. We would expect the subject to provide written confirmation of admissions and its acceptance of the settlement requirements.

## Settlement following a provisional decision and prior to written representations

6.18 If the subject of the investigation is in principle prepared to agree to the settlement requirements and admit to the contravention(s) set out in the provisional decision, it may inform Ofcom that it wishes to enter into a settlement on that basis.

6.19 We will provide the subject with an indication of the settlement discount we would be minded to apply if a successful settlement process is commenced at this stage. We will

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<sup>41</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.

<sup>42</sup> The timeframe for doing so will be set on a case-by-case basis, having regard to possible resource savings through the settlement process.

<sup>43</sup> If Ofcom considers that the subject's representations appear to go beyond this (for example into the merits of our provisional findings or on the level of the penalty), we would reassess whether the case remained appropriate for settlement at this stage.

<sup>44</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 provisional decision. We would, however, expect to confirm the level of the available settlement discount at this stage which would, for example, be the same amount as previously proposed to the subject were the settlement process successful and concluded swiftly. The available discount may be reduced in the event the settlement process takes longer, as set out above.

then set a deadline for the subject to indicate its willingness to settle and provide a short period for written representations on manifest factual inaccuracies only in the provisional decision.<sup>45</sup> We then expect the subject to provide written confirmation of admissions and its acceptance of the settlement requirements in the manner set out below.

## Settlement following a provisional decision and following written representations

- 6.20 If the subject of the investigation wishes to make written representations on the provisional decision (beyond identifying manifest factual inaccuracies), it may nonetheless indicate to Ofcom that it wishes to enter into a settlement process after doing so.
- 6.21 Ofcom would consider any written representations made to it in line with our usual process, including representations as to the level of any penalty, before deciding whether to engage in a settlement process and on what basis. Settlement is not a negotiation. Therefore, if we consider it appropriate to engage in a settlement process after considering the subject's written representations, we would normally provide it with a written statement of our position.<sup>46</sup> This would set out:
- a) the contravention(s) we are minded to find; and
  - b) an indication of the level of penalty we would be minded to impose, taking into account our assessment of the nature of the contravention(s) and after applying the settlement discount on the penalty at that stage of the process.<sup>47</sup>
- 6.22 We will set a deadline for the subject to indicate its willingness to settle on the basis of the written statement.<sup>48</sup> We then expect the subject to provide written confirmation of admissions and its acceptance of the settlement requirements in the manner set out below.

## Successful conclusion of the settlement process

- 6.23 If the settlement process is successful and the subject indicates that it is prepared to agree to the settlement requirements and make admissions which reflect 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.

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<sup>45</sup> The timeframe for doing so will be set on a case-by-case basis having regard to possible resource savings through the settlement process.

<sup>46</sup> This may, for example, take the form of a draft final decision, or we might confirm via letter that our position remains unchanged from the provisional decision.

<sup>47</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.

<sup>48</sup> The timeframe for doing so will be set on a case-by-case basis having regard to possible resource savings through the settlement process.

- 6.24 Where settlement is agreed prior to the subject making substantive written representations on the provisional decision, we expect the subject to provide written confirmation following receipt of the provisional decision. We normally expect in such cases that the final decision would be in the same terms as the provisional decision (subject to any corrections of factual inaccuracies).
- 6.25 Where settlement is agreed after the subject has made substantive written representations on the provisional decision, we expect the subject to provide its written confirmation following receipt of Ofcom’s draft final decision.
- 6.26 Once we have received the subject’s written confirmation, 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.
- 6.27 Following the conclusion of a successful settlement process, Ofcom will close the case and update the details of the case on Ofcom’s website. This will generally refer to the fact that a settlement has been agreed and include:
- a) a summary of the contraventions Ofcom has found;
  - b) details of the penalty (including the level of the settlement discount); and
  - c) any other measures imposed (such as any requirements on the subject to take action to bring itself into compliance and/or remedy the consequences of the contravention(s)).
- 6.28 Ofcom may also publicise the outcome of the case in a media release. Ofcom will normally share in advance a copy of the website update with the subject for information only shortly (and no more than one working day) before publication.
- 6.29 Ofcom will also publish a non-confidential version of the final decision, in accordance with our standard practice, on its website.

## Withdrawing from the settlement process

- 6.30 Either the subject of the investigation or Ofcom may withdraw from the settlement process at any point. In the event that the settlement process is unsuccessful, the case will revert to the usual process and the content of any settlement discussions will not be revealed to the final decision maker.
- 6.31 The final decision maker may be aware of the fact that the possibility of settlement has been discussed between Ofcom and the subject. However, neither the substance of any oral discussions between the subject and Ofcom, nor any correspondence relating to, or written records of, such discussions would be disclosed to the final decision maker, so that the decision could be taken impartially on the basis of the relevant evidence.
- 6.32 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 decision even if the settlement process is unsuccessful. In addition,

Ofcom may follow up any new issues of regulatory concern which come to light during the settlement process.

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



## 7. Regulatory investigations: Urgent action and interim steps

### Introduction

- 7.1 Ofcom has the power to take urgent action in relation to the following types of regulatory investigation:
- a) under section 98 of the Communications Act in relation to a contravention of condition under section 96A;
  - b) under section 111A of the Communications Act in relation to a contravention of a requirement under the Electronic Communications Code (Conditions and Restrictions) Regulations 2003; or
  - c) under paragraphs 8 to 10 of Schedule 7 to the Postal Services Act in relation to a contravention of a regulatory requirement imposed under the Postal Services Act or other postal legislation.
- 7.2 With respect to the enforcement of the security duties,<sup>49</sup> Ofcom also has the power to direct providers to take interim steps pending the commencement or completion of enforcement action (sections 105U and 105V of the Communications Act).

### Urgent action

- 7.3 Ofcom can take urgent action to make a direction suspending or restricting a provider's or operator's activities. We will assess requests from applicants for urgent action against the relevant statutory criteria. If we consider the test is met, then we may take urgent action at our discretion. In exercising this discretion, we will have regard to other relevant considerations including the impact of the direction on the subject and any relevant third-party interests, as well as on the interests of citizens and consumers.
- 7.4 In most cases where we are considering whether to take urgent action in response to a third-party request, where time allows, Ofcom will:
- a) inform the subject about which the request for urgent action has been made that we have received a request to restrict or suspend its activities; and
  - b) give it the opportunity to make representations on a non-confidential version of the request.
- 7.5 Where we are minded to give a direction suspending or restricting the subject's activities (whether on our own initiative or in response to a third party request), where time allows, we would normally expect to inform the subject of this and provide it with an opportunity to comment on our provisional decision. Given the circumstances in which we would be

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<sup>49</sup> I.e., a duty imposed by or under any of sections 105A to 105D of the Communications Act (see section 105U(1)(a)).

considering taking urgent action, Ofcom will normally allow only a short period to comment. This may include written and/or oral representations as appropriate in the circumstances, having regard to the urgency of the case. We may also allow the applicant to make representations if we consider it appropriate.

- 7.6 If Ofcom is minded not to grant a third-party request for urgent action, where time allows, we will normally inform the applicant and the subject and provide them with a brief opportunity to comment and submit any further information or evidence before reaching our final decision.
- 7.7 In cases where Ofcom is satisfied that the statutory criteria are met and that due to the risk of serious harm there is a need to take immediate action, we may decide to give a direction suspending or restricting a provider's or operator's activities without first consulting the subject or giving it the opportunity to comment.<sup>50</sup> We will decide what is necessary and appropriate in the circumstances on a case-by-case basis.
- 7.8 We normally publish an update on our website stating that we have issued such a direction and publish a non-confidential version of our decision. As one of the statutory criteria for taking urgent action is that we must have reasonable grounds for believing that the subject is contravening or has contravened a relevant regulatory requirement, typically we will issue a provisional decision alongside the decision to give a direction suspending or restricting the subject's activities.
- 7.9 Given the need to decide whether to confirm the direction as soon as reasonably practicable, we may set a short timeframe for representations. The provider may also request an oral hearing.
- 7.10 As soon as reasonably practicable after the period for representations has ended, Ofcom must determine whether the relevant contravention did occur and whether the circumstances made it an urgent case justifying the direction. If Ofcom decides that the contravention occurred and the direction was justified, we may confirm the direction, but if not, we must revoke it, or in some cases modify the condition. We will follow the same process for reaching our final decision as set out in Section 5 of these Regulatory Enforcement Guidelines.
- 7.11 We will inform the relevant subject (and the applicant if relevant) as soon as reasonably practicable of the outcome of our decision and will normally publish details of our decision and a non-confidential version of it on our website in line with our usual process (see Section 5 of these Regulatory Enforcement Guidelines).

## Interim steps

- 7.12 With respect to the enforcement of the security duties (see Annex 3), Ofcom also has the power to direct providers to take interim steps pending the commencement or completion

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<sup>50</sup> As noted below, in accordance with the relevant statutory requirements, in such a case the operator or provider would have an opportunity to make representations to Ofcom as soon as reasonably practicable after the direction has been given.

of enforcement action (sections 105U and 105V of the Communications Act). Ofcom’s general statement of policy under section 105Y of the Communications Act (in particular, paragraphs 6.9-6.20)<sup>51</sup> sets out procedural guidance on the exercise of this power.

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<sup>51</sup> Ofcom is currently consulting on its draft general statement of policy under section 105Y of the Communications Act (Ofcom’s “procedural guidance”). See <https://www.ofcom.org.uk/consultations-and-statements/category-1/ensuring-compliance-with-security-duties>. We plan to issue our final procedural guidance in Autumn 2022.

## 8. Outcomes of consumer protection law investigations and the decision-making process

### Introduction

- 8.1 Ofcom’s processes for making decisions covered by these Regulatory Enforcement Guidelines vary depending on the type of decision being made. This section covers how Ofcom decides on the outcome of a consumer protection law investigation and who will make key decisions during an investigation.
- 8.2 Consumer protection law investigations include investigations under the Consumer Rights Act 2015 and Part 8 of the Enterprise Act 2002 including under the Consumer Protection from Unfair Trading Regulations 2008 and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.<sup>52</sup> Further information on the type of consumer protection law contraventions we may investigate and the general process we follow when enforcing consumer protection law is set out in Annex 12.
- 8.3 Ofcom is not the final decision maker in cases relating to enforcement of consumer protection law investigations. This is a matter for the courts.
- 8.4 Decisions on how to progress consumer protection law investigations will be taken by a senior member of Ofcom’s executive with appropriate Board-delegated authority. Typically, this will be the person who is responsible for overseeing the investigation.
- 8.5 Ofcom exercises its consumer protection powers concurrently with a number of other regulatory bodies, including the Competition and Markets Authority (‘CMA’), and the Trading Standards Institute.

### Part 8 of the Enterprise Act

- 8.6 In relation to cases brought under Part 8 of the Enterprise Act, Ofcom does not have powers to make decisions on contraventions or issue penalties. Instead, we may accept undertakings from a party under investigation to cease the conduct, or apply for a court order to put a stop to the harmful conduct.
- 8.7 Where we consider that there is a potential infringement of the relevant consumer protection legislation,<sup>53</sup> we are likely in most cases to engage with the subject of the investigation and seek to agree undertakings to ensure that the harmful conduct stops and

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<sup>52</sup> We can enforce the Consumer Rights Act 2015 under Schedule 3 of that Act or Part 8 of the Enterprise Act. We can enforce other consumer protection law, including the Consumer Protection from Unfair Trading Regulations 2008 and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 under Part 8 of the Enterprise Act.

<sup>53</sup> Unless we consider that urgent action is required.

is not repeated. Undertakings may also include commitments to taking consumer redress measures, such as those:

- a) offering compensation or redress to consumers who have suffered a loss as a result of the harmful conduct;
- b) intended to prevent or reduce the risk of the harmful conduct recurring; and
- c) enabling consumers to choose more effectively between suppliers of goods and services.<sup>54</sup>

8.8 If undertakings cannot be agreed, or if the undertakings are subsequently broken, Ofcom can take action through the courts to enforce compliance by way of an enforcement order. Where we do so, we will follow the statutory requirements for appropriate consultation. Except where the CMA) considers that an order should be sought without delay, we will consult the CMA and the subject of our investigation for a minimum of 14 days<sup>55</sup> to see if we can ensure the harmful conduct is stopped and not repeated. For example, we may at that stage make a further attempt to obtain undertakings from the subject.

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

8.10 If we are unsuccessful in obtaining undertakings and consider it is warranted, we can apply to the court for an order. The court may grant an enforcement order requiring the undertaking to cease the conduct in question and ensure that it is not repeated. It may also require consumer redress measures to be taken, or that the subject of the investigation publishes details of the order or a corrective statement. Alternatively, the court may itself accept an undertaking from the subject of the investigation to cease and not repeat the conduct in question. It is a contempt of court to contravention the terms of an enforcement order, which can lead to a fine or imprisonment.

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

## Urgent action

8.12 We may seek an interim enforcement order from the court if we consider that the conduct in question should be prohibited or prevented immediately. This is a temporary order which remains in force until the court determines whether to make an enforcement order. Alternatively, the court can accept undertakings from the subject of the investigation in lieu of making such an interim enforcement order. We must give the CMA notice of our intention to apply for an interim enforcement order and, in most cases, we are required to

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<sup>54</sup> These would reflect the provisions of section 219A to 219B of the Enterprise Act.

<sup>55</sup> Seven days if we consider that an application for an interim order may be appropriate.

engage in a period of consultation with the subject for a minimum of seven days, unless the CMA considers that the application should be made without delay.

## Enforcement under the Consumer Rights Act

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

## 9. Procedural complaints about investigations

### Introduction

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

### The Procedural Officer

- 9.3 A number of appropriately experienced Ofcom staff have Board-delegated authority to act as the Procedural Officer for the purposes of an investigation. The relevant Procedural Officer will be appointed on a case-by-case basis, if a relevant procedural complaint is made.
- 9.4 The Procedural Officer will be independent from the investigation, case team and decision makers, and will not have been involved in the investigation (other than as the Procedural Officer). The role of the Procedural Officer is intended to ensure that procedural issues can be addressed quickly, efficiently and cost effectively, and independently of the case team.

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

- 9.5 Complaints about the procedure followed by Ofcom when conducting an investigation can be made to the Procedural Officer by the subject of the investigation, complainant or a third party (where relevant) once the investigation has been formally opened.
- 9.6 The Procedural Officer will deal with complaints which relate to the following:
- a) deadlines for parties to respond to information requests, submit documents or provide representations;
  - b) requests for redaction of confidential information in documents that Ofcom proposes to publish or disclose;
  - c) requests for disclosure or non-disclosure of certain documents or information on Ofcom's case file;
  - d) issues relating to the process for oral hearings; or
  - e) other significant procedural issues that may arise during the course of an investigation.
- 9.7 The Procedural Officer is not able to deal with complaints which relate to decisions taken by Ofcom relating to substantive issues, for example decisions on the scope of information requests or decisions relating to the scope and substance of an investigation.

## Making a complaint to the Procedural Officer

- 9.8 If a party wishes to refer its concerns to the Procedural Officer, it should make an application to the Procedural Officer as soon as possible after receiving the decision from the case supervisor, and in any event within five working days.
- 9.9 The application should be no longer than five sides of A4 paper and should include:
- a) the name and contact details of the applicant;
  - b) the name and contact details of the lawyers acting for the applicant (where relevant);
  - c) the Ofcom case name and reference number;
  - d) the date of decision made by the case supervisor; and
  - e) a short summary of the issues including a summary of the case team’s original decision, the decision of the case supervisor, the reason the applicant wants a review of that decision and the outcome the applicant is seeking.
- 9.10 The applicant should also provide copies of relevant correspondence between it and Ofcom relating to the issue in question and copies of any relevant information or documents which the applicant holds.
- 9.11 The application should be submitted by email to [procedural.officer@ofcom.org.uk](mailto:procedural.officer@ofcom.org.uk).
- 9.12 The Procedural Officer will provide members of the case team and the case supervisor, and the applicant, the opportunity to present their arguments orally on the telephone or at a meeting.

## The Procedural Officer’s decision

- 9.13 The Procedural Officer will deal with the application as quickly as possible, and will aim to take a decision in most cases within 10 working days from receipt of the application. In any event, the Procedural Officer will reach a decision within 20 working days from receipt of the application. The Procedural Officer may extend this timeframe by no more than 20 working days if there are special reasons to do so.
- 9.14 The Procedural Officer’s decision will be submitted in writing to the applicant, and it will be binding on the case team and decision makers. A non-confidential version of the Procedural Officer’s decision, or a summary of it, will be published on Ofcom’s website, generally at the time the decision is made or at the end of Ofcom’s investigation.



## 10. Civil liability for contravention of regulatory requirements

### Introduction

- 10.1 In certain circumstances, persons who sustain loss or damage as a result of a contravention of certain regulatory requirements imposed by Ofcom may bring proceedings against the relevant company. Ofcom’s consent is required in order to bring such proceedings and, in granting any such consent, Ofcom may impose conditions relating to the conduct of the proceedings.
- 10.2 The statutory frameworks which set out these rights include sections 104 and 105W of the Communications Act 2003 and paragraph 16 of Schedule 7 of the Postal Services Act 2011.

### Applying for consent

- 10.3 Any persons wishing to request consent to bring proceedings under these sections should contact Ofcom’s enforcement team.<sup>56</sup>
- 10.4 For Ofcom to consider the request, we will generally require the following information:
- a) details of precisely which regulatory obligation(s) is alleged to have been contravened and by which company;
  - b) details of when and how the alleged contravention(s) took place, together with a brief summary of the supporting facts and evidence relied on; and
  - c) the timing and location of the proposed proceedings.
- 10.5 While we do not require underlying evidence to be provided, we may ask a number of follow up questions if this is necessary for us to consider the request. In addition, a non-confidential version of the application should be provided to Ofcom at the time the request is made.

### Ofcom’s approach to considering requests for consent

- 10.6 The use of private proceedings to enforce regulatory requirements, or seek damages that result from a contravention of regulatory requirements, is an important aspect of the enforcement regime. Effective use of these powers can increase compliance incentives and introduce an additional deterrence effect while minimising the impact on Ofcom’s public resources.
- 10.7 Accordingly, we would expect to grant any request for consent unless we can identify a good reason not to grant such a request. In doing so, Ofcom will consider other activities it

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<sup>56</sup> Guidance on how to make a complaint is set out in our [Advice for complainants: Submitting a complaint to Ofcom](#).

is carrying out – such as market reviews or enforcement matters – to ensure there are no potential conflicts.

- 10.8 Ofcom will not however consider the merits of any proposed proceedings. These are a matter wholly for a court to consider. This also means that, should we grant consent, we will do so expressly on the basis that Ofcom has no view on the merits of the proposed proceedings.
- 10.9 In carrying out its assessment, Ofcom may seek comments from the target of the proposed proceedings.
- 10.10 Where we grant consent, we will write to the requesting person confirming the scope of the consent. This letter will be copied to the target of the proposed proceedings.
- 10.11 We will also consider on a case-by-case basis whether it is appropriate to impose conditions on any granting of consent. Such conditions could include, for example, a requirement to share certain information with Ofcom during the course of proceedings.
- 10.12 Where we are minded not to grant consent, we will consult with the person requesting consent before making a final decision.

# A1. SMP, USO, General Conditions and other regulatory conditions and directions applicable to communications providers

## Compliance with regulatory conditions and directions under sections 45 or 49 of the Communications Act 2003

### Regulatory requirements

- A1.1 Ofcom has the power to impose a number of different types of regulatory conditions under sections 45 and 49 of the Communications Act 2003 (the ‘Communications Act’). These include:<sup>57</sup>
- a) general Conditions, which can be imposed on all or some providers of electronic communications networks and services operating in the UK;<sup>58</sup>
  - b) significant market power service conditions, which can be imposed on communications providers who are found to have significant market power in certain markets,<sup>59</sup> and
  - c) universal service conditions, which can apply to someone that Ofcom has designated a universal service provider under section 66 of the Communications Act.<sup>60</sup>

### Enforcement

- A1.2 The Regulatory Enforcement Guidelines set out our general approach to enforcement. We identify below the key provisions supporting the section 96A Communications Act process for the types of regulatory requirements covered by this annex, and some notable additional points and exceptions relating to the section 96A process.

Area of guidelines	Provisions and additional information
Why and how Ofcom opens cases	Ofcom can enforce compliance with general and specific regulatory conditions under sections 96A – 103 of the Communications Act.

<sup>57</sup> Ofcom is able to impose other types of conditions such as access conditions and privileged supplier conditions. See section 45(2)(b) of the Communications Act.

<sup>58</sup> See sections 45(2)(a) and 45(3) of the Communications Act. Further information on the [General Conditions](#) is available on Ofcom’s website.

<sup>59</sup> See sections 45(2)(b)(iv), 45(7)(a) and 45(8) of the Communications Act. Ofcom is also able to impose ‘SMP Apparatus Conditions’ (see sections 45(2)(b)(iv), 45(7)(b) and 45(9) of the Communications Act). Ofcom cannot enforce compliance with SMP apparatus conditions under sections 96A – 96C of the Communications Act and must instead follow the process set out in sections 94 – 96 of the Communications Act.

<sup>60</sup> See section 45(2)(b)(i) and 45(4) of the Communications Act. Further information on [universal service obligations](#) can be found on Ofcom’s website.

	<p>Before exercising our enforcement powers under section 96A of the Communications Act, we must consider if a more appropriate way of proceeding would be under the Competition Act 1998 (the ‘Competition Act’). Where we decide that it is more appropriate to proceed under the Competition Act, we will state our reasons for doing so.</p>
<p><b>Investigating</b></p>	<p><i>Information gathering</i></p> <p>Ofcom has wide powers to require the provision of information under section 135 of the Communications Act.</p> <p>Ofcom has powers to impose financial penalties and give directions to secure compliance with a statutory information request, as well as criminal sanctions for non-compliance under sections 138 to 144 of the Communications Act.</p> <p><i>Confidentiality</i></p> <p>There are restrictions on disclosure contained in sections 26 and 393 of the Communications Act.</p>
<p><b>Outcomes of regulatory investigations</b></p>	<p><i>Provisional decision</i></p> <p>Where Ofcom decides that there are reasonable grounds for believing that the subject of the investigation is contravening or has contravened the relevant regulatory requirements, Ofcom will issue a provisional decision under section 96A of the Communications Act. The provisional decision will specify the contravention, and, where applicable, the period within which the subject should comply with the notified condition(s) and remedy the consequences of the notified contravention(s).</p> <p>Where Ofcom is minded to impose a financial penalty, it is required to include a provisional determination of that penalty in the provisional decision under section 96A of the Communications Act.</p> <p>The amount of penalty proposed must be appropriate and proportionate to the contravention. See sections 96B and 97 of the Communications Act for further information.</p> <p><i>Written and oral representations</i></p> <p>No additional points to the main Regulatory Enforcement Guidelines.</p> <p><i>Final decision</i></p> <p>Where Ofcom remains satisfied that the subject of the investigation is contravening or has contravened any of the relevant statutory requirements, Ofcom will issue a final decision under section 96C of the Communications Act.</p> <p><i>Penalty</i></p>

	Ofcom has published penalty guidance which out how it proposes to determine the amount of the penalties which it imposes. <sup>61</sup>
<b>Settlement procedure</b>	No additional points to the main Regulatory Enforcement Guidelines.
<b>Urgent action</b>	<p>Ofcom has the power to take urgent action under section 98 of the Communications Act in relation to a contravention of a regulatory requirement imposed under section 45 of the Communications Act.</p> <p>Ofcom can make a direction suspending or restricting a provider’s activities where we have reasonable grounds to suspect that the contravention has resulted in, or creates, an immediate risk of serious economic or operational problems for persons (other than the contravening provider) who provide communications under section 98(4) of the Communications Act. Sections 98(5) to (8) of the Communications Act also apply to such a direction.</p> <p>Ofcom is required, as soon as reasonably practicable after giving a direction to restrict or suspend a provider’s activity, to give the provider an opportunity of making written representations to Ofcom about the grounds on which it was given and its effect, and an opportunity of proposing steps to remedy the situation under section 99(1) of the Communications Act.</p> <p>If Ofcom decides that the contravention occurred and the direction was justified, we may confirm the direction; but if not, we must revoke it. See sections 99(2) to (4) of the Communications Act.</p>

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<sup>61</sup> See Ofcom’s [penalty guidelines](#).

## A2. Universal Service Obligation and other regulatory conditions and directions applicable to postal operators

### Compliance with regulatory conditions and directions imposed or given by Ofcom under the Postal Services Act 2011 and other postal legislation

#### Regulatory requirements

- A2.1 Ofcom has the power to impose conditions and directions on providers of postal services, in particular under Part 3 of the Postal Services Act 2011 (the ‘Postal Services Act’).<sup>62</sup> These conditions and directions can cover a range of issues.<sup>63</sup>
- A2.2 Under the Postal Services Act, Ofcom’s primary duty in relation to postal services is to carry out its functions in a way that it considers will secure the provision of a universal postal service.

#### Enforcement

- A2.3 The Regulatory Enforcement Guidelines set out our general approach to enforcement. We identify below the key provisions supporting the process for the types of regulatory requirements covered by this annex, and some notable additional points/exceptions relating to this process.

Area of guidelines	Provisions and additional information
Why and how Ofcom opens cases	Ofcom can enforce compliance with general conditions and directions under Schedule 7 of the Postal Services Act.  Before exercising our enforcement powers under Schedule 7 to the Postal Services Act, we must consider if a more appropriate way of proceeding would be under the Competition Act 1998 (the ‘Competition Act’). Where we decide that it is more appropriate to proceed under the Competition Act, we will state our reasons for doing so.
Investigating	<i>Information gathering</i>  Under section 55 and Schedule 8 of the Postal Services Act, Ofcom can require the provision of information relating to a suspected contravention

<sup>62</sup> Ofcom can also impose conditions and directions under other postal legislation, such as sections 89A or 116(2A) of the Postal Services Act 2000 and under section 25(5) of the Consumers, Estate Agents and Redress Act 2007.

<sup>63</sup> More information on [conditions and directions under the Postal Services Act](#) is available on Ofcom’s website.

	<p>of any regulatory condition/direction imposed under Part 3 of the Postal Services Act or other postal legislation.<sup>64</sup></p> <p>Failure to comply with a statutory information request can constitute a criminal offence under Part 2 of Schedule 8 to the Postal Services Act.</p> <p><i>Confidentiality</i></p> <p>There are restrictions on disclosure contained in section 56 of the Postal Services Act.</p>
<p><b>Outcomes of regulatory investigations</b></p>	<p><i>Provisional decision</i></p> <p>Where Ofcom decides that there are reasonable grounds for believing that the subject of the investigation is contravening or has contravened relevant regulatory requirements, it will issue a provisional decision under paragraph 2 of Schedule 7 to the Postal Services Act.</p> <p>Where applicable, this provisional decision will set out the steps that must be carried out to comply with the relevant requirement and remedy the consequences of the notified contravention. In some circumstances this will not be applicable, including where such steps have already been taken or where it is not possible to take such steps because the contravention is historic and cannot be remedied on a retrospective basis.</p> <p>Where Ofcom is minded to impose a financial penalty, we have discretion over whether to include the penalty in the provisional decision.</p> <p><i>Written and oral representations</i></p> <p>For provisional decisions under the Postal Services Act, Ofcom is required to give a period of at least one month, beginning with the day after the one on which the decision was given, for representations to be made.</p> <p>In relation to oral hearings, there are no additional points to the main Regulatory Enforcement Guidelines.</p> <p><i>Final decision</i></p> <p>Where Ofcom finds the subject of the investigation to have contravened a regulatory requirement, we will generally issue a final decision and, if relevant, impose a financial penalty. See paragraphs 6 and 7 of Schedule 7 to the Postal Services Act for information on the penalties that Ofcom can impose.</p> <p>In circumstances where Ofcom has specified steps that must be taken and the subject has not carried these out, Ofcom may also issue a final decision in accordance with paragraph 5 of Schedule 7 requiring that</p>

<sup>64</sup> This includes any direction under section 89A or 116(2A) of the Postal Services Act 2000 (schemes as to terms and conditions for provision of postal services, and the Postcode Address File) or section 25(5) of the Consumers, Estate Agents and Redress Act 2007 (enforcement of requirements to give information to Citizens Advice, etc).

	<p>person to comply with the relevant regulatory requirement and remedy the consequences of their failure to comply.</p> <p><i>Penalty</i></p> <p>Ofcom has published penalty guidance which out how it proposes to determine the amount of the penalties which it imposes.<sup>65</sup></p>
<p><b>Settlement procedure</b></p>	<p>No additional points to the main Regulatory Enforcement Guidelines.</p>
<p><b>Urgent action</b></p>	<p>Ofcom has the power to take urgent action under paragraphs 8 to 10 of Schedule 7 to the Postal Services Act in relation to a contravention of a regulatory requirement imposed under the Postal Services Act or other postal legislation.</p> <p>Ofcom can make a direction suspending or restricting a postal operator’s activities where we have reasonable grounds to suspect that the contravention has resulted in, or creates an immediate risk of serious economic or operational problems for persons (other than the contravening provider) who provide postal services under paragraph 8(4) and 9 of Schedule 7 to the Postal Services Act.</p> <p>Ofcom is required, as soon as reasonably practicable after giving a direction to restrict or suspend an operator’s activity, to give the operator an opportunity to make written representations about the grounds on which it was given and its effect, and an opportunity to propose steps to remedy the situation under paragraph 10(1) of the Postal Services Act.</p> <p>If Ofcom decides that the contravention occurred and the direction was justified, we may confirm the direction; if not, we must revoke it or modify the conditions under section 10(1) of the Postal Services Act.</p>

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<sup>65</sup> See our [penalty guidelines](#).



## A3. Network security

- A3.1 This annex covers investigations carried out into:
- a) requirements imposed by or under sections 105A to 105D, 105I to 105K, 105L(6), (7)(c) and (8), 105N(2)(a) and 105O of the Communications Act 2003 relating to the security and resilience of public electronic communications networks; and
  - b) compliance with requirements on Operators of Essential Services set out in the Network and Information Systems Regulations 2018.

### Compliance with security duties under the Communications Act 2003

#### Regulatory requirements

- A3.2 The Telecommunications (Security) Act 2021 (the ‘Security Act’) introduced a revised framework for protecting the security and resilience of providers of public electronic communications networks and public electronic communications services in the UK (together referred to as ‘Communications providers’).
- A3.3 The new legislative framework includes the following elements:
- a) the overarching security duties set out in sections 105A and 105C of the Communications Act;
  - b) duties to take specified measures imposed by the Secretary of State by regulations (sections 105B and 105D);
  - c) guidance given by the Secretary of State in codes of practice (section 105E);
  - d) a duty to explain a failure to act in accordance with a code of practice where Ofcom directs a Communications provider to do so (section 105I);
  - e) duties to report security compromises to Ofcom and to inform users (sections 105J and 105K);
  - f) a duty to comply with a direction given by Ofcom under section 105L in relation to informing others of a security compromise (section 105L(8))
  - g) a duty to co-operate with an assessment under section 105N (section 105N(2)(a)); and
  - h) a duty to comply with the requirements set out in an assessment notice under section 105O.
- A3.4 Ofcom has a general duty under section 105M of the Communications Act to seek to ensure that Communications providers comply with their security duties. This gives Ofcom a clear remit to work with Communications providers to improve their security and monitor their compliance.

- A3.5 To allow Ofcom to fulfil this role, the Communications Act gives Ofcom powers to monitor and enforce industry’s compliance with their security duties (sections 105I and 105N to 105V).
- A3.6 Ofcom’s general statement of policy under section 105Y of the Communications Act (‘Ofcom’s Procedural guidance’)<sup>66</sup> provides general guidance with respect to the exercise of Ofcom’s functions under sections 105I and 105M to 105V.<sup>67</sup>
- A3.7 Ofcom’s Regulatory Enforcement Guidelines (complemented by this annex) provide additional guidance with respect to the enforcement of industry compliance with their security duties.

## Enforcement

- A3.8 The Regulatory Enforcement Guidelines set out our general approach to enforcement. As set out above, this document should be read alongside Ofcom’s Procedural guidance. In particular, section 6 of Ofcom’s Procedural guidance sets out our general approach to enforcement of the security duties. We identify below the key provisions within Ofcom’s Procedural guidance supporting the process for the types of regulatory requirements covered by this section and some notable additional points/exceptions relating to this process.

Area of guidelines	Provisions and additional information
Why and how Ofcom opens cases	See paragraph 6.3 of Ofcom’s Procedural guidance, concerning the information which may trigger an investigation and Ofcom’s initial assessment process.
Investigating	See Ofcom’s Procedural guidance. In particular: <ul style="list-style-type: none"> <li>a) the principles behind Ofcom’s approach to compliance monitoring and our approach to monitoring Tier 1 and Tier 2 Communications providers (paragraphs 3.1-3.15);</li> <li>b) Ofcom’s information-gathering powers (paragraphs 3.16-3.28);</li> <li>c) Ofcom’s power to direct Communications providers under section 105I to explain any failure to act in accordance with guidance given by the Secretary of State in a code of practice (paragraphs 3.29-3.33);</li> </ul>

<sup>66</sup> Ofcom is currently [consulting on our draft general statement](#) of policy under section 105Y of the Communications Act (Ofcom’s ‘Procedural guidance’). We plan to issue our final Procedural guidance in Autumn 2022.

<sup>67</sup> For the purposes of section 105S, a ‘security duty’ is defined as “a duty imposed by or under any of sections 105A to 105D, 105I to 105K, 105L(6), (7)(c) and (8), 105N(2)(a) and 105O”.

	<ul style="list-style-type: none"> <li>d) the penalties that Ofcom may impose for contravention of an information requirement or refusal to explain a failure to follow guidance given by the Secretary of State in a code of practice (paragraph 6.22);</li> <li>e) Ofcom’s powers under sections 105N-105R to assess Communications providers’ compliance with their security duties, including our powers to give assessment notices (paragraphs 3.34-3.43);</li> <li>f) Ofcom’s power under section 105O to enter premises (paragraphs 3.44-3.46);</li> <li>g) Ofcom’s powers to require Communications providers to carry out, or make arrangements for another person to carry out, specified tests (paragraphs 4.1-4.15); and</li> <li>h) Communication providers' duty under section 105J to inform others of the risk of a security compromise and their duty under section 105K to inform Ofcom of the risk of a security compromise (paragraphs 5.1-5.36).</li> </ul> <p><i>Confidentiality</i></p> <p>There are restrictions on disclosure contained in the Communications Act, including those set out in sections 26 and 393 of the Communications Act.</p> <p>See also paragraphs 7.1-7.7 of Ofcom’s Procedural guidance, concerning our approach to sharing information with other public bodies.</p>
<p><b>Outcomes of regulatory investigations</b></p>	<p><i>Provisional decision</i></p> <p>Where Ofcom decides that there are reasonable grounds for believing that the subject of the investigation is contravening or has contravened the relevant regulatory requirements, we will issue a provisional decision under section 96A of the Communications Act.</p> <p>Where Ofcom is minded to impose a financial penalty, we are required to include a provisional determination of that penalty in the provisional decision.<sup>68</sup></p> <p><i>Written and oral representations</i></p> <p>No additional points to the main Regulatory Enforcement Guidelines.</p> <p><i>Final decision</i></p> <p>Where Ofcom remains satisfied that the subject of the investigation is contravening or has contravened any of the relevant statutory requirements, Ofcom will issue a final decision under section 96C of the Communications Act.</p>

<sup>68</sup> See section 96A(2)(e) of the Communications Act 2003

	<p><i>Penalty</i></p> <p>Ofcom has published penalty guidance which out how it proposes to determine the amount of the penalties which it imposes.<sup>69</sup></p>
<p><b>Settlement procedure</b></p>	<p>Where Ofcom has given a direction under section 105V (see paragraphs 6.9-6.20 of Ofcom’s Procedural guidance), the requirements for settlement set out in the Regulatory Enforcement Guidelines will also include the taking of such interim steps as directed by Ofcom until the completion of enforcement action.</p>
<p><b>Urgent action or interim steps</b></p>	<p><i>Urgent action</i></p> <p>Ofcom has the power to take urgent action under section 98 of the Communications Act where the conditions set out in section 98(1) are met.</p> <p>In particular, Ofcom can make a direction suspending or restricting a Communications provider’s activities where we have reasonable grounds to suspect that the contravention has resulted in, or creates, an immediate risk of a serious threat to the safety of the public, to public health or to national security or serious economic or operational problems for persons (other than the contravening provider) who are Communications providers or make use of electronic communications network or services. Sections 98(5) to (8) of the Communications Act also apply to such a direction.</p> <p>Ofcom is required, as soon as reasonably practicable after giving a direction to restrict or suspend a Communications provider’s activity, to give the provider an opportunity of making written representations to Ofcom about the grounds on which it was given and its effect and an opportunity of proposing steps to remedy the situation. See section 99(1) of the Communications Act.</p> <p>If Ofcom decides that the contravention occurred and the direction was justified, we may confirm the direction; but if not, we must revoke it. See section 99(2) to (4) of the Communications Act.</p> <p><i>Interim steps</i></p> <p>Ofcom also has the power to direct Communications providers to take interim steps pending the completion of enforcement action (sections 105U and 105V). See paragraphs 6.9-6.20 of Ofcom’s Procedural guidance.</p>

## Compliance with requirements on Operators of Essential Services under the Network and Information Systems Regulations 2018

### Regulatory requirements

A3.9 Ofcom has responsibilities under the amended Network and Information Systems Regulations 2018 (the ‘NIS Regulations’). We are the designated competent authority for

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<sup>69</sup> See our [penalty guidelines](#).

the digital infrastructure subsector and, as such, have published guidance setting out how we approach our functions under the NIS Regulations.<sup>70</sup>

## Enforcement

- A3.10 The Enforcement Guidelines set out our general approach to enforcement, which is broadly reflective of our expected normal approach to enforcement action under the NIS Regulations and imposition of any penalties on Operators of Essential Services ('OES').<sup>71</sup> Where we consider it appropriate to take a different approach, we will inform the subject of our investigation how we will proceed.
- A3.11 We identify below the key provisions supporting the regulatory process covered by this section, and some notable additional points/exceptions relating to this process.

Area of guidelines	Additional information for these regulatory requirements
<b>Why/how we open cases</b>	<p>In addition to the usual factors Ofcom considers in deciding whether to open investigations, we must also have regard to the NIS national strategy when carrying out our duties under the NIS Regulations.<sup>72</sup></p> <p>We have duties to consult and co-operate with: (a) the Information Commissioner when addressing incidents resulting in breaches of personal data; and (b) relevant law enforcement authorities, other competent authorities under the NIS Regulations, the Single Point of Contact ('SPOC') and the Computer Security Incident Response Team ('CSIRT'). We may consider those duties in deciding whether to open an investigation.</p>
<b>Investigating</b>	<p><i>Information gathering</i></p> <p>Ofcom has powers to gather information regarding a suspected breach of regulatory requirements under regulation 15.</p> <p>We also have the power to supplement such information gathering by conducting inspections under regulation 16.</p> <p><i>Confidentiality</i></p> <p>Ofcom has powers under regulation 6 of the NIS Regulations to share information with other NIS enforcement authorities, relevant law enforcement authorities, the CSIRT and public authorities in the EU. However, Ofcom can only share the information if it is necessary for (among other things) taking</p>

<sup>70</sup> See Ofcom's guidance on security requirements in sections 105A to D of the Communications Act 2003, and guidance for OES in the digital infrastructure subsector under the NIS Regulations, which are available on [our website](#).

<sup>71</sup> Regulation 1(2) defines an OES as "a person who is deemed to be designated as an operator of an essential service under regulation 8(1) or is designated as an operator of an essential service under regulation 8(3)".

<sup>72</sup> Regulation 3(6). Regulation 2(2) provides that the strategic objectives and priorities set out in the NIS national strategy must aim at achieving and maintaining a high level of security of network and information systems in sectors, such as the digital infrastructure subsector for which Ofcom is responsible. The NIS national strategy must also address the regulatory measures and enforcement framework to secure the objectives and priorities of the strategy.

	<p>enforcement action. In doing so, our information sharing must be limited to information which is relevant and proportionate to the purpose of the information sharing. Such disclosure will depend on the facts and circumstances in each case and we will decide on the best means of dealing with any confidential information on a case-by-case basis.</p> <p>In relation to disclosure and confidentiality more generally, there are no corresponding general restrictions (such as under section 393 of the Communications Act 2003) on our disclosure of information under the NIS Regulations.</p>
<p><b>Outcomes of regulatory investigations</b></p>	<p><i>Regulation 17 notices</i></p> <p>If we decide there are grounds for action, we must serve an enforcement notice under regulation 17(1) (see further below).<sup>73</sup> Before doing so, we must inform the OES – in such form and manner as we consider appropriate – of the alleged failure, and how, and by when, representations may be made (regulation 17(2A)). At the same time, we may provide notice of our intention to serve an enforcement notice (regulation 17(2B)).</p> <p><i>Regulation 18 notices</i></p> <p>If we are minded to impose a penalty on an OES, we must first serve a notice of our intention to do so under regulation 18(1) where we:</p> <ul style="list-style-type: none"> <li>a) have reasonable grounds to believe the OES has failed to comply with a duty under regulation 17(1) or 17(3A); and</li> <li>b) consider a penalty is warranted having regard to the facts and circumstances of the case.<sup>74</sup></li> </ul> <p>Normally we will serve a single document containing:</p> <ul style="list-style-type: none"> <li>c) the matters in regulation 17(2A);</li> <li>d) notice of our intention to serve an enforcement notice under regulation 17(2B); and</li> <li>e) if we intend to impose a penalty, notice of our intention to do so under regulation 18(1).</li> </ul>

<sup>73</sup> Where the OES subject of our investigation is a company, Ofcom may serve documents or notices by post or electronically to the registered or principal office of the company, or the email address of the secretary or clerk of that company. Where possible, we will serve notices using the email address of the Company Secretary. However, where the OES has its head office outside the UK, we will serve by email on the person nominated by the OES under regulation 8A(3). In both cases, we will copy this email to our main contact at the OES.

<sup>74</sup> Pursuant to regulation 18(3), a ‘notice of intention to impose a penalty’ must be in writing and specify the reasons for imposing a penalty; the sum that is intended to be imposed as a penalty and how it is to be paid; the date on which the notice of intention to impose a penalty is given; the period within which a penalty will be required to be paid if a penalty notice is served; that the payment of a penalty under a penalty notice (if any) is without prejudice to the requirements of any enforcement notice (if any); and how and when representations may be made about the content of the notice of intention to impose a penalty and any related matters.

This would be equivalent to a provisional breach notification and all references to that term in the main body of this document should be read as such, unless context otherwise requires. In other circumstances, we may decide to follow a different approach (see, for example, urgent action).

#### *Written representations*

The Regulatory Enforcement Guidelines set out the process for the subject of an investigation to make written representations on our proposed finding(s), penalty, required steps and/or direction. When we take action under the NIS Regulations, the OES will be given a similar opportunity after we have served notice of our intention to serve an enforcement notice or impose a penalty under regulation 18(1), but not necessarily where we simply inform the OES in accordance with regulation 17(2A). We will decide on a case by case basis what approach should be taken in allowing an OES to make representations to us in the latter case. While we endeavour to give an OES at least 20 working days to make written representations, we may set a shorter period depending on circumstances of each case. However, we will always ensure the OES is given a fair opportunity to consider the case against it (including associated evidence) and make representations.

#### *Final decision*

##### *Enforcement notices*

After considering any representations, we may serve an enforcement notice<sup>75</sup> within a reasonable time, having regard to the facts and circumstances of the case (irrespective of whether we have given notice of our intention to serve an enforcement notice under regulation 17(2B)).

The OES must comply with the enforcement notice, regardless of whether it has paid any penalty imposed under regulation 18 (regulation 17(3A)). Enforcement notices amount, in effect, to ‘enforcement decisions’ which may be enforced under regulation A20 of the NIS Regulations. We can commence civil proceedings for an injunction if we have reasonable grounds to believe an OES has failed to comply with an enforcement notice.

##### *Penalty notices*

After considering any representations, we may serve a penalty notice with a final penalty decision, if we are satisfied a penalty is warranted having regard to

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<sup>75</sup> If we have reasonable grounds to believe the OES has failed to comply with any of the duties and requirements listed in regulation 17(1), namely: (i) failure to notify us under regulation 8(2); (ii) failure to comply with the requirements stipulated in regulation 8A; (iii) failure to fulfil the security duties under regulation 10(1) and (2); (iv) failure to notify us of an NIS incident under regulation 11(1); (v) failure to comply with the notification requirements stipulated in regulation 11(3); (vi) failure to notify us of an incident as required by regulation 12(9); (vii) failure to comply with our information notices issued under regulation 15; or (viii) failure to comply with our directions given under regulation 16(1)(c) or the requirements stipulated in regulation 16(3).

	<p>the facts and circumstances of the case.<sup>76</sup> We may serve notice of our intention to impose a penalty or a penalty notice, irrespective of whether we have served, or are serving, an enforcement notice under regulation 17(1). However, where we intend to serve notice of our intention to impose a penalty by reference to any failure to comply with a duty set out in regulation 17(3A), this requires by its nature that we have already served an enforcement notice under regulation 17(1). The OES is under a statutory duty to comply with any requirement imposed by a penalty notice<sup>77</sup> and we may enforce penalty notices through civil proceedings in England, Wales, Scotland and Northern Ireland. We may withdraw a penalty notice by informing the person upon whom it was served in writing.</p> <p><i>Decisions to take no further action</i></p> <p>If Ofcom is satisfied no further action is required, having considered any representations or steps taken to rectify the alleged failure, we must inform the OES in writing as soon as reasonably practicable. The OES may request our reasons for a decision to take no further action within 28 days of being informed of that decision. Upon receipt of such a request, we must provide written reasons within a reasonable time and in any event no later than 28 days.</p> <p><i>Compliance monitoring</i></p> <p>If Ofcom has taken enforcement action or closed a case having accepted assurances, we may decide to continue to monitor compliance. This may involve using our powers under regulation 15 to serve information notices on an OES and, where appropriate, supplementing such information gathering by conducting inspections under regulation 16.</p>
<p><b>Settlement procedure</b></p>	<p>The Regulatory Enforcement Guidelines address our settlement procedure, which applies where we intend to impose a penalty on an OES under the NIS Regulations. References in that section to stages falling prior to, or following, ‘provisional breach notifications’, should be read as referring to stages falling prior to, or following, serving any notices of our intention to impose a penalty on an OES under regulation 18(1). This is regardless of whether we have served, or are serving, an enforcement notice under regulation 17(1).</p>

<sup>76</sup> Regulation 18(3A). Pursuant to regulation 18(3D), a ‘penalty notice’ must be in writing and include reasons for the final penalty decision; require the OES to pay the penalty specified in the notice of intention to impose a penalty or such penalty as Ofcom considers appropriate in the light of any representations made by, and any steps taken by, the OES to rectify the failure or to do one or more of the things required by an enforcement notice under regulation 17(3); specify the period within which the penalty must be paid (the ‘payment period’) and the date on which the payment period is to commence; provide details of the appeal process under regulation 19A; and specify the consequences of failing to make payment within the payment period. The maximum levels of penalty under a penalty notice is covered by regulation 18(5). In determining the amount of any penalty under the NIS Regulations, we will have regard to our Penalty Guidelines.

<sup>77</sup> Regulation 18(3E).



**Urgent action**

As discussed in the Regulatory Enforcement Guidelines we have specific powers to take urgent action in relation to some types of enforcement action under other legislation, such as the Communications Act 2003. We may from time to time rely on our powers to simply inform an OES in accordance with regulation 17(2A), without serving a notice of our intention to serve an enforcement notice under regulation 17(2B). In other cases, we may also decide to serve a notice of intention to impose a penalty without issuing an enforcement notice under regulation 17(1).

## A4. Video-sharing platforms

### Compliance with legal obligations on VSPs under the Communications Act 2003

#### Regulatory requirements

- A4.1 As the regulator for UK-established video-sharing platforms ('VSPs'), Ofcom is responsible for overseeing VSP regulation and ensuring that VSP providers comply with the statutory framework set out within the Communications Act 2003 (the 'Communications Act'). All references to legislation in the annex refer to this Act unless otherwise stated.
- A4.2 This framework imposes a number of legal obligations on VSPs, and Ofcom has powers to enforce compliance with these obligations.

#### Enforcement

- A4.3 The Regulatory Enforcement Guidelines set out our general approach to enforcement. We identify below the key provisions supporting the process for the types of regulatory requirements covered by this annex, and some notable additional points/exceptions relating to this process.

Area of guidelines	Provisions and additional information
Why and how Ofcom opens cases	Ofcom has powers under sections 368W and 368Z2 – 368Z4 of the Communications Act to take enforcement action where it has determined that a VSP is contravening, has contravened, or is failing to comply with the statutory rules set out above.
Investigating	<p><i>Information gathering</i></p> <p>Ofcom has information gathering powers under section 368Z10 of the Communications Act. Information may be required for the purpose of carrying out Ofcom's functions under Part 4B, including the specific purposes set out in section 368Z10(3).</p> <p><i>Confidentiality</i></p> <p>There are restrictions on disclosure contained in sections 26, 393 and 368Z11(3) and (4) of the Communications Act; see paragraphs 4.17 – 4.18 of the Regulatory Enforcement Guidelines.</p>
Outcomes of regulatory investigations	<p><i>Provisional decision</i></p> <p>Where Ofcom decides that there are reasonable grounds for believing that the subject of the investigation is contravening, has contravened, or is failing to comply with any of the relevant statutory requirements, we will allow the subject an opportunity to make</p>

representations about that apparent contravention(s) by issuing a provisional decision under sections 368W(1), 368Z2(1) and/or 368Z3(1) – (2) of the Communications Act.

*Written and oral representations*

No additional points to the main Regulatory Enforcement Guidelines.

*Final decision*

Where Ofcom remains satisfied that the subject of the investigation is contravening or has contravened with any of the relevant statutory requirements, Ofcom will issue a final decision under sections 368W(1), 368Z2(1) and/or 368Z3(1) – (2). The final decision will include the reasons for our decision to make a final decision and may include directions with which the recipient must comply within the period stipulated by us in the final decision.

Where the recipient of a final decision fails to comply with any directions given in it within the period fixed by Ofcom, we may impose a financial penalty. See section 368Z4 for information on the penalties that Ofcom can impose.

*Power to issue direction to suspend and restrict VSP services*

Under section 368Z5 of the Communications Act, if a VSP fails to remedy a contravention or failure about which an final decision and possibly a financial penalty has been imposed, Ofcom has the power to suspend or restrict the service.

Ofcom will only exercise this power if it considers that the suspension or restriction is appropriate and proportionate in light of the seriousness of the contravention.

Where we consider that our use of this power is justified, we will:

- a) serve a notice on the VSP stating our reasons for considering the requirements for a suspension/restriction are satisfied and specifying any direction(s) that we intend to impose;
- b) specify within the notice a period within which the VSP may make representations to us on the notice; and
- c) carefully consider any representations made by the VSP.

If, after considering the representations, we remain satisfied that the VSP has failed to take the steps specified in the enforcement notice for remedying the contravention or failure and that it is necessary in the public interest to give a direction under section 368Z5, we will issue a direction to suspend or restrict the service.

	<p>Section 368Z6 also confers on Ofcom an additional power to suspend or restrict a service for inciting crime or disorder. Section 368Z6 provides an expedited process for this purpose.</p> <p><i>Penalty</i></p> <p>Ofcom has published penalty guidance which out how it proposes to determine the amount of the penalties which it imposes.<sup>78</sup></p>
<b>Settlement procedure</b>	No additional points to the main Regulatory Enforcement Guidelines.
<b>Urgent action</b>	Ofcom is able to take interim action to suspend or restrict a service under section 368Z6(4), where a service has failed to comply with its obligations, and such failure is due to, or has resulted in, the inclusion in the service of material likely to encourage or incite the commission of a crime or lead to disorder.

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<sup>78</sup> See our [penalty guidelines](#).

## A5. Mobile billing limits

### Compliance with mobile phone billing limit requirements under section 124S of the Communications Act 2003

#### Regulatory requirements

A5.1 Section 124S of the Communications Act 2003 (the ‘Communications Act’) requires providers of mobile phone services to give customers the ability to limit the cost of their bill, to notify customers when that limit is likely to be reached, and to notify customers if the limit is in fact reached. Ofcom can enforce compliance with section 124S of the Communications Act under section 96A.

#### Enforcement

A5.2 The Regulatory Enforcement Guidelines set out our general approach to enforcement. We identify below the key provisions supporting the process for the types of regulatory requirements covered by this annex, and some notable additional points/exceptions relating to this process.

Area of guidelines	Provisions and additional information
Why and how Ofcom opens cases	Ofcom can enforce compliance with mobile phone billing limit requirements under sections 96A to 96C of the Communications Act, although sections 96A(2)(f) and (g) (Ofcom directions) and sections 96A(5) to (7) (action under the Competition Act 1998) do not apply in this context (see section 124T).
Investigating	<p><i>Information gathering</i></p> <p>Ofcom has wide powers to require the provision of information under section 135 of the Communications Act.</p> <p>Ofcom has powers to impose financial penalties and give directions to secure compliance with a statutory information request, as well as criminal sanctions for non-compliance under sections 138 to 144 of the Communications Act.</p> <p><i>Confidentiality</i></p> <p>There are restrictions on disclosure contained in sections 26 and 393 of the Communications Act.</p>
Outcomes of regulatory investigations	<p><i>Provisional decision</i></p> <p>Where Ofcom decides that there are reasonable grounds for believing that the subject of the investigation is contravening or has contravened the relevant regulatory requirements, we will issue a provisional decision under 96A of the Communications Act.</p>

	<p>Where Ofcom is minded to impose a financial penalty, we are required to include a provisional determination of that penalty in the provisional decision in relation to contraventions under sections 96A of the Communications Act.<sup>79</sup></p> <p><i>Written and oral representations</i></p> <p>No additional points to the main Regulatory Enforcement Guidelines.</p> <p><i>Final decision</i></p> <p>Where Ofcom remains satisfied that the subject of the investigation is contravening or has contravened any of the relevant statutory requirements, Ofcom will issue a final decision under section 96C of the Communications Act.</p> <p><i>Penalty</i></p> <p>Ofcom has published penalty guidance which out how it proposes to determine the amount of the penalties which it imposes.<sup>80</sup></p>
<p><b>Settlement procedure</b></p>	<p>No additional points to the main Regulatory Enforcement Guidelines.</p>
<p><b>Urgent action</b></p>	<p>Urgent action is not available.</p>

<sup>79</sup> See section 124(T) of the Communications Act for information on the level of penalty that can be imposed.

<sup>80</sup> See our [penalty guidelines](#).

## A6. Persistent misuse of electronic communications networks or services

### Enforcement action to prevent persistent misuse of electronic communications network or service under the Communications Act 2003

#### Regulatory requirements

- A6.1 Ofcom has the power to take enforcement action to stop the ‘persistent misuse’ of an electronic communications network or service under the Communications Act 2003 (the ‘Communications Act’). Persistent misuse involves using a network or service in ways which cause or are likely to cause someone else, especially consumers, to suffer harm. This could include, for example, making silent or abandoned phone calls, or using the phone in a way that misleads others into calling premium rate service numbers.
- A6.2 This annex explains the enforcement procedures we will generally follow where we take action in respect of such misuse.<sup>81</sup>

#### Enforcement

- A6.3 The Regulatory Enforcement Guidelines set out our general approach to enforcement. We identify below the key provisions supporting the process for the types of regulatory requirements covered by this annex, and some notable additional points/exceptions relating to this process.

Area of guidelines	Provisions and additional information
Why and how Ofcom opens cases	Ofcom has power to take enforcement action against ‘persistent misuse’ of an electronic communications network or service under sections 128 – 130 of the Communications Act.
Investigating	<p><i>Information gathering</i></p> <p>Ofcom has wide powers to require the provision of information under section 135 of the Communications Act.</p> <p>Ofcom has powers to impose financial penalties and give directions to secure compliance with a statutory information request, as well as criminal sanctions for non-compliance under sections 138 – 144 of the Communications Act.</p> <p><b>Confidentiality</b></p>

<sup>81</sup> More information is set out in [Persistent Misuse – A statement of Ofcom’s general policy on the exercise of its enforcement powers](#).

	<p>There are restrictions on disclosure contained in sections 26 and 393 of the Communications Act.</p>
<b>Outcomes of regulatory investigations</b>	<p><i>Provisional decision</i></p> <p>Where Ofcom determines there are reasonable grounds to believe that a person has persistently misused an electronic communications network or service, we will issue a provisional decision notifying of misuse under section 128 of the Communications Act which:</p> <ul style="list-style-type: none"><li>a) sets out our determination;</li><li>b) specifies the use that we consider constitutes persistent misuse; and</li><li>c) specifies the period during which the person notified has an opportunity of making representations.</li></ul> <p>Ofcom also has discretion over whether to specify in the provisional decision the steps that we think should be taken by the subject in order to comply with the relevant regulatory requirement(s) and/or remedy the consequences of the contravention.</p> <p><i>Written and oral representations</i></p> <p>Under section 128 of the Communications Act, we are required to give a period of at least one month for representations to be made, except in urgent cases where the period must be at least 7 days. A case is urgent if Ofcom considers: (a) that the misuse in question is continuing; and (b) that the harm it causes makes it necessary for it to be stopped as soon as possible.</p> <p><i>Final decision</i></p> <p>Ofcom will issue a final decision for stopping persistent misuse under section 129 where it considers that the notified person has not taken all such steps Ofcom consider appropriate for: (i) securing that the misuse is brought to an end and is not repeated; and (ii) remedying the consequences of the notified misuse. Ofcom shall fix a reasonable period for the taking of steps required by the final decision.</p> <p><i>Penalty</i></p> <p>Ofcom may also impose a penalty for persistent misuse or contravening a requirement of the final decision. See section 130 of the Communications Act.</p>



	Ofcom has published penalty guidance which out how it proposes to determine the amount of the penalties which it imposes. <sup>82</sup>
<b>Settlement procedure</b>	No additional points to the main Regulatory Enforcement Guidelines.
<b>Urgent action</b>	No specific procedure for persistent misuse, except for the shortening of the period within which persons may submit written representations (see above).

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<sup>82</sup> See our [penalty guidelines](#).

## A7. Mobile roaming

### Compliance with mobile roaming regulations

#### Regulatory requirements

- A7.1 Ofcom has powers to enforce compliance with the requirements of the EU Mobile Roaming Regulation (as retained in UK law following the exit of the UK from the EU)<sup>83</sup> and under the Mobile Roaming (European Communities) Regulations 2007 (as amended) (the ‘Mobile Roaming Regulations’).<sup>84</sup> These powers are to be found principally in the Mobile Roaming Regulations.<sup>85</sup>
- A7.2 The EU Mobile Roaming Regulation expires on 30 June 2022<sup>86</sup>. Ofcom’s enforcement powers will continue to apply to contraventions of the requirements of the EU Mobile Roaming Regulation that occurred before its expiry,<sup>87</sup> but those powers would be exercised in light of the expiry of the obligations (for instance, Ofcom might issue a financial penalty and require a person to remedy the consequences of any contravention, but would not require the person to comply with an obligation insofar as that obligation no longer applied).

#### Enforcement

- A7.3 The Regulatory Enforcement Guidelines set out our general approach to enforcement. We identify below the key provisions supporting the process for the types of regulatory requirements covered by this annex, and some notable additional points/exceptions relating to this process.

Area of guidelines	Provisions and additional information
Why and how Ofcom opens cases	Ofcom has powers to enforce compliance with the requirements set out in the EU Mobile Roaming Regulation and the Mobile Roaming Regulations.
Investigating	<p><i>Information gathering</i></p> <p>Ofcom has powers to require the provision of information under regulation 2B of the Mobile Roaming Regulations.</p> <p>As noted below, Ofcom has powers to impose financial penalties and impose further requirements to secure compliance with an information</p>

<sup>83</sup> EUR 2012/531. The full title of the instrument is Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13<sup>th</sup> June 2012 on roaming on public mobile communications networks within the Union.

<sup>84</sup> S.I. 2007/1933 (as amended by S.I. 2009/1591, 2013/822, 2014/2715, 2019/587 and 2020/1470).

<sup>85</sup> But see also Article 16 (supervision and enforcement) of the EU Mobile Roaming Regulation.

<sup>86</sup> See Article 22 of the EU Mobile Roaming Regulation.

<sup>87</sup> See section 16 of the Interpretation Act 1978.

	<p>requirement under regulations 3 to 5 of the Mobile Roaming Regulations.</p> <p>Failure to comply with a statutory information request can constitute a criminal offence under regulation 5A.</p> <p><i>Confidentiality</i></p> <p>There are no general restrictions on Ofcom disclosing information under the Mobile Roaming Regulations.</p>
<p><b>Outcomes of regulatory investigations</b></p>	<p><i>Provisional decision</i></p> <p>Where Ofcom decides that there are reasonable grounds for believing that the subject of the investigation is contravening or has contravened the relevant regulatory requirements, we will issue a provisional decision under regulation 3 of the Mobile Roaming Regulations.</p> <p>Where Ofcom is minded to impose a financial penalty, it is required to specify the proposed penalty in the provisional decision.</p> <p>In the case of an information requirement, the provisional decision will specify the information to be provided to Ofcom to comply with the requirement.</p> <p>In the case of any other regulatory requirement, the provisional decision will specify the steps that Ofcom think should be taken to comply with the obligation and remedy the consequences of the contravention.</p> <p><i>Written and oral representations</i></p> <p>No additional points to the main Regulatory Enforcement Guidelines.</p> <p><i>Final decision</i></p> <p>Where Ofcom is satisfied that the person has contravened a regulatory requirement in one or more of the respects notified in the provisional breach notification, Ofcom will issue a final decision under regulation 4A of the Mobile Roaming Regulations. In the alternative, Ofcom will inform the person that no further action will be taken.</p> <p>The final decision will specify any action which must be taken to comply with the relevant regulatory requirement.</p> <p><i>Penalty</i></p> <p>Ofcom has published penalty guidance which out how it proposes to determine the amount of the penalties which it imposes.<sup>88</sup> Also see regulation 5 and regulation 4(4B) of the Mobile Roaming Regulations.</p>

<sup>88</sup> See our [penalty guidelines](#).

<b>Settlement procedure</b>	No additional points to the main Regulatory Enforcement Guidelines.
<b>Urgent action</b>	Urgent action is not available.

## A8. Net neutrality

### Compliance with the rules on open internet access

#### Regulatory requirements

- A8.1 Open internet access is the principle that providers of internet access services should treat all internet traffic in an equal and non-discriminatory way, subject to limited permitted exceptions.
- A8.2 The rules on open internet access are set out in three legislative instruments:
- The EU Open Internet Access Regulation (Regulation (EU) 2015/2120), as retained in UK law following the exit of the UK from the EU (the ‘retained EU Open Internet Access Regulation’);
  - The Open Internet Access (EU Regulation) Regulations 2016 (SI 2016/607) (the ‘UK Open Internet Access Regulations’); and
  - The Open Internet Access (Amendment etc.) (EU Exit) Regulations 2018.
- For ease of reference, we refer to these collectively as the ‘Open Internet Access Regulations’ below.
- A8.3 Ofcom has powers under the Open Internet Access Regulations to enforce the provisions regarding safeguarding open internet access and related end-user rights, to impose and enforce certain regulatory requirements on providers of public electronic communications services or networks, and to issue and enforce statutory information requests made under the regulations.
- A8.4 In May 2019, Ofcom published a document setting out our approach to assessing compliance with certain aspects of the Open Internet Regulations.<sup>89</sup>

#### Enforcement

- A8.5 The Regulatory Enforcement Guidelines set out our general approach to enforcement. We identify below the key provisions supporting the process for the types of regulatory requirements covered by this annex, and some notable additional points/exceptions relating to this process.
- A8.6 Certain transparency requirements of the Open Internet Regulations are also reflected in the General Conditions (‘GCs’) which come into force on 17 June 2022.<sup>90</sup> Ofcom may choose whether to enforce under either the GCs (see annex A1 above) or under the Open Internet Regulations (see table below).

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<sup>89</sup> See [Ofcom’s approach to assessing compliance with net neutrality rules: Frameworks for assessing zero rating offers and traffic management measures for compliance with the Open Internet Regulation](#).

<sup>90</sup> See [Annex 4: Revised General Conditions \(unofficial consolidated version\) June 2022](#).

Area of guidelines	Provisions and additional information
<p><b>Why and how Ofcom opens cases</b></p>	<p>Ofcom has powers under the Open Internet Access Regulations to enforce the provisions regarding safeguarding open internet access and related end-user rights, to impose and enforce certain regulatory requirements on <b>providers</b> of public electronic communications services or networks, and to issue and enforce statutory information requests made under the regulations.</p>
<p><b>Investigating</b></p>	<p><i>Information gathering</i></p> <p>Ofcom has powers to require the provision of information under Article 5 of the retained EU Open Internet Access Regulation and regulation 17 of the UK Open Internet Access Regulations.</p> <p>Ofcom has powers to impose financial penalties and give directions to secure compliance with a statutory information request, including powers to impose financial penalties and give directions to secure compliance, as well as criminal sanctions for non-compliance, under regulations 19 to 23 of the UK Open Internet Access Regulations.</p> <p><i>Confidentiality</i></p> <p>There are no general restrictions on us disclosing information under the Open Internet Access Regulations.</p>
<p><b>Outcomes of regulatory investigations</b></p>	<p><i>Provisional decision</i></p> <p>Where Ofcom determines that there are reasonable grounds for believing that a person has breached an obligation under the Open Internet Access Regulations, Ofcom may give that person a provisional decision under regulation 19 of the UK Open Internet Access Regulations.</p> <p>Where Ofcom is minded to impose a financial penalty for such a breach, it is required to include in its provisional decision under regulation 19 (amongst other things) a provisional determination of the penalty it is minded to impose. See regulations 20 and 21 of the UK Open Internet Access Regulations for further information.</p> <p><i>Written and oral representations</i></p> <p>No additional points to the main Regulatory Enforcement Guidelines.</p> <p><i>Final decision</i></p> <p>When Ofcom proceeds to issue a final decision confirming a finding of a contravention under regulation 22 of the UK Open Internet Access Regulations, Ofcom is required to specify in the decision the steps that we think should be taken by the recipient of the decision in order</p>

	<p>to comply with the relevant regulatory requirement(s) and/or remedy the consequences of the contravention.</p> <p><i>Penalty</i></p> <p>Ofcom has published penalty guidance which out how it proposes to determine the amount of the penalties which it imposes.<sup>91</sup></p>
<b>Settlement procedure</b>	No additional points to the main Regulatory Enforcement Guidelines.
<b>Urgent action</b>	Urgent action is not available.

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<sup>91</sup> See our [penalty guidelines](#).

## A9. Electronic Communications Code

### Compliance with restrictions or conditions applicable to companies with powers under the Electronic Communications Code

#### Regulatory requirements

A9.1 Ofcom does not have powers to enforce compliance with the Electronic Communications Code (the ‘Code’) itself;<sup>92</sup> rather, Ofcom may make a direction to grant Code powers as set out in Schedule 3A of the Communications Act 2003 (the ‘Communications Act’). The exercise of Code powers is subject to regulations under the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (the ‘EEC Regulations’), as set out below.

#### Enforcement

A9.2 Ofcom does not have powers to enforce the Code. Ofcom does have powers to make a direction. The table below sets out key provisions we will use when consider the use of these powers.

Area of guidelines	Provisions and additional information
Why and how Ofcom opens cases	No additional points to the main Regulatory Enforcement Guidelines.
Investigating/Information gathering	<p><i>Information gathering</i></p> <p>Our statutory powers to gather information in regard to a suspected contravention of regulatory requirement imposed under the EEC Regulations is set out under section 135 of the Communications Act.</p> <p>Ofcom has wide powers to require the provision of information under section 135 of the Communications Act.</p> <p>Ofcom has powers to impose financial penalties and give directions to secure compliance with a statutory information request, as well as criminal sanctions for non-compliance under sections 138 to 144 of the Communications Act.</p> <p>Ofcom can also impose a financial penalty if a person fails to comply with a statutory information request under section 368Z10(8) of the Communications Act.</p> <p><i>Confidentiality</i></p>

<sup>92</sup> [Electronic Communications Code](#).



	<p>There are restrictions on disclosure contained in sections 26 and 393 of the Communications Act; see paragraphs 4.17 – 4.18 of the Regulatory Enforcement Guidelines.</p>
<p><b>Outcomes of regulatory investigations/Provisional decision</b></p>	<p><i>Provisional decision</i></p> <p>Where Ofcom decides that there are reasonable grounds for believing that the subject of the investigation is contravening or has contravened a requirement of the EEC Regulations, we will issue a provisional decision under section 110 of the Communications Act.</p> <p>Where Ofcom is minded to impose a financial penalty, we have discretion over whether to include a provisional determination of that penalty in the provisional decision in relation to provisional decisions under section 110 of the Communications Act.</p> <p><i>Written and oral representations</i></p> <p>No additional points to the main Regulatory Enforcement Guidelines.</p> <p><i>Final decision</i></p> <p>Where Ofcom remains satisfied that the subject of the investigation is contravening or has contravened any of the relevant statutory requirements, Ofcom will issue a final decision imposing a financial penalty or a direction under section 111(2)(a) (relating to contraventions of the EEC Regulations).</p> <p><i>Penalty</i></p> <p>Ofcom has published penalty guidance which out how it proposes to determine the amount of the penalties which it imposes.<sup>93</sup></p>
<p><b>Settlement procedure</b></p>	<p>No additional points to the main Regulatory Enforcement Guidelines.</p>
<p><b>Urgent action</b></p>	<p>Ofcom has the power to take urgent action under section 111A of the Communications Act in relation to a contravention of a requirement under the EEC Regulations.</p> <p>Ofcom is able to make a direction suspending the application of powers granted in respect of the Code. See section 111A of the Communications Act.</p> <p>The decision on whether to give a direction suspending the application of powers granted in respect of the Code will be taken by a senior member of Ofcom’s executive with appropriate Board-delegated authority.</p>

<sup>93</sup> See our [penalty guidelines](#).

Where Ofcom decides to make a direction suspending the application of powers granted in respect of the Code, we will notify the relevant provider/operator and the applicant of our decision.

Ofcom is required, as soon as reasonably practicable after giving a direction suspending the application of powers granted in respect of the Code, to give the operator an opportunity of making written representations to Ofcom about the grounds on which it was given and its effect and an opportunity of proposing steps to remedy the situation. See section 111B(1) of the Communications Act.

If Ofcom decides that the contravention occurred and the direction was justified, we may confirm the direction, but if not, we must revoke it. See sections 111B(2) to (5) of the Communications Act.

## A10. Wireless telegraphy licences

### Compliance with the Wireless Telegraphy Act 2006

#### Regulatory requirements

- A10.1 Ofcom is responsible for protecting and managing the radio spectrum. We issue licences under the Wireless Telegraphy Act 2006 (the ‘Wireless Telegraphy Act’) authorising the use of spectrum subject to the terms and conditions of the licence. Ofcom has the power to take regulatory enforcement action under the Regulatory Enforcement Guidelines in relation to contraventions of the terms of conditions, including powers to impose financial penalties under sections 42 to 44 of the Wireless Telegraphy Act.
- A10.2 These Regulatory Enforcement Guidelines do not apply to criminal enforcement action which Ofcom may separately take for various offences under the Wireless Telegraphy Act.

#### Enforcement

- A10.3 The main body of this document sets out our general approach to enforcement. We identify below the key provisions supporting key parts of the process for the types of regulatory requirements covered by this annex, and some notable additional points/exceptions relating to them:

Area of guidelines	Provisions and additional information
<p><b>Why and how Ofcom opens cases</b></p>	<p>Ofcom has a network of enforcement staff across the UK with technical expertise to identify and investigate possible contraventions of wireless telegraphy licences. Many contraventions are therefore likely to be identified and initially investigated by our Spectrum Compliance team who use a range of approaches to ensure compliance with the law. One approach that is used is to issue a notice under section 39 Wireless Telegraphy Act which requires the licensee to remedy the alleged contravention within a certain timeframe.</p> <p>In some cases, we may consider it appropriate to open a regulatory investigation in relation to a potential contravention of a wireless telegraphy licence. Where permitted by the law, we may do so before or after any formal action has been commenced by our spectrum enforcement team. For example, we may open a regulatory investigation after we have issued a notice to a licensee under section 39 of the Wireless Telegraphy Act regardless of whether the licensee has remedied a contravention.</p> <p>When deciding whether regulatory enforcement action may be appropriate, we will consider all relevant factors. These may include</p>

	<p>the following factors (as appropriate) although other factors may also be relevant:</p> <ul style="list-style-type: none"> <li>• Whether the alleged contravention has caused: (1) a serious threat to the safety of the public, to public health or to national security; or (2) serious economic or operational problems for users of the radio spectrum.</li> <li>• Whether the licensee in question has a history of similar contraventions or infringements, or a record of poor compliance.</li> <li>• Whether the alleged contravention concerns conduct that is, or appears to be, an intentional or particularly flagrant contravention (for example, where there has been a deliberate attempt to deceive Ofcom).</li> </ul> <p>Note: Ofcom cannot open a regulatory investigation in respect of criminal offences under the Wireless Telegraphy Act including under sections 8, 11, 35 - 38, 46 - 48, 51, 53, 58, 60, 66, 68, 77 – 87, 98 and 100 (except where the contravention involves contravening the terms and condition of a wireless telegraphy licence). Other contraventions of the Wireless Telegraphy Act will be considered by Ofcom’s Spectrum Compliance team who will determine what action may be appropriate on a case-by-case basis.</p>
<p><b>Investigating</b></p>	<p>As noted above, many contraventions are likely to be identified and initially considered by our Spectrum Compliance team.</p> <p><i>Information gathering for regulatory investigations</i></p> <p>Ofcom also has wide powers to issue statutory information requests requiring the provision of information under section 32A of the Wireless Telegraphy Act.</p> <p>Ofcom has powers to impose financial penalties and give directions to secure compliance with a statutory information request, as well as criminal sanctions for non-compliance under sections 32C – 33 of the Wireless Telegraphy Act.</p> <p>Ofcom may rely on evidence gathered by its spectrum compliance team in the context of a regulatory investigation but will generally issue a statutory information request to confirm the accuracy and completeness of any information previously provided.</p> <p><i>Confidentiality</i></p> <p>There is a restriction on disclosure contained in section 111 of the Wireless Telegraphy Act.</p>

<p><b>Outcomes of regulatory investigations</b></p>	<p><i>Provisional decision</i></p> <p>Where Ofcom considers it appropriate to open a regulatory investigation in relation to a potential contravention of a wireless telegraphy licence, Ofcom will issue a provisional decision under section 42(1)(c) of the Wireless Telegraphy Act. The notification will specify the term or condition(s) of the licence that Ofcom provisionally considers to have been contravened. It will also identify the steps we think the licensee should take to comply with the relevant term or condition(s) and remedy the consequences of the contravention(s).</p> <p>Ofcom has discretion over whether to include a provisional penalty in the provisional decision but will generally do so where we are minded to impose a financial penalty.</p> <p><i>Written representations</i></p> <p>Ofcom will generally give the licensee 20 working days to provide written representations on the provisional decision. The licensee will also have an opportunity to provide oral representations.</p> <p><i>Final decision</i></p> <p>Where Ofcom finds the licensee to have contravened one or more terms or conditions of their licence, we will generally issue a final decision and, if relevant, impose a financial penalty in accordance with section 42 of the Wireless Telegraphy Act.</p> <p><i>Penalty</i></p> <p>Ofcom has published penalty guidance which sets out how it proposes to determine the amount of the penalties which it imposes.<sup>94</sup></p> <p>The amount of any penalty will be determined in accordance with sections 43 – 44 of the Wireless Telegraphy Act and Ofcom’s Penalty Guidelines.</p>
<p><b>Settlement procedure</b></p>	<p>No additional points to the main Regulatory Enforcement Guidelines.</p>
<p><b>Urgent action</b></p>	<p>Urgent action is not available.</p>

<sup>94</sup> See our [penalty guidelines](#).

# A11. Directions to block access to a telephone number on the basis of fraud or misuse

## Introduction

A11.1 This annex explains the process that Ofcom will usually follow when it issues a direction under General Condition ('GC') B4.4 requiring communications providers ('Communications providers') to block access to telephone numbers and/or public electronic communications services ('PECS') on the basis of fraud or misuse.

A11.2 GC B4.4 states that:

“Regulated Providers shall, where requested by or on behalf of Ofcom on the basis of fraud or misuse, block access to Telephone Numbers and/or Public Electronic Communications Services and in such cases withhold revenue associated with such Telephone Numbers and/or Public Electronic Communications Services.”<sup>95</sup>

A11.3 This section explains:

- a) the types of cases in which Ofcom may consider issuing a direction under GC B4.4;
- b) the steps Ofcom will usually take before issuing a direction; and
- c) how affected stakeholders can request that Ofcom amend or withdraw a direction.<sup>96</sup>

## Circumstances in which Ofcom will consider issuing a direction under GC B4.4

A11.4 Directions under GC B4.4 may have significant consequences for stakeholders and are likely to be focused on serious cases of suspected fraud or misuse. Ofcom considers that 'fraud or misuse' in this context may include the following types of conduct:

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<sup>95</sup> [General Conditions of Entitlement, Unofficial Consolidated Version](#).

<sup>96</sup> It does not cover the action Ofcom may take against persistent misuse pursuant to section 128 of the Communications Act 2003; requirements in relation to blocking and retaining revenue under the [Phone-paid Services Authority's Code of Practice](#); or action taken by a Communications provider to block access to numbers on a voluntary basis (for example, where they consider that a number is being used unlawfully or where requested by a customer).

- a) misuse of Calling Line Identification ('CLI'):<sup>97</sup> use of invalid or non-dialable numbers, or numbers which do not uniquely identify the caller, contrary to Ofcom's published policies and guidance.<sup>98</sup> For example, the use of spoofed numbers to mislead the recipient of a call about who is calling them;<sup>99</sup>
- b) calls made following the use of services which were obtained by providing false information in the subscription or provision of electronic services, identity theft (or other kinds of theft), payment card cloning or manipulation of network parameters;
- c) use of numbers in contravention of the requirements set out in the National Telephone Numbering Plan<sup>100</sup> or GC B1 (such as failing to provide necessary information about costs to callers/consumers or failure to comply with numbering conditions regarding use of non-geographic numbers);
- d) call-back scams – for example, where missed or short duration calls are made to entice the called party to return the call and incur a cost which, in the circumstances, is inappropriate (and often to a premium rate or other revenue sharing number that is not included in the called party's monthly call allowance). This is also known as 'Wangiri fraud';
- e) other artificial inflation of traffic schemes or scams. These generally include where calls:
  - i) are made, generated, stimulated and/or prolonged for the direct or indirect benefit of anybody operating, hosting or otherwise connected with a telecommunication service as a result of any activity by or on behalf of such a body; and
  - ii) result in a calling pattern which is disproportionate to the overall amount, duration and/or extent of calls which would be expected from good faith usage or from an acceptable and reasonable commercial practice relating to the operation of a telecommunication system.

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

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<sup>97</sup> This is the data that enables identification of the number from which a call could be made or to which a return or subsequent call could be made.

<sup>98</sup> [Guidance on the provision of CLI facilities and other related services](#), 14 May 2019. We are currently [consulting on a modification of GC C6](#) and a number of changes to our CLI guidance. We aim to publish a decision on the proposals in Autumn 2022.

<sup>99</sup> Spoofing is a tactic commonly used by scammers and involves callers hiding their identity by causing a false or invalid phone number to be displayed when making calls. Those making such calls may create a phone number that appears like or mimics the number of a real company, such as a bank.

<sup>100</sup> The [National Telephone Numbering Plan](#) sets out the telephone numbers available for allocation and any restrictions on how they may be adopted or used.

- f) use of a number to make calls or send messages which are in contravention of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the ‘Privacy Regulations’) – for example, making unsolicited direct sales/marketing calls to recipients who have opted out of receiving them or leaving recorded messages without the recipient’s consent;
- g) calls/messages which conceal the sender’s identity;
- h) calls where, on request, the caller does not provide contact details; and marketing calls that fail to present accurate and authorised CLI numbers; and
- i) use of a number by a third party to whom the number was not allocated, without the consent of the allocatee (e.g. spoofing, PBX hijacking or phone hacking).

A11.5 This is a non-exhaustive list, and we will assess whether or not particular conduct constitutes ‘fraud or misuse’ on a case-by-case basis. Some of the activities that may warrant the use of our GC B4.4 powers are motivated by a desire for unscrupulous or dishonest gain, and this annex does not fully describe them so as not to encourage their perpetration. In addition, we may decide to use our GC B4.4 powers to address a new technology or new use of technology that allows for the operation of a form of fraud or misuse not previously known to Ofcom.

## Relationship with other forms of fraud or misuse

A11.6 Some forms of fraud or misuse may also constitute ‘persistent misuse’,<sup>101</sup> and Ofcom may additionally or alternatively decide to take action using our powers under sections 128 – 130 of the Communications Act 2003 (the ‘Communications Act’).

A11.7 Given the breadth of the legislation, some forms of fraud or misuse may also represent contraventions of other consumer protection legislation, enforced by Ofcom or other authorities. Where such legislative overlap exists and Ofcom is faced by a particular instance of misuse, we expect to liaise with the relevant competent authorities as to which set of legislative requirements is more appropriate and may be more effectively deployed.

## When Ofcom will consider issuing a direction under GC B4.4

A11.8 Where Ofcom has reasonable grounds to suspect that fraud or misuse is occurring in connection with the use of a number or a PECS and that this conduct has caused or has the potential to cause consumer harm, we will consider whether it may be appropriate and proportionate to issue a direction under GC B4.4 requiring Communications providers to block access to that number or that service and to withhold associated revenue.

A11.9 In doing so, Ofcom will consider all relevant evidence, which may include:

- a) complaints data (including complaints made to Ofcom’s Consumer Contact Team);

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<sup>101</sup> [Persistent Misuse Policy Statement](#), 20 December 2016.



- b) information requested from Communications providers about CLI numbers generating the greatest number of customer complaints;
- c) information provided to Ofcom using its information gathering powers under section 135 of the Communications Act – for example, information requested from Communications providers about CLIs generating the most traffic to numbers which display characteristics that suggest potential fraud or misuse (e.g. large numbers of very short calls presenting premium rate or other revenue sharing numbers); and
- d) individual reports to Ofcom provided by the Communications providers who are parties to the Nuisance Calls (Technical Measures) Memorandum of Understanding<sup>102</sup> – these reports are in the form of a monthly network monitoring and call volume measurement exercise.

A11.10 In appropriate cases, Ofcom may also liaise with, among others, the Information Commissioner’s Office (‘ICO’), which has primary responsibility for taking enforcement action against contraventions of the Privacy Regulations, and the Phone-paid Services Authority, the enforcement authority with responsibility for enforcing the Premium Rate Services Code of Practice.<sup>103</sup>

A11.11 A GC B4.4 direction is an extraordinary measure, use of which is more likely to be appropriate and proportionate in cases where:

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

A11.12 Other relevant considerations may include whether:

- a) there is evidence of previous conduct indicating repeat behaviour on the part of a Communications provider or end-user of a number;
- b) relying only on other types of enforcement action may be inappropriate or ineffective given the harm or risk of harm involved and/or relevant parties’ previous conduct; and/or
- c) a new serious form of misuse or fraud has come to light and Ofcom needs to act quickly in order to stop the misuse or fraud and deter others from engaging in it.

A11.13 Ofcom will usually take these considerations into account and make a judgment about whether we have reasonable grounds to suspect fraud or misuse within GC B4.4 has occurred and it is reasonable and proportionate to issue a direction. We may issue

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<sup>102</sup> [Memorandum of understanding – Nuisance calls \(Technical Measures for Transit Communications Providers\)](#), 14 December 2020.

<sup>103</sup> [PSA Code of Practice](#).

directions at different points in time, depending on the circumstances of the particular case. These include:

- a) where there is evidence of sufficiently serious and/or widespread harm that we judge it appropriate to act immediately pending further investigation, we may issue a direction to stop that harm while we carry out our investigation. Exceptionally, in the most serious cases a direction may be issued without notice to the party or parties whose use of numbers or services is blocked; and
- b) in other cases, where we judge it appropriate to issue a direction alongside other measures. For example, where we impose a penalty under section 130 of the Communications Act in a case of persistent misuse that also falls within GC B4.4, we may decide that we should also issue a direction under that condition if there is a risk of repetition of the behaviour and of future harm that justifies that measure.

## The process

A11.14 In most cases (see the exceptions in paragraphs A11.19 – A11.23) before issuing a direction, we will usually issue a provisional notification to the originating Communications provider/number range-holder, the terminating Communications providers and the relevant end-user of the number(s)/PECS provider setting out details of our proposal to issue a direction.<sup>104</sup> This will explain the proposed scope of the direction, including:

- a) details of the numbers to be blocked and whether this includes both calls to and from those numbers;
- b) whether the originating Communications provider is also required to withhold revenues and, if so, the nature of the revenues to be withheld;
- c) a summary of the reasons why Ofcom is proposing to issue the direction, including details of any service or conduct considered relevant to the alleged fraud or misuse;
- d) the proposed duration of the direction (which may be time-limited or until further notice from Ofcom as appropriate); and
- e) how long Ofcom proposes that Communications providers have to bring the direction into effect.

A11.15 The notification will also set out a period in which representations can be made on the proposed direction. Where relevant, it may also request that the originating Communications provider/number range-holder supplies Ofcom with a list of the range of numbers it has allocated to the relevant sub-allocatee or end-user/PECS provider.

A11.16 The period in which parties have the opportunity to make representations may vary depending on the circumstances but is likely to be within 10 working days. In exceptional circumstances Ofcom may set a shorter period, but it will not usually be less than one

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<sup>104</sup> Where we propose to issue a direction alongside other measures such as a penalty under section 130 of the Communications Act in a case of persistent misuse that also falls within GC B4.4, the notification of the proposed direction may be in the same document as the proposed penalty.

working day. Representations should usually be made in writing but parties may request an oral hearing.

- A11.17 Ofcom will take into account any representations we receive on the proposed direction before deciding whether we have reasonable grounds to believe fraud or misuse has occurred and it is reasonable and proportionate to issue it (or an amended direction). If we decide to do so, we will issue the direction to the relevant Communications providers and copy it to the other recipients of the provisional notification. If not, we will inform the recipients of the provisional notification that no further action will be taken under GC B4.4 at that stage.
- A11.18 Any direction will set out the nature, scope and duration of the obligations imposed on the relevant Communications providers, together with Ofcom’s reasons for making it. It will also inform affected parties about the next steps and their rights to request a review of the direction (this is discussed further in paragraphs A11.24 – A11.29 below). We will normally publish the directions on our website.

## Exceptions to giving notice when issuing a Direction

- A11.19 Exceptionally, some cases may require Ofcom to act very quickly and issue a direction without first giving notice to the end-user and/or service provider whose use of numbers and/or services would be the subject of the direction.<sup>105</sup> We are only likely to do so in the most serious of all cases, where giving notice would defeat the object of issuing the direction and we judge this to be the appropriate and proportionate course of action. In particular, this may be where it appears to us that it would not be in the public interest to give the relevant end-user/service provider prior notice because the fraud or misuse is causing such serious or widespread harm, or presents a serious risk of such harm, to consumers or the general public that it requires immediate corrective action and:
- a) it would not be practicable or would cause undue delay to seek representations first; or
  - b) there is a risk of serious prejudice to the investigation and/or the effectiveness of any action if they were ‘tipped off’.
- A11.20 Issuing a direction without advance notice may also be the appropriate course where we have not been able to identify and/or contact the relevant end-user or service provider (despite reasonable efforts to do so).<sup>106</sup>
- A11.21 In such cases:

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<sup>105</sup> In most cases, we would still seek to give advance notice to the Communications providers who will be subject to the direction and allow them an opportunity to make representations, although we would be likely to set a very short deadline for responses (i.e. no more than one working day). In some cases, this may not be practicable, but we would still seek to give Communications providers an appropriate time to comply with the direction.

<sup>106</sup> Although Ofcom can identify the Communications provider which has been allocated a telephone number, in some cases it can be very difficult to identify the end-user of a telephone number (i.e. the person who is in fact using the number to make calls). For example, sometimes presentation CLIs are spoofed (i.e. are being used without the permission of the allocatee of the number) and therefore the actual caller cannot be identified through the CLI alone. This can be a particular issue where the calling party may be located abroad and is using a UK presentation CLI.

- a) Ofcom will take into account the need to ensure that any interim measure is limited to the minimum scope required to address the relevant harmful conduct;
- b) Ofcom will consider all available facts material to our assessment, including any information or evidence which we consider might reasonably have been relied upon by the relevant end-user/service provider; and
- c) once a decision has been made to issue a direction without notice, Ofcom will use reasonable endeavours to provide the relevant party(ies), as soon as reasonably possible following the decision, with a copy of the direction.

A11.22 A direction issued without notice will generally take the same form as one made with notice, setting out the nature, scope and duration of the obligations imposed as well as Ofcom's reasons for making it and the rights relevant parties have to request review of the decision. Such directions will also usually be published on our website.

A11.23 Any direction, whether made giving advance notice or not, may be for a specified time or apply indefinitely. Prior to the expiry of any period set out in the direction, Ofcom will consider whether it is appropriate to extend it (for example, pending further investigation). Ofcom will at that time normally seek to give Communications providers and the relevant end-user of the number/the service provider the opportunity to make representations as to the appropriate course of action.

## Rights of review

A11.24 Following the issuing of a GC B4.4 direction by Ofcom, an affected party (which includes the end-user of a number, an affected service provider, a Communications provider subject to the direction, the allocatee of the number in question or other relevant party) may apply to Ofcom to have the direction varied or lifted.

A11.25 Such a request may be made in the following circumstances:

- a) the direction was issued without prior notice to the relevant end-user and/or service provider which is the subject of the direction and the request for review is made by that party;
- b) new facts, evidence or circumstances have subsequently come to light which mean that access to the number/service should no longer be blocked and/or that revenues should no longer be withheld (as relevant); or
- c) a Communications provider wishes for the direction to be lifted for the purpose of reallocating the number to a new end-user.

A11.26 A request must be made in writing and include all relevant supporting information and/or evidence, including setting out how the applicant is an affected party. It should set out the grounds on which the relevant party considers that the direction should not remain in place and any relevant new facts, evidence or circumstances. The affected party may also request an oral hearing.

- A11.27 The application of the direction will not usually be automatically suspended by an application for a review. In most cases, it is likely to remain in place pending the outcome.
- A11.28 Where Ofcom is satisfied that the applicant for the review is an affected party, it will write to the applicant to inform the applicant that its application for a review has been accepted and explaining any next steps. The applicant may also be asked to provide additional information for the purposes of the review.
- A11.29 Admissible applications for review will be considered by a review decision maker, who will be different from the person who decided to issue the direction. Subject to any requirement for further information, Ofcom’s review decision maker will aim to consider the matter within five working days of receipt of an application for review or any oral hearing (if later) and will determine whether there are reasonable grounds for the direction to remain in force and, if so, in what form.

## A12. Consumer protection law

### Regulatory requirements

A12.1 Ofcom has powers to enforce certain consumer protection laws against operators in the communications or postal sectors, and is a ‘designated enforcer’ under Part 8 of the Enterprise Act 2002 (the ‘Enterprise Act’).<sup>107</sup> The consumer protection legislation that Ofcom enforces includes:

- a) Parts 1 and 2 of the Consumer Rights Act 2015 (the ‘Consumer Rights Act’);
- b) the Consumer Protection from Unfair Trading Regulations 2008 (the ‘Consumer Protection Regulations’); and
- c) the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (the ‘Consumer Contracts Regulations’).

A12.2 We exercise these powers concurrently with a number of other regulatory bodies, including the Competition and Markets Authority (‘CMA’), and Trading Standards Services.<sup>108</sup> We may only take action where we consider the potential infringements may harm the collective interests of consumers in the UK.

### Consumer Rights Act

A12.3 Part 1 of the Consumer Rights Act gives consumers certain contractual rights and remedies when traders supply goods, digital content or services. For example, consumers are entitled to a replacement, repair or price reduction if goods, digital content or services they purchase are not of a satisfactory quality or as described.

A12.4 Part 2 of the Consumer Rights Act protects consumers against unfair terms in consumer contracts and notices and requires terms to be transparent.<sup>109</sup>

A12.5 Ofcom may enforce the provisions of Parts 1 and 2 of the Consumer Rights Act under Part 8 of the Enterprise Act, or under Schedule 3 of the Consumer Rights Act. Under that Schedule, Ofcom has powers to consider complaints about allegedly unlawful or unfair terms included, or proposed to be included, in consumer contracts or notices.<sup>110</sup> If we intend to consider a relevant complaint, we must notify the CMA that we intend to do so.<sup>111</sup> We may also investigate on our own initiative where we consider terms of consumer

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<sup>107</sup> Under the Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003, as amended.

<sup>108</sup> Ofcom and the CMA have signed a [Memorandum of Understanding](#) on the use of concurrent powers under consumer.

<sup>109</sup> The Consumer Rights Act applies to terms in contracts between traders and consumers entered into from 1 October 2015. Contract terms entered into prior to that date remain subject to the Unfair Terms in Consumer Contracts Regulations 1999 - Ofcom may also take action in respect of those terms under that legislation directly or under Part 8 of the Enterprise Act.

<sup>110</sup> See Ofcom’s [guidance on unfair terms in contracts](#).

<sup>111</sup> The CMA has also published guidance on [unfair contract terms](#).

contracts or consumer notices may be unlawful under the provisions of Part 1 or Part 2 of the Consumer Rights Act.

## Part 8 Enterprise Act

A12.6 Under Part 8 of the Enterprise Act, Ofcom has the power to seek court orders against businesses that breach a range of specified laws, including the Consumer Rights Act (under both Parts 1 and 2), Consumer Protection Regulations and the Consumer Contracts Regulations.

### Consumer Protection from Unfair Trading Regulations

A12.7 The Consumer Protection Regulations include a general duty not to trade unfairly and seek to ensure that traders act honestly and fairly towards consumers. They apply primarily to business to consumer practices but elements of business to business practices are also covered where they affect, or are likely to affect, consumers.

A12.8 Infringements of the Consumer Protection Regulations include:

- a) commercial practices contravening the requirements of professional diligence (Regulation 3);
- b) misleading actions (Regulation 5);
- c) misleading omissions, including where material information is hidden or is provided in a manner which is unclear, unintelligible, ambiguous or untimely (Regulation 6);
- d) aggressive practices (Regulation 7); and
- e) specified unfair commercial practices that are banned (Schedule 1).

### Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

A12.9 The Consumer Contracts Regulations impose various information and other requirements on traders when selling to consumers.<sup>112</sup> For example, they require contracts to include all essential details, including a description of the goods or services, the total price and the rights and obligations of the relevant parties. Where products, digital content or services are purchased online, there is also a general right of cancellation within 14 days (subject to certain exceptions, for example, where services have been provided or digital content downloaded during the cancellation period).

## Enforcement under the Enterprise Act and Consumer Rights Act

A12.10 The Regulatory Enforcement Guidelines set out our general approach to enforcement. We identify below the key provisions supporting key parts of the process for the types of regulatory requirements covered by this annex, and some notable additional points/exceptions relating to them.

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<sup>112</sup> See the [Consumer contracts \(information, cancellation and additional charges\) regulations](#).

Area of guidelines	Provisions and additional information
<p><b>Why and how Ofcom opens cases</b></p>	<p>Before opening a case, we will engage with the CMA (as the central co-ordinator of consumer enforcement) to discuss who is best placed to take an investigation forward.</p>
<p><b>Investigating</b></p>	<p>When we open an investigation, in addition to the steps we will take to inform the subject and any complainant set out in the main body of our guidance, we will also enter the required information on the National Trading Standards Sanctions Information Database.</p> <p><i>Information gathering</i></p> <p>We have powers to gather information for the purposes of exercising our functions under:</p> <ul style="list-style-type: none"> <li>a) Part 8 of the Enterprise Act; and</li> <li>b) Schedule 3 of the Consumer Rights Act.</li> </ul> <p>Our information gathering powers are set out in paragraph 14 of Part 3 of Schedule 5 of the Consumer Rights Act.<sup>113</sup></p> <p>This involves Ofcom issuing a written notice to the person from whom the information is required, specifying the nature of the information required and the purpose for which it is required.<sup>114</sup></p> <p>Where the recipient of an information request fails to comply with an information request, we can apply to court for an order requiring the recipient to comply with the notice and can require the recipient to meet the costs or expenses of such an application. See paragraph 16 of Schedule 5 to the Consumer Rights Act.</p> <p>We also have powers to take other forms of action to obtain information during our investigation in some cases, for example, the power to enter premises, as set out in Schedule 5 of the Consumer Rights Act.<sup>115</sup></p>
<p><b>Outcomes of consumer investigations</b></p>	<p><i>Enterprise Act</i></p> <p>In relation to cases brought under Part 8 of the Enterprise Act, Ofcom does not have powers to make a final decision on contraventions or issue penalties. Instead, we may accept undertakings from a party under investigation under Part 8 of the Enterprise Act to cease the conduct, or</p>

<sup>113</sup> We also have the power to require the production of documents in paragraph 27 of Part 4 of Schedule 5 to the Consumer Rights Act.

<sup>114</sup> See paragraph 15 of Schedule 5 to the Consumer Rights Act.

<sup>115</sup> For further information on these powers, see section 6 of the CMA’s [Consumer Protection: Enforcement Guidance \(CMA58\)](#).



can apply for a court order to put a stop to the harmful conduct under section 219 and sections 215 to 217 of the Enterprise Act.

An undertaking under section 219 of the Enterprise Act may include ‘enhanced consumer measures’ under section 219(5ZA).<sup>116</sup>

If undertakings cannot be agreed, or if the undertakings are subsequently broken, Ofcom can take action through the courts by way of an enforcement order under section 215 of the Enterprise Act. The statutory requirements for appropriate consultation are set out under section 214 of the Enterprise Act.

The court may grant an enforcement order requiring the cessation of the conduct and that it is not repeated. It may also require consumer redress measures to be taken or that the subject of the investigation publishes details of the order or a corrective statement under section 217 of the Enterprise Act.

#### *Consumer Rights Act*

If we consider a term to be unlawful or unfair within the meaning of Part 1 or Part 2 of the Consumer Rights Act (as relevant), we may accept undertakings from the person against whom the complaint has been made, or who we are investigating on our own initiative under paragraph 6 of Schedule 3 of the Consumer Rights Act.

If we are unable to secure such undertakings, and consider further action is required, we may make an application for an injunction (or interdict in Scotland) preventing the party from using the term in its consumer contract or consumer notice. We are required to notify the CMA prior to making such an application, and must also inform the CMA of any undertakings we obtain and the outcome of any application to court for an injunction (which we would do by entering the required information on the National Trading Standards Sanctions Information Database).

We would normally expect to publish any undertakings we obtain on our website, as well announcing the outcome of any application to court and the terms of any injunction obtained (if relevant). The CMA also has obligations under paragraph 7 of Schedule 3 to the Consumer Rights Act to publish details of any undertakings or injunctions we obtain and notify to it.

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<sup>116</sup> Enhanced consumer measures are defined in section 219A of the Enterprise Act and can include requiring an operator to compensate affected customers (the ‘redress category’) and/or comply with the Consumer Rights Act going forward, for example, by amending its terms and conditions (the ‘compliance category’).

<p><b>Settlement procedure</b></p>	<p>Not applicable.</p>
<p><b>Urgent action</b></p>	<p><i>Enterprise Act</i></p> <p>We may seek an interim enforcement order from the court if we consider that the infringing conduct should be prohibited or prevented immediately under section 218 of the Enterprise Act.</p> <p>We must give the CMA notice of our intention to apply for an interim enforcement order and, in most cases, we are required to engage in a period of consultation with the subject for a minimum of 7 days, unless the CMA considers that the application should be made without delay under section 214 of the Enterprise Act.</p> <p><i>Consumer Rights Act</i></p> <p>Not available.</p>