

Question 1: Do you have any comments on our proposed approach to including the enforcement of the VSP framework, OES obligations and the TSA in the Regulatory Enforcement Guidelines?

1. We welcome Ofcom's inclusion of the VSP framework, OES obligations and the TSA in the Regulatory Enforcement Guidelines. It is sensible to have a single set of guidelines that apply to all areas Ofcom has enforcement powers.
2. We note that neither the draft General Policy on Ensuring Compliance with Security Duties (and associated Guidelines) nor the draft Revised Regulatory Enforcement Guidelines contain detailed information regarding how Ofcom will use its powers, including those relating to forced entry, under Section 105O of the Telecommunications Security Act 2021. We would welcome clarity on this.

Question 2: Do you have any comments on the proposed addition of regime-specific annexes?

3. We welcome Ofcom's addition of the regime-specific annexes. It is helpful for practitioners to have information on enforcement gathered in one document and clearly organised.

Question 3: Do you have any comments on the proposed redrafting of the settlement section of the Regulatory Enforcement Guidelines?

4. We welcome Ofcom's intention to clarify and update the settlement process. However, we note the addition of the requirement, for parties willing to benefit from a settlement, not to challenge or appeal against the infringement decision. Such a requirement goes further than in other regimes where parties are not required to accept they will not challenge or appeal against the final decision to enter into settlement.
5. An effective judicial remedy should remain available to settling parties to ensure that the fundamental rights of defence of the parties are observed and to maintain the quality of Ofcom's decisional practice<sup>1</sup>. It is important because information can come to light in the final decision which calls into question the basis for settlement – e.g. on the level of fine<sup>2</sup>.
6. It should be sufficient, from the perspective of the regulator, to require parties to make a clear and unequivocal written admission of liability in relation to the nature, the scope and the duration of the infringement, to gain the savings that justify the reduction of the fines.
7. A point which is not sufficiently covered in the draft guidance is the right of the subject of the investigation to have access to Ofcom's file. Access to the file is one of the procedural guarantees intended to apply the principle of equality of arms and to protect the rights of the defence<sup>3</sup>. It is particularly important for the subject of the investigation to have access to Ofcom's file in its entirety as there could be exculpatory evidence which Ofcom may not have used or that the subject considers to be key evidence to support an appeal. Access solely to the information Ofcom has relied upon is not sufficient because there could be

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<sup>1</sup> See case T-95/15 of 13 December 2016, the EU General Court issued its first judgment on an appeal brought by Printeos, a settling party, against a settlement decision relating to the envelopes cartel [CURIA - Documents \(europa.eu\)](#). The General Court recognised that the settling parties are entitled to appeal settlement decisions (since the right to an effective remedy and to a fair trial is guaranteed by Article 6 of the European Convention of Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights (CFR)).

<sup>2</sup> See for instance the amended decision of the European Commission in CASE AT.39914 – Euro Interest Rate Derivatives [39914\\_8702\\_9.pdf \(europa.eu\)](#)

<sup>3</sup> Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004.

other information in the file that is relevant to the proper exercising of the rights of defence of the subject of the investigation. Access to the file is therefore important for the subject of an investigation to decide whether to enter into a settlement process.

Question 4: Do you have any comments on the proposed updates and clarifications to the text in the Regulatory enforcement Guidelines?

8. We welcome the developments the guidance provides on a number of practice such as:
  - Ofcom's recognition that resolution via means other than an enforcement action can be most effective. Indeed, there may be many circumstances where a solution to an issue can be determined more adequately when discussed with the subject of a complaint and/or in the context of industry discussions.
  - The assurance process which, depending on the circumstances of the case, can be a very effective way to deal with an issue and ensure consumers eventually get the best results.
  
9. We note the following which we believe Ofcom should consider to improve the enforcement process:
  - In relation to the information gathering process relied upon by Ofcom in the context of an investigation, there would be real benefit for Ofcom to send draft information requests to the subject of an investigation. This would help Ofcom ensure that: (i) the questions are sufficiently clear, (ii) adequately focused and (iii) sufficiently narrow to ensure the search that the recipient is asked to do is proportionate and that the recipient is reasonably in a position to provide a complete and accurate response. It would also help Ofcom set an appropriate timeline, and eventually, run the investigation in a timely, fair and efficient manner. It would also help Ofcom obtain the most pertinent information for their investigation (e.g. avoiding getting information that would be superfluous or missing relevant information).
  - Ofcom's draft guidance explains the role of the procedural officer. In particular, the draft guidance indicates that the procedural officer is an Ofcom's official who is part of the investigation team. It would be helpful to understand the process followed by the procedural officer to conduct his review and ensure an independent assessment of the matter brought to him/her. It would also be helpful to understand the extent to which a decision of the procedural officer against the parties could be used by Ofcom in their final decision e.g. as aggravating circumstances in the setting of the fines.
  - Before issuing a 96A Notice, Ofcom could give a last chance to the subject of the investigation to present their arguments in a meeting. This meeting could also be used by Ofcom to ask final questions of the subject of the investigation.

- The guidance would benefit from a section similar to the CMA guidance<sup>4</sup>, describing the review process Ofcom will conduct to ensure that its actions and decisions are well-founded, fair and robust. In particular, the review of the draft decision by a member of a team separate from the investigation team would help ensure that the decision adopted by Ofcom is sufficiently balanced and supported by the required robust evidence.

Question 5: Do you have any comments on Ofcom's proposed guidance on how to apply for consent to bring civil proceedings against companies in breach of relevant regulatory requirements?

10. We welcome Ofcom's intention to issue guidance on the exercise of its power to authorise persons who suffered loss or damages as a result of a contravention to bring proceedings on the back of an infringement decision<sup>5</sup>. However, we have the following comments:

- In its guidance, Ofcom indicates that it will grant consent for any request except if they have any good reasons not to do so. We note that if the legislator has introduced provisions in the Communications Act and the Telecommunications Security Act requiring Ofcom grants consent, it cannot have been the intention of the legislator that Ofcom should provide its consent on a systematic (and virtually default) basis.
- The consent process set out in Section 104 of the Communications Act and Section 105W of the Telecommunications Security Act implies that Ofcom should conduct a review of the request based on a number of criteria to assess whether to give consent. In the draft guidance, Ofcom does not sufficiently set out these criteria nor does it sufficiently explain the circumstances where it would consider it is inappropriate to grant consent.

Question 6: Do you have any other comments on the proposed changes to the Regulatory Enforcement Guidelines?

We have no other comments.

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<sup>4</sup> See Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8, Updated 10 December 2021, Section 9 – Analysis and review - internal scrutiny. [Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/guidance-on-the-cma-s-investigation-procedures-in-competition-act-1998-cases-cma8)

<sup>5</sup> Section 104 of the Communications Act and Section 105W of the Telecommunications Security Act.