



## Draft Enforcement Guidelines

Ofcom's draft guidelines for the handling of  
competition complaints and complaints concerning  
regulatory rules

Consultation

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## Important Consumer Information

These Guidelines apply to the submitting of complaints in relation to breaches of regulatory rules, including postal regulatory rules, and/or competition law.

If you have a complaint you wish to make as a consumer, viewer or listener about a communications provider or a broadcaster, these Guidelines do not apply to you.

Ofcom already has established processes for complaints about television and radio programmes (including fairness and privacy issues), about advertisements on television and radio, complaints about interference to wireless spectrum and licensing to use wireless spectrum and consumer complaints about telecommunications providers. Details of these processes can be found on the Ofcom website at <http://consumers.ofcom.org.uk/tell-us/>. This link also provides guidance if you have a complaint about the services provided by a postal operator.

## Section 1

# Consultation

- 1.1 Ofcom is the independent regulator and competition authority for the UK communications industries.
- 1.2 Ofcom has a number of roles and duties relating to identifying and responding to conduct which is unlawful, which is anti-competitive, or otherwise harms consumer interests. Responding to complaints filed by companies - or in some instances by consumers - our investigations teams ensure that we respond quickly, firmly and effectively to breaches of regulatory rules or relevant law and are able to act effectively in resolving disputes.
- 1.3 Ofcom's investigations activities are conducted by the Competition Group Investigations Team and the Consumer Protection Team (part of the Consumer Group).
- 1.4 This is a consultation on our new draft enforcement guidelines.
- 1.5 We are updating our guidance on competition and consumer investigations following a number of significant changes to the way we work, in particular:
  - new enforcement powers that came into effect following implementation of the revised European Framework on Electronic Communications in May 2011;
  - changes to Ofcom's internal structure: the separation of our investigations programme into two separate teams dealing with competition and consumer issues;
  - development of separate guidelines on how we handle regulatory disputes, which were published for consultation on 17 December 2010 and confirmed on 7 June 2011; and
  - Ofcom assuming functions in relation to postal services under the Postal Services Act 2011 ("the Postal Services Act").
- 1.6 Our current guidance on investigations dates from 2004. We published draft guidelines for consultation in 2006<sup>1</sup>, which have remained the most up-to-date statement on the way we carry out investigations. Where relevant, we have taken into account stakeholders' responses to the 2006 consultation. However, given that some of the content of the 2006 consultation has been superseded by the developments outlined above, we did not consider it necessary to include a full assessment of responses in this document.
- 1.7 The draft guidelines are set out in sections 2 to 9 of this document and Ofcom welcomes any views which respondents may have.

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<sup>1</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/enforcement/summary/enforcement.pdf>

## Equality impact assessment (EIA)

1.8 Ofcom has a general duty under the Equality Act 2010 in carrying out our functions to have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation;
- advance equality of opportunity between different groups; and
- foster good relations between different groups.

1.9 For our investigations, Ofcom will only provide an EIA with enforcement decisions in cases where one has not been prepared previously. For instance, if we are enforcing an obligation that was subject to an EIA when the obligation was imposed, we will not conduct a fresh EIA when taking enforcement action.

## Next steps

1.10 Stakeholders are invited to comment on these draft guidelines. The deadline for responses is **Friday 6 January 2012**.

## Section 2

# Introduction

### What do these guidelines cover?

- 2.1 Ofcom has two teams that carry out investigations covered by these guidelines. They are the Competition Group Investigations Team and Consumer Protection Team, part of Ofcom’s Consumer Group. These guidelines explain how both teams carry out investigations.
- 2.2 We allocate investigations to the appropriate team on a case-by-case basis. Sometimes, it will be appropriate for the Competition Group Investigations Team to handle a ‘consumer’ case and vice versa. Case teams may include people from both teams, depending on the resources and expertise needed for a particular case.
- 2.3 In general, however, the Consumer Protection Team handles the following types of investigations:
- compliance with regulatory conditions imposed under the Communications Act 2003 (“the Communications Act”), where the complaint or concern is about consumer protection;
  - compliance with consumer protection provisions in Part 8 of the Enterprise Act 2002 (“the Enterprise Act”), including the Consumer Protection from Unfair Trading Regulations 2008;
  - potentially unfair terms in consumer contracts under the Unfair Terms in Consumer Contracts Regulations 1999 (the “UTCCRs”);
  - compliance with the “persistent misuse provisions” of the Communications Act (including silent calls); and
  - compliance with regulatory conditions imposed by Ofcom in carrying out its functions in relation to postal services under the Postal Services Act.
- 2.4 The Competition Group Investigations Team generally handles the following types of investigations:
- alleged anti-competitive conduct or agreements under competition law;
  - compliance with regulatory conditions, where the complaint or concern is not about consumer protection (this includes investigations about numbering);
  - compliance with undertakings given to Ofcom under Part 4 of the Enterprise Act;
  - super-complaints made by a designated consumer body about a feature, or combination of features, of a market that is, or appears to be, significantly harming the interests of consumers; and
  - compliance with conditions in Broadcasting Act licences relating to fair and effective competition.

- 2.5 These guidelines set out Ofcom’s procedures for handling complaints and explain the steps we expect complainants to take before making a complaint to Ofcom. They also set out the format for submitting a complaint. We may reject without further investigation complaints that are not submitted in this format, or complaints with no supporting evidence.
- 2.6 Ofcom has limited resources and cannot investigate every complaint that we receive. These guidelines explain how Ofcom decides what to investigate, and set out the prioritisation framework that we use to decide whether or not to open (or continue) an investigation.

**What is not in these guidelines?**

- 2.7 These guidelines do not cover Ofcom’s work in:
- resolving regulatory disputes which are the subject of separate guidelines<sup>2</sup>;
  - monitoring compliance with regulatory conditions;
  - respect of enforcing future Online Copyright Infringements obligations;
  - investigations into the persistent misuse of an electronic network or service which are the subject of separate guidelines<sup>3</sup>;
  - the investigation of complaints about broadcast content, which are covered by Ofcom’s Broadcasting Code<sup>4</sup>; and
  - the investigation of interference with radio spectrum.<sup>5</sup>
- 2.8 These guidelines also do not cover complaints from individual consumers, which are handled by Ofcom’s Consumer Contact Team. If you want to make a complaint to Ofcom as a consumer, viewer, or listener about a communications provider or a broadcaster, please visit our website for advice on how to make a complaint <http://consumers.ofcom.org.uk/tell-us/>. This link also provides guidance if you have a complaint about the services provided by a postal operator.
- 2.9 In the event that it is considered appropriate, in particular where Ofcom has received a number of complaints in relation to a similar issue, we may decide to investigate such complaints on a generalised basis and will follow these guidelines in conducting that investigation. In certain situations, Ofcom may be required to modify the

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<sup>2</sup> Ofcom has published separate guidelines to cover how we will deal with regulatory disputes which are available at <http://stakeholders.ofcom.org.uk/binaries/consultations/dispute-resolution-guidelines/statement/guidelines.pdf>

<sup>3</sup> See Ofcom’s “Revised statement of policy on the persistent misuse of an electronic communications network or service 2010” contained in Annex 1 of the 2010 Statement on Tackling abandoned and silent calls available at <http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/statement/silentcalls.pdf>

<sup>4</sup> Ofcom has published procedures for investigating breaches of content standards for television and radio which are available at <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/>. Separate procedures apply to the consideration of Fairness and/or Privacy complaints and are available at <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/fairness/>

<sup>5</sup> Ofcom’s 2009 “Enforcement Report - A report on Ofcom’s approach to enforcement and recent activity” explains how Ofcom uses its enforcement powers in this area [http://stakeholders.ofcom.org.uk/enforcement/enforcement-report/enforcement\\_report.pdf](http://stakeholders.ofcom.org.uk/enforcement/enforcement-report/enforcement_report.pdf)

approach in conducting our investigation as a result of the statutory or regulatory framework in place. For example, whilst the majority of these guidelines will apply to an investigation of BT's compliance with undertakings given under the Enterprise Act,<sup>6</sup> it may be more appropriate for the body established under those undertakings to deal with a complaint before Ofcom becomes involved.

## Ofcom's investigation and enforcement powers

2.10 Ofcom's investigation and enforcement powers in relation to the matters covered by this guidance are principally derived from the following legislation:

- the Communications Act;
- the Competition Act 1998 ("the Competition Act") and Articles 101 and 102 of the Treaty on the Functioning of the European Union;
- the Enterprise Act;
- the Postal Services Act; and
- the UTCCRs.

## Ofcom's statutory duties and regulatory principles

2.11 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.”

2.12 These principal duties apply not only to Ofcom's work under the Communications Act, but to its work under other legislation including the Postal Services Act<sup>7</sup>.

2.13 Excluding in relation to postal services, where Ofcom is carrying out functions for the purpose of fulfilling our “Community obligations” which includes investigations into compliance with regulatory conditions,<sup>8</sup> Ofcom must act in accordance with the six Community requirements which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive. In summary, those requirements are:

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<sup>6</sup> Implementation of BT's undertakings <http://stakeholders.ofcom.org.uk/telecoms/policy/bt-undertakings/>

<sup>7</sup> Section 29(1) of the Postal Services Act provides that Ofcom must carry out its functions in relation to postal services in a way that it considers will secure the provision of a universal service. Section 3(6A) of the Communications Act provides that the duty in section 29(1) of the Postal Services Act takes priority over Ofcom's duties in section 3 of the Communications Act in the case of conflict between the two where we are carrying out our functions in relation to postal services.

<sup>8</sup> The Community obligations are set out at section 4 of the Communications Act. Ofcom is required to act in accordance with the Community obligations where it is carrying out its functions under Chapter 1 of Part 2 of the Communications Act. Chapter 1 of Part 2 of the Communications Act covers several areas that are relevant to the work of the Competition Investigation and Consumer Protection teams, including the power to set and enforce regulatory rules (General Conditions, Universal Service Conditions and SMP Conditions), the electronic communications code, the persistent misuse provisions and rules about premium rate services. It also covers regulatory disputes.

- to promote competition in communications markets;
- to secure that Ofcom contributes to the development of the European internal market;
- to promote the interests of all European Union citizens;
- to act in a manner which, so far as practicable, is technology-neutral;
- to encourage, to the extent Ofcom considers it appropriate, the provision of network access and service interoperability for the purposes of securing efficiency and sustainable competition in communications markets and the maximum benefit for the customers of providers of communications network and services; and
- to encourage such compliance with certain international standards as is necessary for facilitating service interoperability and securing freedom of choice for the customers of communications providers.

2.14 Ofcom has established a set of regulatory principles, which provide a clear statement of Ofcom's approach to regulating communications markets. These principles are consistent with Ofcom's duty under the Communications Act, and the Postal Services Act, to have regard to regulatory principles of transparency, accountability, proportionality, consistency and the targeting of regulation only at cases where action is needed, and to other principles Ofcom considers represent best regulatory practice.

2.15 Ofcom's regulatory principles are:

- Ofcom will regulate with a clearly articulated and publicly reviewed annual plan, with stated policy objectives;
- Ofcom will intervene where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve;
- Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required;
- Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome;
- Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives;
- Ofcom will research markets constantly and will aim to remain at the forefront of technological understanding; and
- Ofcom will consult widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation upon a market.

2.16 We think that two of these principles are of particular relevance to the work of Ofcom's Competition Group Investigation and Consumer Protection Teams:

- Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required; and

- Ofcom will strive to ensure its interventions are evidence-based, proportionate, consistent, accountable and transparent.

### Advice to complainants

2.17 If you are thinking of making a complaint to Ofcom, we recommend that you read these guidelines thoroughly and consider the following advice:

- **Speak to us first:** We are always prepared to discuss emerging issues. We cannot give a view on the merits of a complaint but may be able to refer you to previous policy decisions or investigations that have dealt with similar issues.
- **Try and resolve matters through commercial discussions:** Not every matter of disagreement between communications providers is suitable for resolution through an investigation. If it is appropriate, there may be benefits in trying to resolve problems directly with the target of your complaint before asking Ofcom to intervene.
- **Read and apply the rules:** We may not accept complaints that do not comply with the submission criteria set out in these guidelines.
- **Consider any relevant decisions:** The issue you want to complain about may have been the subject of previous investigations or policy decisions. Details of investigations are published in the Competition and Consumer Enforcement Bulletin (CCEB) section of Ofcom’s website.<sup>9</sup> The CCEB gives details of any appeals against Ofcom decisions, which may help you in considering how to submit your case.
- **Gather as much evidence and information as possible:** We often decide not to pursue complaints where the complainant does not provide any evidence to support an allegation. We realise that, in some cases, complainants will not have access to all relevant information (for example competitors’ cost data). However, you should provide as much evidence as you can, rather than gathering the minimum requirement for submission. We do not apply this rule where issues have been raised by a ‘whistleblower’ (see section 4).
- **Be prepared:** We commit to a demanding timetable in handling investigations and expect large and well-resourced organisations to do the same in supporting an investigation, for example, in meeting deadlines for information requests. If you submit a complaint, we will assume that you have considered and are prepared to meet this commitment.

### Status of these guidelines

2.18 These guidelines are not a substitute for any regulation or law and are not legal advice.

2.19 These guidelines will be kept under review and amended as appropriate in light of further experience and developing law and practice and any change to Ofcom’s powers and responsibilities.

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<sup>9</sup> <http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/?a=0>

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

## Section 3

# Ofcom's investigation and enforcement powers

- 3.1 This section sets out Ofcom's investigation and enforcement powers, which come from various pieces of legislation. It is not a comprehensive list, but explains the legal basis for the main types of investigations conducted by the Competition Group Investigations Team and Consumer Protection Team.
- 3.2 This section also sets out our enforcement options under the different pieces of legislation. Note that as well as, or instead of, using our enforcement powers, we may take some other action to try and resolve the issues considered in an investigation, for example making a statement to clarify our interpretation of a regulatory rule.

## The Communications Act

- 3.3 The majority of investigations under the Communications Act which are covered by these guidelines relate to regulatory conditions imposed under section 45 of that Act. Other significant areas in which Ofcom also has powers to investigate and enforce compliance under the Communications Act include:
- the Electronic Communications Code and associated Regulations;
  - the PhonePayPlus Code of Practice; and
  - conditions relating to competition matters imposed on broadcasters.

## Section 45 regulatory conditions

### Types of condition

- 3.4 Ofcom has the power under section 45 of the Communications Act to set various types of conditions on communications providers:
- **General Conditions** which apply to all communications providers, although not every general condition is relevant to every communications provider. The general conditions include, for example, rules on sales and marketing to domestic and small business customers, arrangements for number portability between communications networks, and rules for the adoption and use of telephone numbers;
  - **Universal Service Conditions** which apply only to designated universal service providers. Currently, there are two designated universal service providers in the UK, BT and (in the Hull area) KCom, that are required to provide services such as payphones, directory enquiries and services for disabled users;
  - **SMP Conditions** which apply only to a particular provider that has been designated as having significant market power ("SMP") in a particular market. SMP is defined as "a position of economic strength affording [the provider] the power to behave to an appreciable extent independently of competitors,

customers and ultimately consumers”<sup>10</sup>. Types of SMP conditions imposed include requirements to provide network access to other providers, pricing transparency obligations and charge controls;

- **Access related conditions**, which aim to ensure that interconnection is maintained between communications providers and may include requirements to provide access to communications networks on fair and reasonable terms; and
- **Privileged supplier conditions**, imposed on communications providers who enjoy “special or exclusive rights” in non-communications markets, which primarily concern a requirement to account separately in respect of the communications networks or services it provides.

### Enforcement of conditions

3.5 Enforcement of section 45 conditions may follow one of two forms. Ofcom’s principal powers of enforcement are contained in sections 96A to 104 of the Communications Act. The exception to this concerns SMP apparatus conditions where a slightly different procedure is set out in sections 94 to 96. SMP apparatus conditions are SMP conditions which apply to providers of apparatus which is used for conveying signals over electronic communications networks.

#### *Section 96A Notification*

3.6 Where we find that there are reasonable grounds for believing that a communications provider is contravening or has contravened a condition (other than an SMP apparatus condition), we will issue a notification under section 96A of the Communications Act (a “section 96A Notification”).

3.7 The section 96A Notification will set out Ofcom’s preliminary view including details of:

- a) the condition which is alleged to have been contravened;
- b) the nature of the alleged contravention;
- c) the period during which the provider may make representations;
- d) the steps which Ofcom considers should be taken to comply with the condition and, where appropriate, remedy the consequences of the contravention;
- e) any penalty which Ofcom is minded to impose;
- f) where the contravention is serious, any direction which Ofcom is minded to give under section 100<sup>11</sup>; and
- g) where the contravention relates to an SMP condition (other than an SMP apparatus condition), any direction which Ofcom is minded to give under section 100A<sup>12</sup>.

<sup>10</sup> See Article 14 Framework Directive.

<sup>11</sup> A direction under section 100 is a direction to suspend or restrict a person’s entitlement to provide an electronic communications network or service and/or to make associated facilities available.

<sup>12</sup> A direction under section 100A is: (a) a direction that the entitlement of the person to provide an electronic communications service over the public electronic communications network to which the contravened condition relates is suspended (either generally or in relation to particular services); or (b) a direction that the person may not begin to provide an electronic communications service over the public electronic communications network to which the contravened provision relates.

- 3.8 Where the section 96A Notification proposes to impose a penalty, this may be both a fixed amount in respect of a past contravention and, where the alleged contravention is continuing, may be a daily penalty accruing until the contravention is remedied. Any fixed penalty may not exceed 10% of the turnover of the person's relevant business for the relevant period<sup>13</sup>. The level of any daily penalty may not exceed £20,000 per day. In considering the level of any penalty Ofcom must ensure that it is appropriate and proportionate to the contravention in respect of which it is imposed. Ofcom's approach to setting penalties under the Communications Act is set out in more detail in Ofcom's Penalty Guidelines<sup>14</sup>.
- 3.9 On expiry of the period allowed for representations, Ofcom may either:
- a) issue a "confirmation decision" confirming Ofcom's position set out in the section 96A Notification; or
  - b) inform the recipient that we are satisfied with their representations and that no further action will be taken.
- 3.10 Where Ofcom issues a confirmation decision in respect of the imposition of a penalty, we may require the person to pay the penalty specified in the Section 96A Notification or specify a lower penalty in light of any written and/or oral representations made or any steps taken to ensure compliance or to remedy the consequences of the contravention.

#### *Section 94 Notification*

- 3.11 Where Ofcom determines that there are reasonable grounds for believing that a person is contravening, or has contravened, an SMP apparatus condition, Ofcom may give a notification under section 94 of the Communications Act (a "section 94 Notification"). The section 94 Notification will give the person an opportunity (usually one month) to make representations about the matters notified, comply with the condition and remedy the consequences of the contravention.
- 3.12 Once the period for making representations has expired, if the notified provider has not taken all the steps Ofcom considers appropriate for complying and/or remedying the consequences of the breach, Ofcom may proceed to issue an enforcement notification under section 95 of the Communications Act and/or impose a penalty notification under section 96 of the Act.

### **The Electronic Communications Code**

- 3.13 The Electronic Communications Code enables Ofcom to give powers to some communications providers (known as "Code operators") that enable them to install and maintain electronic communications apparatus on public highways without needing to go through full local planning procedures. Code operators are required to comply with a set of obligations called the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (the "Regulations")<sup>15</sup>.

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<sup>13</sup> Relevant business and relevant period are defined in section 97(5) of the Communications Act. In broad terms this will equate to 10% of a person's turnover derived from electronic communications networks and/or services during the previous financial year.

<sup>14</sup> <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

<sup>15</sup> Statutory Instrument 2003 No. 2553. The Regulations can be found at: <http://www.legislation.gov.uk/ukxi/2003/2553/contents/made>

- 3.14 Ofcom can issue a notification under section 110 of the Communications Act where we have reasonable grounds to believe a Code operator has contravened or is contravening the Regulations. Amongst other things the notification will specify the steps Ofcom thinks should be taken to comply and remedy the consequences of the contravention and will specify a period in which the person notified can make representations about the matters notified. The notification may also include any penalty Ofcom is minded to impose and where the contravention is serious, specify any direction which Ofcom is minded to give. The proposed penalty may include a daily penalty not exceeding £100 per day for each day the contravention continues. Any fixed penalty imposed may not exceed £10,000. Any penalty imposed must be appropriate and proportionate to the contravention in respect of which it is imposed and in accordance with Ofcom's Penalty Guidelines.
- 3.15 Once the period for representations has expired, Ofcom can issue a confirmation decision confirming the position set out in the section 110 notification or we may notify the provider that no further action will be taken.
- 3.16 Ofcom also has the power, in certain circumstances, to suspend Code powers under section 113/114 where we find that a Code operator has been in serious or repeated breach of its obligations.

### **Premium Rate Services: Ofcom's powers to enforce the PhonepayPlus Code of Practice**

- 3.17 Under sections 120-124 of the Communications Act, Ofcom has responsibility for the regulation of premium rate services (PRS).<sup>16</sup>
- 3.18 Day-to-day regulation of PRS is carried out by the co-regulatory agency PhonepayPlus. PRS providers and network operators are required to comply with the PhonepayPlus Code of Practice (the "PP Code")<sup>17</sup> which has been approved by Ofcom in accordance with section 121 of the Communications Act. That Code sets out obligations which apply to PRS providers and network operators to regulate the content of those services and any facilities made available in the provision of the services. Any breach of the PP Code will be dealt with initially in accordance with the procedures set out in section 4 of the PP Code and may result in the imposition of a sanction on a network operator. If a network operator does not comply with a PhonepayPlus sanction direction, then PhonepayPlus can refer the matter to Ofcom for enforcement action.
- 3.19 Where a matter is referred to Ofcom, it may impose a penalty of up to £250,000 per breach on providers that have not complied with the terms of the Code. Where it is appropriate to do so, Ofcom will need to follow the procedure for a section 94 Notice, as set out at paragraphs 3.11 and 3.12 above, prior to the imposition of any penalty. In exceptional circumstances, where there have been serious and repeated breaches of the PP Code and the imposition of penalties has failed to prevent further breaches, or where urgent action is needed, Ofcom may issue a direction to a communications provider requiring it to suspend the provision of a particular PRS service or requiring it to comply with restrictions relating to the PRS service.

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<sup>16</sup> PRS is the term used to describe a range of products and services that consumers can buy by calling or texting telephone numbers starting 09, 0871 and 070. Calls to PRS numbers can cost up to £1.50 per minute or per call from BT landlines, with calls from other landlines and particularly mobiles costing more.

<sup>17</sup> <http://www.code.phonepayplus.org.uk/pdf/PhonepayPlusCOP2011.pdf>

- 3.20 Failure to comply with PhonepayPlus directions undermines the co-regulatory scheme for PRS and thereby threatens a regime that operates in the interests of citizens and consumers.

### Broadcasting competition rules

- 3.21 Many broadcast services require licences from Ofcom under the Broadcasting Acts 1990 and 1996. Under the Communications Act, Ofcom has powers to impose conditions in those licences to:
- a) ensure fair and effective competition in the provision of broadcast services; and
  - b) ensure compliance with a Code for practices to be followed in the provision of electronic programme guides.
- 3.22 The Competition Group Investigations Team handles investigations about compliance with these licence conditions. Compliance with the remainder of the conditions of licences issued under the Broadcasting Act 1990 or 1996 is not covered by these guidelines.
- 3.23 Before opening an investigation into whether or not a relevant licence condition has been contravened, Ofcom is required to consider whether it would be more appropriate to investigate the matter using its powers under the Competition Act (see paragraphs 3.38 to 3.42 and section 8 below). Where Ofcom is satisfied that it would not be more appropriate to open an investigation under the Competition Act, we may open an investigation into whether or not the relevant licence condition has been breached. If Ofcom concludes that a licence condition has been breached, we may:
- a) impose a financial penalty on the holder of the licence of the greater of:
    - o £250,000; and
    - o 5% of qualifying revenue; and/or
  - b) require the holder of the licence to comply with such directions as it considers appropriate to remedy the contravention.

## The Enterprise Act

### Part 8 of the Enterprise Act

- 3.24 Ofcom is a “designated enforcer” under Part 8 of the Enterprise Act, meaning that we are empowered to take action to enforce certain consumer protection legislation<sup>18</sup>, including the UTCCRs<sup>19</sup> the Distance Selling Regulations<sup>20</sup> and the Consumer Protection from Unfair Trading Regulations (the “CPRs”)<sup>21</sup>. Ofcom will consider complaints alleging a breach of one or more pieces of the relevant legislation, and will investigate where we believe the evidence demonstrates a business practice that infringes the legislation and which Ofcom considers may be harming the collective interests of consumers.

<sup>18</sup> The Director General of Telecommunications is listed as a designated enforcer in the schedule of the Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003

<sup>19</sup> <http://www.legislation.gov.uk/uksi/1999/2083/contents/made>

<sup>20</sup> <http://www.legislation.gov.uk/uksi/2000/2334/contents/made>

<sup>21</sup> <http://www.legislation.gov.uk/uksi/2008/1277/contents/made>

- 3.25 Where Ofcom considers that such a practice does exist, we will investigate and if appropriate secure undertakings to prevent the harm. Where suitable undertakings are not given or are given but subsequently breached, we would need to apply to the court for an enforcement order requiring cessation of the conduct in question. Breach of an Order is contempt of court and can lead to a fine or imprisonment.

### **Unfair Terms in Consumer Contracts Regulations (UTCCRs)**

- 3.26 Ofcom also has the power to enforce the UTCCRs directly (as a “Qualifying Body” under the UTCCRs), rather than under the provisions of Part 8 of the Enterprise Act. Ofcom will generally consider complaints about potentially unfair terms in standard consumer contracts under the UTCCRs directly. Ofcom may consider not only the terms complained about, but also the other terms and conditions of the contract in question where we consider this is appropriate in order to prevent consumer harm.
- 3.27 Alternatively, Ofcom will use its powers under Part 8 of the Enterprise Act to enforce the UTCCRs where there is evidence of one, or both, of the following:
- that the collective interests of consumers in the UK are being harmed; or
  - that a provider’s conduct raises issues under other pieces of consumer protection legislation, as well as the UTCCRs.
- 3.28 Under both the UTCCRs and Part 8, we will seek to secure undertakings from a party that it will cease using an unfair term in its contracts with consumers. If the party fails to comply with those undertakings, we may apply to the court for an injunction.
- 3.29 If a provider does not provide suitable undertakings, we may “reserve our position” on the term(s) in question. This means that, as a matter of administrative priority, we will take no further action at that point, but reserve our right to re-open the matter if we receive complaints in future.
- 3.30 Where we remain concerned about the terms, we may apply to the court for an injunction preventing a party from using an unfair term in its contracts with consumers. Failure to comply with any injunction granted by the court is contempt of court and can lead to a fine or imprisonment.

### **Postal services**

- 3.31 Regulation of postal services is carried out by Ofcom<sup>22</sup>. Ofcom has the power to set various types of conditions on postal operators:
- Universal postal service provider conditions, which apply only to a designated universal postal service provider (“USP”)<sup>23</sup>. Currently, Royal Mail is the only designated USP in the UK. These conditions impose requirements on the USP, such as: the requirement to provide a universal postal service in accordance with certain standards and to provide access points for the purposes of that universal postal service; the requirement to give access to its postal network to other postal operators; the requirement to maintain a separation for accounting purposes; and price controls;

<sup>22</sup> Under Part 3 of the Postal Services Act.

<sup>23</sup> These are: designated USP conditions, see sections 36 and 37; USP access conditions, see section 38 and Schedule 3; and USP accounting conditions, see section 39.

- Conditions of general application. These consist of the following:
  - Notification conditions<sup>24</sup>, which can apply to all postal operators, or postal operators of a specified description, providing a service within the scope of the universal service, and which require advance notice to be given to Ofcom of the intention to provide such a postal service or, where the postal service is already being provided, of the intention to expand the postal service;
  - General universal service conditions<sup>25</sup>, which can apply to all postal operators, or postal operators of a specified description, providing a service within the scope of the universal service, and which impose such requirements as Ofcom considers necessary for securing the universal service or for the purpose of requiring contributions to be made for meeting some or all of the burden imposed on the USP of complying with its universal service obligations;
  - Essential conditions<sup>26</sup>, which can apply to all postal operators, or postal operators of a specified description, and which impose requirements for purposes such as securing the delivery of post to the intended addressees;
  - General access conditions<sup>27</sup>, which can apply to a particular postal operator (or operators) and which impose requirements such as the giving of access to other postal operators, or users of postal services, to the particular postal operator's postal infrastructure or any service within the scope of the universal service which it provides;
  - Consumer protection conditions<sup>28</sup> which can apply to all postal operators, or postal operators of a specified description, and which impose requirements such as establishing and maintaining procedures, standards and policies with respect to consumer protection matters<sup>29</sup>.

### Enforcement of conditions

3.32 Ofcom's principal powers of enforcement of the conditions set out above are contained in Schedule 7 of the Postal Services Act. Where we find that there are reasonable grounds for believing that a condition is being, or has been, contravened, we will issue a notification under paragraph 2 of Schedule 7 ("Schedule 7 notification"). We will not issue a Schedule 7 notification if we decide a more appropriate way of proceeding would be under the Competition Act 1998.

3.33 Where a Schedule 7 notification is issued, it will set out Ofcom's preliminary view, including details of:

- a) the condition which is alleged to have been contravened;
- b) the nature of the alleged contravention;
- c) the period during which the recipient may make representations; and

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<sup>24</sup> See section 41.

<sup>25</sup> See section 42 (and section 46).

<sup>26</sup> See section 49.

<sup>27</sup> See section 50.

<sup>28</sup> See sections 51 and 52.

<sup>29</sup> The reference to consumer protection matters is given a broad definition in section 51(3). In addition Section 51(3)(e) states that it can be "anything else appearing to OFCOM to be necessary to secure effective protection for [users of postal services]".

- d) the steps which Ofcom considers should be taken to comply with the condition and, where appropriate, remedy the consequences of the contravention;
- 3.34 On expiry of the period allowed for representations, Ofcom may issue an enforcement notification, provided it is satisfied the recipient:
- a) has been in contravention of a condition specified in the Schedule 7 notification; and
  - b) has not, during the period allowed, taken steps to comply with the condition nor to remedy the consequences of the notified contravention of that condition.
- 3.35 An enforcement notification imposes one or both of the following requirements on the recipient:
- a) A requirement to take such steps to comply with the condition as may be specified;
  - b) A requirement to take such steps to remedy the consequences of the condition as may be specified.
- 3.36 In addition, on expiry of the period allowed for representations, Ofcom may impose a penalty:
- a) if the recipient has been in contravention of a condition specified in the Schedule 7 notification;
  - b) if the recipient is contravening, or has contravened, a requirement of an enforcement notification.
- 3.37 The amount of any penalty must be appropriate and proportionate to the contravention in respect of which it is imposed, and the amount must not be more than 10% of the turnover of the recipient's postal services business for the relevant period<sup>30</sup>.

## Competition law

### The prohibitions

- 3.38 Under the Competition Act and the Treaty on the Functioning of the European Union (the "TFEU"), the following are prohibited:
- agreements that may affect trade within the UK that have, or had as their object or effect, the prevention, restriction or distortion of competition within the UK (the Chapter I prohibition of the Competition Act);
  - agreements that may affect trade between Member States that have, or had as their object or effect, the prevention, restriction or distortion of competition within the European Community (Article 101 TFEU);

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<sup>30</sup> The postal services business and the relevant period are defined in paragraph 7 of Schedule 7. In broad terms this will equate to 10% of the recipient's turnover derived from any business consisting in the provision of postal services during the previous financial year.

- conduct that amounts to an abuse of a dominant position which may affect trade in the UK (the Chapter II prohibition of the Competition Act); and
- conduct that amounts to an abuse of a dominant position which may affect trade within the European Community (Article 102 of the Treaty on the Functioning of the European Union).

## Enforcement

- 3.39 Ofcom has concurrent powers with the Office of Fair Trading (the “OFT”) to enforce the competition law prohibitions in the Competition Act and the TFEU in relation to communications matters. Where Ofcom has reasonable grounds for suspecting that the prohibitions in the Competition Act or TFEU have been infringed, Ofcom may open an investigation into that conduct.
- 3.40 If, following investigation, Ofcom determines that a prohibition has been infringed, Ofcom may:
- impose a financial penalty on the infringing party of up to 10% of the undertaking’s turnover in a relevant market. In deciding upon the appropriate level of any penalty, we must have regard to the OFT’s guidance on setting the amount of a penalty; and/or
  - issue directions requiring the subject of the investigation to bring the infringement to an end.
- 3.41 In cases of urgency, Ofcom also has powers to issue appropriate directions to any person. Ofcom may only issue such directions where we consider it necessary to prevent serious and irreparable damage to a particular person or to protect the public interest.
- 3.42 As an alternative to reaching a decision that a prohibition has been infringed, Ofcom may also accept binding commitments from the parties under investigation to take appropriate action to address the competition concerns which Ofcom has identified. The OFT has published guidance on many different aspects of the competition law regime in the UK, which is available on its website<sup>31</sup>. We often refer to the OFT’s guidance in carrying out our work, and complainants may find the OFT’s guidelines a useful source of information in competition law cases.

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<sup>31</sup> See <http://www.ofcom.gov.uk/about-the-ofcom/legal-powers/legal/competition-act-1998/publications>

## Section 4

# Complaints and Whistleblowers

- 4.1 Many of our investigations are opened in response to a complaint. This section explains how you can submit a complaint and how we decide which complaints to investigate.
- 4.2 We also open investigations without a specific complaint, which we refer to as “own-initiative” investigations. This section explains how we identify and decide whether to investigate potential problems on our own initiative.
- 4.3 Before we open an investigation, we generally carry out an enquiry to determine whether there is a case to answer and, if there is, that it would be consistent with Ofcom’s administrative priorities to carry out an investigation (or to take some other action).

### Submission requirements for a complaint

- 4.4 This section is about complaints about regulatory rules and competition law, and complaints about consumer protection issues, made by a stakeholder other than a consumer directly affected by the alleged conduct, for example, another company or an organisation representing consumers.
- 4.5 We will refer to the Consumer Contact Team (the “CCT”) any complaints from individual consumers who want to complain about the service they have received from a communications provider. However, complaints to CCT are a key source of information for helping us identify potential consumer protection issues and decide whether to open own initiative investigations.
- 4.6 While we consider every complaint we receive, we expect complaint submissions to meet minimum standards before we take any further action. A full list of submission requirements, together with contact details for where to send a complaint, is at section 9 of these guidelines.
- 4.7 We work with complainants to ensure that they understand the requirements set out in these guidelines for submitting a complaint and to encourage them to include any required supporting documents when they make a complaint.
- 4.8 If a complaint does not meet our submission requirements or lacks supporting information, we can provide some guidance for complainants to help them identify what else they need to do before Ofcom will consider opening an investigation.
- 4.9 We do not apply our submission criteria in a bureaucratic way and will consider the circumstances surrounding each complaint. However we will not take further action in response to unsubstantiated allegations or inadequate submissions. This, along with our administrative priority framework (see paragraphs 5.11 to 5.13 below), enables us to target our resources at the most important issues.
- 4.10 We acknowledge that smaller companies and individuals may need our help in formulating complaints, and will provide guidance to less experienced complainants. However, we expect large, experienced stakeholders to make adequate, well reasoned submissions and back up allegations with evidence.

- 4.11 The most common reasons for not accepting submissions are:
- the complainant does not explain which provision it considers has been infringed, or, if it has done so, does not provide any evidence or reasoning to explain why;
  - the complainant makes a general complaint about ‘anti-competitive’ behaviour without specifying the conduct in question, explaining why it is unlawful and also explaining the impact that it has had on competition and the consumer interest; or
  - the complaint is about a commercial or contractual disagreement between organisations and is unrelated to regulatory issues.
- 4.12 Some of the complaints we receive fall within the jurisdiction of another agency which is better placed to handle the complaint, for example PhonepayPlus, Trading Standards or the Information Commissioner’s Office. We will tell you if we think your complaint would more appropriately be handled by another agency.

**Evidence**

- 4.13 Complaints, particularly complaints about anti-competitive behaviour, often result in extensive, resource-intensive investigations which impose significant costs not only on Ofcom but also on the target of the complaint, the complainant and other stakeholders (such as the target’s competitors) who may be required by Ofcom to supply information.
- 4.14 Allegations must, therefore, be supported by evidence. For example, an allegation of predatory pricing or margin squeeze should be backed up by an analysis of costs and prices. We realise that complainants may have little or no access to information on their competitors’ costs. However, where information about a target’s costs is not available, there may be alternatives, for example costs based on a model or on the complainant’s own costs.
- 4.15 We recommend that anyone considering making a complaint takes legal advice on their submission. If you want to make a complaint about competition law issues, you may want to consider the Competition Pro Bono Scheme (which is independent of Ofcom), which offers free independent legal advice to individuals or businesses who believe that their rights under competition law have been infringed or who are concerned that they may be in breach of the competition law prohibitions.<sup>32</sup> You may also find it useful to refer to guidance published by the OFT (see paragraph 3.42 above).
- 4.16 We require complainants to submit a statement by an officer of the company, preferably the Chief Executive Officer, that due care has been taken to ensure that the evidence submitted with a complaint is correct and complete. We also require complainants to submit a non-confidential version of the complaint, or to confirm that the complaint is non-confidential.

**Complainant’s request for anonymity**

- 4.17 Ofcom will consider requests from complainants to remain anonymous. However, it may not be feasible to open an investigation without revealing the identity of the complainant. This does not apply to whistleblowers (see below).

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<sup>32</sup> Further details on the scheme are available at <http://www.probonogroup.org.uk/competition/>

## Whistleblowers

- 4.18 Ofcom is required, under the Public Interest Disclosure Act 1998, to put in place a procedure under which individuals working in the communications sector may contact Ofcom if they have concerns about possible wrongdoing at their own organisation and where they have been unable to raise or resolve those concerns internally.
- 4.19 Ofcom is a Prescribed Person under the Public Interest Disclosure Act to which external disclosures can be made on matters relating to:
- a) the provision of electronic communications networks and services and the use of the electro-magnetic spectrum;
  - b) broadcasting and the provision of television and radio services;
  - c) media ownership and control; and
  - d) competition in communications markets.
- 4.20 Ofcom has published guidance on how to make a disclosure under the Public Interest Disclosure Act, which is available on Ofcom's website.<sup>33</sup>
- 4.21 Disclosures are made in confidence to the Secretary to the Corporation who is Ofcom's "Designated Officer" for the purposes of the Act.

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<sup>33</sup> <http://www.ofcom.org.uk/about/policies-and-guidelines/procedure-for-making-a-disclosure-to-ofcom-under-the-public-interest-disclosure-act-pida/>

## Section 5

# Deciding Whether to Investigate

### Informal resolution

- 5.1 Ofcom tries to address complaints in the most efficient (least resource intensive) and effective way. In some cases, Ofcom can resolve an issue raised in a complaint through informal contact with a communications provider, for example by clarifying a regulatory rule or ensuring that the appropriate people within an organisation are aware of the issue complained about. In these cases, Ofcom is not using its formal powers and does not make any decisions on the merits of a complaint.
- 5.2 We aim to resolve any issue being dealt with informally within 15 working days. If, after this, we are not satisfied that the issue in question has been adequately addressed, we will consider whether there is sufficient evidence for us to take the matter further, either formally or informally.

### The enquiry phase

- 5.3 Before we open an investigation following the receipt of a complaint, we generally carry out an enquiry to determine whether there is a case to answer and, if there is, that it would be consistent with Ofcom's administrative priorities to carry out a formal investigation (or to take some other action). We do not generally exercise our formal powers and do not consider the merits of a complaint during the enquiry phase.
- 5.4 When we open an enquiry, we will generally tell the complainant and the target, and will provide contact details for the case leader, who acts as the main point of contact during an enquiry and any subsequent investigation.
- 5.5 We will usually commence the enquiry phase by sending the non-confidential version of the complaint to the target of the complaint. We will invite the target to comment on the complaint (although we do not do this under formal powers and the target does not have to respond).
- 5.6 During the enquiry phase we may also meet the complainant and the target of the complaint. We may gather further information from both parties (usually without using our formal powers) to help us decide whether or not an investigation would be appropriate.
- 5.7 If we open an enquiry on our own initiative we will generally advise the target whose behaviour we are considering opening an investigation into, giving them an opportunity to make representations to us.
- 5.8 We do not publish details of enquiries, or comment publicly on enquiries. We may, however, discuss enquiries with other stakeholders where we think they may be able to provide information to help us decide whether to open an investigation.

### Length of the enquiry phase

- 5.9 We aim to complete the enquiry phase within 15 working days for all cases except those being conducted under competition law where our target is eight weeks (see paragraphs 8.4 and 8.5).

- 5.10 These timescales are internal targets and may be extended if we think we need longer to make a decision, or if we are asked for an extension by either the complainant or the target of the complaint.

### **Ofcom's administrative priority framework**

- 5.11 Ofcom does not have the resources to investigate all the complaints that we receive. To ensure that we use our resources effectively, we must make decisions about whether or not to open investigations by weighing up the likely benefits of conducting an investigation against the resources that would be required to carry out the investigation, and the comparative benefits of using those resources in other ways. In other words, we decide whether conducting an investigation would be consistent with our administrative priorities.
- 5.12 To help us make these decisions, we have adopted an administrative priority framework based on the type of questions we ask ourselves when deciding whether or not to open an investigation. In making a decision on administrative priority, we will also bear in mind the relevant regulatory principles (see section 2 above).
- 5.13 We will make decisions about whether or not to open investigations on a case-by-case basis. Our administrative priority framework is illustrative, rather than exhaustive, and we will consider other factors where appropriate. A decision by Ofcom not to open an investigation does not imply any view by Ofcom about the merits of a complaint. The factors we may consider are listed below.
- The resources required to conduct an investigation, given the need to do justice to the interests of all parties likely to be affected by an investigation (for example: citizens and consumers; the complainant; third parties; and the target of the investigation). Particular issues may arise where there are specific policy or specialist skills that are required to conduct an investigation;
  - The risk to the interests of citizens or consumers as a result of the alleged contravention or infringement (and whether that risk is immediate or not and whether it is direct or indirect);
  - Whether the issue that has been identified directly relates to Ofcom's broader strategic goals or priorities (including those within Ofcom's Annual Plan);
  - Whether the conduct is on-going;
  - Whether the allegation concerns conduct that is, or that appears to be, a repeated, intentional or particularly flagrant contravention or infringement;
  - Whether there is a point of public policy of wider application with respect to which an investigation would help to clarify Ofcom's approach for stakeholders;
  - Whether the company under investigation has a history of similar contraventions or infringements, or a demonstrated record of poor compliance;
  - Whether there are other alternative proceedings (for example, planned market reviews) that are likely to achieve the same ends, or deal with the same issues, as the planned investigation. This could include, for example, whether other agencies may be better placed to investigate the complaint; and

- In the case of complaints in relation to competition concerns of alleged abuse of a dominant position infringing Chapter II Competition Act/Article 102 Treaty on the Functioning of the European Union, whether Ofcom has recently found (for example in a market review) that no communications provider (including the target of the complaint) occupies a position of significant market power in the market which appears relevant to the complaint.

### **Own-initiative investigations**

- 5.14 As well as responding to complaints brought by stakeholders, Ofcom may also consider taking further action on our own initiative.
- 5.15 The most common reason for taking own-initiative action is in response to complaints to Ofcom from consumers – either because we have received significant numbers of consumer complaints about a particular issue, or where the number of complaints is not particularly large but consumers are raising an issue that seems to be particularly serious, or may be affecting a large number of consumers. We may also consider own-initiative action where the same issue has been raised by a number of stakeholders, who may or may not have submitted formal complaints.
- 5.16 Although no formal enquiry phase will necessarily occur where Ofcom is considering whether or not to open an investigation on our own initiative, we will apply the administrative priority framework to our consideration of the issues at hand.

### **Enforcement programmes**

- 5.17 As well as investigations into specific companies, Ofcom conducts own-initiative investigations to address compliance issues across a group of communications providers, which are referred to as enforcement programmes. We often use enforcement programmes to ensure compliance with a new regulation when it is introduced or where we are assessing compliance with an existing regulation/obligation across industry.
- 5.18 We publish details of the aims, scope and targets (although not, generally, the names of individual targets) of enforcement programmes, as for other investigations.
- 5.19 We will initially set a plan for the first six months of an enforcement programme. At the end of this period, we will decide whether to extend the programme – and may extend a programme more than once if we consider that there is still work to be done to meet the programme’s objectives.
- 5.20 Where an enforcement programme reveals information or evidence that suggests it may be appropriate for Ofcom to open an investigation into a particular company or multiple investigations into individual companies, we will use the process set out above to decide whether or not to open an investigation.

## Section 6

# Conducting investigations

6.1 The section sets out the procedures we will follow once we have decided to open an investigation.<sup>34</sup>

### Opening an investigation

6.2 If we decide to open an investigation, we normally inform the complainant (if there is one) and the target. One exception to this would be where Ofcom considers that if it alerts the target of an investigation before formally requesting information, this could prejudice the progress of the investigation.

6.3 Details of open investigations are published in the *Competition and Consumer Enforcement Bulletin* section of the website at <http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/>. We update the details on the website when we open or close a case or reach a significant milestone (such as the publication of a draft decision or a s96A confirmation decision).

6.4 Stakeholders who want to keep up to date with ongoing investigations can subscribe to email notification of changes to the Competition and Consumer Enforcement Bulletin.<sup>35</sup>

6.5 We can widen the original scope of an investigation if we become aware of new issues that warrant investigation. If we are thinking of changing the scope of an investigation, we will apply the administrative priority framework set out in section 5. When we change the scope of an investigation we will update the case details on our website.

### Ofcom's timescales for carrying out investigations

6.6 Ofcom is not legally required to complete investigations within a specific period. However, we have set non-statutory targets for completing investigations because:

- it is important for all stakeholders that if we open an investigation we complete it as soon as possible.
- it helps us to manage projects more effectively, for example by being better able to predict when we will need resources;
- it provides milestones for us to assess whether open cases continue to be consistent with our administrative priorities, i.e. to represent the best use of our resources.

6.7 Ofcom has, therefore, set itself a target to complete investigations, other than investigations under the Competition Act, within six months of the opening of the investigation. The date of the opening of the investigation will be indicated directly to any relevant parties and the case will be listed in the Competition and Consumer Enforcement Bulletin on Ofcom's website.

<sup>34</sup> See section 8 for procedures in competition law cases.

<sup>35</sup> [http://www.ofcom.org.uk/static/subscribe/comp\\_bull.htm](http://www.ofcom.org.uk/static/subscribe/comp_bull.htm)

6.8 Investigations under the Competition Act are of particular complexity, involving detailed economic analysis and are subject to different procedures. Ofcom has not, therefore, set itself a specific target for the completion of such investigations as this will depend on the level of complexity of each case. However, Ofcom will periodically review any open investigation against its administrative priority criteria and will decide whether to continue to investigate or close the case.

### **Urgent cases under the Communications Act and Postal Services Act**

6.9 Ofcom has the power to take urgent action under section 98 of the Communications Act and paragraphs 8 to 10 of Schedule 7 to the Postal Services Act 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;
- serious economic or operational problems for persons (other than the contravening provider) who are communications providers or persons who make associated facilities available, or who provide postal services; or
- serious economic or operational problems for persons who make use of electronic communications networks, electronic communications facilities or associated facilities, or for users of postal services.

6.10 Under both the Communications Act and Postal Services Act, if Ofcom is satisfied that a case is urgent we can make a direction suspending or restricting a provider's activities.<sup>36</sup> In the cases of contraventions of the Electronic Communications Code, if Ofcom is satisfied that a case is urgent, it can make a direction suspending the application of powers granted in respect of the Electronic Communications Code.

### **Making an application for urgent action**

6.11 We will assess requests from complainants for urgent action against the relevant statutory criteria.

6.12 If you think we should take urgent action, you must provide us with clear arguments and supporting evidence as soon as possible. You are unlikely to persuade us that we should consider these options if you have not acted urgently in bringing us your request. Representations about proposed or recent changes in agreements or conduct are generally more likely to present grounds for urgent action than allegations about established behaviour or agreements.

6.13 As well as providing evidence of a contravention of a condition, you should provide compelling evidence that the statutory thresholds are met in your case and that the alleged contravention or infringement justifies the commitment of significant resources by Ofcom to pursue the issue as a matter of urgency. Relevant evidence may include:

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<sup>36</sup> See paragraph 8(4) of Schedule 7 of the Postal Services Act. More specifically, '*a direction that [the provider's] entitlement to provide electronic communications networks or electronic communications services, or to make associated facilities available, is suspended (either generally or in relation to particular networks, services or facilities; or a direction that that entitlement is restricted in the respects set out in the direction.*' (Section 98(4), Communications Act). Sections 98(5) to (8) also apply to such a direction.

- an assessment of the financial losses directly attributable to the behaviour complained about (although financial loss on the part of a person bringing the complaint may not be sufficient to demonstrate that a case has met the statutory criteria);
  - details of other stakeholders likely to be affected; and
  - an explanation of why the damage caused will be irreparable.
- 6.14 We may decide not to take urgent action even where the statutory criteria are met. Ofcom may decide to accept a written assurance in lieu of taking urgent formal action if it is satisfied that these will address concerns that might otherwise form the basis for action. Such an informal assurance (which may be detailed and will always be in writing) from a company under investigation that it will do something, or refrain from doing something, may obviate the need for formal directions. Ofcom is never bound to accept, or even consider, such an assurance if it is more appropriate to exercise its statutory powers in a particular case.<sup>37</sup>
- 6.15 Repeated requests for Ofcom to reconsider a decision on urgent action can be counterproductive, as responding to these requests may divert resources away from the full investigation.
- 6.16 Ofcom may also take urgent action in the absence of a complaint, where it considers it appropriate to do so.

## During an investigation

### Contact with the case team during an investigation

- 6.17 When Ofcom decides to open an investigation, we will provide the complainant, if there is one, and the target of the investigation with contact details of the case leader who will be the main point of contact throughout the investigation. If and when appropriate we will also provide details of who the likely decision maker(s) will be. Decisions will be taken by one or more senior members of Ofcom's executive who have appropriate delegated authority from Ofcom's Board.
- 6.18 Complainants (where they exist) and targets can expect regular contact with the case leader and regular updates on the progress of investigations. Sometimes, this will mean just a short telephone call or email. At other times, particularly when Ofcom is gathering information, we may be in touch more frequently and may be able to provide more detailed updates.

### Information gathering

- 6.19 Ofcom relies on accurate information, provided in a timely manner, to carry out efficient investigations.

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<sup>37</sup> See further OFT 407 at 3.17 – 3.20 in relation to assurances in lieu of interim measures directions under the Competition Act

## Formal information requests

- 6.20 Under section 135 of the Communications Act, Ofcom has the power to require the provision of specified documents or specified information from any person who appears to have relevant information, in relation to the exercising of Ofcom's functions under Chapter 1 of Part 2 of the Communications Act. This applies to all the different types of investigations that Ofcom carries out into compliance with section 45 regulatory conditions and the Electronic Communications Code.
- 6.21 Ofcom also has equivalent powers to give notice to any person (this includes companies) requiring them to provide information in relation to Ofcom's functions under Part 8 of the Enterprise Act and its functions under the Postal Services Act. In relation to alleged contraventions of the broadcasting competition rules, Ofcom's powers to require information are contained in the relevant broadcast licences. Ofcom cannot, therefore, formally require information from persons who do not hold a broadcasting licence.
- 6.22 Delays in the provision of information can have a significant impact on overall timescales. Ofcom, therefore, expects stakeholders to respond to information requests to strict deadlines.
- 6.23 We will generally use Ofcom's statutory powers to collect the information we need to pursue investigations and may take enforcement action against companies that fail to respond to statutory requests for information. For example, if the recipient of a notice under section 135 of the Communications Act fails to comply with that notice, Ofcom can impose (amongst other things) a penalty of up to £2,000,000 and a penalty of up to £500 per day in respect of each day during which the contravention continues. A failure to comply could also result in Ofcom suspending a provider's entitlement to provide networks, services or facilities in certain circumstances. Any offence under section 144 of the Act of failing to provide the requested information or of providing false information may also be prosecuted.
- 6.24 Ofcom has similar powers in relation to postal services under Schedule 8 of the Postal Services Act. In the case of a failure to comply with an information request under those provisions, Ofcom can impose a penalty of up to £50,000 and may also suspend or restrict the entitlement of the addressee to provide postal services<sup>38</sup>.
- 6.25 In the case of information requests sent under broadcasting licences, failure to comply will amount to a breach of the licence itself and is subject to the same penalties outlined at paragraph 3.23 above.
- 6.26 For investigations, Ofcom normally issues formal information requests in draft, allowing three working days for the recipient to comment on the scope of the information requested and the practicality of providing the information by the specified deadline. After considering comments and making any changes as a result, Ofcom will issue a final version of the information request.
- 6.27 Where an information request is straightforward or the information is required quickly, Ofcom may not send a draft information request. We will not send information requests in draft if we think that giving someone advance notice of a formal information request could prejudice the progress of the investigation.

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<sup>38</sup> However the Postal Services Act does not provide for the power to impose daily penalties.

- 6.28 Where the case timetable demands it, Ofcom will set challenging deadlines for responses to information requests. Even when a final decision is still some way off, we may request information urgently to meet internal deadlines and ensure we can complete our analysis to target milestones.
- 6.29 Once we have issued a final information request, we will not be minded to agree to an extension of the deadline, unless the recipient provides a good reason for needing more time to comply. Ofcom will be robust in enforcing the requirement to respond to formal information requests, and will consider formal sanctions for non-compliance where appropriate.

### Other sources of information

- 6.30 Ofcom may also issue informal requests for information in certain circumstances, in particular, when the nature of the information required means that a statutory request is inappropriate.

### Confidentiality

- 6.31 If you are providing information to Ofcom that you consider to be confidential, you should clearly identify this information and explain why you think it is confidential.
- 6.32 The Communications Act imposes significant duties of transparency on Ofcom and one of Ofcom’s regulatory principles is to investigate and enforce in a transparent manner. Those duties of transparency must be balanced against the restrictions on disclosure contained in sections 26 and 393 of the Communications Act and the legitimate right of parties to ensure that confidential and commercially sensitive information is protected.
- 6.33 Ofcom will always consider whether disclosure of information about a particular business is necessary for the purpose of facilitating the carrying out by Ofcom of its enforcement functions. In particular, Ofcom may judge that disclosure of information gathered in an investigation to the target of the investigation is necessary in order to protect the target’s rights of defence. Similarly, Ofcom may judge that disclosure of information gathered from the target of the investigation to a complainant and other third parties is justified.
- 6.34 If you provide us with information that you consider is confidential, you should also supply a non-confidential version of your submission. This non-confidential version should include suggested non-confidential summaries of information (for example “confidential details of contracts”) and non-confidential ranges of numbers rather than simply removing the confidential information.
- 6.35 A blanket marking of “confidential” on all information supplied is unhelpful. Ultimately, it is for us to determine what is, and is not, confidential within the statutory definitions.

### **Involvement of third parties**

- 6.36 Stakeholders other than the complainant or target – for example, competitors, customers, suppliers, consumers’ associations and trade associations – can play an important part in investigations.

- 6.37 Third parties who want to be involved in an investigation will need to demonstrate that:
- they have a sufficient interest in the investigation. A sufficient interest will usually arise where someone's economic interests are directly affected (positively or negatively) by the subject matter of the investigation. A company operating in a relevant market, or a body representing stakeholders likely to have a sufficient interest, may be deemed to have a sufficient interest; and
  - their involvement would facilitate the exercise of Ofcom's functions.
- 6.38 Ofcom will then consider whether or not the third party has a sufficient interest in the investigation and the appropriate level of involvement for that party. Stakeholders that do not have a sufficient interest, but want to follow the progress of an investigation, can follow the progress of the investigation on Ofcom's website.

## Section 7

# Closing cases

## Communications Act and Postal Services Act

### Closing a case without enforcement action

- 7.1 If our investigation finds that the target has complied with its obligations, we will close the case. We will inform the target (and the complainant if there is one) and update the details of the case on the Competition and Consumer Enforcement Bulletin section of Ofcom's website.
- 7.2 Although in the majority of cases, a case closure decision of this type is likely to be a brief statement indicating case closure, in certain cases, we may publish a reasoned case closure document setting out Ofcom's reasons for taking no further action, for example if we think it would be helpful for all stakeholders to clarify our interpretation of a particular regulatory condition.

### Enforcement

- 7.3 Our enforcement process, where we conclude that there are reasonable grounds to believe that a person has contravened, or is contravening a condition set under the Communications Act or Postal Services Act, is set out in section 3 above.
- 7.4 In addition to the statutory framework for taking formal enforcement action which provides the target of an investigation with the opportunity to make written representations prior to Ofcom issuing a final decision, where we are considering imposing a financial penalty we will generally also offer the target the opportunity to make oral representations before the decision maker(s).

### Alternatives to enforcement action

- 7.5 Ofcom may consider, and may accept, assurances in some cases in respect of conduct under investigation under the Communications Act or Postal Services Act and may decide to close a case on the basis of those assurances.

## Enterprise Act

### Part 4 Enforcement

- 7.6 Where Ofcom considers a party to have breached an undertaking or enforcement order, we can bring civil proceedings to enforce compliance.

### Part 8 Enforcement

- 7.7 Ofcom does not have powers to notify breaches or issue penalties under the Enterprise Act. Instead, Ofcom can seek undertakings from a party under investigation under Part 8 of the Enterprise Act to cease the conduct.
- 7.8 If undertakings cannot be agreed, or if the undertakings are subsequently broken, Ofcom can take action through the courts to enforce compliance through an enforcement order.

- 7.9 The case will be closed once undertakings, or an enforcement order, have been received (but there may be a period of compliance monitoring).
- 7.10 Alternatively, if undertakings cannot be agreed, Ofcom may decide to close the case at this stage rather than proceeding to court action. This will be if the resources required and likely outcome of taking the case to court are not warranted by the benefits of doing so. Ofcom will review this decision if further, or future, evidence of consumer harm comes to light.
- 7.11 Similarly for cases under the UTCCRs, a case will be closed once the party under investigation has agreed to revise its consumer contract terms to meet the requirements of the Regulations, either through undertakings to Ofcom, or as a result of a decision of the courts. Alternatively, if an investigated party does not agree to revise its contract terms, Ofcom may decide to “reserve our position” in that particular case, that is it will not take further action at that time, but will reserve the right to do so should we receive further evidence of consumer harm in the future.

### **The compliance phase**

- 7.12 Instead of closing a case, Ofcom may decide at the end of an investigation to “put it into compliance”. The purpose of the compliance phase is to ensure that the target of an investigation does not repeat behaviour that Ofcom has deemed to breach regulatory rules, that it complies with any undertakings or commitments, and that it implements any remedies required by Ofcom (for example, paying affected customers compensation).
- 7.13 The process that we follow during the compliance phases will differ from case to case. We may use formal information gathering powers to require targets to provide data that can be used to measure compliance.
- 7.14 The length of the compliance phase will depend on the circumstances of the case and the measures that are to be monitored.
- 7.15 Generally, Ofcom will not grant extensions to any deadline set for compliance with a direction or notification, unless it receives an application prior to the expiry of the deadline together with an explanation of why the deadline should be extended including supporting evidence.
- 7.16 The Competition and Consumer Enforcement Bulletin section of Ofcom’s website includes a section for cases in compliance, where we will publish details of significant developments.
- 7.17 Once we consider that compliance has been established, we will close the case.

## Section 8

# Enforcing competition law

- 8.1 As set out in section 3, Ofcom has concurrent powers with the OFT to enforce the competition law prohibitions in the Competition Act and the Treaty on the Functioning of the European Union (the “TFEU”) in relation to communications matters.
- 8.2 Competition cases generally raise issues of particular complexity and it is not therefore appropriate to apply the same framework for consideration as for investigations under the Communications Act and Enterprise Act. In addition, there are certain specific obligations which are set out in the Competition Act and associated legislation which require Ofcom to adopt a different approach when investigating allegations of anti-competitive conduct.
- 8.3 This section sets out those differences in approach. Where a matter is not raised in this section, Ofcom will follow the procedures set out in the preceding sections. In particular, Ofcom would expect any complaint submission to meet the requirements set out in section 4 so as to clearly identify the prohibition which is at issue and supply evidence to support the allegation.

### Length of the enquiry phase

- 8.4 Section 25 of the Competition Act specifies that Ofcom can only open a formal investigation under the Competition Act if there are reasonable grounds for suspecting that one of the competition law prohibitions has been infringed in an area falling within Ofcom’s concurrent powers. As a result, Ofcom must be satisfied during the enquiry phase that reasonable grounds for suspicion have been established. This assessment is a more complex assessment than that required for other cases involving in-depth economic and legal advice at the same time as considering whether or not an investigation would be consistent with Ofcom’s administrative priorities. As set out below, Ofcom must also consider whether, in light of the concurrent regime for competition enforcement, it is the authority which would be best placed to investigate any complaint.
- 8.5 It is therefore appropriate for the enquiry phase in competition cases to be longer than in other cases and we aim to complete enquiries about Competition Act complaints within eight weeks.
- 8.6 This timescale is an internal target and may be extended if we think we need longer to make a decision, or if we are asked for an extension by either the complainant or the target of the complaint.

## Ofcom's concurrent power to enforce competition law

- 8.7 In competition cases, we also need to consider whether Ofcom is the best placed competition regulator to handle the case under concurrency rules.
- 8.8 Ofcom exercises its powers as a national competition authority following the Concurrency Regulations<sup>39</sup> and the European Commission's *Notice on Cooperation within the Network of Competition Authorities* (the "Network Notice").<sup>40</sup> When Ofcom receives a competition complaint, we will consider whether Ofcom or the OFT is best placed to act on a case. In certain circumstances, the OFT may pass a complaint to Ofcom (or vice versa), where the two regulators agree to the transfer and subject to notifying the company under investigation under Rule 7, Concurrency Regulations.
- 8.9 Where a case raises issues under Article 101 and/or Article 102, Ofcom applies the case allocation principles set out in the Network Notice to determine whether Ofcom, the OFT, a national competition authority ("NCA") from another Member State, or the European Commission is well placed to act.<sup>41</sup> Ofcom will notify the European Commission before, or without delay after, using its powers of investigation in a competition investigation raising Article 101/102 issues.<sup>42</sup> In the context of an Ofcom investigation raising Article 101 and/or Article 102 issues, Ofcom will co-operate with the European Commission and other NCAs in the European Competition Network ("ECN") following the Network Notice. This may include the exchange of information by Ofcom within the ECN subject to the confidentiality and disclosure provisions of the Modernisation Regulation and Part 9 of the Enterprise Act.
- 8.10 If we make a decision on administrative priority to close an ongoing investigation, we will pass details of the case to the OFT for them to decide whether they wish to pursue it further. Similarly, when the OFT is considering closure of a case that relates to the communications sector, it will invite Ofcom to consider whether it wishes to continue the investigation.

## Targets for Competition Act investigations

- 8.11 Investigations under the Competition Act are typically complex, requiring a great deal of detailed information gathering and analysis. Experience has shown us that Competition Act investigations therefore tend to take longer than other types of investigations – in some cases, several years. Ofcom has therefore decided not to set a target for completion of such investigations.
- 8.12 However, Ofcom will review Competition Act cases at key stages in the investigation to scope out the next phase of the investigation. These case reviews will consider whether an investigation continues to be a priority under Ofcom's administrative priority framework. This will enable us to determine whether the investigation should continue or if we should close it on grounds of administrative priority.

<sup>39</sup> See Competition Act 1998 (Concurrency) Regulations 2004, SI 2004/1077 <http://www.legislation.gov.uk/ukxi/2004/1077/regulation/1/made> and OFT 405 Concurrent application to regulated industries, December 2004

[http://www.ofcom.gov.uk/shared\\_ofcom/business\\_leaflets/ca98\\_guidelines/ofcom405.pdf](http://www.ofcom.gov.uk/shared_ofcom/business_leaflets/ca98_guidelines/ofcom405.pdf)

<sup>40</sup> Commission Notice on cooperation within the Network of Competition Authorities, 2004/C 101/03 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0043:0053:EN:PDF>

<sup>41</sup> See further OFT405 and guidelines OFT442 Modernisation in relation to case allocation within the European Competition Network

[http://www.ofcom.gov.uk/shared\\_ofcom/business\\_leaflets/competition\\_law/ofcom442.pdf](http://www.ofcom.gov.uk/shared_ofcom/business_leaflets/competition_law/ofcom442.pdf)

<sup>42</sup> Article 11(3) Modernisation Regulation and sections 26 to 28A Competition Act 1998.

## Interim measures

- 8.13 Under section 35 of the Competition Act, Ofcom can impose interim measures before it completes its investigation, where it has reasonable suspicion that there is an infringement of a Competition Act prohibition. Ofcom can impose interim measures in order to:
- prevent serious, irreparable damage to a particular person or category of person; or
  - protect the public interest.
- 8.14 Ofcom may give such directions as it considers appropriate for preventing serious, irreparable damage or protecting the public interest.<sup>43</sup>
- 8.15 Ofcom may exercise these powers because a complainant has asked it to, or on its own initiative.

## Making an application for interim measures

- 8.16 Any request for interim measures should satisfy the same criteria as those set out in respect of requests for urgent action set out in section 6.

## Information gathering

- 8.17 Under section 26 of the Competition Act, Ofcom has the power to require a person (this includes companies, and in most cases will be a company) to produce specified documents or specified information. We are likely to use this power in all Competition Act investigations.
- 8.18 Ofcom also has powers under sections 27-28 of the Competition Act to enter business premises without a warrant and to enter and search any premises (both business premises and domestic premises) with a warrant.<sup>44</sup>
- 8.19 A person is guilty of an offence if he fails to comply with a requirement imposed on him under section 26, 27 or 28.

## Confidentiality

- 8.20 As set out at paragraph 6.32 above, the Communications Act imposes significant duties of transparency on Ofcom in all its activities, including in the context of competition investigations and one of Ofcom's regulatory principles is to investigate and enforce in a transparent manner. Ofcom must therefore consider whether or not it is appropriate to disclose information which has been gathered during the course of its investigations. In the context of competition investigations, Ofcom must be mindful of the need to ensure that it does not disclose confidential information. This concept differs from that of "information relating to a business" which is contained in the Communications Act and therefore a slightly different approach needs to be adopted.

<sup>43</sup> See further paragraphs 6.18 to 6.36 of the OFT's guide to investigation procedures in competition cases, available at [http://www.ofcom.gov.uk/shared\\_ofcom/policy/ofcom1263.pdf](http://www.ofcom.gov.uk/shared_ofcom/policy/ofcom1263.pdf)

<sup>44</sup> For further information on Ofcom's investigation powers under the Competition Act see the OFT's guide Powers of Investigation, OFT404, December 2004 available at [http://www.ofcom.gov.uk/shared\\_ofcom/business\\_leaflets/ca98\\_guidelines/ofcom404.pdf](http://www.ofcom.gov.uk/shared_ofcom/business_leaflets/ca98_guidelines/ofcom404.pdf)

- 8.21 If you are providing information to Ofcom that you consider to be confidential, you should clearly identify this information and explain why you think it is confidential. Confidential information is defined in the relevant legislation for competition law cases as:
- commercial information whose disclosure the OFT or a regulator thinks might significantly harm the legitimate business interests of the undertaking to which it relates; or
  - information relating to the private affairs of an individual whose disclosure the OFT or a regulator thinks might significantly harm the individual's interests; or
  - information whose disclosure the OFT or a regulator thinks is contrary to the public interest.<sup>45</sup>
- 8.22 Ofcom will review requests for confidentiality in Competition Act cases in accordance with Ofcom's obligation not to disclose confidential information under Part 9 of the Enterprise Act and must comply with the Rule 6 of the OFT's Rules where we are proposing to disclose information over which confidentiality has been claimed.<sup>46</sup>
- 8.23 If you provide us with information that you consider is confidential, you should therefore also supply a non-confidential version of your submission. This non-confidential version should include suggested non-confidential summaries of information (for example "confidential details of contracts") and non-confidential ranges of numbers rather than simply removing the confidential information.
- 8.24 A blanket marking of "confidential" on all information supplied is unhelpful. Ultimately, it is for us to determine what is, and is not, confidential within the statutory definitions.
- 8.25 Where confidentiality has been claimed and Ofcom is nevertheless proposing to disclose such information, in accordance with Rule 6 of the OFT's Rules Ofcom will inform the relevant party of our proposed disclosure and provide that party with the opportunity to make representations on the proposed course of action. Ofcom may require further clarifications from such party prior to deciding what, if any of the information provided should be disclosed.

### Third party involvement

- 8.26 In competition law cases, we will generally offer at least the following opportunities for involvement to third parties deemed to have a sufficient interest:
- the opportunity to comment on a non-confidential version of any statement of objections issued by Ofcom; and

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<sup>45</sup> Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2004/2751 <http://www.legislation.gov.uk/ukSI/2004/2751/contents/made>

<sup>46</sup> Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2004/2751 <http://www.legislation.gov.uk/ukSI/2004/2751/contents/made>

- the opportunity to comment on a non-confidential version of any draft non-infringement decision.<sup>47</sup>

8.27 Ofcom will consider requests from a third party with sufficient interest to have access to Ofcom's file. However, Ofcom will only disclose information if permitted under Part 9 of the Enterprise Act and Ofcom will assess whether to redact confidential information from documents in the file.

## Closing cases

### Statement of objections

8.28 If Ofcom reaches the view that the conduct under investigation represents an infringement of competition law, we must give the target of the investigation notice of this by sending it a statement of objections.

8.29 A statement of objections must include:

- the prohibition that has been infringed;
- Ofcom's reasons for considering that the conduct under investigation represents a breach of competition law;
- the facts on which Ofcom has relied in reaching its conclusion;
- the action that Ofcom proposes to take and its reasons for the proposed action;
- the period in which the target may make written representations to Ofcom on the confidentiality of information contained in the statement of objections; and
- the period in which the target may make written representations to Ofcom on the content of the statement.<sup>48</sup>

8.30 Ofcom must also give the target of a statement of objections access to the case file and provide an opportunity for the target to make oral representations if it wishes to do so.

8.31 We may also offer third parties with a sufficient interest the opportunity to consider and make representations on a non-confidential version of the statement of objections and may, in the event of a request, consider granting access to documents on the file where that is permissible under Part 9 of the Enterprise Act.<sup>49</sup>

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<sup>47</sup> Ofcom will consider the guidance and practice of the OFT in Competition Act investigations, OFT451, April 2006 Involving third parties in Competition Act investigations available at [http://www.ofcom.gov.uk/shared\\_ofcom/business\\_leaflets/ca98\\_guidelines/oft451.pdf](http://www.ofcom.gov.uk/shared_ofcom/business_leaflets/ca98_guidelines/oft451.pdf). Ofcom will also consider European Commission practice on complainant's rights.

<sup>48</sup> The procedure that Ofcom must follow is set out in *The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004*, <http://www.legislation.gov.uk/ukSI/2004/2751/contents/made>

<sup>49</sup> Ofcom will consider the OFT's approach to involving third parties in Competition Act investigations, OFT451

## **Draft “No grounds for action” decision**

- 8.32 If we reach the view that there is no evidence that an infringement of the Competition Act has occurred, we will prepare a draft “No grounds for action” decision setting out the facts, our analysis and the reasons for our provisional conclusion.
- 8.33 We will offer the target an opportunity to make representations on the confidentiality of the information contained in the document, and on the substance of Ofcom’s provisional decision. Ofcom may also give interested parties an opportunity to comment on a non-confidential version of the draft non-infringement decision.

## **After a statement of objections or draft “No grounds for action” decision**

- 8.34 It is difficult to predict how a case will progress after we issue a statement of objections or draft “No grounds for action” decision. We will consider submissions made to us by stakeholders during the period for representations and may need to undertake further analysis to explore stakeholders’ comments.
- 8.35 If the consideration of the parties’ submissions changes our view, then we may issue a further statement of objections or a new draft “No grounds for action” decision. In some cases, we may change our decision, so that we issue a statement of objections followed by a draft “No grounds for action” decision (or vice versa). If this happens, where appropriate we may offer stakeholders a further opportunity to comment before we move to a final decision.

## **Closing competition investigations without reaching a conclusion**

- 8.36 Competition law cases are complex and resource intensive. We will undertake a periodic internal review of the case to decide whether to continue. If the case no longer meets Ofcom’s administrative priorities, we may close the case without reaching a decision as to whether or not there has been an infringement. This may be, for example:
- because the evidence, or our analysis, suggests that the likelihood of consumer detriment from the conduct or agreement in question is less significant than anticipated at the outset; or
  - the resources needed to progress the investigation in a timely fashion are greater than planned and cannot be justified in the light of Ofcom’s overall portfolio of work and resource demands.
- 8.37 Where Ofcom closes a case on grounds of administrative priority, this will mean that Ofcom is taking no decision on the merits of the case.

## **Enforcement**

### Accepting commitments from the target of an investigation

- 8.38 Under the Competition Act, Ofcom can accept binding commitments from parties under investigation in appropriate circumstances.<sup>50</sup>
- 8.39 A party may offer binding commitments to Ofcom at any time during the course of an investigation and up until a decision is made. However, Ofcom is unlikely to consider

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<sup>50</sup> See section 31A Competition Act.

it appropriate to accept commitments offered at a very late stage in its investigation. Once commitments are offered, we may discuss the form and content of the commitments in order to reach agreement as to what might be acceptable to Ofcom.

- 8.40 The fact that the target of an investigation has approached us to discuss commitments, and the substance of any discussion about commitments, are not relevant to our consideration of whether an infringement has occurred. We will therefore not use the offer of commitments as evidence in any subsequent decision about the agreement or conduct under investigation.
- 8.41 In deciding whether to accept commitments, Ofcom must follow the procedural requirements set out in schedule 6A of the Competition Act, including giving notice to persons it considers likely to be affected by the commitments (which might include publishing the notice) and considering representations made. Ofcom will have regard to the guidance published by the OFT in relation to commitments which set out further details of the procedure to be followed.<sup>51</sup>

#### Making directions in relation to an infringement of the Competition Act or the Treaty on the Functioning of the European Union

- 8.42 After we have issued a statement of objections and considered the representations provided, Ofcom may issue a final infringement decision including directions, setting out actions the party under investigation must take to bring the infringement to an end.<sup>52</sup>
- 8.43 Ofcom may also impose a financial penalty of up to ten per cent of the target's turnover in a relevant market. Any decision on imposing a financial penalty and the level of the penalty will be made in accordance with the OFT's guidance on competition penalties, including consideration of any grounds for leniency.<sup>53</sup>

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<sup>51</sup> OFT 407, Enforcement, Incorporating the Office of Fair Trading's guidance as to the circumstances in which it may be appropriate to accept commitments, at section 4 and Annex A available at [http://www.ofc.gov.uk/shared\\_ofc/business\\_leaflets/ca98\\_guidelines/ofc407.pdf](http://www.ofc.gov.uk/shared_ofc/business_leaflets/ca98_guidelines/ofc407.pdf)

<sup>52</sup> See the OFT's rules and OFT 407 at section 2 for the procedure on directions.

<sup>53</sup> See the OFT's rules and OFT 407 at section 5 and OFT 423: OFT's Guidance as to the appropriate amount of a penalty.

## Section 9

# Format for submitting a complaint to Ofcom

9.1 Complaints (including complaints about consumer protection) should be submitted to:

Investigations Programme Manager  
Competition Group Investigations Team  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA  
e-mail: [competition.complaints@ofcom.org.uk](mailto:competition.complaints@ofcom.org.uk)  
Telephone: 020 7783 4100

9.2 If you need any further guidance on how to submit a complaint to Ofcom (including a complaint about consumer protection), please contact the Investigations Programme Manager.

9.3 We will send a non-confidential version of your submission to the parties named in your complaint. If your submission contains confidential information, you should provide a separate non-confidential version that we can send to the target of the complaint, as well as explaining why you believe the information to be confidential.

9.4 Unless you specifically ask Ofcom not to do so, Ofcom will disclose your identity to the target of the complaint.

9.5 Unless you specifically ask Ofcom not to do so, in the event that Ofcom decides to investigate your complaint, Ofcom will publish details of the complaint, including your identity, on Ofcom's website.

## Contents of a submission

9.6 A submission should contain the following information:

### Section A: Preliminary information

9.7 Please provide:

- summary of complaint (background, undertakings concerned, products/services, key dates, alleged infringement, harm done, relief sought);
- business name, address, telephone number, e-mail address and the contact details of a person who can discuss the detail of a complaint;
- a brief explanation of the nature of your business and its scale (local, national, international, approximate turnover);
- details of the target(s) of the complaint;
- details of the relationship between the complainant and the target, for example whether the complainant is a customer or a competitor.

## **Section B: Legal basis for the complaint**

9.8 Please specify what provision you believe has been breached, for example:

- the Chapter I and/or Chapter II prohibitions of the Competition Act; or
- a General Condition
- an SMP Condition; or
- a consumer protection provision, for example the UTCCRs or CPRs.

9.9 Please explain clearly why you believe this provision has been breached.

## **Section C: Details of the complaint**

9.10 Please provide:

- an explanation of the reasons for the complaint;
- the products and/or services concerned by the complaint;
- details of the structure of supply and demand for the products/services concerned;
- relevant dates and incidents;
- details of any relevant contact with the target of the complaint;
- a chronology of events;
- how your business has been affected by the alleged activity;
- evidence of actual or potential effect on consumers;
- relief/remedy sought including details of the timing/urgency of the complaint and reasons; and
- names of other industry members who can support the complaint.

## **Section D: The relevant market**

**This section is only required for complaints made under competition law. Complainants may refer to relevant sections of Ofcom's market reviews in support of a competition law complaint.**

9.11 In order to carry out its investigation, Ofcom will have to obtain certain information from the complainants, the target and others, to enable it to reach a view on the relevant economic market(s).

9.12 Information about the markets involved is fundamental to any investigation of alleged anti-competitive behaviour. For example, in order to take action against an abuse of dominant position, it is necessary to establish the market(s) - if any - in which the dominant position exists, identify the firm(s) that hold that position and then assess the effect of the alleged abuse on competition.

- 9.13 The following is a non-exhaustive list of the type of questions we ask in an economic analysis of the market(s):
- What are the products/services that are the subject of the complaint?
  - What is the complainant's understanding of the relevant market(s) into which these products/services fall?
  - Are there any close substitutes for the product or service? Are they interchangeable with other products/services? What are the actual and potential alternatives?
  - How would customers react if the price of the products/services increased? Could and would they buy alternative products/services more cheaply or would they continue to purchase the more expensive products/services? Why?
  - What are the characteristics and intended use of the relevant products/services? Do they have one or many applications?
  - Who are the target customers? What features of the product or service are important to them?
  - How easily could undertakings switch to supplying (or buying) an alternative product? If an existing supplier increased the price of the product/service, would another supplier provide the same or similar products more cheaply? What factors would be relevant in making the decision to start to supply the products/services more cheaply (for example, is production equipment dedicated or are costly special connections, maintenance, staff training etc required to supply substitute?)
  - How quickly could there be an alternative source of supply (for example, would governmental authorisation materially delay supply)?
  - Does the product/service under consideration share a common technology or common network facilities with any other?
  - Could any other firms switch existing capacity to supply the product?
  - What is the extent of the geographical market for the product or service (i.e. regional or national)? Are there cross border sales of the product/service?
  - Are there any legal or regulatory rules applying to the products/services in question and how does this affect their supply?

Competitive conditions in the relevant market(s)

- 9.14 Please tell us about the state of competition in the relevant market(s), for example:
- the key market participants and their approximate market shares (by value and by volume);
  - how market shares have changed in the last 2-5 years;
  - the approximate total size of the market (in value and volume terms) and how it has changed in recent years;

- the manner in which firms in the market compete (for example, mainly on price or on quality/service);
- how competition is organised/takes place (for example, are there formal tendering processes? Are there long-term contracts?);
- the structure of supply and demand for the relevant products/services;
- the main customers of the products/service concerned;
- how prices differ between firms, what the price history of the market is (for example, upward or downward trends);
- the importance of economies of scale or of scope in the market;
- any significant first mover advantages;
- barriers to entry or exit;
- market entry and exit and any market consolidation in the last three years.

**Section E: Verification by an officer of the company:**

9.15 Please include a declaration by an officer of the company, preferably the CEO or equivalent, stating:

The information provided in this submission is correct and complete to the best of my knowledge and belief.

Signed:

Position in the Company:

Date:

**Section F: Other relevant information**

9.16 Please include any supporting information you think is relevant, for example:

- copies of any relevant documentation (e.g. minutes of meetings, board papers etc) or communications (e.g. emails or notes of telephone conversations) involving the target/complainant that provides evidence of the alleged behaviour;
- copies of any relevant industry reports/consumer surveys;
- details of any similar complaints/investigations/proceedings concerning the same or similar products/services (for example, an investigation by the European Commission).

## **Acknowledgement of submissions**

- 9.17 We will acknowledge receipt of a complaint within two working days.
- 9.18 This does not necessarily mean that we think the complaint meets the requirements set out above. If a submission does not meet the requirements set out above, we will advise you on what else may be needed before we will consider the submission.

## Annex 1

# Responding to this consultation

### How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document **by 5pm on Friday 6 January 2012**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://stakeholders.ofcom.org.uk/consultations/draft-enforcement-guidelines/>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not you consider any part of your response to be confidential (the response coversheet is incorporated into the online web form).
- A1.3 For larger consultation responses, particularly those with supporting charts, tables or other data, please email [competition.complaints@ofcom.org.uk](mailto:competition.complaints@ofcom.org.uk) attaching your response, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted to the address below, marked with the title of the consultation.
- Keith Loader  
Competition Group  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- A1.5 We do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.

### Further information

- A1.6 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Keith Loader on 020 7783 4165.

### Confidentiality

- A1.7 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk) ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.
- A1.8 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.

- A1.9 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at:  
<http://www.ofcom.org.uk/about/accoun/disclaimer/>

### Next steps

- A1.10 Following the end of the consultation period, Ofcom intends to publish a final version of these guidelines.
- A1.11 You can register to receive free email updates alerting you to the publications of relevant Ofcom documents. For more details please see:  
[http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm)

### Ofcom's consultation processes

- A1.12 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.13 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk) . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.14 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Graham Howell, Secretary to the Corporation, who is Ofcom's consultation champion:

Graham Howell  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

Tel: 020 7981 3601

Email [Graham.Howell@ofcom.org.uk](mailto:Graham.Howell@ofcom.org.uk)

## Annex 2

# Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

### Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

### During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

### After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

## Annex 3

# Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk).
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at [www.ofcom.org.uk/consult/](http://www.ofcom.org.uk/consult/).
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

**Cover sheet for response to an Ofcom consultation**

**BASIC DETAILS**

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

**CONFIDENTIALITY**

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

**DECLARATION**

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)