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OFCOM'S CONSULTATION ON ITS APPROACH TO ENFORCEMENT

RESPONSE OF ASHURST LLP

Ashurst LLP welcomes the opportunity to respond to the consultation by Ofcom on its approach to enforcement, published on 23 January 2017. This response represents our own views, based on our experience of advising and representing clients in respect of complaints, investigations and appeals in the enforcement of the Competition Act 1998 ("**CA98**") by Ofcom, the Competition and Markets Authority ("**CMA**") and the Office of Fair Trading ("**OFT**"). It is not made on behalf of any of our clients.

In this response we refer to the various consultation documents as follows:

- "*Consultation: Ofcom's approach to enforcement*" is referred to as the "**Introductory Document**";
- "*[DRAFT] Enforcement guidelines*" is referred to as the "**Draft Regulatory Guidelines**";
- "*[DRAFT] Enforcement guidelines for Competition Act investigations*" is referred to as the "**Draft CA98 Guidelines**";
- "*[DRAFT] Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences Guidelines*" is referred to as the "**Draft Broadcasting Act Guidelines**"; and
- "*[DRAFT] Advice for complainants*" is referred to as the "**Draft Complainants Guidelines**".

We confirm that the contents of this response are not confidential. We also confirm that we would be happy to be contacted by Ofcom in relation to our responses.

1. **Do you have any comments on the proposed draft Enforcement Guidelines published alongside the consultation document?**

1.1 In order to make the scope of this guidance clear on the face of the document, it would be helpful to amend the title of this document to "Enforcement Guidelines for Regulatory Investigations".

Status of the Draft Guidelines

1.2 Ofcom states that the guidelines "… *do not have binding legal effect*" (paragraph 1.8 of the Draft Regulatory Guidelines). However, as discussed below in relation to the Draft CA98 Guidelines (at paragraph 2.6), the Competition Appeal Tribunal ("**CAT**") has ruled that guidelines should be followed unless there are compelling reasons for doing otherwise. Accordingly, it would be preferable to adopt wording similar to that used in the CMA's "*Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases*" (CMA8, March 2014) (the "**CMA's CA98 Guidance**"), stating that the guidelines will be applied flexibly and are not a definitive statement of, or substitute for, the law itself (see the CMA's CA98 Guidance at paragraphs 1.8 to 1.11).

Stakeholders should be able to rely on guidance, which should be robust and followed by the regulator unless reasons are given for taking a different approach.

Removal of non-binding time-limits with "as soon as possible" and "case-by-case" commitments

1.3 It is of real concern that Ofcom is proposing to remove both the 15 working day aspiration for completing the enquiry phase and the non-statutory target for completing cases within six months.

(a) In relation to the 15 working days requirement (Current Enforcement Guidelines, paragraph 4.9), the Introductory Document states: "*although we will aim to complete an enquiry as quickly as possible, we propose instead that we would generally set a target for completing this process on a case-by-case basis*" (paragraph 2.12).

(b) In relation to the 6 month timeframe, Ofcom states: "*We think that in some cases a 6 month timeframe is too long and we should be more ambitious and aim to complete investigations more quickly wherever practicable, whereas in other cases it will be unrealistic to expect to complete an investigation within 6 months as we will need to undertake detailed evidence gathering and analysis … Therefore, while we always aim to conclude investigations as quickly as possible, we think it is better for us to work towards a realistic timeframe for completing an investigation on a case-by-case basis. We will generally be unable to give an indication of the likely timescale involved in completing an investigation at the point when we open the investigation, but, as noted above, we will provide updates on the progress of investigations, including when we expect to reach a particular milestone, and will also provide updates where this changes*" (Introductory Document, paragraphs 6.24-6.25) (emphasis added).

1.4 Our experience suggests that this approach is likely to lead to two key negative outcomes:

(a) less transparency about the timing of an investigation and its status; and

(b) longer investigations, for no good reason.

1.5 It is difficult to have confidence in Ofcom's purported claim that it wants to be "*more ambitious*" in its commitment to "*complete investigations more quickly wherever practicable*" when it is proposing to remove non-binding timing requirements in its Draft Regulatory Guidelines. This is especially so given Ofcom's acknowledgement that some investigations will "*have a relatively narrow focus, and can be completed relatively quickly*". If that is so, it is not clear why these non-binding, indicative timeframes are being removed.

1.6 We agree that in many cases 15 working days will not be sufficient to complete the enquiry phase. However, as Ofcom itself acknowledges, there are many cases where it will be more than adequate and may even be too long. In this connection, it is suggested that a standard 20 working day period should apply with up to four months (possibly longer) in more complicated cases.

Procedure – keeping the investigation confidential from the subject matter of the investigation

1.7 The Draft Regulatory Guidelines do not provide sufficient detail on the safeguards put in place when Ofcom does not inform the subject of an investigation that an investigation has been opened (Introductory Document, paragraph 2.17). In particular:

(a) How is this decision taken?

(b) Who is this decision taken by?

(c) What record is made of the decision? We consider that a record should be taken setting out the reason for making the decision, the concern that has been identified, and when it is anticipated that the concern will be resolved (and therefore should be reviewed).

(d) When is this decision reviewed? As a matter of natural justice and in light of the right to a fair trial, the decision should be reviewed on a regular basis to ensure that the subject matter of the investigation is informed as soon as possible that its conduct is under formal scrutiny, so that it can properly defend itself.

Draft information requests

1.8 It is not clear why Ofcom considers the risk of document destruction to justify ending its policy of ordinarily sending the parties an information request in draft. Generally speaking, and particularly where extensive or detailed data is being sought, it is sensible to discuss with the parties what sort of information is available within a reasonable timeframe and without requiring disproportionate effort to produce it. We consider that Ofcom should reverse this change and continue to follow the approach taken in the CMA's CA98 Guidance of usually providing the parties with a draft information request. We note that this is also the standard approach of other concurrent regulators.

Decision-making

1.9 We note that there is no proposal to augment the decision-making process in relation to regulatory enforcement. We consider that, whether legally required or not, Ofcom should ensure that it has strong internal checks and balances integrated into its decision-making frameworks, including peer review, collective decision-making and a "fresh pair of eyes" at the final decision-maker stage. These issues are discussed in more detail at paragraphs 2.15 to 2.21 below).

2. **Do you have any comments on the proposed draft Enforcement Guidelines for Competition Act investigations published alongside the consultation document?**

The CMA is the lead authority in relation to CA98 enforcement – its lead should be followed

2.1 Ofcom has not sought to explain why it is seeking to forge its own path as regards CA98 guidance. We consider that it should simply mirror the approach of the CMA, as set out in the CMA's CA98 Guidance.

2.2 We take this view for the following reasons:

(a) as well as enforcing the same substantive law as the CMA, Ofcom is bound by the same formal rules of procedure, as set out in the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (the "**CMA's Rules**"). It is not clear why Ofcom has not continued this theme of consistency into the discretionary elements of its CA98 procedure;

(b) the reforms to the concurrency regime made by the Enterprise and Regulatory Reform Act 2013 ("**ERRA** 2013") were "*intended to give the CMA a leadership role in the concurrency arrangements*" (*Explanatory Notes to the Enterprise and Regulatory Reform Act 2013* at paragraph 372). Ofcom's CA98 enforcement work can therefore be seen as complementary, and arguably subsidiary, to that of the central enforcement body, the CMA. We consider that this guiding concurrency

principle should mean that Ofcom should also follow the CMA's lead as regards the discretionary elements of its CA98 procedure;

(c) as discussed further below (see paragraphs 2.15 to 2.21), the reforms arising out of ERRA 2013 were also intended to implement an enhanced administrative regime, addressing perceptions of a lack of robustness in decision-making and potential for confirmation bias. Ofcom's decision-making framework fails to meet the standard set by the CMA;

(d) the higher level of CA98 enforcement output from the CMA means that rulings by the CAT on procedure are more often than not based on CMA cases. If Ofcom's procedures mirror those of the CMA, a CAT ruling on CMA procedure will be readily translatable to Ofcom, facilitating adherence to administrative law developments in relation to CA98 enforcement; and

(e) mirroring the CMA's procedure would allow Ofcom to draw directly on the deeper experience of the CMA in relation to CA98 enforcement. There is no need for Ofcom to keep elements of its procedure flexible until it has developed more case experience on a particular issue;

(f) mirroring the CMA's approach would also ensure consistency and facilitate a clear read-across over the whole landscape of CA98 enforcement. This is far preferable and more cost effective for business (and their advisers) than having to understand parallel sets of slightly different procedure and terminology in enforcing the same rules within the same legislative framework.

2.3 We consider, therefore, that Ofcom's approach in relation to competition enforcement should be to treat the CMA's approach as a minimum standard in this area. Ofcom should only depart from the CMA's CA98 procedure where it wishes to enhance the rigour, transparency or level of engagement on a particular issue, or where there are compelling reasons for taking a different approach (likely to be related to Ofcom's specific powers or to the characteristics of the communications sector). The Draft CA98 Guidelines should make it clear that where Ofcom is silent on a particular issue, it will follow the CMA's CA98 Guidance, unless there is a good reason for doing otherwise (which should be stated).

2.4 Observations related to this overarching point:

(a) We note that Ofcom is abandoning any targets in terms of the timing and deadlines of a CA98 investigation (paragraphs 2.18, 3.9 and 3.10 of the Draft CA98 Guidelines). Ofcom should follow the approach of the CMA as a minimum and in all cases produce an indicative administrative timetable, updating it as required, and giving reasons for the update (see paragraph 5.8 of the CMA's CA98 Guidance). Competition enforcement investigations are extremely burdensome for business at certain points in the investigation (for example, following receipt of a significant request for information, or when responding to a statement of objections), and the required effort typically falls on existing staff, over and above their day to day roles. In our experience, for these reasons and because CA98 investigations can last for years, businesses under investigation need to have a sensible estimate of major milestones in the investigation to facilitate their resource planning. The fact that, in many cases, the investigation may prove to be more complex than initially expected such that estimated timings have to moved back, is accepted. Nevertheless, it is in the interests of all that investigations are timetabled at the outset and efforts made to keep to deadlines, as far as possible.

(b) We note that Ofcom refers to leniency applications as "self-referrals" (paragraphs 2.12 to 2.15 of the Draft CA98 Guidelines). It would be preferable simply to use the CMA's terminology, widely used and understood in the context of CA98 enforcement. The same logic applies to all terminology.

(c) Ofcom states that it will be prepared to provide written or verbal updates, or to meet with the subject of the investigation "*where it will assist the investigation*" (paragraph 3.3 of the Draft CA98 Guidelines). This falls far short of the procedural baseline set by the CMA. It would also appear to be materially downgrading the degree of transparency and clarity provided for in Ofcom's current guidance (usually two state of play meetings, plus a third where a statement of objections is issued). We consider that Ofcom should follow the CMA in committing to offering case updates to businesses under investigation, as well as offering state of play meetings at key points in the procedure (see paragraphs 9.13 to 9.21 of the CMA's CA98 Guidance).

(d) Ofcom's discussion of "*Formal information gathering*" is notably thin in comparison to the corresponding section of the CMA's CA98 Guidance: 14 paragraphs/2 pages (paragraphs 3.12 to 3.28) in the Draft CA98 Guidelines, compared to 47 paragraphs/13 pages of the CMA's CA98 Guidance. Moreover, Ofcom's discussion of these powers offers little guidance and mostly simply summarises the law. These powers are central to the conduct of the pre-statement of objections phase of a CA98 investigation and Ofcom offers little insight into its approach. We consider that Ofcom should adopt the approach of the CMA on these issues, if only by confirming that it follows the CMA's CA98 Rules on these issues.

(e) Ofcom's Draft CA98 Guidelines contain no reference to the limitations on its formal information gathering powers. We consider that this omission renders the guidance imbalanced. Clearly, an adviser will know that Ofcom cannot seize or demand material which is not relevant to the subject matter of its investigation or which is protected by legal privilege. An adviser would also be aware of the privilege against self-incrimination. However, the value of the guidance to a lay person seeking to understand the position of a business under investigation is materially undermined by the lack of a presentation of all relevant considerations. We consider that Ofcom should follow the approach of the CMA, which has a full section on the limitations on its powers.

(f) The CMA's CA98 Guidance gives a clear explanation of the checks and balances which are in place for internal review, challenge and verification of its analysis (section 9). This transparency reflects the commitments made by the OFT and recorded by the Government in its response to the consultation which preceded enactment of ERRA 2013: the OFT stated that it would introduce "*Greater transparency of the checks and balances provided by lawyers and economists outside the case team, from the OFT's General Counsel's Office and the Office of the Chief Economist and Competition Policy to guard against perceived confirmation bias*" (BIS "*Growth, competition and the competition regime: Government response to consultation*" (March 2012) at page 56). There is nothing comparable in Ofcom's Draft CA98 Guidelines. We can see no reason why it is acceptable for Ofcom's procedures to be less robust and transparent than those of the OFT/CMA.

Robustness in the guidance

2.5 As an overarching comment, we note that statements in the Draft CA98 Guidelines about what Ofcom will or will not do are widely hedged with vocabulary such as "usually", "generally", "normally". This caution is in addition to the overarching disclaimer in the Introduction that the guidelines are not binding, are designed to be flexible and may be departed from (paragraph 1.5).

2.6 First, we consider that the wide degree of latitude which Ofcom affords itself risks materially undermining its overarching objective for the guidance review of "*increasing transparency and clarity*" (paragraph 1.6 of the Introductory Document). Secondly, we note that the CAT has recognised that, although guidance is "*no more than that*", it is

widely relied upon and there should therefore be "*good reasons*" for departing from it (see **Unichem v OFT** [2005] CAT 8 at paragraph 95).

2.7 In that context, we note that the legal effect of the caveat is questionable. Digressions from clear (even if hedged) statements in guidance are very likely to be result in challenges by parties to the procedural officer. Moreover, given the comments of the CAT regarding the status of guidance, departure from guidance creates a vulnerability to judicial review challenges, unless the departure is well reasoned and explained to the parties. Clarity of procedure and robustness in guidance is to the benefit of all concerned.

2.8 We consider that the appropriate tone for the Draft CA98 Guidelines would be to state in a clear and unequivocal manner what the authority will do, and then to depart from that statement only with good reasons which will be specific to the facts of a particular case. To the extent that a caveat is needed, it can be given as an overarching statement. As noted, we do not consider that Ofcom can justify giving itself a wide degree of latitude in its procedural approach in order to work out best practice though its casework, since it should be mirroring the CMA's CA98 procedure and drawing on the CMA's experience in any case.

Acknowledgement of the impact of the rights of defence

2.9 The judgment of the CAT in **Pernod Ricard v OFT** [2004] CAT 10 clearly established that section 60 CA98 requires issues of procedure under UK competition law to be decided consistently with the treatment of corresponding questions under EU competition law. In reaching this conclusion, the CAT quoted Government comments during the CA98 parliamentary debates that section 60 was intended to import "*high level principles, such as proportionality, legal certainty and administrative fairness*" into domestic law (see paragraph 231 of the CAT's judgment, quoting Hansard, 25 November 1997, column 961).

2.10 The obligation on the enforcement body to respect the rights of defence is long established in EU law, being:

> "*an application of the fundamental principle of Community law which requires the right to a fair hearing to be observed in all proceedings, even those of an administrative nature, and lays down in particular that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty*" (Joined Cases 100-103/80, **Musique Diffusion Française v Commission** (EU:C:1983:158) at paragraph 10).

2.11 These requirements are now enshrined in the European Charter of Human Rights. Very recently this principle has been restated in the context of merger control enforcement in Case T-194/13, **United Parcel Service v Commission** (EU:T:2017:144):

> "*… observance of the rights of the defence is a general principle of EU law enshrined in the Charter of Fundamental Rights of the European Union which must be guaranteed in all proceedings*" (paragraph 199); and
>
> "*… the right to a fair hearing, which forms part of the rights of the defence, requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim*" (paragraph 200).

2.12 Set in that context, Ofcom's objective of giving "*those we are investigating a fair opportunity, but no more than a fair opportunity, to make representations to us*"

(paragraph 1.4 of the Draft CA98 Guidelines, repeated at paragraph 3.2) does not properly acknowledge the legal rights of those under investigation. The guidance should recognise expressly that Ofcom is required, as a matter of UK/EU human rights, administrative and procedural law, to respect the principles of procedural fairness and the parties' rights of defence.

2.13 Moreover, the phrase "*no more than a fair opportunity*" indicates a begrudging, reluctant approach and creates a negative impression as regards Ofcom's willingness to be open and transparent in its dealings with business. It is important to recognise that transparency is in the interests of all concerned. As regards the facts, transparency provides the parties with an opportunity to correct misconceptions, or produce evidence on issues which they had not realised were in play. As regards legal and economic analysis, not only is it a legal right of the parties to know the case against them, but openness during the investigation will flush out counterarguments and test the case team's assessment. Whilst this process may slow down the investigation, such exchanges ultimately result in more robust outcomes, which ought to be less vulnerable to strong challenge from the parties on appeal because the key counter-arguments are already known and have been dealt with in the decision. Transparency and engagement should be seen as an integral part of the respect of the parties' rights of defence, not a procedural inconvenience.

2.14 It is not clear that Ofcom has fully taken on board its obligations in relation to the rights of defence. We note the following:

(a) As regards engagement with the parties, we note that Ofcom proposes to meet with the parties only "*where it would assist the investigation*" (paragraph 3.3). For the reasons noted, we consider that Ofcom should revert to a much clearer statement of how and when it will engage with the parties under investigation, including a commitment to state of play meetings. As explained above, the CMA approach should be treated as the minimum standard in these circumstances.

(b) Paragraph 4.24 of the Draft CA98 Guidelines states that where, after the issue of the statement of objections, Ofcom receives additional facts which it proposes to rely on in its final decision, it "*may put this evidence to the subject of the investigation and give it the opportunity to respond*" (emphasis added). However, this is not a matter for Ofcom's discretion: the rights of defence require that any such evidence is disclosed to the parties. We note that the General Court has recently annulled a merger control ruling by the EU Commission because the final decision relied on an econometric model which differed from that used in the statement of objections, and which the Commission had failed to disclose to the parties in breach of their rights of defence (see **United Parcel Service**, cited above). This is an example of the type of new information which should be disclosed to the parties in a letter of facts (possibly in a supplementary statement of objections if the new model changes the legal analysis of the infringement).

(c) Paragraph 4.25 of the Draft CA98 Guidelines discusses the situations in which a supplementary statement of objections will be issued, referring to changes in the scope of the infringement. Our experience indicates that supplementary statements of objections are more commonly required where the parties' counter-arguments to the assessment in the statement of objections have required a reworking or strengthening of the case team's reasoning. Ofcom should make it clear that it recognises that a supplementary statement of objections might also be required where there is no change in the nature of the infringement but a change in its reasoning.

(d) In relation to settlement procedures, although the rights of defence are voluntarily partially waived by the parties, they cannot be ignored. We note that the discussion of the access to the file process (paragraph 5.18 of the Draft CA98

Guidelines) suggests that the extent of disclosure will be driven by administrative considerations such as "*the procedural and resource saving efficiencies*" and "*the volume and complexity of the evidence on the file*". The rights of defence dictate that the primary consideration should be to ensure that the settling party has had access to the key evidence on which Ofcom plans to rely. Similarly, the parties must be given an opportunity to make representations on the statement of key facts and the access to the file process: the guidance should include express acknowledgement of this point.

(e) As regards complainants, it is stated in paragraph 2.27 of the Draft CA98 Guidelines that where Ofcom decides not to open an investigation, it will not normally give complainants an opportunity to comment. This approach is inconsistent with both the CMA's baseline approach (see paragraphs 10.3 and 10.4 of the CMA's CA98 Guidance) and the legal rights of complainants ("… *we regard the failure to allow [the complainant] to make observations before closing the file on its complaint as a breach of the principle of administrative fairness*" – see **Pernod Ricard**, cited above, at paragraph 253).

Decision-making structures

2.15 The issue of proper and robust decision-making was an issue in the consultations leading up to the merger of the OFT and the Competition Commission pursuant to ERRA 2013. Concerns were raised about whether it was compatible with the right to a fair hearing to have the same body act as investigator, prosecutor and adjudicator. The possibility was mooted of moving from an administrative system to a prosecutorial system, with the CMA and sectoral regulators presenting the case for finding an infringement before the CAT, which would rule on the outcome.

2.16 In the end, the UK government decided "*to embed an enhanced administrative approach to antitrust enforcement, involving improvements to the speed of the process and the robustness of decision-making, addressing perceptions of confirmation bias*" (see the BIS consultation response of March 2012 (cited above) at page 9). It recorded the OFT's intention to implement "*changes to decision-making in antitrust cases to increase the robustness of decisions and reduce any perception of confirmation bias by introducing collective judgement* [sic] *in decision-making with separation between responsibility for the investigation of the case and for the final decision*" (paragraph 6.21, final bullet). Confirmation bias is the risk that the final outcome of the investigation will be skewed towards taking enforcement action, in order to demonstrate that the earlier decisions to initiate the investigation and to issue a statement of objections were justified.

2.17 The CMA's Rules were amended to include a requirement that one decision-maker will oversee the investigation from deciding whether to initiate proceedings to deciding whether to issue an statement of objections, and a second decision-maker will take over once the statement of objections has been issued. The latter must be a different person to the former, and must comprise at least two individuals (Rule 3 of the CMA's Rules).

2.18 The changes made by the OFT in the run-up to the formation of the CMA were continued by the CMA. CA98 decisions up to and including the decision whether to issue a statement of objections are taken by the Senior Responsible Officer, who will be a senior CMA staff member, not usually a board member. From the point after a statement of objections is issued, however, decisions are taken by a Case Decision Group ("**CDG**") appointed for the particular matter. The CDG comprises three people, being "*senior CMA staff or board members and/or any member of the CMA panel. At least one member of the [CDG] will be legally qualified*" (paragraphs 11.30 to 11.33 of the CMA's CA98 Guidance) .

2.19 As regards other concurrent regulators, we note that:

(a) in June 2014, Ofgem formed the Enforcement Decision Panel (EDP), which currently numbers seven members. CA98 final decisions are taken by a case decision panel which will comprise two EDP members plus one senior member of Ofgem staff. "*The EDP has been created to allow cases to be decided by dedicated specialists (who are employees of the Authority specifically employed for EDP duties), with an easily visible separation between the investigation and decision-making functions*" (Ofgem, "*Committees of The Authority - Terms of Reference and Non-Executive membership",* 14 April 2016). In this way, Ofgem has adopted the rigour of bringing in completely separate decision-makers to take the final decisions on CA98 enforcement activities;

(b) since April 2016, the Civil Aviation Authority has been able to draw on Ofgem's EDP for its own CA98 decision-making;

(c) The Financial Conduct Authority and Payment Systems Regulator have created a Competition Decisions Committee ("**CDC**") Panel. CA98 enforcement decisions following the decision to issue a statement of objections are taken by three people drawn from the CDC Panel – again with no involvement of staff members.

These concurrent regulators have all adopted decision-making procedures which are at least as robust and rigorous as those of the CMA, and arguably stronger.

2.20 By contrast, Ofcom has gone no further than meeting the bare requirements in the CMA's Rules. In particular, we note the following:

(a) There is no provision for the introduction of a "fresh pair of eyes" in the Ofcom final decision-making group ("**the post-SO decision making body**"). The pool of potential people from which to draw the post-SO decision-maker are full time Ofcom personnel, heavily involved in and presumably well informed about the full range of its activities, including CA98 enforcement work. There is no-one available for selection as the post-SO decision-making body who is clearly independent of the case team or the decision-maker in the earlier stage of the investigation.

(b) Ofcom will normally appoint two people to form the post-SO decision-making body, rather than three. Notwithstanding that this meets the CMA's Rules, this is poor practice since it generates the risk of a deadlock (there is no indication that either person has a deciding vote). There should be at least three people in the post-SO decision-making body.

(c) The two new appointees will come from exactly the same group of Ofcom personnel as the earlier decision-maker - senior members of Ofcom's executive with appropriate Board-delegated authority (see paragraphs 4.4 and 4.5 of the Draft CA98 Guidelines). We assume that "Ofcom's executive" does not mean the executive Board members, of which there are only three (which would be too small a pool from which to draw). Clarification is required in the Draft CA98 Guidelines of who the "Ofcom executive" comprises for these purposes.

(d) Ofcom makes no requirement that at least one member of its post-SO decision-making body is legally qualified. We consider that such a requirement should be adopted, in line with the CMA's approach. The post-SO decision-making body should include a senior lawyer with knowledge of competition law.

2.21 There is no clear reason why Ofcom should not implement the same enhanced administrative procedural approach as the CMA and, *a fortiori*, other concurrent regulators. We consider that Ofcom's CA98 decision-making framework does not stand up to comparison with that of its peers.

3. **Do you have any comments on the proposed draft Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences published alongside the consultation document?**

3.1 We consider that the points made above in relation to the Draft Regulatory Guidelines and the Draft CA98 Guidelines should be read across into the Draft Broadcasting Act Guidelines, with a similar approach adopted.

4. **Do you have any comments on the proposed draft Advice for complainants document published alongside the consultation document?**

4.1 We note that there is no clear explanation in either the Draft CA98 Guidelines or the Draft Complainants Guidelines of what a complainant who makes a formal complaint to Ofcom about CA98 issues should expect. Moreover, as noted above, the legal rights of complainants do not appear to be reflected accurately in the Draft CA98 Guidelines. We consider that it would fulfil the objective of Ofcom's revised guidance to increase transparency and clarity if there was a statement about the position of complainants at the different stages of an investigation.

Ashurst LLP
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