BT's response to Ofcom's consultation document

"Ofcom's approach to enforcement
Consultation on revising the Enforcement Guidelines and supporting documents"

NON-CONFIDENTIAL VERSION

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1. Introduction

Ofcom's consultation on its enforcement process is very timely, and a good opportunity for Ofcom to update its 2012 Enforcement Guidelines to reflect recent developments in regulation and regulatory practice. BT therefore welcomes the invitation to comment on Ofcom's proposals.

Enforcement processes have an important role to play in helping to drive compliant behaviour on the part of those who are subject to regulatory rules imposed to protect the interests of consumers and promote competition. But they have an equally important role to play as a system of checks and balances on the exercise of regulatory powers so as to ensure consistency, fairness, and proportionality of regulatory intervention.

It is therefore essential that Ofcom's guidelines articulate the processes that Ofcom will operate with as great a degree of certainty and transparency as is possible so that they can then be operated consistently, and with all parties having clear expectations of how the processes will operate. This is an opportunity for Ofcom to codify its enforcement processes in ways that are world class in terms of efficacy and fairness. We also support the intent that they should drive for efficiency – but this has to be a secondary consideration. Fairness must not be sacrificed on the altar of efficiency.

BT has participated fully with the other members of the Enforcement Reform Group (ERG) to produce the ERG's joint reply. BT adopts and supports the content of that submission. In this response, BT builds on and supplements that response with a number of additional observations and submissions of its own. These are conditioned by BT's experiences of regulatory and competition law enforcement over the last few years and by work we have undertaken to compare Ofcom's proposed processes with those of other enforcement authorities.

2. Additional Submissions on Ofcom's Proposed Enforcement Processes.

1. Draft Information Requests

Paragraph 3.14 of the CA98 Guidelines states that Ofcom "*may provide the recipient of a written information request with a draft for comment before it is issued in final form. We will decided whether it is appropriate to issue a draft on a case by case basis"*. We note that there is no corresponding paragraph in the Enforcement Guidelines.

Paragraphs 3.43 to 3.45 of the ERG response set out the ERG's views on the proposal not to routinely issue draft information requests. To be clear, BT considers that the assumption should be that Ofcom will, in both its ex ante and ex post investigations, provide draft information requests in all circumstances unless doing so would prejudice the investigation or the amount of information requested was so small as to make such a process unnecessary.

This is of particular importance given that administrative penalties may be imposed on companies for failing to comply with deadlines in information requests (as demonstrated recently by the CMA's decision to impose a penalty of £10,000 on Pfizer Limited for failing to provide information by the requested date). BT's view is, therefore, that this is a key requirement to ensure that the information request process remains fair and does not create an undue risk of penalties.

2. *Engagement With CPs*

BT does not consider that the Guidelines provide for sufficient engagement with the subject of the investigation:

(i) paragraphs 3.4 and 3.3 of the Enforcement Guidelines and CA98 Guidelines respectively state that "*where it would assist the investigation, we will be prepared to meet with the subject of an investigation and complainants, and/or provide written or verbal updates"*.

BT considers that it is inappropriate for Ofcom to propose that any meetings with the subject of an investigation be subject to the condition that Ofcom pre-emptively judges that it will assist the investigation. This contrasts with the approach of the CMA, for example, which states that it "will also offer each party under investigation separate opportunities to meet with representatives of the case team"[1]. Engagement with the complainant and subject of an investigation is beneficial to both Ofcom and the subject of the investigation. Where Ofcom is investigating a responsible major communications provider[2], genuine dialogue can be expected to help progress rather than hinder the investigation and help drive efficiency, whilst ensuring greater fairness and transparency for the communications provider. By closing down opportunities for engagement, Ofcom is limiting its opportunities to learn more about the case.

(ii) Unlike other regulators[3] who provide indicative case timetables on their websites setting out, for example, when the regulator expects to conclude the information gathering stage of the investigation, Ofcom states in its Guidelines that "*we are generally unable to give an indication of the likely timescale involved in completing an investigation at the point when we open the investigation"*. BT sees no reason why Ofcom is unable to publish indicative timetables on its website, when other regulators are able to do so.

[CONFIDENTIAL.] BT suggests that if engagement with the parties is to be of value to Ofcom or to the other party, i.e. if it is to help the process run smoothly, efficiently and fairly, Ofcom needs to be willing to engage in meaningful dialogue and answer valid questions at any update meetings.

BT also opposes the proposal that parties under investigation need not be invited to submit representations before the scope of an investigation is amended. Ofcom's Competition Act investigation of the Complaint from TalkTalk Telecom Group plc against BT Group plc about alleged margin squeeze in superfast broadband pricing (CW/01103/03/13) is a good example of why it would be unreasonable (and unlikely to drive efficient resolution of the investigation) not to consult. In that case, Ofcom opened an investigation into the pricing of BT's superfast broadband services (BT Infinity). Following the launch of BT Sport, another complaint was made alleging that the additional costs associated with that service would exacerbate an already existing margin squeeze.

The additional allegation was not a minor adjustment of the scope of the existing investigation. It changed the essential nature of the case, and impacted significantly on the way in which any assessment of margin squeeze would have to be undertaken. In such circumstances, fairness dictates that the party under investigation faced, essentially, with a whole new set of allegations, should be

[1] Paragraph 9.15 of CMA8. This approach is also adopted in the FCA and ORR Guidance.
[2] See Paragraph 3.1(a) of the Enforcement Reform Group response.
[3] For example, paragraph 4.20 of ORR's CA98 Enforcement Guidelines states "*We will publish indicative timetables for on-going investigations on our website"*. The CMA's website also includes indicative timetables when new investigations are opened.

entitled to make representations. It would be as unfair to allow the new allegations (which would underpin the decision to extend the scope of the investigation) to stand on their face as it would be to open an investigation without allowing the party against whom the complaint has been made to make initial representations.

3. Procedural Fairness

As flagged in the Annex to the Enforcement Reform Group response, BT is concerned by statements in Ofcom's Enforcement Guidelines and CA98 Guidelines that Ofcom "*will give those we are investigating a fair opportunity, but no more than a fair opportunity, to make representations to us"*. As currently drafted, the Guidelines suggest that Ofcom believes that it can define narrowly what constitutes a "*fair opportunity*" and that if it determines that sufficient information has been provided to the subject of an investigation so as to appear to be fair, no further information should be provided. This appears to be making efficiency of case management the pre-eminent consideration.

BT suggests that the Competition Appeal Tribunal and Courts may well not agree with a public authority's view as to procedural fairness, especially where the authority has committed to doing the bare minimum. For example, in R (Eisai Limited) v NICE, which concerned the judicial review of guidance issued by NICE in relation to the use of a particular drug, the Court of Appeal recognised that NICE's procedures involved "*a remarkable degree of disclosure and of transparency in the consultation process"* [4] (which on its face would, on Ofcom's wording, be sufficient). Nonetheless, the Court of Appeal determined that in the circumstances procedural fairness required disclosure of additional material to enable the consultees to fully check and comment.

BT contends that Ofcom's approach is likely to risk unnecessary and costly litigation before the Competition Appeal Tribunal. The NICE case illustrates that the courts will expect public authorities to err on the side of caution in meeting the requirements of procedural fairness and should not aim to exactly hit a fairness threshold simply to save resources. BT therefore requests that Ofcom amend its Guidelines to confirm that it will carry out is investigations in a procedurally fair manner, taking into account the interests of stakeholders, according to the standards of administrative law.

4. Oversight

BT is particularly concerned by Ofcom's proposals in relation to oversight and decision making. Paragraphs 3.49 to 3.57 of the ERG response set out our opposition to Ofcom's proposals. Ofcom's key driver here appears to be saving of resources, but we note that Ofcom is already operating processes that are "leaner" than other authorities.

By way of example, BT notes that Competition Act investigations undertaken by Ofcom have less senior executive oversight than investigations run by the CMA and other concurrent regulators:

(i) Ofcom nominates one senior member of Ofcom's executive with appropriate Board delegated authority ("**authorised persons**") to decide whether to issue a Statement of Objections. This differs from the CMA's practice who will nominate a Senior Responsible Officer who is responsible for opening a formal investigation and issuing a Statement of Objections but will consult two other senior officials at key stages of the investigation and the Case and Policy Committee ("**CPC**") which operates under delegated authority from the CMA Board will oversee and scrutinise the development of CMA casework[5]

[4] [2008] EWCA Civ 438 paragraph 66

[5] Paragraph 9.10 and footnote 106 of the CMA's CA98 Guidance CMA8.

(ii) Following the Statement of Objections, two authorised persons will be nominated to make the final decision. Again, standard practice in Competition Act investigations is that the final decision will be made by a panel of three[6] authorised persons[7]. For the CMA this the Case Decision Group is appointed by the CPC to be the responsible

The use of Ofgem's decision making panel, the Enforcement Decision Panel, is shared with the Civil Aviation Authority for the purposes of deciding Competition Act cases.[8]

BT suggests that this review of its processes is an opportunity for Ofcom to align itself with the best practices of other authorities with competition law jurisdiction.

In relation to regulatory decision making, we note that Ofgem adopts the same approach to ex ante and ex post investigations. BT considers that this would be a good model for Ofcom to adopt where there is overlap between regulatory and competition law matters (i.e. in terms of the matters being investigated and the potential consequences).

To be clear, BT does not consider that it would be fair or reasonable for only one decision maker to determine a regulatory investigation. A second decision maker will bring a level of rigour to the decision making process that no one decision maker can bring alone. Having (at least) two decision makers means that there will be more than one perspective on these typically complex matters. It also means that if one decision maker has doubts or concerns about the case, there is a mechanism to consult with/bounce thoughts off, another decision maker. It may also reduce the pressure on the decision making individual if they do have any doubts about whether to uphold the draft decision that many of their colleagues may have been working on for months. In other words, it provides a forum for the decision makers to share opinions and reach a consensus.

Finally, in this regard, BT has had experience of oral hearings in both a competition law investigation (Wholesale Calls) and a regulatory investigation (Next Generation Text Relay). These are formal hearings, which require due process to be followed. It is wholly unreasonable to expect a single decision maker to be able to chair the hearing, ensure that the legal formalities of process are being followed and to be fully engaged with all the substance of the matters being put before them.

3. Additional Submissions on Ofcom's Proposed Regulatory Investigations Settlement Process

As indicated in the ERG Response, BT welcomes Ofcom's proposal to formalise the settlement process that it has trialled in recent months, including the tiered discount structure with greater discounts available for early settlement. Based on our experience of the process to date, we do however have a number of additional concerns around how the regime will work in practice, particularly as regards consistent application, and as to the adequacy of the safeguards to ensure procedural fairness.

[6] Not including the Senior Responsible Officer.
[7] The CMA's Case Decision Group is made up of three members (see paragraph 11.30 of the CMA's CA98 Guidance CMA8). The FCA's Competition Decisions Committee will comprise *at least* three people (see paragraph 5.2 of the FCA's CA98 Guidance). Ofgem's decision making Panel consists of three members of the Enforcement Decision Panel (see paragraph 6.15 of Ofgem's Enforcement Guidelines).
[8] https://www.ofgem.gov.uk/publications-and-updates/ofgem-and-civil-aviation-authority-work-together-enforcement

1. *Availability of early settlement and the full 30% discount*

Whilst not all cases will be suitable for settlement there should be a presumption that where parties are willing to settle, Ofcom will look to do so at the earliest possible stage. Moreover, as soon as Ofcom reaches a stage where it considers that settlement may be possible it should inform the parties.

In all cases Ofcom will need to do some ground work to establish the relevant facts both in order to determine whether an infringement has been committed and, if so, to calculate the possible fine. The Guidelines should however make clear that Ofcom will be mindful in conducting that initial work not to reach a stage where the full 30% discount is not available because Ofcom sees little procedural efficiency in issuing a summary of the case against the party rather than a full provisional breach notification. [CONFIDENTIAL]

2. *Consistency*

The Guidelines on settlement are brief and high level and are thus capable of differing application by different case teams. Engaging in settlement discussions may be a sensitive subject for a party under investigation, and, indeed, it may be unsure as to whether this is the right thing to do. For the regime to achieve maximum efficacy and fairness, it is important that the party under investigation can be sure that the Guidelines will be consistently applied within Ofcom, and it must be able to understand clearly how the process will unfold. [CONFIDENTIAL]. Ofcom should therefore explain in more detail, possibly with the use of some worked examples, exactly how a settlement process would work in practice.

3. *Publicity*

The Guidelines refer briefly to communications that Ofcom may issue. At least for infringements of consumer law, Ofcom will also issue a press release. It is important for Ofcom to appreciate that in many cases this will be as important, if not more important, to the settling party as the text in the final decision. It is welcome that Ofcom in practice provides a copy of the press release before publication (and BT suggests that this should be confirmed in the Guidance) however the Guidance should go further and provide that Ofcom will give the party an opportunity to comment on the press release.

4. *Interaction with fining guidelines*

The lack of transparency in the fining guidelines makes it challenging to assess the value of any discount offered. We urge Ofcom to give greater transparency as to how fines are calculated (beyond the high level descriptive narrative provided in the final decision) so that it is clearer that a discount has been applied (rather than discounting against an uplifted fine).

Whilst ostensibly outside the direct scope of this consultation, BT would mention that as a result of the lack of transparency of how fines are calculated, it is difficult to see the extent to which Ofcom differentiates, for example, between CPs who have taken all reasonable measures possible to secure compliance and remedy the consequences of any non-compliance, and CPs who have had a less rigorous approach to compliance. Clearer differentiation of fines, accompanied by clear messages that credit will be given to those who are in the former category would, BT believes, help incentivise compliant behaviour in the first place, as well as incentivising CPs to take action themselves to remedy any unintended non-compliances.

5. *Procedural safeguards*

BT notes that there is no effective process to resolve disputes relating to procedural fairness, and consider this to be a significant flaw in the proposed settlement regime. BT suggests that there should be a procedural adjudicator to whom the investigated party can appeal to in the event of a disagreement over fairness of the process. In line with the proposals at paragraph 3.30 et seq of the ERG response, BT suggests that recourse to the Procedural Officer should be available in such circumstances.

6. *Settlement Discussions – Admissions*

BT would like to amplify the submissions in the ERG response at paragraph 3.73 et seq.

Paragraphs 5.33 of the Enforcement Guidelines and 5.28 of the CA98 Guidelines state, in the context of settlement discussions which are unsuccessful, that "*the subject of the investigation would not have entered into the binding settlement agreement and therefore would not have made any formal admissions"*.

This approach conflicts with that of the CMA. Paragraph 14.22 of the CMA's Guidance states that "*any admissions made during failed settlement discussions will not be disclosed to other businesses involved in the investigation or the Case Decision Group"*. This approach is reflected in the CA98 Guidance of other concurrent regulators.[9]

As a result of past experience, BT does not consider that Ofcom's proposed approach reflects the realities of the settlement negotiations, which are conducted in large part orally. Ofcom should be clear in its Enforcement Guidelines and CA98 Guidelines that, in the event that the subject of an investigation makes oral admissions which are documented, it will not rely on such statements in the event that settlement discussions collapse. Also, Ofcom would benefit from such this approach – settling parties are more likely to speak freely during settlement negotiations if they know that this is the case.

4. Directions under General Condition 20.3

BT fully supports Ofcom's aim of providing greater clarity and consistency in relation to call-blocking and revenue retention orders under GC20.3. The effective use of such orders can be a significant aid to reducing fraud and nuisance calls. However, there are often complex commercial arrangements involved and Ofcom's order will not normally be directed to the party responsible for the undesirable behaviour. This can lead to confusion and delay in resolving any disputes that arise as a consequence of the order, and can leave innocent third parties at risk of financial loss. As stated in the Enforcement Reform Group response, we consider that a separate review of the whole process surrounding the implementation of these orders is necessary and BT therefore urges Ofcom to conduct such a review and consultation.

An industry-wide approach is needed to ensure the smooth operation of these enforcement orders. BT believes that a separate consultation should encompass the commercial, operational and legal

[9] For example, paragraph 6.18 of the FCA's CA98 Guidance states that "We would expect to hold any settlement discussions on the basis that neither we nor the party concerned would seek to rely against each other on any admissions or statements made in the course of settlement discussions if settlement discussions fail and the matter becomes contested."

impacts of blocking and retention orders. Ofcom should consider the effects of such orders once in place and when they are withdrawn. For example, in 2016 Ofcom issued a Direction requiring BT and others temporarily to stop traffic and retain payments due to a company [CONFIDENTIAL]. This was done, and the order was renewed while Ofcom undertook its investigation. However, because the traffic ceased, Ofcom lifted the blocking order before its investigation was complete. BT was then subject to legal action by [CONFIDENTIAL] to recover the money, while BT's customers were the victims of the alleged fraud. BT strongly believes that there needs to be a proper system in place for both issuing and withdrawing these Directions, to avoid the risk of this happening again.

The draft Guidelines state that these Directions will be used on an exceptional basis, where there is a clear risk of consumer harm. Unfortunately, the parties most often responsible for such behaviour are not the CPs that carry the traffic, but specialised service providers, whose response to any enforcement action is frequently to dissolve and reappear under another name, with both CPs and end customers left out-of-pocket. They are also most likely to "spoof" their CLIs, so that when one number range is blocked, the service reappears on another. This could lead to multiple number ranges being blocked, which is inefficient in terms of number husbandry and puts an increased burden on limited network resources.

Ofcom's enforcement consultation and its proposed guidelines are not the best place to address such matters. BT therefore urges Ofcom to undertake a wider-ranging consultation to consider all aspects of call blocking and revenue retention.

5. Ofcom's draft Broadcasting Act Guidelines

BT considers Ofcom's proposal to create separate guidelines in relation to Ofcom's procedures for investigating breaches of competition-related conditions in Broadcasting Act licences ("Broadcasting Act Guidelines") to be sensible. BT agrees that adding these guidelines to a sector-specific suite of documents will make it easier for stakeholders to find information on how Ofcom will conduct enforcement activities in relation to broadcasting.

BT also agrees with Ofcom's proposal broadly to model the draft Broadcasting Act Guidelines on its draft Enforcement Guidelines. This not only makes sense given Ofcom's statutory duties to act consistently, but is also likely to help stakeholders on a practical level. Designing effective internal processes to respond to investigations will be easier where Ofcom's procedures in enforcing different regulatory regimes are aligned.[10]

However, beyond the essential procedures, BT's view is that Ofcom is at risk of missing an opportunity to provide additional much-needed clarity in this area. Investigations in relation to possible breaches of competition-related conditions in Broadcasting Act licenses have historically been rare and, as Ofcom notes, it has never imposed a statutory sanction for a breach.[11]

Accordingly, BT believes that it would be appropriate for Ofcom to provide greater transparency in the draft Broadcasting Act Guidelines of how it would grapple with the competition-related issues it would inevitably encounter in pursuing a case in this area. This can be contrasted with Ofcom's use

[10] Please note that where the Broadcasting Act Guidelines and the Enforcement Guidelines align, any other comments BT has are captured elsewhere in this response or in the ERG response

[11] See Paragraph 4.6 of the Consultation

of its competition law powers, where those involved can refer to the extensive guidance and decisional practice of the European Commission and the UK's concurrent regulators.

BT would therefore invite Ofcom to confirm, and set out in the Broadcasting Act Guidelines, that it will take an orthodox approach, in line with the decisional practice and guidance that has developed over time in relation to competition law. One way to build this into the draft Broadcasting Act Guidelines would be to follow the example of Ofgem at paragraphs 4.34 – 4.36 of the Ofgem Enforcement Guidelines[12]. This sets out the sources of information Ofcom may consider when conducting investigations. The sources include, among other things, expert economic analysis, market data, and statistical reports.

BT suggests that it would be helpful for Ofcom to add a similar section to the draft Broadcasting Act Guidelines, clarifying what sources of information it would expect to gather in the event of an investigation, and the types of analysis it would conduct in order properly to grapple with competition-related issues.

- END -

[12] https://www.ofgem.gov.uk/system/files/docs/2016/12/enforcement_guidelines.pdf