
Ofcom's approach to enforcement

Consultation on revising the Regulatory Enforcement Guidelines

[Consultation on revising the Regulatory Enforcement Guidelines](#) – Welsh overview available

CONSULTATION:

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Contents

Section

1. Overview	1
2. Introduction	2
3. Proposed changes to the Regulatory Enforcement Guidelines	4
4. Impact assessment and equality impact assessment	9

Annex

A1. Responding to this consultation	11
A2. Ofcom's consultation principles	14
A3. Consultation coversheet	15
A4. Consultation questions	16

1. Overview

We are consulting on a proposed revision of our Regulatory Enforcement Guidelines to include new enforcement powers and make them easier to understand and follow.

Ofcom is the independent regulator, competition authority and designated enforcer of consumer protection law for the UK communications sector. In this role we may need to take enforcement action in the interests of citizens and consumers, and where appropriate to promote competition. Our Regulatory Enforcement Guidelines set out how Ofcom will approach the enforcement of regulatory requirements and consumer protection law relating to the industries for which we are responsible.

What we are proposing – in brief

Expanding the Regulatory Enforcement Guidelines to cover new enforcement powers. We propose that the revised guidelines will apply to Ofcom’s enforcement activity in three new areas:

- obligations placed on video sharing platforms under Part 4B of the Communications Act 2003;
- requirements imposed on operators of essential services for the digital infrastructure subsector under the Network and Information Systems Regulations 2018; and
- the revised framework for protecting the security and resilience of telecoms networks and services in the UK as set out in the Telecommunications (Security) Act 2021.

Restructuring the Regulatory Enforcement Guidelines to make them easier to follow. We propose to move much of the material previously contained in technical and legal supporting footnotes to regime-specific annexes, to make it easier to understand the application of the range of Ofcom’s different enforcement powers. The section on settlement has also been simplified, as we consider that this process can be set out more succinctly.

Updating and clarifying the text of the Regulatory Enforcement Guidelines to reflect our experience of running investigations in practice. The breadth of our regulatory duties means that the appropriate procedural approach can vary from case to case. We propose amendments to the guidelines intended to:

- recognise where the wider range of regulatory powers places different procedural obligations on Ofcom;
- reflect our day-to-day experience of enforcement investigations; and
- remove repetition and clarify the procedural steps we intend to follow.

Including information about civil liability for a breach of regulatory requirements. In certain circumstances, persons who sustain loss or damage as a result of a breach of regulatory requirements imposed by Ofcom may bring proceedings directly against the relevant company, but must first gain Ofcom’s consent to do so. We propose to include in the guidelines an explanation of the process for applying for consent and how Ofcom will approach such requests.

2. Introduction

Ofcom's approach to enforcement

- 2.1 Ofcom is the independent regulator, competition authority and designated enforcer of consumer protection law for the UK communications sector. Ofcom takes enforcement action across a number of industries and is able to use a range of administrative powers granted by, amongst others, the Communications Act 2003 (the 'Communications Act'), the Postal Services Act 2011 (the 'Postal Services Act'), and consumer protection legislation. Since our last review of the Regulatory Enforcement Guidelines in 2017, Ofcom has also been given a regulatory remit under the Network and Information Systems Regulations 2018 and the Telecommunications (Security) Act 2021. Ofcom also has enforcement powers under these areas.
- 2.2 It is important that any such enforcement action is conducted fairly and transparently, that the subject of the investigation has a fair opportunity to respond to Ofcom's case as part of the administrative process, and that cases are completed efficiently and as promptly as possible.
- 2.3 The Regulatory Enforcement Guidelines set out how Ofcom will approach enforcement of regulatory requirements relating to electronic communications networks and services, postal services and consumer protection legislation. The Regulatory Enforcement Guidelines were last updated in 2017, adopting changes at that time to reflect new enforcement powers, provide greater clarity around when and how we would publicise investigations, and introduce a procedure for reaching settlement of investigations.
- 2.4 We are now proposing to revise the Regulatory Enforcement Guidelines, to:
- a) expand the Regulatory Enforcement Guidelines to cover our new enforcement powers with respect to video sharing platforms and operators of essential services for the digital infrastructure subsector, and to reflect changes introduced by the Telecommunications (Security) Act 2021;
 - b) restructure the Regulatory Enforcement Guidelines to make them easier to follow by simplifying the text where appropriate, removing repetition, refining the explanation of the settlement process, and creating regime-specific annexes that set out how the guidelines apply to different statutory powers within their scope;
 - c) update some of the text to reflect our experience how we usually run investigations in practice, and allow for the different circumstances of the range of investigations that we carry out; and
 - d) include an explanation of the process for applying to Ofcom for consent to bring a civil procedure against a company that we regulate, and how we will approach such applications.

- 2.5 The proposed changes are described in more detail below. We have also published a proposed revised version of our Regulatory Enforcement Guidelines alongside this consultation.

3. Proposed changes to the Regulatory Enforcement Guidelines

Expanding the Regulatory Enforcement Guidelines to cover new enforcement powers

- 3.1 We propose to clarify the scope of the Regulatory Enforcement Guidelines to include new enforcement powers that we have gained since the last time the guidelines were reviewed. For each new regulatory power, we propose to:
- a) include the relevant regulatory requirements in the section 'What do these Guidelines cover?'; and
 - b) provide a separate annex setting out the legislative provisions supporting key parts of the enforcement process for each of these powers, highlighting notable additional points or exceptions relating to that process.
- 3.2 We intend to follow the same approach when proposing to amend the Regulatory Enforcement Guidelines in the future to reflect further changes to Ofcom's regulatory powers. We also propose to apply this approach to the existing regulatory powers already covered in the Guidelines. This is discussed further in paras 3.11 to 3.14 below.
- 3.3 In the current instance, we propose to amend the Regulatory Enforcement Guidelines to cover Ofcom's new powers relating to:
- a) video-sharing platforms (VSP);
 - b) operators of essential services (OES); and
 - c) the Telecommunications (Security) Act 2021.

Video-sharing platforms

- 3.4 In November 2020 Ofcom was given new powers to regulate VSPs established in the UK. The statutory framework applying to VSPs (the 'VSP framework') sets out a number of obligations.¹ These include requirements to:
- a) protect the general public from 'relevant harmful material';
 - b) protect under-18s from 'restricted material';
 - c) ensure certain standards around advertising are met;² and
 - d) provide an impartial dispute resolution procedure.

¹ Ofcom has produced guidance to help providers decide how best to comply with their statutory obligations. See: [Guidance for video-platform sharing providers on measures to protect users from harmful material](#).

² See our guidance for providers on [control of advertising](#) and [advertising harms and measures](#).

- 3.5 Ofcom has a duty to take steps to ensure that VSP providers comply with their obligations under the VSP Framework. This includes taking enforcement action where we suspect a provider has failed to take or implement appropriate measures to protect users against harm. We will undertake any enforcement of the VSP framework in line with the approach set out in the Guidelines.

Operators of essential services

- 3.6 Ofcom is the designated competent authority for the digital infrastructure subsector in the UK for the Network and Information Systems Regulations 2018, as amended in 2020 (the 'NIS Regulations'). We have published guidance³ for the OES in this sector, which they must have regard to in complying with:
- a) identification and designation of an OES;
 - b) security measures; and
 - c) NIS incident notifications to Ofcom.
- 3.7 We will undertake any enforcement of the NIS Regulations in line with the approach set out in the Regulatory Enforcement Guidelines. There are a number of procedural steps, powers and associated process requirements set out in the NIS Regulations that differ from many of the enforcement regimes covered by the Guidelines, and these are explained in the proposed new Annex 3 of the Guidelines.

Telecommunications (Security) Act 2021

- 3.8 The Telecommunications (Security) Act 2021 (the 'TSA') places additional, strengthened security duties on telecoms providers, which must have in place measures to identify and reduce the risks of security compromises. Telecoms providers will be required to take appropriate and proportionate action after a security compromise has occurred, to limit damage and take steps to remedy or mitigate the damage.
- 3.9 Under the TSA, Ofcom has a new duty to make sure telecoms providers comply with their security duties. To allow us to do this, we have been given powers to monitor and enforce how providers comply with their new duties and requirements. Telecoms providers will be required to share information with us that will help us to assess the security of their networks. We will be able to take enforcement action if a provider fails to comply with its security duties or with our statutory information requests.
- 3.10 We can also require telecoms providers to take interim steps to address security gaps during any enforcement process. We propose to follow the approach set out in the Regulatory Enforcement Guidelines when enforcing compliance under the TSA.

³ See our [guidance for OES in the digital infrastructure subsector under the NIS Regulations](#).

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

Restructuring the Guidelines

- 3.11 We have taken this opportunity to restructure the Guidelines to remove repetition, improve readability and generally streamline the document. The key changes are:
- a) the creation of separate regime-specific annexes for our different regulatory powers; and
 - b) streamlining the section on the settlement procedure.

Annexes

- 3.12 Previous versions of the Guidelines have made extensive use of footnotes to cover a significant amount of technical and legal content, often relating to the specific legislative provisions underpinning the different regulatory requirements. We consider that the lengthy footnotes introduce complexity, interrupt the narrative flow, and overall reduce the clarity of the document.
- 3.13 However, the material contained within the footnotes is important to fully understand how Ofcom will approach enforcement of its regulatory powers, particularly in making clear which legislative provisions would be applied in different types of investigation. We are therefore proposing to consolidate information on each relevant regulatory power and consumer legislation into a set of annexes.
- 3.14 Each annex will focus on a specific regime, such as the enforcement of particular sections of the Communications Act or Postal Services Act. The annex will describe the obligations to be complied with, and summarise key parts of the relevant legislation that give Ofcom powers to:
- a) open cases to enforce each set of obligations;
 - b) investigate and gather information;
 - c) conclude on the outcome of an investigation;
 - d) provide for settlement, if applicable; and
 - e) take urgent or interim action, if applicable.

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

Settlement

- 3.15 The 2017 revision of the Guidelines introduced a new section setting out the procedure for closing an investigation by reaching a settlement with the subject of the investigation. As this was the first time Ofcom had formally set out such a procedure, care was taken to explain the requirements and processes in depth.
- 3.16 The settlement process has become an established and an accepted method of concluding enforcement investigations, where appropriate. We consider that it is now possible to set out the requirements and processes more succinctly and improve the clarity of this section. We are therefore proposing a redrafted settlement section of the Guidelines.
- 3.17 We are also proposing to update the section on the requirements for settlement, to include that in order to benefit from a settlement discount, the subject of the investigation will not challenge or appeal against any infringement decision.

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

Updating and clarifying text

- 3.18 We are proposing to update and clarify some of the text of the Guidelines, reorder some paragraphs, and remove the process flowcharts. These changes are intended to:
- a) recognise where the wider range of regulatory powers place different procedural obligations on Ofcom, and allow flexibility to reflect the nuances of different regimes;
 - b) reflect our practical day to day experience of enforcement investigations, e.g. how we approach initial assessments. While there are procedures we would expect to follow in the majority of cases, we have clarified that there are some circumstances in which it may not be appropriate to follow the standard process; and
 - c) remove repetition and clarify the procedural steps we intend to follow.
- 3.19 While we are proposing to modify some of the text in the Guidelines, our general approach to these issues has not substantively changed. Ofcom will continue to ensure that any enforcement action is conducted fairly and transparently, that the subject of the investigation has a fair opportunity to respond to Ofcom's case as part of the administrative process, and that cases are completed efficiently and as promptly as possible.

- 3.20 We are also proposing to delete references to the Competition and Consumer Enforcement Bulletin and refer instead to the 'Ofcom website', to reflect that case updates may also be mentioned elsewhere on the website.

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

Process for obtaining Ofcom's consent to bring civil proceedings

- 3.21 In certain circumstances, persons who sustain loss or damage as a result of a breach of certain regulatory requirements imposed by Ofcom may bring civil proceedings against the relevant company. The statutory frameworks which set out these rights include section 104 of the Communications Act and paragraph 16 to Schedule 7 of the Postal Services Act. Ofcom's consent is required in order to bring such proceedings and, in granting any such consent, Ofcom may impose conditions relating to the conduct of the proceedings.
- 3.22 This is an important part of the enforcement regime and we consider that effective use of these powers could increase compliance incentives and introduce an additional deterrence effect. We also note these effects can be obtained while minimising the impact on Ofcom's public resource.
- 3.23 We therefore propose to include in the Regulatory Enforcement Guidelines an explanation of the process for obtaining Ofcom's consent under the relevant sections. This includes an explanation of how private persons can apply for Ofcom's consent, and the factors Ofcom will consider in response to such requests.

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

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

4. Impact assessment and equality impact assessment

Impact assessment

- 4.1 Section 7 of the Communications Act requires us to carry out and publish an assessment of the likely impact of implementing a proposal which would be likely to have a significant impact on businesses or the general public, or when there is a major change in Ofcom's activities. As a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of our policy decisions, although the form of that assessment will depend on the particular nature of the proposal.
- 4.2 Our proposal to expand the Regulatory Enforcement Guidelines to include our new enforcement powers stems from new regulatory requirements in legislation. The procedures we intend to follow when enforcing regulatory requirements relating to these new powers therefore follow from the legislative process and have previously been consulted on by Ofcom and Government, during which one or more impact assessments were produced.⁴
- 4.3 More generally, we consider the proposals upon which we are consulting will either have no additional impact, or will tend to reduce the costs of our enforcement action by streamlining our administrative processes (and therefore reducing the level of our administrative fees overall) and/or by making it easier for our stakeholders and other interested persons to find information without having to ask us.

Equality impact assessment

- 4.4 We have considered whether our proposals will have a particular impact on persons sharing protected characteristics (broadly including race, age, disability, sex, sexual orientation, gender reassignment, pregnancy and maternity, marriage and civil partnership and religion or belief in the UK and also dependents and political opinion in Northern Ireland), and in particular whether they may discriminate against such persons or impact on equality of opportunity or good relations. This assessment helps us comply with our duties under section 149 of the Equality Act 2010 and section 75 of the Northern Ireland Act 1998.
- 4.5 We do not consider that any of the proposals on which we are consulting will have any equality impacts (whether in Northern Ireland or the rest of the UK). This is because we consider that the proposals in this document are likely to affect all citizens and consumers

⁴ In relation to video sharing platforms, see Annex A1 of [our consultation on guidance for VSP providers on measures to protect users from harmful material](#) (and other documents referred to in paragraph A1.2 of that consultation). In relation to operators of essential services, see [DCMS Impact Assessment](#). In relation to additional security requirements imposed under the Telecommunications (Security) Act 2021, see [DCMS Impact Assessments](#).

in the same way, and would not have any particular implications for the different equality groups.

A1. Responding to this consultation

How to respond

- A1.1 If you would like to provide views or comments on the issues raised in this document, you must do so no later than 5pm on 19 July 2022.
- A1.2 You can download a response form from <https://www.ofcom.org.uk/consultations-and-statements/category-2/revising-regulatory-enforcement-guidelines>. You can return this by email or post to the address provided in the response form.
- A1.3 If your response is a large file, or has supporting charts, tables or other data, please email it to regulatoryenforcementguidelines@ofcom.org.uk, as an attachment in Microsoft Word format, together with the [cover sheet](#). This email address is for this consultation only, and will not be valid after 19 July 2022.
- A1.4 Responses may alternatively be posted to the address below, marked with the title of the consultation:
Regulatory Enforcement Guidelines team
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- A1.5 We welcome responses in formats other than print, for example an audio recording or a British Sign Language video. To respond in BSL:
- Send us a recording of you signing your response. This should be no longer than 5 minutes. Suitable file formats are DVDs, wmv or QuickTime files. Or
 - Upload a video of you signing your response directly to YouTube (or another hosting site) and send us the link.
- A1.6 We will publish a transcript of any audio or video responses we receive (unless your response is confidential)
- A1.7 We do not need a paper copy of your response as well as an electronic version. We will acknowledge receipt if your response is submitted via the online web form, but not otherwise.
- A1.8 You do not have to answer all the questions in the consultation if you do not have a view; a short response on just one point is fine. We also welcome joint responses.
- A1.9 It would be helpful if your response could include direct answers to the questions asked in the consultation document. The questions are listed at Annex 4. It would also help if you could explain why you hold your views, and what you think the effect of Ofcom's proposals would be.
- A1.10 If you want to discuss the issues and questions raised in this consultation, please email regulatoryenforcementguidelines@ofcom.org.uk.

Confidentiality

- A1.11 Consultations are more effective if we publish any responses we have received before the consultation period closes. In particular, this can help people and organisations with limited resources or familiarity with the issues to respond in a more informed way. So, in the interests of transparency and good regulatory practice, and because we believe it is important that everyone who is interested in an issue can see other respondents' views, we usually publish all responses on [the Ofcom website](#) as soon as we receive them.
- A1.12 If you think your response should be kept confidential, please specify which part(s) this applies to, and explain why. Please send any confidential sections as a separate annex. If you want your name, address, other contact details or job title to remain confidential, please provide them only in the cover sheet, so that we don't have to edit your response.
- A1.13 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and try to respect it. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.14 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's intellectual property rights are explained further in our [Terms of Use](#).

Next steps

- A1.15 Following this consultation period, Ofcom plans to publish a statement in Q4 2022.
- A1.16 If you wish, you can [register to receive mail updates](#) alerting you to new Ofcom publications.

Ofcom's consultation processes

- A1.17 Ofcom aims to make responding to a consultation as easy as possible. For more information, please see our consultation principles in Annex 2.
- A1.18 If you have any comments or suggestions on how we manage our consultations, please email us at consult@ofcom.org.uk. We particularly welcome ideas on how Ofcom could more effectively seek the views of groups or individuals, such as small businesses and residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.19 If you would like to discuss these issues, or Ofcom's consultation processes more generally, please contact the corporation secretary:

Corporation Secretary
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA
Email: corporationsecretary@ofcom.org.uk

A2. Ofcom's consultation principles

Ofcom has seven principles that it follows for every public written consultation:

Before the consultation

- A2.1 Wherever possible, we will hold informal talks with people and organisations before announcing a big consultation, to find out whether we are thinking along the right lines. 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

- A2.2 We will be clear about whom we are consulting, why, on what questions and for how long.
- A2.3 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 for people to give us a written response. If the consultation is complicated, we may provide a short Plain English / Cymraeg Clir guide, to help smaller organisations or individuals who would not otherwise be able to spare the time to share their views.
- A2.4 We will consult for up to ten weeks, depending on the potential impact of our proposals.
- A2.5 A person within Ofcom will be in charge of making sure we follow our own guidelines and aim to reach the largest possible number of people and organisations who may be interested in the outcome of our decisions. Ofcom's Consultation Champion is the main person to contact if you have views on the way we run our consultations.
- A2.6 If we are not able to follow any of these seven principles, we will explain why.

After the consultation

- A2.7 We think it is important that everyone who is interested in an issue can see other people's views, so we usually publish all the responses on our website as soon as we receive them. After the consultation we will make our decisions and publish a statement explaining what we are going to do, and why, showing how respondents' views helped to shape these decisions.

A3. Consultation coversheet

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

Name/contact details/job title

Whole response

Organisation

Part of the response

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)

A4. Consultation questions

Revising the Enforcement Guidelines

A4.1 We are proposing to revise the Enforcement Guidelines to reflect additional powers that Ofcom has gained since the last revision, and to make the document overall easier to read and understand. We would welcome views on the questions below.

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

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

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

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

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

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