

Ofcom

making communications work
for everyone

[DRAFT] Enforcement guidelines for Competition Act investigations

Guidelines

Consultation

Publication date: 23 January 2017

Closing Date for Responses: 6 March 2017

About this document

Ofcom is the independent regulator and competition authority for the UK communications industries. It has concurrent powers with the Competition and Markets Authority to investigate suspected infringements of competition law.

These Guidelines set out the procedures Ofcom will normally follow in Competition Act investigations.

Competition Act investigations are investigations into anti-competitive conduct and/or agreements under Chapter 1 and/or Chapter 2 of the Competition Act 1998, and/or Article 101 and Article 102 of the Treaty on the Functioning of the European Union.

If you have a complaint you wish to make as a consumer, viewer or listener about a communications provider, broadcaster or postal services provider, this guidance is unlikely to be relevant to you. Details of how to make a complaint can be found on the Ofcom website at <https://www.ofcom.org.uk/complain-to-ofcom>.

Contents

Section		Page
1	Introduction	1
2	Why and how Ofcom opens cases	3
3	Investigating	9
4	Outcomes of investigations and the decision-making process	16
5	Settlement	25
6	Taking urgent action	31
7	Procedural complaints about investigations	33
Annex		
1	Overview of Competition Act case	36

Section 1

Introduction

- 1.1 Ofcom is the independent regulator and competition authority for the UK communications industries. It has concurrent powers with the Competition and Markets Authority (the “CMA”) to investigate suspected infringements of competition law.

What do these Guidelines cover?

- 1.2 These Guidelines set out the procedures Ofcom will normally follow in Competition Act investigations. Competition Act investigations are investigations into anti-competitive conduct and/or agreements under Chapter 1 and/or Chapter 2 of the Competition Act 1998 (the “Competition Act” or the “Act”) and/or Article 101 and/or Article 102 of the Treaty on the Functioning of the European Union (the “TFEU”).

Our objectives

- 1.3 We take enforcement action against non-compliance with competition law to prevent harm to competition and consumers, and to remedy this where we can.
- 1.4 We seek to ensure that Competition Act investigations are conducted in a fair, transparent and timely way, and that those we are investigating have a fair opportunity to respond to Ofcom’s case as part of the administrative process. In order to conduct efficient and prompt investigations, we will give those we are investigating a fair opportunity, but no more than a fair opportunity, to make representations to us.

Status of these Guidelines

- 1.5 These Guidelines take effect from **[DATE]**. They set out Ofcom’s general approach to enforcement in Competition Act investigations. They do not have binding legal effect, and are designed to be flexible. Where we depart from the approach set out in these Guidelines, we will be prepared to explain why.
- 1.6 These Guidelines are not a substitute for any regulation or law, and are not legal advice.
- 1.7 They 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.

Structure of these Guidelines

- 1.8 In Section 2 we explain why and how Ofcom opens a Competition Act case.
- 1.9 In Section 3 we explain how Ofcom carries out a Competition Act investigation, including how it gathers information during an investigation.
- 1.10 In Section 4, we explain possible outcomes in a Competition Act investigation. We also explain how decisions are taken in such cases.

- 1.11 In Section 5, we explain the process for settlement of a Competition Act investigation – this involves the subject of the investigation admitting it has an infringement of competition law and accepting that the remainder of the investigation will follow a streamlined administrative procedure, and in return getting a reduced financial penalty.
- 1.12 In Section 6, we explain the process Ofcom would follow when considering imposing interim measures.
- 1.13 In Section 7, we set out the process for referring procedural complaints to Ofcom’s Procedural Officer.
- 1.14 An outline of the process we will usually follow in Competition Act investigations is set out in Annex 1.

Section 2

Why and how Ofcom opens cases

2.1 This section sets out why and how Ofcom decides whether to open a Competition Act investigation.

How Ofcom decides whether to investigate

2.2 We cannot pursue every possible issue that comes to our attention and we must make decisions about whether or not to open investigations by weighing up the likely benefits of conducting an investigation compared to the resources that would be required, and the comparative benefits of using those resources in other ways. We make decisions about whether or not to open an investigation on a case-by-case basis, having considered all the matters that appear to us to be relevant to whether or not we should do so.

2.3 The matters we will generally consider include the following, so far as they are relevant to the case concerned:

- a) The risk of harm arising from/seriousness of the alleged conduct. For example:
 - The risk to the interests of citizens or consumers as a result of the alleged infringement (including whether that risk is immediate or not and whether it is direct or indirect), and conversely the direct and indirect benefit to consumers of taking action (e.g. to deter similar conduct by others);
 - 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 the business which is under investigation has a history of similar contraventions or infringements, or a demonstrated record of poor compliance;
- b) The strategic significance of addressing the alleged conduct and whether we are best placed to act. For example:
 - Whether an investigation would help clarify the regulatory or legal framework for stakeholders;
 - 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 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;
 - In the case of complaints in relation to the Chapter II prohibition and/or Article 102 of the TFEU, whether Ofcom has recently found (for example in a market review) that no communications provider (including the subject of the

investigation) occupies a position of significant market power in the market which appears relevant to the complaint; and

- c) The resource implications of conducting an investigation, including what resources (in particular what specialist resources) are required to conduct an investigation, given the need to do justice to the interests of all parties likely to be affected.
- 2.4 Where appropriate we will also consider other factors as well.
- 2.5 In addition, before opening an investigation, under section 25 of the Competition Act, Ofcom must be satisfied that there are reasonable grounds for suspecting that a competition law infringement has occurred.
- 2.6 Ofcom will also consider whether it is the best placed competition authority to handle the case under the concurrency rules.
- 2.7 Ofcom exercises its powers as the UK competition authority for communications industries in accordance with the Concurrency Regulations¹ and the European Commission's Network Notice². When considering whether to open a Competition Act investigation, we will consider whether Ofcom or the CMA is best placed to act on a case.³ In certain circumstances, Ofcom may pass details on to the CMA (or vice versa) where the two regulators agree to the transfer and subject to notifying the subject of the investigation under Rule 7 of the Concurrency Regulations.⁴
- 2.8 Where a case raises issues under Article 101 and/or Article 102 of the TFEU, Ofcom will apply the case allocation principles set out in the Network Notice to decide whether we, the CMA, a national competition authority from another Member State or the European Commission is well placed to act.

Sources of information

- 2.9 Information which could trigger a Competition Act investigation could come to Ofcom's attention in a number of ways. For example, Ofcom may consider opening an investigation:

¹ The Competition Act 1998 (Concurrency) Regulations 2014 (SI 2014/536). These are available on www.legislation.gov.uk.

² Commission Notice on cooperation within the Network of Competition Authorities (2004/C101/03) [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(02)&from=EN)

³ See further *Guidance on concurrent application of competition law to regulated industries* (CMA10), published March 2014,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288958/CMA10_Guidance_on_concurrent_application_of_competition_law_to_regulated_industries.pdf and *Modernisation* (OFT442),

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284432/oft442.pdf

⁴ Ofcom has entered into a Memorandum of Understanding with the CMA in relation to our exercise of concurrent powers. See *Memorandum of understanding between the Competition and Markets authority and the Office of Communications – concurrent competition powers* (2 February 2016), https://www.ofcom.org.uk/data/assets/pdf_file/0021/83523/cma_and_ofcom_mou_on_use_of_concurrent_consumer_powers_webversion.pdf

- a) where a business comes to us to let us know that they believe they have or may have breached competition law (a “self-referral”);
- b) in response to a complaint by an industry stakeholder or whistleblower;
- c) in response to information provided to us by other bodies (for example, where other regulatory bodies, MPs, consumer organisations or the press draw our attention to complaints they have received about a particular issue);
- d) where routine monitoring by us gives rise to a concern about compliance;
- e) where we identify a particular concern through other areas of our work.

Complaints and whistleblowing

- 2.10 As noted above, some of our investigations begin because we have received a complaint about a potential infringement of competition law by a business, from another business or a trade association. Guidance for stakeholders who wish to make a complaint is set out in the document *Advice for complainants: Submitting a complaint to Ofcom*.⁵
- 2.11 In addition, Ofcom has published guidance on how individuals working the communications sector may contact us if they have concerns about possible wrongdoings at their own organisation (or their former organisation) and where they have been unable to raise or resolve those concerns internally.⁶ Further guidance for whistleblowers is set out in *Advice for complainants: Submitting a complaint to Ofcom*.

Self-referrals

- 2.12 An undertaking that considers it has or may have breached competition law may contact Ofcom with details.
- 2.13 In the context of suspected involvement in a cartel, this is known as an application for “leniency”. By confessing, an undertaking could gain total immunity from, or a significant reduction in, any financial penalties Ofcom can impose if it decides that the arrangement breaches the Chapter I prohibition and/or Article 101. Confessing may also protect staff and senior individuals from prosecution and/or competition disqualification orders against directors.
- 2.14 Applications for lenient treatment should be made to Ofcom’s Investigations Programme Manager at competition.complaints@ofcom.org.uk or 020 7783 4100.
- 2.15 Ofcom will apply the CMA’s guidance in relation to such applications, insofar as it applies to applications for corporate leniency under the Competition Act.⁷

⁵ [Link to be inserted when available]

⁶ <https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines>

⁷ *Applications for leniency and no action in cartel cases* (OFT1495), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf

Enquiry phase

- 2.16 When considering whether to open an investigation, Ofcom will generally carry out an enquiry phase during which we will give the business whose conduct we are considering the opportunity to comment, and relevant information to assist us in deciding whether to open an investigation. However, we may decide not to have an enquiry phase if we consider that we already have sufficient information to decide whether to open an investigation or not, for example as a result of previous engagement with the subject of the possible investigation, or where the scale of any possible consumer harm appears too low to merit the resource required to investigate. In some cases, we may also not have an enquiry phase where there are reasons to proceed to an investigation more quickly.
- 2.17 When we open an enquiry, we will notify the business we are considering investigating and any complainant, and generally provide them with contact details of the case leader. The case leader will act as the main point of contact during an enquiry and any subsequent investigation (as discussed in further detail in Section 3 below).
- 2.18 We will aim to complete an enquiry as quickly as possible, but the length of time that this will take is likely to vary on a case-by-case basis based on the issues under consideration. We will generally inform the subject of the possible investigation and any complainant how long we expect the enquiry phase to take when we begin this process and to keep them updated on progress.
- 2.19 Where we open an enquiry following receipt of a complaint, we will generally tell the subject of the possible investigation that we are doing so on the basis of the complaint we have received and will generally share a non-confidential version of the complaint with it for comment. Ofcom will consider requests from complainants to remain anonymous. However, it may not be feasible to open or conduct an enquiry or investigation without revealing the identity of the complainant. This does not apply to whistleblowers.
- 2.20 We are not able to exercise our formal information gathering powers under the Competition Act during an enquiry, although as noted above we will normally give the subject the opportunity to comment on our concerns and may invite them to provide relevant information in response.⁸ In some cases, we may meet the subject of the possible investigation and/or a complainant if relevant.
- 2.21 We do not publish details of enquiries, or comment publically on enquiries.

Informal resolution

- 2.22 In some cases, Ofcom may be able to resolve an issue through informal contact with the business whose conduct we are considering, including during an enquiry phase. For example, we may be satisfied that the business has taken, or has offered

⁸ Information will not be requested using our formal information gathering powers under the Act. Notwithstanding this, we would expect the business we are considering investigating and any complainant to provide accurate and complete information by any deadline set by Ofcom. Should we open an investigation, we are likely to request, using our formal information gathering powers under the Act, that the parties confirm that any information provided to us during the enquiry phase is complete and accurate, and can be used for the purposes of our investigation.

assurances that it will take, appropriate steps to address any concerns we have identified, such that there is no need to take further action. In such cases we would normally write to it and any complainant to explain the basis on which we have decided not to proceed to formal enforcement action, and the circumstances in which we might reconsider the need to take formal enforcement action in future if relevant (for example, in the event that the organisation did not take the steps which it had said that it would or we received further evidence of a potential breach of competition law).

- 2.23 Such informal action would generally not involve Ofcom taking any decision on the merits of a complaint or about whether or not competition law has been breached.
- 2.24 In the event that Ofcom has decided not to pursue formal enforcement action in relation to a particular issue as a result of informal resolution, but we later become aware of further issues relating to the same or a similar issue, we may take formal enforcement action at that stage. If we did so, we would generally expect to take into account any failure on the part of the relevant business to abide by assurances previously given to us relating to this conduct.
- 2.25 We may publish details of such assurances that have been given about the steps the relevant business will take to address the issue, for example where we consider this would be in the interests of potentially affected customers or consumers more generally.

Next steps following Ofcom's decision on whether to open an investigation

- 2.26 A senior member of Ofcom's executive with Board-delegated authority will decide whether to open an investigation. Typically, this would be the person who would be responsible for overseeing the investigation.
- 2.27 Where we decide not to open an investigation following the enquiry phase, we will normally inform the business whose conduct we have been considering and any complainant, but will not usually give them the opportunity to comment before we take our decision.
- 2.28 Ofcom will not usually publicise a decision not to open a formal investigation. We may do so if the fact that a complaint has been made has been put into the public domain by either the complainant or the business we were considering investigating, or a potential investigation has been put into the public domain is the subject of press speculation, and we consider fairness requires us to clarify the position.
- 2.29 If Ofcom decides to open an investigation, we will generally inform the subject of the investigation and any complainant by sending them each a case opening letter explaining the scope of Ofcom's investigation, who the case leader and case supervisor are (as discussed further at paragraph 3.5 below) and next steps (although we may delay doing so if we consider it may prejudice our ability to carry out an investigation).
- 2.30 Shortly after sending the case opening letter(s), we will generally also announce that we have opened an investigation on the Competition and Consumer Enforcement

Bulletin section of our website (the “CCEB”)⁹ (although we may delay doing so if we consider it may prejudice our ability to carry out an investigation). The case opening announcement will typically include the following details:

- a) the identity of the subject of the investigation;
- b) the identity of any complainant;¹⁰
- c) whether the case is being investigated under Chapter I and/or Chapter II of the Act (and/or Article 101 and/or 102 of the TFEU);
- d) the scope of the investigation; and
- e) the case leader’s contact details.¹¹

2.31 Announcing the beginning of an investigation does not imply that Ofcom has formed any view about whether competition law has been breached.

2.32 If the investigation raises issues under Article 101 and/or Article 102 of the TFEU, Ofcom will notify the European Commission before (or without delay after) using its powers of investigation. In such investigations, Ofcom will co-operate with the European Commission and other national competition authorities 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 Regulation¹² and Part 9 of the Enterprise Act 2002 (“the Enterprise Act”).

⁹ <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins>

¹⁰ If a complainant has concerns about being publically identified on Ofcom’s website, it should raise this concern with Ofcom at the time of making the complaint submission. For the avoidance of doubt, Ofcom will not publish a copy of the complaint submission itself.

¹¹ See Competition Act 1998, section 25A(1)

¹² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32003R0001>

Section 3

Investigating

- 3.1 This section sets out how Ofcom is likely to conduct an investigation. This includes guidance on Ofcom's likely engagement and contact with the subject of the investigation, complainant and third parties, and how we will gather information, publish information and deal with confidential information.

Engagement with Ofcom during the investigation

- 3.2 We seek to ensure that Competition Act investigations are conducted in a fair, transparent and timely way, and that those we are investigating have a fair opportunity to respond to Ofcom's case as part of the administrative process. In order to conduct efficient and prompt investigations, we will give those we are investigating a fair opportunity, but no more than a fair opportunity to make representations to us and engage with us during the course of an investigation. As set out in the relevant sections of this document, Ofcom may also request representations from and engage with complainants and other relevant third parties.
- 3.3 Where it will assist the investigation, we will be prepared to meet with the subject of the investigation and any complainant, and/or provide written or verbal updates. We will decide whether and when it is appropriate to do so on a case-by-case basis.
- 3.4 We explain in the following sections of these Guidelines the type of engagement that businesses we are investigating, complainants and third parties can generally expect to have with Ofcom at key points during the investigation.

Case team

- 3.5 At the outset of the investigation, Ofcom will usually¹³ inform the subject of the investigation, and any complainant, of who is acting as:
- a) the case leader (who will also be their main contact at Ofcom during the course of the investigation);
 - b) the case supervisor (who will be the person overseeing the investigation);¹⁴ and
 - c) the Procedural Officer (see Section 7 of this document).
- 3.6 At the same time Ofcom may ask the subject and any complainant to each nominate a principal point of contact for communications about the investigation.

¹³ As noted above, there may be circumstances in which we decide not to do this until a later point in the investigation, for example where we consider this could prejudice the conduct of any subsequent investigation, such as in cases where we consider we may need to use our formal information gathering powers to obtain and preserve evidence prior to alerting the subject of the investigation.

¹⁴ As explained at paragraph 4.4 below, the case supervisor is the person responsible for overseeing the investigation and for deciding whether to issue a statement of objections.

- 3.7 If the case leader, the case supervisor and/or the Procedural Officer change we would update the subject of the investigation and any complainant.
- 3.8 Details of the case leader will also be set out on the CCEB section of our website.

Timescales

- 3.9 Ofcom recognises that it is important for all stakeholders that if we open an investigation we complete it as soon as possible. However, while we always aim to conclude investigations as quickly as possible, 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.
- 3.10 We will provide updates on the progress of investigations, including when we expect to reach particular milestones, and will provide updates where this changes.

Changing the scope of an investigation

- 3.11 We may widen the scope of an investigation if we become aware of new issues that warrant investigation, or reduce the scope if we decide it is no longer appropriate to pursue particular aspects of the case. When we change the scope of an investigation, we will inform the subject of the investigation and any complainant, and will update the CCEB entry on our website.

Formal information gathering

- 3.12 Ofcom relies on accurate information, provided in a timely manner, to carry out efficient investigations. After Ofcom has opened an investigation, we will usually use our formal information gathering powers under the Competition Act to obtain information to help us establish whether a competition law infringement has been committed.

Written information requests

- 3.13 Ofcom has the power, under section 26 of the Competition Act, to issue formal written information requests requiring a person to produce specified documents or information. This is the power we would expect to use most often to gather information during investigations.
- 3.14 Ofcom may provide the recipient of a written information request with a draft for comment before it is issued in final form. We will decide whether it is appropriate to issue a draft on a case-by-case basis.
- 3.15 Ofcom will set a deadline by which the response to a written information request must be received. This will depend on the demands of the investigation timetable, and the nature and amount of the information we have requested. Ofcom will consider any requests to extend such a deadline on a case by case.

Other information gathering powers

- 3.16 Ofcom also has powers under sections 26A – 28A of the Act to:

- a) require an individual connected with the subject of the investigation to answer oral questions¹⁵; and
- b) enter, and in some instances to search, business and domestic premises.

3.17 We would expect to use these powers less frequently.

Power to require an individual to answer oral questions

3.18 Where we wish to question a connected individual, we will provide the individual with a formal written notice requiring them to answer questions at a specified place and time or immediately on receipt of the notice. The notice will explain what the investigation is about and give details of when and where the questions will be asked.¹⁶

3.19 Where the individual has a current connection with the subject of the investigation at the time the notice is given, Ofcom will also give a copy of the notice to the subject of. We will usually do so before the interview takes place and at the same time as, or as soon as reasonably practicable after, giving the notice to the individual.¹⁷

3.20 The individual may request to have their legal adviser present. Where an interview is to take place immediately on receipt of the notice, it may be delayed for a reasonable time to allow the individual's legal adviser to attend.

3.21 Ordinarily interviews will be recorded, but in circumstances where this is unnecessary or impracticable a contemporaneous note will be taken of the interview.

Powers to enter and search premises

3.22 Ofcom has powers under the Act to enter a business premises (without a warrant)¹⁸, and to enter and search a business or domestic premises (with a warrant).¹⁹

3.23 If Ofcom is entering and/or searching premises, Ofcom's authorised officers will normally arrive at the premises during office hours. If Ofcom intends to use its powers to enter business premises without a warrant we will give the premises' occupier at least two days' written notice of such arrival.²⁰ On entry, Ofcom's authorised officers will provide evidence of their identity, written authorisation by Ofcom, and a document (or the warrant, where one has been obtained) setting out

¹⁵ An individual has a connection with the subject of the investigation if they are or were concerned in the management or control of the subject or employed by, or otherwise working for the subject. An individual has a current connection with an undertaking if, at the time in question, they are so concerned, so employed or otherwise so working (*Competition Act 1998, section 26A(6)*).

¹⁶ Competition Act 1998, section 26A

¹⁷ Competition Act 1998, section 26A(2), section 26A(3), section 26A(4)

¹⁸ Competition Act 1998, section 27

¹⁹ Competition Act 1998, section 28, section 28A, section 29. For the procedure for making an application to the High Court for a warrant see *Civil Procedure Rules, Practice Direction – Application for a warrant under the Competition Act 1998* (May 2004) and the *Alternative Procedure for Claims* in Rule 8 CPR, as modified by the Practice Direction.

²⁰ Competition Act 1998, section 27(2). Ofcom may enter business premises without giving notice if it suspects that the premises is or has been occupied by the subject of the investigation and we have taken all reasonably practicable steps to give written notice (*Competition Act 1998, section 27(3)*).

what the investigation is about and describing what criminal offences may be committed if a person fails to co-operate.

- 3.24 If the occupier has not been given notice of the visit, and there is no in-house lawyer on the premises, Ofcom officers will wait a reasonable time for legal advisers to arrive. During this time, Ofcom's officers may take necessary measures to prevent tampering with evidence or warning other businesses about the investigation.
- 3.25 Where possible, the person in charge at the premises should designate an appropriate person to be a point of contact for Ofcom authorised officers during the inspection.

Non-compliance with Ofcom's formal information gathering powers

- 3.26 Ofcom's formal information gathering powers under the Competition Act are a critical tool in obtaining information necessary to carry out a Competition Act investigation. We expect recipients to provide correct and complete information in response to written information requests by the given deadline, and to comply with Ofcom's other formal information gathering powers. Ofcom may take enforcement action against failures to respond properly to formal information requests, and to comply with its other information gathering powers.
- 3.27 Ofcom may impose a penalty on any person who fails, without reasonable excuse, to comply with a requirement imposed by our formal information gathering powers. This may be either a fixed or daily penalty, or a combination of the two, depending on what is appropriate in the circumstances.²¹ It is also a criminal offence punishable by fine and/or imprisonment to provide false or misleading information, or to destroy, falsify or conceal documents, or to intentionally obstruct an officer exercising their information gathering powers to enter or search a business premises.²²
- 3.28 If we consider that a party has not complied with a requirement imposed by our formal information gathering powers, we may first raise concerns through informal contact with the party. If we decide to impose a penalty, we will serve on the party and publish on the CCEB a notice setting out the nature and amount of the penalty, and our reasons for imposing it.²³

Confidentiality

- 3.29 Information provided to Ofcom during the course of a Competition Act investigation is often confidential. Ofcom will always consider whether disclosure of information about a particular business is necessary for the purpose of facilitating the exercise by Ofcom of its functions.²⁴ In particular, Ofcom may judge that it is necessary to

²¹ Competition Act 1998, section 40A. See *Administrative penalties: Statement of Policy on the CMA's approach (CMA4)*,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270245/CMA4_-_Admin_Penalties_Statement_of_Policy.pdf

²² Competition Act 1998, section 42, section 43, section 44

²³ Competition Act 1998, section 40A(9); Enterprise Act 2002, section 112.

²⁴ Under Part 9 of the Enterprise Act 2002, we must not disclose information relating the affairs of an individual, or any business of any undertaking, unless it is permitted by one of the prescribed "gateways" under that Part. The gateway under section 241 of the Enterprise Act provides that a

disclose information gathered from complainants or other third parties to the subject of the investigation in order to allow the subject respond to Ofcom's case. Similarly, Ofcom may judge that disclosure of information gathered from the subject to a complainant and other third parties is justified in order to facilitate the carrying out by us of our functions.

- 3.30 When Ofcom is considering disclosing confidential information, we must consider the extent to which the disclosure of the information is necessary for the purpose for which we are permitted to make the disclosure. We must also consider the need to exclude from disclosure (as far as practicable):
- a) information whose disclosure we consider is contrary to the public interest;
 - b) commercial information whose disclosure we consider might significantly harm the legitimate business interests of the undertaking to which it relates; or
 - c) information relating to the private affairs of an individual whose disclosure Ofcom considers might significantly harm the individual's interest.²⁵
- 3.31 If the subject of the investigation, any complainant or a third party provides us with information that they consider to be confidential, they should clearly identify this information and explain why they consider it to be confidential, in accordance with the relevant statutory definition.²⁶
- 3.32 Ultimately, it is for Ofcom to determine what is and is not appropriate to disclose in accordance with the statutory framework, and Ofcom may consider it is appropriate to disclose information notwithstanding that a party has asserted confidentiality over it.
- 3.33 Ofcom may, in some circumstances, consider it appropriate to disclose information to certain named individuals only (usually specialist economic or legal advisers to the subject of the investigation) within a "confidentiality ring", or to establish a data room where information may be viewed by named individuals.
- 3.34 If Ofcom is proposing to disclose information which a party considers to be confidential, we will take reasonable steps to inform that party and will give it a reasonable opportunity to make representations on our proposal,²⁷ before making a final decision on whether to disclose the information. If a party wishes to dispute Ofcom's decision to disclose the information, it may make a procedural complaint to Ofcom in accordance with Section 7, below.

public authority may disclose such information for the purpose of facilitating the exercise of its functions. This gateway also provides that the recipient of information that is disclosed by Ofcom for these purposes may not disclose the information further without Ofcom's consent.

²⁵ Enterprise Act 2002, section 244

²⁶ Confidential information is defined by Rule 1 of the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 ("the CMA Rules") as: (a) commercial information whose disclosure Ofcom considers might significantly harm the legitimate business interests of the undertaking to which it relates; (b) information relating to the private affairs of an individual whose disclosure Ofcom considers might significantly harm the individual's interests; or (c) information whose disclosure Ofcom considers is contrary to the public interest.

²⁷ CMA Rules, Rule 7

- 3.35 We may request that we are provided with a non-confidential version of a submission, if needed for the purposes of publication and/or disclosure. Such a non-confidential version should normally include suggested non-confidential summaries of information (for example “confidential details of contracts”) or ranges of numbers, rather than simply removing confidential information.

Publicity

- 3.36 Ofcom ensures that its regulatory activities are transparent and accountable. Publicising the action we take can also usefully draw it to the attention of parties who have relevant information, can help deter non-compliance in future and educate others about what can go wrong.
- 3.37 As explained in paragraph 2.30 above, when we open an investigation, we will typically publicise it on the CCEB section of our website.²⁸
- 3.38 We will also will publish updates regarding the progress of an investigation on the CCEB when we reach key milestones (such as when we issue a statement of objections, when we change the scope of an investigation, when we issue a final infringement decision or when we close a case). This is explained in more detail in the relevant sections of these Guidelines.
- 3.39 We do not agree the text of CCEB updates with the subject of the investigation or any complainant.
- 3.40 We will ordinarily inform the subject of the investigation shortly before (and no more than one working day before) publication on the CCEB that we will be doing so, and provide them with a copy of the intended text for information at that stage.
- 3.41 Where we consider an announcement to be potentially market sensitive, we will generally inform the subject of the investigation after markets have closed, with publication at 7.00am on Ofcom’s website and via the Regulatory News Service, just before markets open. Where the subject is a listed company in other jurisdictions, we will, where possible, seek to avoid publication during stock exchange hours in those jurisdictions.
- 3.42 There may be certain cases which we consider it would be inappropriate to discuss publicity, for example because it is particularly sensitive and/or publicity could have a detrimental impact on third parties. We would inform the subject of the investigation and any complainant if we intend to take this approach to an investigation. We would expect these cases to be exceptional.

Involvement of third parties

- 3.43 Ofcom may consider it necessary to seek input from other relevant third parties – for example, from trade associations, competitors or customers of the subject of the investigation, in order to assist us in reaching a decision on the case. Ofcom will

²⁸ <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins>. Stakeholders who are interested in following the progress of our investigations can also subscribe to receive email notifications of changes to the CCEB.

involve third parties to the extent necessary to carry out our functions fairly and effectively.

How to raise concerns with Ofcom

- 3.44 If a subject of an investigation, a complainant or third party (where relevant) is dissatisfied with any aspect of the way in which Ofcom is proceeding, they should usually raise their concerns in writing with the case leader or case supervisor in the first instance.
- 3.45 Where engagement with the case leader / case supervisor does not resolve a party's concerns, it may contact the Procedural Officer. The process for doing so is set out in Section 7.

Section 4

Outcomes of investigations and the decision-making process

- 4.1 This section sets out the possible ways in which Ofcom may conclude a Competition Act investigation. This includes reaching a decision that there has been an infringement of competition law, a decision that there is not sufficient evidence to find an infringement, a decision to close the case without taking a decision on the merits, and accepting binding commitments from the subject of the investigation to address our competition concerns.
- 4.2 In some cases, we may be able to reach a settlement with the subject of an investigation as a way of resolving a case. The process for settlement is set out in Section 5 of these Guidelines.
- 4.3 This section also sets out who will make key decisions during an investigation.

Decision makers

- 4.4 Ofcom will nominate a person to oversee the investigation and to decide whether to issue a statement of objections (the case supervisor),²⁹ who will be a senior member of Ofcom's executive with appropriate Board-delegated authority.
- 4.5 Following the statement of objections, Ofcom will nominate at least two different relevant persons to collectively make the following subsequent decisions:³⁰
- a) whether to issue a supplementary statement of objections;
 - b) whether to issue a draft penalty statement;
 - c) whether to issue an infringement decision (including any penalty and/ or directions).

These decision makers will normally comprise two senior members of Ofcom's executive with appropriate Board-delegated authority. They will not have been involved in the investigation nor be the person who is responsible for overseeing the investigation and making the decision to issue the statement of objections.

²⁹ CMA Rules, Rule 3(1)

³⁰ CMA Rules, Rule 3(2)

Investigation outcomes

Statement of objections

- 4.6 Where Ofcom reaches the provisional view that the conduct under investigation amounts to an infringement of competition law, we will issue a statement of objections to the subject of the investigation.³¹
- 4.7 The statement of objections represents Ofcom's provisional view which may be subject to change in light of subsequent representations or material provided by the subject of the investigation (or complainants or other third parties where relevant) or any further evidence which comes to light. It allows the subject of the investigation to know the full case against it, and if it chooses to do so, to formally respond in writing and orally.
- 4.8 The statement of objections will state:
- a) which of the competition law prohibitions Ofcom considers has been infringed;
 - b) Ofcom's reasons for considering that the conduct under investigation amounts to an infringement of competition law;
 - c) the facts on which Ofcom has relied;
 - d) the action Ofcom proposes to take, such as imposing a financial penalty (although Ofcom will not include a provisional determination of the amount of the penalty) and/or issuing directions, and our reasons for the proposed action; and
 - e) the period in which the subject of the investigation may make written representations to Ofcom on the matters referred to in the statement of objections, and on the confidentiality of the information contained in the statement of objections.³²
- 4.9 If the subject of the investigation is a company then Ofcom will send the statement of objections in hard copy to the Company Secretary, copied by email to our main contact, unless the subject of the investigation has agreed otherwise with us.
- 4.10 Ofcom will not publish the statement of objections, but we will generally publish an update on the CCEB section of our website. Our update will normally explain that we have issued a statement of objections along with a summary of the infringement which Ofcom is minded to find. The CCEB update will also state that the subject of the investigation will have the opportunity to make representations on the statement of objections before we make our final decision.

Access to file

- 4.11 Ofcom will give the subject of the investigation a reasonable opportunity to inspect copies of disclosable documents on Ofcom's investigation file ("access to file").³³ We will usually give access to file at the same time as we issue the statement of

³¹ CMA Rules, Rule 5(1)

³² CMA Rules, Rule 5(2), Rule 6(1)

³³ CMA Rules. Rule 6(2)

objections. Access to file will usually be given by supplying the file by electronic means.

4.12 Disclosable documents are documents on Ofcom's file which relate to the matters contained in the statement of objections. Ofcom may withhold a document:

- a) to the extent that it contains confidential information;³⁴ or
- b) if it is an Ofcom internal document.³⁵

Ofcom may also exclude routine administrative documents³⁶ from the file and list these in a schedule which will be placed on the file. Ofcom will provide the subject with a schedule of external documents on its file which have not been disclosed as part of the access to file process.

4.13 Ofcom has discretion to grant access to file using confidentiality rings or data rooms, and the use of such methods will be considered by Ofcom on a case-by-case basis, in accordance with paragraphs 3.29 – 3.34, above.

Written representations

4.14 The subject of the investigation will have the opportunity to make written representations to Ofcom on the proposed findings in the statement of objections.³⁷

4.15 The deadline for submitting representations will be set by Ofcom having regard to the circumstances of the case. Ofcom will give a longer period in more complex cases. If Ofcom is unable to give access to file at the same time as we issue the statement of objections, the time for submission of written representations will not start to run until access to file has been given.

4.16 Where we consider that a complainant or another relevant third party stakeholder may have further information relevant to the proposed decision, we may also provide it with a non-confidential copy of the statement of objections for the purposes of giving it the opportunity to make written representations on it.

4.17 In such cases, Ofcom would expect to give the complainant or the third party access to a non-confidential copy of the statement of objections subject to its entering into appropriate agreements with us limiting its use of and onward disclosure of the document. We will set deadlines for representations depending on the circumstances of the case. We will not usually provide a complainant or third parties with copies of or access to the underlying evidence relied on.

Oral hearing

4.18 Ofcom will offer the subject of the investigation the opportunity to attend an oral hearing to make oral representations on matters referred to in the statement of

³⁴ CMA Rules, Rule 1(1)

³⁵ CMA Rules, Rule 6(1)

³⁶ Routine administrative documents will generally include correspondence setting up meetings and documents which do not relate to the substance of the matters set out in the statement of objections.

³⁷ CMA Rules, Rule 6(2)

objections.³⁸ The hearing will take place after written representations have been made.

- 4.19 The oral hearing will be chaired by Ofcom's Procedural Officer³⁹ and will usually be held at the Ofcom offices in which the case team investigating the case is based.
- 4.20 The case supervisor and members of the case team may also be present and may comment during the course of the hearing. The hearing will be transcribed and the transcript will be shared with the subject of the investigation.
- 4.21 The subject of the investigation may bring legal advisers or other relevant expert advisers to the oral hearing to assist in presenting its oral representations, although Ofcom may ask that it limits the number of persons attending the oral hearing on its behalf to a reasonable number.
- 4.22 Complainants and other third parties will not usually be invited to attend the oral hearing.
- 4.23 The Procedural Officer will prepare a report following the oral hearing assessing the fairness of the procedure followed in the hearing and on any procedural issues that have been brought to his/her attention.⁴⁰

Letter of facts

- 4.24 Where Ofcom acquires new evidence at this stage which supports the case contained in the statement of objections, and Ofcom proposes to rely on it to establish that an infringement has been committed, Ofcom may put this evidence to the subject of the investigation and give it the opportunity to respond. The timeframe for responding will depend on the volume and complexity of the new evidence.

Supplementary statement of objections

- 4.25 In some cases, new information or evidence may come to Ofcom's attention after we have issued the statement of objections, which leads us to consider making a material change to the nature of the proposed infringement (such as evidence of a different or more serious infringement). In such circumstances, we would issue a supplementary statement of objections. If we issue a supplementary statement of objections, we will provide the subject of the investigation with any new documents on the file in accordance with paragraphs 4.11 to 4.13, above. We would also provide the subject of the investigation, and may provide the complainant and any interested third parties, with the opportunity to respond in accordance with paragraphs 4.14 to 4.23, above. We would also generally expect to publish a CCEB update as per paragraph 4.10.

Draft penalty statement

- 4.26 If, following investigation, Ofcom finds that there has been an infringement, it may impose a financial penalty on the subject of the investigation of up to 10% of the its

³⁸ CMA Rules, Rule 6(3), Rules 6(4)

³⁹ CMA Rules, Rule 6(5)

⁴⁰ CMA Rules, Rule 6(6), Rule 6(7).

turnover in a relevant market.⁴¹ In determining penalties, Ofcom is required to have regard to the CMA's guidance on how it calculates the appropriate amount of a penalty, including consideration of any grounds for leniency.⁴² We must also have regard to the seriousness of the infringement and the desirability of deterring the subject and other stakeholders from infringing competition law.⁴³

- 4.27 Where Ofcom has said it is minded to impose a penalty in the statement of objections or any supplementary statement of objections, it will issue a draft penalty statement to the subject of the investigation⁴⁴ on the level of that penalty after considering any written and oral representations on the statement of objection and any supplemental statement of objections. The draft penalty statement will set out the level of the penalty Ofcom is minded to impose and its reasons.
- 4.28 The subject of the investigation will be offered the opportunity to make written representations on the draft penalty statement and to attend an oral hearing, chaired by the Procedural Officer.⁴⁵ The deadline for submitting written representations on the draft penalty statement will be set on a case-by-case basis and will allow for the opportunity for the subject to inspect any new relevant documents on the file.⁴⁶
- 4.29 Ofcom will not publish the draft penalty statement and will not comment publicly about issuing a draft penalty statement.

The infringement decision

- 4.30 After considering any written or oral representations on the statement of objections, any supplementary statement of objections and any draft penalty notice, if Ofcom determine there is sufficient evidence to establish an infringement of competition law, we will issue a final infringement decision to the subject of the investigation.⁴⁷ If the subject of the investigation is a company, we will deliver the infringement decision in hard copy to the Company Secretary, copied by email to our main contact, unless the subject has agreed otherwise with us.
- 4.31 The infringement decision will state the facts on which Ofcom bases the decision and the reasons for our decision. It will also set out the reasons for any decision to impose a financial penalty on the subject of the investigation and the level of penalty.⁴⁸ The infringement decision may also include directions setting out actions the subject must take to bring the infringement to an end, and the reasons for imposing these directions.⁴⁹

⁴¹ *Competition Act 1998, section 36(8)*, calculated in accordance with *Competition Act 1998 (Determination of turnover for penalties order) (SI 2000/309)*

⁴² *OFT's guidance as to the appropriate amount of penalty (OFT423)*,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf

⁴³ *Competition Act 1998, section 36(7A)*

⁴⁴ *CMA Rules, Rule 11(a)*

⁴⁵ *CMA Rules, Rule 6, Rule 11(b)*

⁴⁶ *CMA Rules, Rule 6(2), Rule 11(b)*

⁴⁷ *CMA Rules, Rule 10(2)(a)*

⁴⁸ *CMA Rules, Rule 12(2); Competition Act 1998, section 36*

⁴⁹ *CMA Rules, Rule 12(1); Competition Act 1998, section 32, section 33*

- 4.32 Once the infringement decision has been issued, Ofcom will close the case and update the details on the CCEB section of our website. This will generally include a summary of the contraventions Ofcom has found and details of any penalty and/or directions imposed.⁵⁰
- 4.33 Ofcom will also publish a non-confidential version of the infringement decision on the CCEB section of our website⁵¹ once Ofcom has finalised the relevant redactions of any confidential information. We will generally inform the subject of the investigation and any complainant in advance of the intended date of publication of the final decision.

Investigations that do not lead to an infringement finding

- 4.34 Not all of Ofcom's Competition Act investigations result in a finding that the business under investigation has infringed competition law. Ofcom may decide that we do not have sufficient evidence to find a competition law infringement, or we might decide that it is appropriate to close an investigation without making a finding on whether the subject of the investigation has infringed competition law. Alternatively, we may accept binding commitments as to future conduct from the subject of the investigation which address our competition concerns.

No grounds for action decision

- 4.35 Ofcom may decide, either before or after we issue a statement of objections, that we do not have sufficient evidence to find a competition law infringement.⁵² In these circumstances Ofcom will issue a provisional "no grounds for action decision" to the subject of the investigation stating the facts on which we base our decision and the reasons for the decision. We will invite written representations from the subject of the investigation on the matters set out in our provisional decision. We will usually provide the complainant with a non-confidential version of the provisional decision and invite written representations on it. We may also provide other relevant third parties with a non-confidential copy and the opportunity to make written representations, for example where we consider the relevant stakeholder(s) may have information which would assist us in reaching a decision on the outcome of the investigation. The deadline for written representations will depend on the circumstances of the case. We will not usually provide access to file.
- 4.36 Ofcom will consider any written representations and if our view is that we still do not have sufficient evidence to find a competition law infringement, we will issue a final no grounds for action decision to the subject of the investigation.⁵³ If the representations change our view, we will continue the investigation.
- 4.37 If Ofcom decides to issue a no grounds for action decision, we will close the case and will publish a details of this on the CCEB section of our website.⁵⁴ Ofcom will

⁵⁰ Competition Act 1998, section 25A(4); CMA Rules, Rules 12(3), Rule 12(4)

⁵¹ CMA Rules, Rule 10(2)(b)

⁵² Depending on the stage at which this decision is reached, the decision maker may be the person responsible for deciding whether there are grounds for action (who, as noted above, will typically be the person responsible for overseeing the investigation), or it may be the final decision makers referred to at paragraph 4.5 above.

⁵³ CMA Rules, Rule 10(4)

⁵⁴ Competition Act 1998, section 25A(4)

generally publish a non-confidential version of the decision on the CCEB⁵⁵ once we have finalised the relevant redactions of any confidential information.

Case closure without a decision on the merits

- 4.38 Ofcom may close an investigation without taking a decision on the merits of the case and without making a finding on whether there has been a breach of competition law.⁵⁶ For example, we may no longer consider it appropriate to pursue the case in light of the factors set out in paragraph 2.3 above.
- 4.39 If we make a decision to close an investigation on this basis, we will usually write to the subject of the investigation and the complainant in advance setting out the reasons why we are minded to make a decision to close the investigation, and invite comment from them. The timeframe for comment may be short, particularly where we consider there is limited scope for comment on the reasons underpinning our proposed decision to close the investigation. We will also pass details on the CMA for them to decide whether they wish to pursue the case further.
- 4.40 In the majority of cases, a case closure decision of this type is likely to be a brief statement indicating case closure and the basis on which we have decided to close the case. We will publish details of our decision to close the case on the CCEB section of our website.⁵⁷

Commitments

- 4.41 Ofcom may accept binding commitments which address our competition concerns from the subject of an investigation in relation to its future conduct.⁵⁸
- 4.42 The subject of the investigation may offer binding commitments to Ofcom at any time during an investigation up until a final infringement decision is made. However, Ofcom is unlikely to consider it appropriate to accept commitments offered at a very late stage in an investigation, such as after considering representations on a statement of objections.
- 4.43 Ofcom is likely to consider it appropriate to accept commitments only in cases where the competition concerns are readily identifiable, will be fully addressed by the commitments offered, and the proposed commitments can be implemented effectively and, if necessary, within a short period of time. Ofcom is very unlikely to accept commitments in cases involving secret cartels between competitors or a serious abuse of a dominant position.
- 4.44 The fact that the subject of an investigation has approached us to discuss commitments, and the substance of commitments, is not relevant to our consideration of whether an infringement has occurred. We will therefore not use any

⁵⁵ CMA Rules, Rule 10(5)

⁵⁶ Depending on the stage at which this decision is reached, the decision maker may be the person responsible for deciding whether there are grounds for action (who, as noted above, will typically be the person responsible for overseeing the investigation), or it may be the final decision makers referred to at paragraph 4.5 above.

⁵⁷ Competition Act 1998, section 25A(4)

⁵⁸ Competition Act 1998, section 31A(2)

offer of commitments as evidence in any subsequent decision about the agreement or conduct under investigation.

- 4.45 If a subject of the investigation would like to discuss offering commitments, it should contact the case leader in the first instance. If, following that, Ofcom considers that commitments may be appropriate, then (if a statement of objections has not been issued) Ofcom will send a summary of its competition concerns to the subject. Ofcom may discuss with the subject the form and content of any commitments offered in order to reach an agreement as to what might be acceptable to Ofcom.
- 4.46 If Ofcom proposes to accept the commitments offered, we will consult those likely to be affected by them, including any complainant. We will give those persons an opportunity to make representations within a time limit of at least 11 working days.⁵⁹ Ofcom will then discuss these representations with the subject of the investigation and indicate whether Ofcom considers that changes are required to the commitments before we would consider accepting them.
- 4.47 If the subject of the investigation offers revised commitments with significant changes we will consult affected persons and give them another opportunity to make representations, within a time limit of at least 6 working days.⁶⁰ We will discuss these representations with the subject.
- 4.48 The decision on whether to accept commitments will be taken by a decision-maker with appropriate Board-delegated authority. Depending on the stage at which this decision is reached, this will generally be the person responsible for deciding whether there are grounds for action (who, as noted above, will typically be the person responsible for overseeing the investigation, i.e. the case supervisor), or the final decision makers referred to at paragraph 4.5 above.
- 4.49 If Ofcom decides to accept commitments, we will notify the subject of the investigation and publish the commitments on the CCEB section of our website.⁶¹

After the final decision

Compliance monitoring

- 4.50 Where Ofcom has made an infringement decision or closed a case having accepted commitments or informal assurances, we may decide at the end of the investigation to put “it into compliance”. The purpose of the compliance phase is to ensure that the subject of the investigation does not repeat behaviour that Ofcom has deemed to breach competition law, that it complies with any commitments or assurances given, and that it implements any directions imposed by Ofcom.
- 4.51 The process that we follow during the compliance phases will differ from case to case. The length of the compliance phase will depend on the circumstances of the case and the measures that are to be monitored. Generally, Ofcom will not grant extensions to any deadline set for compliance with a direction, unless it receives an

⁵⁹ Competition Act 1998, Schedule 6A, paragraph 2

⁶⁰ Competition Act 1998, Schedule 6A, paragraph 3

⁶¹ Competition Act 1998, Schedule 6A, paragraph 7

application prior to the expiry of the deadline together with an explanation of why the deadline should be extended including supporting evidence.

- 4.52 The CCEB section of Ofcom's website includes a section for cases in compliance, where we will publish details of significant developments.⁶²
- 4.53 Once we consider that compliance has been established, we will close the case and update the CCEB accordingly.

⁶² <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/cases-in-compliance>

Section 5

Settlement

Introduction

- 5.1 In some cases, Ofcom may consider that it is appropriate to settle a Competition Act investigation. Settlement is a voluntary process in which the subject of the investigation admits it has breached competition law and accepts that the remainder of the investigation will follow a streamlined administrative procedure.⁶³ In such cases, Ofcom will impose a reduced penalty.⁶⁴
- 5.2 Those who we are investigating are not under any obligation to enter into settlement discussions or to settle, and Ofcom has broad discretion to decide whether a case is appropriate for settlement or to agree to settlement.
- 5.3 Settlement is a process for resolving a Competition Act investigation which leads to a formal, legally binding infringement decision.⁶⁵ It is distinct from leniency (as discussed at paragraph 2.13 above) and Ofcom’s power to accept commitments under section 31A of the Competition Act. Leniency and the use of settlements are not mutually exclusive – it is possible for a leniency applicant to settle a case under the Competition Act and benefit from both leniency and settlement discounts.
- 5.4 Settlement discussions are not a negotiation with Ofcom about what contraventions Ofcom might be prepared to find or not to find – for example, it would not involve discussing whether Ofcom might be prepared to drop a more serious contravention on the basis that a business is prepared to admit to a less serious contravention. Nor are they negotiations about the level of the penalty which Ofcom would impose.
- 5.5 Settlement discussions are not equivalent to the type of discussions which take place between parties to litigation or potential litigation on a “without prejudice” basis for the purposes of seeking to resolve or avoid litigation:
- As noted above, where successful, settlement discussions will result in a formal, legally binding infringement decision, which is likely to refer to the fact that settlement has been agreed and would reflect the substance of any admissions made by the subject of the investigation for the purposes of the settlement.
 - As explained further below, in the event that settlement discussions break down, the case would revert to the usual process and the content of any settlement discussions would not be revealed to the final decision maker(s).
 - However, any additional documentary evidence provided during the settlement discussions would go onto the case file and could be taken into account by Ofcom for the purposes of our final enforcement decision.

⁶³ CMA Rules, Rule 9(1)

⁶⁴ See the CMA’s *Guidance as to the appropriate amount of penalty* (OFT423), paragraph 2.26

⁶⁵ CMA Rules, Rule 9

- In addition, Ofcom may follow up any new competition law issues which come to light during settlement discussions.

5.6 In an investigation involving more than one undertaking, Ofcom is likely to inform other undertakings under investigation that another undertaking under investigation is exploring the possibility of settlement. Entering into discussions on possible settlement will typically pause the case timetable and therefore we consider it necessary to inform other undertakings as to this to ensure that Competition Act investigations are conducted fairly and transparently. At settlement discussion, Ofcom will not name the undertaking that has decided to explore the possibility of settlement⁶⁶ and we will make clear to other undertakings that the relevant undertaking is only exploring the possibility of settlement at that stage.

Requirements for settlement

5.7 As a minimum, Ofcom will require the subject of the investigation to:

- Make a clear and unequivocal admission of liability in relation to the nature, scope and duration of the infringement.⁶⁷ This would need to reflect Ofcom's position on the nature of the contraventions we are minded to find and the appropriate level of penalty (as explained further below).
- Cease the contravening behaviour immediately from the date it enters into settlement discussions with Ofcom and refrain from engaging again in the same or similar contravening behaviour.
- Confirm that it accepts that there will be a formal and published finding of infringement against it, it will pay a penalty set out at a maximum amount and will comply with any directions imposed.
- Confirm that it accepts that it will no longer benefit from the settlement discount if it appeals the decision.⁶⁸
- Confirm that it will accept a streamlined administrative process.⁶⁹ This will be decided on a case-by-case basis depending on the stage at which a settlement agreement is reached, but would include streamlined access to file arrangements (for example through access to key documents only and/or through the use of a confidentiality ring), limiting written representations to manifest factual inaccuracies only (where settlement is concluded prior to a statement of objections being issued), no oral hearing and no separate draft penalty statement after settlement has been reached. In addition, the person responsible for deciding whether to issue a statement of objections would also be responsible for the final decision in a settlement case.⁷⁰

⁶⁶ Although in cases involving a small number of businesses, we recognise that that it may be possible for the undertakings to infer which business is considering the possibility of settlement.

⁶⁷ CMA Rules, Rule 9(1)(a)

⁶⁸ The Competition Appeal Tribunal has full jurisdiction to review the appropriate level of penalty

⁶⁹ CMA Rules, Rule 9(1)(b)

⁷⁰ CMA Rules, Rule 9(4)

How does Ofcom decide whether a case is suitable for settlement?

- 5.8 Although there may be cases in which settlement is not appropriate, Ofcom may consider settlement for any investigation in which we have reached a stage where we believe that we have a sufficient basis for giving notice of its proposed infringement decision.
- 5.9 In determining whether a case is suitable for settlement, Ofcom will have regard to a number of factors such as the likely procedural efficiencies and resource savings that can be achieved through settlement, taking into account factors including the stage at which settlement is initiated, whether settlement would result in shortening the case timetable and a reduction in resources, and whether settlement is likely to be reached in a reasonable timeframe.

Settlement discounts

- 5.10 Where settlement discussions result in a final infringement decision being issued, that decision will contain the penalty amount, which will include a settlement discount. Our aim will be to conclude the settlement process as swiftly as possible. In line with this aim, the level of the discount will depend on when settlement is reached.
- 5.11 Settlement discounts will be capped at the level of 20%. The actual discount awarded will take account of the resource savings achieved in settling that case at that particular stage of the investigation. The discount available for settlement pre-statement of objections will be up to 20% and that available for settlement post-statement of objections will be up to 10%.
- 5.12 Where we are concerned that the process is not progressing as swiftly as possible due to delays or inefficiencies caused by the subject of the investigation or that it is not showing its full co-operation with the settlement process, Ofcom is likely to bring settlement discussions to an end or reduce the discount on account of the time taken and resources used. We would give the subject notice that we are minded to do so at that point.

Process

- 5.13 If the subject of an investigation wishes to discuss the possibility of exploring settlement, it should approach the case leader or the case supervisor in the first instance.
- 5.14 While we will engage positively with the subject of an investigation that indicates an early willingness to settle, in order for us to engage in settlement discussions, we will need to have reached a stage in our analysis of the available evidence where we are able to come to a provisional view on the nature of the infringement(s), and can engage meaningfully with the subject about our position during settlement discussions. We may therefore expect an undertaking wishing to engage in early settlement discussions to help speed up the process by providing information in the meantime.
- 5.15 Before settlement discussions can start in a particular case, the relevant decision maker must obtain approval to engage in settlement discussion from at least two

senior members of Ofcom's executive with appropriate Board-delegated authority.⁷¹ Typically, the decision maker in a settlement case will be the person responsible for overseeing the investigation and deciding whether to issue a statement of objections (the case supervisor). The relevant decision maker will then typically oversee settlement discussions and, as noted above, in contrast to our usual process, we would expect this decision maker also to be responsible for taking the final infringement decision on the case in the event that settlement discussions are successful.⁷²

- 5.16 Settlement discussions will generally be conducted orally by members of the case team, led by the relevant decision maker, involving others as appropriate in any particular case (for example, a senior legal director).
- 5.17 As noted at paragraph 5.11 above, the level of discount on the level of penalty as a result of settlement will depend on the stage at which settlement is successfully concluded. There are two main stages at which a settlement may be reached:
- Prior to a statement of objections being issued; and
 - Following a statement of objections being issued.
- 5.18 If the subject of the investigation indicates a willingness to consider settlement pre-statement of objections, and Ofcom considers this to be an appropriate case in which to pursue settlement, Ofcom will send to the subject a summary statement of facts and initial findings for the purposes of the settlement discussions, which would also set out a provisional level of penalty which Ofcom would be minded to impose on that basis, including the discount for the subject's co-operation. We will also provide a streamlined access to file process, the parameters of which will be decided by Ofcom on a case-by-case basis, taking into account the procedural and resource saving efficiencies which can be achieved through settlement and the volume and complexity of the evidence on the file.
- 5.19 The subject of the investigation will be asked if it would be prepared in principle to agree to the settlement requirements and make admissions on the basis of the statement of facts and initial findings. The timeframe for doing so will be set on a case-by-case basis having regard to possible resource savings through the settlement process. Ofcom would then take a view as to whether it is likely to be productive to engage in further settlement discussions on that basis.
- 5.20 In the event that the subject of the investigation is not prepared to agree to a settlement on the basis of the position set out in the summary statement of facts, it is unlikely to be appropriate to pursue settlement at this stage and Ofcom would expect to proceed to issue a statement of objections in accordance with its usual process. If the subject wishes to seek further settlement discussions at a later stage of the process (subject to Ofcom also considering this to be appropriate), it remains open for it to do so, although a lower settlement discount would then apply.
- 5.21 In the event that the subject of the investigation is in principle prepared to agree to the settlement requirements and admit to the contraventions as set out in the

⁷¹ Under the CMA Rules (Rule 9(4)), where a single individual, such as the person overseeing the investigation, is the decision maker in settlement discussions, then they will need a mandate from at least two other individuals.

⁷² CMA Rules, Rule 9(4)

statement of objections, it may inform Ofcom that it wishes to enter into a settlement on that basis. In such a case, we would expect that the subject of the investigation would limit any written representations on the statement of objections to those relating to manifest factual inaccuracies, the deadline for which would be decided on a case by case basis. If access to file has not yet been given, we would expect to provide a streamlined access to file process, in accordance with paragraph 5.18 above.

Successful conclusion of the settlement process

- 5.22 In the event that settlement discussions are successful and the subject of the investigation has indicated to Ofcom that it is prepared to agree to the settlement requirements and to make admissions on a basis which reflects Ofcom's position, it would need to confirm to Ofcom in writing its admissions and acceptance of the settlement requirements. That letter should be sent by its Chief Executive Officer or another senior member of its executive.
- 5.23 If Ofcom had not already done so, we would proceed to issue a statement of objections⁷³ on the basis of the position reached during the settlement discussions. This would contain the proposed penalty amount, including the settlement discount.⁷⁴ The subject of the investigation would then be given a short time period to provide written representations on manifest factual inaccuracies in the statement of objections. We would not usually provide further access to file at this stage.
- 5.24 Prior to the subject of the investigation confirming its final agreement and formally making the relevant admissions, Ofcom would expect to share with the subject, for the purposes of factual corrections, a draft of the proposed final infringement decision which would reflect the position reached during the settlement discussions. The decision would contain the penalty amount, including the settlement discount.⁷⁵
- 5.25 In order to settle the case, the relevant decision maker must obtain the approval of at least two senior members of Ofcom's executive with appropriate Board-delegated authority.⁷⁶ The relevant decision maker would then formally make Ofcom's final decision.⁷⁷

What happens if settlement discussions are unsuccessful?

- 5.26 The subject of the investigation may withdraw from settlement discussions at any time before confirming that it has accepted the requirements for settlement and made an admission. Ofcom may also withdraw from settlement discussions at any stage, though prior to doing so, we would notify the subject and give it the opportunity to respond.

⁷³ CMA Rules, Rule 9(5)

⁷⁴ This would, for example, be the same amount as previously proposed to the subject of the investigation were settlement discussions successful and concluded swiftly. The discount may be reduced in the event the discussions take longer, as set out above.

⁷⁵ As noted above, the discount may be reduced in the event the discussions take longer, as set out above.

⁷⁶ CMA Rules, Rule 9(2) and 9(3)

⁷⁷ CMA Rules, Rules 9(4) – 9(6)

- 5.27 If settlement discussions do not result in a settlement then the case will revert to the usual procedure.
- 5.28 The subject of the investigation would not have entered into the binding settlement agreement and therefore would not have made any formal admissions.
- 5.29 The final decision makers (i.e. the persons deciding on whether to issue an infringement decision) would not see any notes of any settlement discussions and the case team would not reveal details of the settlement discussions to the final decision makers, so that the decision could be taken impartially on the basis of the relevant evidence.
- 5.30 As noted above, settlement discussions are not akin to “without prejudice” negotiations for the purposes of seeking to resolve litigation. Any additional documentary evidence provided during the settlement discussions would still go onto the case file and could be taken into account by Ofcom for the purposes of its final infringement decision even if settlement discussions break down. In addition, Ofcom may follow up any new competition law issues which come to light during settlement discussions.

Publicity in settlement cases

- 5.31 Ofcom will not usually publish the fact that settlement discussions are taking place, or that settlement discussions have been unsuccessful. However, following the conclusion of a successful settlement process, Ofcom would normally expect to refer to the fact that settlement has been agreed in the final published decision and may publicise this on the CCEB section of our website in accordance with our usual process.

Section 6

Taking urgent action

- 6.1 Once Ofcom has formally opened a Competition Act investigation, we have the power to require a person to comply with temporary directions (known as “interim measures”) while we complete our investigation.⁷⁸ We may impose interim measures where we consider that it is necessary to act as a matter of urgency for the purpose of:
- a) preventing significant damage to a particular person or category of person; or
 - b) protecting the public interest.⁷⁹
- 6.2 In such a case, we may impose the interim measures as we consider appropriate for preventing significant damage or protecting the public interest.
- 6.3 Ofcom may exercise these powers following a request to do so by an application or on its own-initiative. For guidance on making an application for Ofcom to take urgent action, see *Advice for complainants: Submitting a complaint to Ofcom*.⁸⁰

Process for considering a request for interim measures

- 6.4 We will assess requests for interim measures against the relevant statutory criteria. If we consider the test is met then we may grant interim measures at our discretion, and we may decide not to impose interim measures even where the statutory criteria are met. In exercising this discretion, we will have regard to other relevant considerations including the impact on the person who would be subject to the interim measures direction and any relevant third party interests.
- 6.5 The decision on whether to impose interim measures will be taken by a senior member of Ofcom’s executive with appropriate Board-delegated authority.
- 6.6 In most cases, where we are considering whether to grant interim measures in response to a third party request, Ofcom will inform the undertaking about whom the request for interim measures has been made (the “subject”) that we have received such a request, and will give the subject the opportunity to make representations to Ofcom on a non-confidential version of the request.
- 6.7 In some cases, we may receive a request for interim measures before we have decided whether to open a Competition Act investigation (for example, we might receive a request with a complaint submission). As stated above, Ofcom does not have powers to impose interim measures until we have formally opened a Competition Act investigation. Therefore, in such cases, before we can make a

⁷⁸ Competition Act 1998, section 35

⁷⁹ Competition Act 1998, section 35(2)

⁸⁰ [Link to be inserted when available]

decision on whether to impose interim measures, we will need to decide whether the statutory test⁸¹ for opening a Competition Act investigation has been met.

- 6.8 We will seek to do this expeditiously, but we may require information from the subject of the application in order to assess whether the statutory criteria to open a Competition Act investigation are met, and whether it is appropriate to take urgent action. In such cases, Ofcom may request information informally as we cannot use our statutory information gathering powers under the Competition Act until we have opened an investigation. Ofcom would expect timely co-operation from the subject in responding to such informal information requests. Assuming we decide that the statutory threshold for opening a Competition Act investigation has been met and we open an investigation, we would expect to follow up with formal information requests, using our statutory powers under the Act.
- 6.9 Before reaching a decision on whether to impose interim measures, the decision-maker will first reach a provisional view based on the evidence set out in the applicant's request, any representations received from the subject of the application and any further information gathered during the course of the investigation up until that point.
- 6.10 Where our provisional decision is to give a direction imposing interim measures, we will send a provisional decision to the subject of the application⁸² and the applicant, which will set out the proposed measures and Ofcom's reasons.⁸³ We will also allow the subject to inspect documents on the file which relate to the proposed measures, but may withhold confidential information and internal documents.⁸⁴ Ofcom will allow the subject the opportunity to make written representations,⁸⁵ and we may allow the applicant to do so if we consider it appropriate.
- 6.11 Where our provisional decision is to reject an application for interim measures, we will normally inform the applicant and the subject and provide them with an opportunity to comment and submit any further information or evidence before reaching our final decision.
- 6.12 Given the urgent nature of the interim measures process, we will normally set a short timeframe for representations. Ofcom will not publish the provisional decision, or any details of it.
- 6.13 As soon as reasonably practicable after the period for representations had ended, and after taking into account any representations, Ofcom will determine whether to impose interim measures. We will inform the subject of the application⁸⁶ (and the applicant if relevant). Ofcom will publish details of our decision and a non-confidential version of it on the CCEB.⁸⁷

⁸¹ In accordance with section 25 of the Competition Act 1998, before opening a Competition Act investigation, we must be satisfied there are reasonable grounds for suspecting that a competition law infringement has occurred

⁸² Competition Act 1998, section 35(3)(a)

⁸³ Competition Act 1998, section 35(4)

⁸⁴ CMA Rules, Rule 13(1), Rule 13(2)

⁸⁵ Competition Act 1998, section 35(3)(b)

⁸⁶ CMA Rules, Rule 13(4)

⁸⁷ Ibid

Section 7

Procedural complaints about investigations

- 7.1 If the subject of an investigation, any complainant or a third party (where relevant) is dissatisfied about any aspect of the investigation procedure, it should usually raise its concerns in writing with the case leader in the first instance, and then with the person overseeing the investigation (i.e. the case supervisor).
- 7.2 If a party does not consider that its concerns have been satisfactorily resolved by the case leader and/or the case supervisor then, if an investigation has been formally opened, it may refer certain procedural complaints to Ofcom's Procedural Officer.⁸⁸

The Procedural Officer

- 7.3 The Procedural Officer is independent from the Competition Act investigation, case team and decision makers, and will not have been involved in the investigation (other than as the Procedural Officer).⁸⁹ The role of the Procedural Officer is intended to ensure that procedural issues can be addressed quickly, efficiently and cost effectively, and independently of the case team.
- 7.4 The Procedural Officer will also chair any oral hearings in Competition Act investigations.⁹⁰

Types of complaint which can be made to the Procedural Officer

- 7.5 Complaints about the procedure followed by Ofcom when conducting a Competition Act investigation can be made to the Procedural Officer by the subject of the investigation, complainant or a third party (where relevant) once the investigation has been formally opened.
- 7.6 The Procedural Officer will deal with complaints which relate to the following:
- a) deadlines for parties to respond to information requests, submit documents or provide representations;
 - b) requests for redaction of confidential information in documents on Ofcom's case file, and in documents that Ofcom proposes to publish or make available to parties of the investigation;
 - c) requests for disclosure or non-disclosure of certain documents or information on Ofcom's case file;
 - d) issues relating to the process for oral hearings;

⁸⁸ CMA Rules, Rule 8(1)

⁸⁹ Ibid

⁹⁰ CMA Rules, Rule 6(5)

- e) other significant procedural issues that may arise during the course of an investigation.

7.7 The Procedural Officer is not able to deal with complaints which relate to decisions taken by Ofcom relating to substantive issues, for example decisions on the scope of information requests or decisions relating to the scope and substance of an investigation.

Making a complaint to the Procedural Officer

7.8 If a party is not satisfied with the decision of the case supervisor regarding the procedural issue it has raised, then it may refer its concerns to the Procedural Officer. If it wishes to do so, it should make an application to the Procedural Officer as soon as possible after receiving the decision from the case supervisor, and in any event within five working days.

7.9 The application should be no longer than five sides of A4 paper and should include:

- a) the name and contact details of the applicant;
- b) the name and contact details of the lawyers acting for the applicant (where appropriate);
- c) the Ofcom case name and reference number;
- d) the date of decision made by the case supervisor; and
- e) a short summary of the issues including a summary of the case team's original decision, the decision of the case supervisor, the reason the applicant wants a review of that decision and the outcome the applicant is seeking.

7.10 The applicant should also provide copies of relevant correspondence between it and Ofcom relating to the issue in question and copies of any relevant information or documents which the applicant holds.

7.11 The application should be submitted by email to [EMAIL ADDRESS TO BE INSERTED].

7.12 The Procedural Officer may, if they consider it appropriate, provide an opportunity for members of the case team, the case leader, the case supervisor and the applicant to make oral representations on the telephone or at a meeting.

The Procedural Officer's decision

7.13 The Procedural Officer will deal with the application as quickly as possible, and will aim to take a decision in most cases within 10 working days from receipt of the application. In any event the Procedural Officer will reach a decision within 20 working days from receipt of the application.⁹¹ The Procedural Officer may extend this timeframe by no more than 20 working days if there are special reasons to do so.⁹²

⁹¹ CMA Rules, Rule 8(2)

⁹² CMA Rules, Rule 8(3)

- 7.14 The Procedural Officer's decision will be submitted in writing to the applicant, and it will be binding on the case team and decision makers. A non-confidential version of the Procedural Officer's decision, or a summary of it, will be published on Ofcom's website, generally at the time the decision is made or at the end of Ofcom's investigation.

Annex 1 - Overview of a Competition Act case

