



# [DRAFT] Enforcement guidelines

Guidelines

Consultation

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## About this document

Ofcom is the independent regulator and competition authority for the UK communications industries. In this role, we may need to take enforcement action in the interests of citizens and consumers, and where appropriate to promote competition.

These Guidelines set out how Ofcom will investigate compliance with and approach enforcement of regulatory requirements relating to electronic communications networks and services, postal services and consumer protection legislation.

However, they do **not** apply to the following:

- Complaints from individual consumers about communications services or postal services.
- Enforcement of the Competition Act 1998.
- Enforcement in relation to broadcasting licences, the BBC or video on demand, including compliance with conditions in Broadcasting Act licences relating to broadcast content or fair and effective competition.
- Compliance with undertakings given to Ofcom under Part 4 of the Enterprise Act 2002.

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>.

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## Section 1

# Introduction

1.1 Ofcom is the independent regulator, competition authority and designated enforcer of consumer law for the UK communications industries. In this role, we may need to take enforcement action in the interests of citizens and consumers, and where appropriate to promote competition.

## What do these Guidelines cover?

1.2 These Guidelines set out how Ofcom will approach enforcement in most cases relating to electronic communications networks and services and postal services. They apply to all Ofcom's enforcement processes, except where otherwise stated or where Ofcom has good reason to depart from them.

1.3 These Guidelines apply in particular when Ofcom is investigating compliance with or enforcing any of the following regulatory requirements (we call these 'regulatory investigations' in the rest of this document):

- Regulatory conditions and directions imposed or given by Ofcom under sections 45 or 49 of the Communications Act 2003 ("the Communications Act"), such as general conditions (including numbering conditions), access-related conditions, universal service conditions, significant market power ("SMP") conditions, privileged supplier conditions and SMP apparatus conditions;
- Regulatory conditions and directions imposed or given by Ofcom under the Postal Services Act 2011 ("the Postal Services Act") or other postal legislation;<sup>1</sup>
- Restrictions or conditions applicable to companies with powers under the electronic communications code ("Code operators"), as set out in the Electronic Communications Code (Conditions and Restrictions) Regulations 2003;<sup>2</sup>
- Requirements under sections 105A to 105C of the Communications Act relating to the security of public electronic communications networks and services;<sup>3</sup>

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<sup>1</sup> Such as section 89A or 116(2A) of the Postal Services Act 2000 (schemes as to terms and conditions for provision of postal services, and the Postcode Address File), or under section 25(5) of the Consumers, Estate Agents and Redress Act 2007 (requirements to give information to Citizens Advice, etc)

<sup>2</sup> Note that Ofcom does not have powers to enforce compliance with the Electronic Communications Code itself.

<sup>3</sup> Section 105A requires network providers and service providers to take technical and organisational measures appropriately to manage risks to the security of public electronic communications networks and services, and network providers to take all appropriate steps to protect, so far as possible, the availability of the provider's public electronic communications network; section 105B requires network providers and service providers to notify Ofcom of certain security breaches; section 105C requires network providers and service providers to submit to an audit of their security measures. Pursuant to section 105D enforcement action can be taken against a failure to comply with the requirements under sections 105A to 105C in accordance with the process set out in sections 96A to 96C of the Communications Act.

- Failure to comply with a direction of the Phone-paid Services Authority (previously known as PhonepayPlus) relating to compliance with the Code of Practice for Premium Rate Services;<sup>4</sup>
- Compliance with the requirements of the EU Mobile Roaming Regulation<sup>5</sup> and the Mobile Roaming (European Communities) Regulations 2007 (the “Mobile Roaming Regulations”);
- Compliance with the requirements relating to net neutrality under Articles 3, 4 and 5 of the EU Open Internet Access Regulation<sup>6</sup> and the Open Internet Access (EU Regulation) Regulations 2016 (“the Open Internet Access Regulations”);
- Statutory information requests made under the Communications Act, the Postal Services Act, the Wireless Telegraphy Act 2006, the Mobile Roaming Regulations and the Open Internet Access Regulations; and
- Ofcom’s powers to take action against persistent misuse of electronic communications networks and services under sections 128-130 of the Communications Act.<sup>7</sup>

1.4 They also apply to enforcement of consumer protection legislation, specifically:

- Consumer protection legislation in relation to which Ofcom has concurrent powers with other regulators under Part 8 of the Enterprise Act 2002 (“the Enterprise Act”), including the Consumer Protection from Unfair Trading Regulations 2008; and

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<sup>4</sup> Under sections 120 to 124 of the Communications Act Ofcom has responsibility for the regulation of premium rate services. Day-to-day regulation of such services is carried out by the co-regulatory agency – the Phone-paid Services Authority (previously known as PhonepayPlus), which has issued a Code of Practice that has been approved by Ofcom in accordance with section 121 of the Communications Act. Providers of controlled premium rate services are required to comply with this Code of Practice. While any breach of that Code will be dealt with initially in accordance with the procedures set out in the Code, if an operator fails to comply with a Phone-paid Services Authority sanction direction, it can refer the matter to Ofcom for enforcement action under section 123 of the Communications Act, in accordance with the process under sections 94 to 96 of the Communications Act.

<sup>5</sup> Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13<sup>th</sup> June 2012 on roaming on public mobile communications networks within the Union (as amended). Ofcom has powers to enforce the EU Mobile Roaming Regulation under the Mobile Roaming (European Communities) Regulations 2007 (as amended), available on [www.legislation.gov.uk](http://www.legislation.gov.uk).

<sup>6</sup> Regulation (EU) No 2015/2120 of the European Parliament and of the Council of 25<sup>th</sup> November 2015 laying down measures concerning open internet access. Ofcom has powers to enforce the provisions relating to net neutrality under Articles 3, 4 and 5 of the Open Internet Access (EU Regulation) Regulations 2016, available on [www.legislation.gov.uk](http://www.legislation.gov.uk).

<sup>7</sup> Ofcom has power to take enforcement action against ‘persistent misuse’ of an electronic communications network or service under sections 128 to 130 of the Communications Act. These guidelines explain the enforcement procedures we will generally follow where we take action against such misuse. Ofcom’s statement of general substantive policy on how we use our persistent misuse powers is available here: [https://www.ofcom.org.uk/data/assets/pdf\\_file/0024/96135/Persistent-Misuse-Policy-Statement.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0024/96135/Persistent-Misuse-Policy-Statement.pdf)

- Requirements relating to unlawful or unfair terms in consumer contracts under the Consumer Rights Act 2015 (“the Consumer Rights Act”).<sup>8</sup>
- 1.5 These Guidelines do **not** apply in the following circumstances, which are dealt with in accordance with different processes and procedures:
- Complaints from individual consumers about communications services or postal services.<sup>9</sup>
  - Investigations under the Competition Act 1998.<sup>10</sup>
  - Enforcement in relation to broadcasting licences or video-on-demand (“VOD”), including compliance with conditions in Broadcasting Act licences relating to broadcast content or fair and effective competition.<sup>11</sup>
  - Enforcement of BBC requirements.<sup>12</sup>
  - Enforcement of statutory information requests made under the Competition Act 1998<sup>13</sup> or under legislation which gives an enforcement role solely to the courts rather than to Ofcom.
  - How Ofcom will resolve disputes under the Communications Act, Schedule 3 of the Postal Services Act<sup>14</sup> or under the Communications (Access to Infrastructure) Regulations 2016.<sup>15</sup>

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<sup>8</sup> Ofcom has powers to enforce these provisions under Part 8 of the Enterprise Act. Alternatively, Ofcom may enforce those provisions under Schedule 3 to the Consumer Rights Act 2015

<sup>9</sup> If you want to make a complaint to Ofcom as a consumer, viewer or listener about a communications provider, broadcaster or postal services provider, please visit our website for advice on how to make a complaint: <https://www.ofcom.org.uk/complain-to-ofcom>

<sup>10</sup> Guidance on Ofcom’s procedures for Competition Act 1998 enforcement may be found here: [*Link to Ofcom’s Enforcement Guidelines for Competition Act investigations when available*]

<sup>11</sup> Guidance on Ofcom’s procedures for broadcasting and VoD enforcement may be found here: <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/guidance/procedures>.

Ofcom has also published procedures for investigating breaches of competition-related conditions in Broadcasting Act licences available here: [*Link to the Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences when available*]

<sup>12</sup> Guidance on Ofcom’s procedures for enforcement of BBC requirements may be found here: [*Link to webpage giving guidance on enforcement of BBC requirements when available*]

<sup>13</sup> Ofcom’s powers to enforce statutory information requests made under the Competition Act 1998 are discussed in Ofcom’s Enforcement Guidelines for Competition Act investigations: [*Link to Ofcom’s Enforcement Guidelines for Competition Act investigations when available*]

<sup>14</sup> Ofcom has published separate procedures relating to these: see our *Dispute Resolution Guidelines*: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0020/71624/guidelines.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0020/71624/guidelines.pdf) and our supplementary guidance on postal disputes:

[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0022/66505/dispute\\_resolution\\_april2012.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0022/66505/dispute_resolution_april2012.pdf).

<sup>15</sup> Ofcom has published separate procedures relating to these: see our *Guidance under the Communications (Access to Infrastructure) Regulations 2016*:

[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0025/95191/Guidance-under-the-Communications-Access-to-Infrastructure-Regulations-2016.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0025/95191/Guidance-under-the-Communications-Access-to-Infrastructure-Regulations-2016.pdf).

- Enforcement of regulatory obligations relating to interference with radio spectrum or radio equipment.<sup>16</sup>
- Compliance with undertakings given to Ofcom under Part 4 of the Enterprise Act.<sup>17</sup>

## Our objectives

- 1.6 We take enforcement action against non-compliance with statutory or regulatory requirements in order to prevent harm to consumers and competition and to remedy this where we can.
- 1.7 We seek to ensure that enforcement action is 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

- 1.8 These Guidelines take effect from [DATE]. They set out Ofcom's general approach to enforcement in the areas covered by the Guidelines. They do not have binding legal effect, and they are designed to be flexible. Where we depart from the approach set out in these Guidelines, we will be prepared to explain why.
- 1.9 These Guidelines are not a substitute for any regulation or law and are not legal advice.
- 1.10 While we have sought to outline the types of enforcement processes which would and would not be covered by these Guidelines, Ofcom's powers and responsibilities may change over time. Were Ofcom to gain new enforcement powers, we would be likely to use the process which appears to us most closely analogous in terms of the statutory framework.

## Structure of these Guidelines

- 1.11 The types of enforcement action covered by these Guidelines take place under a variety of different legal frameworks. Relevant differences in the process adopted for enforcement to reflect the relevant statutory framework are highlighted in this document. In particular, Ofcom's powers to enforce consumer protection legislation are different from Ofcom's powers to enforce compliance with regulatory requirements imposed by Ofcom as they may ultimately involve Ofcom making an application to Court for a court order. We explain below the types of enforcement process covered by different sections of these Guidelines.
- 1.12 In Section 2 we explain why and how Ofcom opens an enforcement case. This section applies to all types of enforcement covered by these Guidelines.

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<sup>16</sup> See the relevant information on our website about our spectrum enforcement powers: <https://www.ofcom.org.uk/spectrum/interference-enforcement>

<sup>17</sup> BT has given Ofcom undertakings under Part 4 of the Enterprise Act, which are available here: <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/policy/bt-undertakings>

- 1.13 In Section 3 we explain how Ofcom carries out an investigation, including how it gathers information during an investigation. This section applies to all types of enforcement covered by these Guidelines.
- 1.14 In Section 4, we explain possible outcomes in a regulatory investigation - meaning any enforcement processes covered by these Guidelines which do not concern enforcement of consumer protection legislation. We also explain how decisions are taken in such cases.
- 1.15 In Section 5, we explain the process for resolving a regulatory investigation through voluntary settlement by the subject of the investigation – this involves the subject admitting it has breached the relevant regulatory requirement(s) and accepting that the remainder of the investigation will follow a streamlined administrative procedure, and in return getting a reduced financial penalty.
- 1.16 In Section 6, we explain the process Ofcom would follow when considering taking urgent action in certain regulatory investigations.
- 1.17 In Section 7, we explain possible outcomes of an investigation into a breach of consumer protection legislation.
- 1.18 In Section 8, we explain the process we would follow when considering whether to issue a direction under General Condition 20.3 of our General Conditions of Entitlement (“GC 20.3”).<sup>18</sup>
- 1.19 An outline of the process we will usually follow in regulatory investigations is set out in Annex 1 and an outline of the process we will usually follow in consumer protection enforcement cases is set out in Annex 2.

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<sup>18</sup> These are available on our website here: <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/telecoms-competition-regulation/general-authorisation-regime>



## Section 2

# Why and how Ofcom opens cases

## Why Ofcom opens cases

- 2.1 Ofcom's principal duties in carrying out our functions, as set out in section 3 of the Communications Act, are:
  - a) to further the interests of citizens in relation to communications matters; and
  - b) to further the interests of consumers in relevant markets, where appropriate, by promoting competition.
- 2.2 Taking action against non-compliance with statutory and regulatory requirements imposed in the interests of citizens and consumers is usually likely to further their interests by preventing or remedying consumer harm. It is also important that we take action in an efficient and effective way, that is evidence-based, proportionate, consistent, accountable and transparent, and targeted only at cases where action is needed. We cannot necessarily pursue every possible issue that comes to our attention and 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.
- 2.3 We make decisions about whether or not to open investigations 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. In doing so, we seek to exercise our discretion to target our action at the cases we think are most likely to produce good outcomes for citizens and consumers.
- 2.4 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 contravention (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 potential investigation. This could include, for example, whether other agencies may be better placed to investigate the complaint; and
- c) The resource implications of conducting an investigation, for example, 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.

2.5 Where appropriate we will also consider other factors as well.<sup>19</sup>

2.6 Before exercising our enforcement powers under sections 94 or 96A of the Communications Act or under Schedule 7 to the Postal Services Act, we must consider if a more appropriate way of proceeding would be under the Competition Act 1998. Where we decide it is more appropriate to proceed under the Competition Act 1998 we will state our reasons for doing so.

## Sources of information

2.7 Information which could trigger an investigation into compliance with a requirement could come to Ofcom's attention from a number of different sources. For example, Ofcom may consider opening an investigation:

- where a business comes to us to let us know that they believe they have or may have breached a requirement;
- in response to a complaint made to us by an industry stakeholder or whistleblower;<sup>20</sup>
- in response to information provided to us by other bodies (for example, where other regulatory bodies, MPs, consumer organisations or the press draw to our attention complaints they have received about a particular issue);
- where routine monitoring by us gives rise to a concern about compliance, for example where we identify that our Consumer Contact Team has received large numbers of complaints from consumers relating to a particular issue;

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<sup>19</sup> For example, any relevant matters set out in statutory policies such as that relating to the exercise of our powers in relation to persistent misuse, which we are required by section 131 of the Communications Act to publish and have regard to in the exercise of those powers.

<sup>20</sup> As explained further below, guidance for stakeholders who wish to make a complaint and for whistleblowers is set out in the document "*Advice for complainants: Submitting a complaint to Ofcom*", available here [*Link to be inserted when available*].

- where we identify a particular concern through other areas of our work, for example, as a result of considering a regulatory dispute under the Communications Act or Postal Services Act.
- 2.8 Sometimes we receive information, including complaints, that suggests there is an industry wide issue causing harm to the interests of citizens and consumers. In such cases, we may use consumer research, mystery shopping or detailed analysis of complaints to determine on which business(es), if any, we should focus our resources. However, it may not always be possible to prioritise our work effectively without further information from those we regulate, and in such cases we may open an enforcement programme and use our formal information gathering powers to gather further evidence from relevant businesses in order to determine where the problem lies, and the appropriate, proportionate response to tackle the harm.<sup>21</sup> When the evidence gathered indicates the need to investigate a particular entity, we will handle the opening of that investigation as for any other investigation under these guidelines.

## Complaints and whistleblowing

- 2.9 As noted above, some of our investigations begin because we have received a specific complaint about potential non-compliance by a business with a relevant regulatory requirement from another business or a trade organisation. Guidance for stakeholders who wish to make a complaint is set out in the document “*Advice for complainants: Submitting a complaint to Ofcom*”, available here [*Link to be inserted when available*].
- 2.10 In addition, Ofcom has published guidance on how individuals working in the communications sector may contact us if they have concerns about possible wrongdoing at their own organisation (or their former organisation) and where they have been unable to raise or resolve those concerns internally.<sup>22</sup> Such disclosures can be made in confidence to the Secretary to the Corporation. Some further guidance for potential whistleblowers is also set out in our *Advice for complainants* document.

## Enquiry phase

- 2.11 When considering whether to open an investigation, Ofcom will generally first carry out an enquiry phase, during which we will give the business whose conduct we are considering the opportunity to comment and provide 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,<sup>23</sup> or where the scale of any possible consumer harm appears too low to merit the resource required to

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<sup>21</sup> An example of where we might do this is in relation to the exercise of our powers to take action against persistent misuse under sections 128 to 130 of the Communications Act. We have an ongoing enforcement programme against such misuse and may use our formal information gathering powers to help us identify where to take action.

<sup>22</sup> <https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines>

<sup>23</sup> An example may be where we have served a formal information notice under our ongoing enforcement programme in relation to persistent misuse under sections 128 – 130 of the Communications Act and obtained information we need to decide to proceed with our investigation.

investigate. In some cases, we may also not have an enquiry phase where there are reasons to proceed to an investigation more quickly.

- 2.12 We do not make a decision on whether or not there has been a breach of a requirement or the merits of a complaint during this phase of our assessment –the purpose of this phase is to decide whether we should commit our resources to an investigation of the relevant matters in all the circumstances, having considered all the relevant factors, as explained in paragraph 2.4 above.
- 2.13 When we open an enquiry, we will notify the business whose conduct we are considering and any complainant, and will generally provide the subject of the possible investigation, and any complainant, with contact details for the case leader, who acts as the main point of contact during an enquiry and any subsequent investigation (as discussed further in Section 3 below).
- 2.14 Where we open an enquiry following receipt of a complaint from a stakeholder, we will generally tell the subject of the possible investigation we are doing so on the basis of a complaint we have received and will generally share a non-confidential version of the complaint submission with it for comment.<sup>24</sup> Ofcom will consider requests from complainants to remain anonymous. However, it may not be feasible to open or conduct an investigation without revealing the identity of the complainant. This does not apply to whistleblowers.
- 2.15 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 (for example where we are also considering whether it is more appropriate to open a case under the Competition Act 1998, an enquiry is likely to take longer). 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.
- 2.16 We do not generally exercise our formal information gathering powers requiring the subject of the possible investigation to respond 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. In some cases, we may meet the subject of the possible investigation and/or a complainant if relevant.
- 2.17 We also do not publish details of enquiries, or comment publicly on enquiries.

## Informal resolution

- 2.18 In some cases, Ofcom may be able to resolve an issue raised in a complaint or identified through compliance monitoring through informal contact with the business whose conduct we are considering, including during an enquiry phase where relevant. For example, we may be satisfied that a business has taken, or has offered

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<sup>24</sup> There may also be cases in which we consider that it is not appropriate to do this, for example, where we consider this may prejudice the conduct of any subsequent investigation. We may also decide not to share a non-confidential version of the complaint with the business whose conduct we are considering at this stage in cases where we consider that we already have sufficient information to decide whether or not to investigate without obtaining comments from it at this stage. In such a case, and in the event that Ofcom decides to open an investigation, we would share a non-confidential version of the complaint submission with the subject of the investigation at that stage (unless doing so may prejudice our ability to carry out an investigation, in which case we may delay doing so until an appropriate later point of time).

assurances that it will take, appropriate steps to address any concerns we have identified, such that there is no need for further action (although there may be a period of compliance monitoring). In such cases, we would normally write to the business whose conduct we have been considering and any complainant if there is one 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 compliance issue).

- 2.19 Such informal action would not generally involve Ofcom taking any decision on the merits of a complaint or about whether or not any regulatory or legal provision has been breached.
- 2.20 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.
- 2.21 We may publish details of 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**

- 2.22 A senior member of Ofcom's executive with appropriate Board-delegated authority will decide whether to open an investigation. Typically, this would be the person who would be responsible for overseeing the investigation.
- 2.23 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 final decision.
- 2.24 Ofcom will not usually publicise a decision not to open a formal investigation unless the fact that a complaint has been made has been put into the public domain by either the complainant or the business whose conduct we were considering investigating, or a potential investigation is the subject of press speculation, and we consider fairness requires us to clarify the position.
- 2.25 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 3.6 below) and next steps (although we may delay doing so if we consider it may prejudice our ability to carry out an investigation).
- 2.26 Shortly after sending the case opening letter(s), we generally also announce that we have opened an investigation on the Competition and Consumer Enforcement

Bulletin (“CCEB”) section of our website<sup>25</sup> (although we may delay doing so if we think this could prejudice our ability to carry out an investigation). The case opening announcement would typically include the following details:

- a) the identity of the subject of the investigation;
- b) the identity of any complainant;<sup>26</sup>
- c) the regulatory or legal provisions to which the investigation relates;
- d) the scope of the investigation; and
- e) the case leader’s contact details.

2.27 Announcing the beginning of an investigation does not imply that Ofcom has formed any view about whether or not any regulatory or legal provision has been breached.

2.28 In some cases, where Ofcom already has sufficient information from informal engagement with the business whose conduct we have been considering and/or public or other third party sources to reach a decision that formal enforcement action is appropriate and to reach a provisional decision on compliance with a relevant requirement, we may first contact the subject of our investigation informing it that we have decided to take formal enforcement action once we have already reached a provisional decision on compliance. For example, this may be the case where we are considering potential non-compliance with requirements imposed under a statutory information request, as such cases typically focus on whether or not the relevant organisation has provided the requested information by the required deadline. In such a case, we may send the case opening letter at the same time as issuing the relevant statutory notification setting out a determination that we have reasonable grounds for believing that there has been a contravention.<sup>27</sup>

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<sup>25</sup> <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins>

<sup>26</sup> If a complainant has a concern about being publicly identified on Ofcom’s website, the complainant should raise this concern with us, ideally at the time of making its complaint submission. For the avoidance of doubt, Ofcom will not publish a copy of the complaint submission itself.

<sup>27</sup> For example, in a case relating to potential non-compliance with a statutory information request under section 135 of the Communications Act, this would be a notification under section 138 of the Act. Further information about the process for issuing a provisional breach notification is set out at paragraphs 4.7 - 4.13 below.

## Section 3

# Investigating

## Introduction

- 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.
- 3.2 Although the statutory framework for each different type of investigation may differ, the initial process in broad outline will be the same for each. This section therefore applies to all the kinds of enforcement covered by these guidelines.

## Engagement with Ofcom during the investigation

- 3.3 We seek to ensure that enforcement action is 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 or other relevant third parties.
- 3.4 Where it would assist the investigation, we will be prepared to meet with the subject of an investigation and complainants, and/or provide written or verbal updates. We will decide whether and when it is appropriate to do so on a case-by-case basis.
- 3.5 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

- 3.6 At the outset of an investigation, Ofcom will usually<sup>28</sup> inform the subject of the investigation, and any complainant, of:
- who the case leader is - this is the person who will be their main contact at Ofcom for the case during the course of the investigation; and
  - who the case supervisor is - this is the person who will be overseeing the investigation.<sup>29</sup>

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<sup>28</sup> 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 may need to use our formal information gathering powers to obtain and preserve evidence prior to alerting the subject of the investigation.

<sup>29</sup> As explained at paragraph 4.5 below, the case supervisor would typically be the person responsible for deciding whether there are grounds for action and to issue a provisional breach notification.

- 3.7 At the same time, Ofcom may ask them to nominate a principal point of contact for communications about the investigation.
- 3.8 We would update the subject of the investigation, and any complainant, if the case leader or case supervisor changes during the course of the investigation.
- 3.9 Details of the case leader for an investigation will also be set out on the CCEB section of our website.

### Timescales

- 3.10 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.
- 3.11 We will provide updates on the progress of investigations, including when we expect to reach a particular milestone, and will also provide updates where this changes.

### Changing the scope of the investigation

- 3.12 We may widen the original scope of an investigation if we become aware of new issues that warrant investigation, or reduce the scope of an investigation if we decide that 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.

### Information gathering

- 3.13 Ofcom relies on accurate information, provided in a timely manner, to carry out efficient investigations. We have a number of statutory information gathering powers which we would expect to use in order to obtain information for the purposes of investigations covered by these Guidelines.
- 3.14 We set out below where our statutory powers to gather information come from:

Type of suspected breach	Information gathering power
Any regulatory requirement imposed under section 45 or 49 of the Communications Act	Section 135 Communications Act
Requirements under section 105A to 105C of the Communications Act relating to network security	Section 135 Communications Act
Any regulatory requirement imposed under the Electronic Communications Code (Conditions and Restrictions) Regulations 2003	Section 135 Communications Act
Persistent misuse	Section 135 Communications Act



Failure to comply with a direction of the Phone-paid Services Authority	Section 135 Communications Act
Any regulatory condition/direction imposed under Part 3 of the Postal Services Act or other postal legislation <sup>30</sup>	Section 55 and Schedule 8 Postal Services Act
EU Mobile Roaming Regulation and the Mobile Roaming Regulations	Regulation 2B Mobile Roaming Regulations
EU Open Internet Access Regulation and the Open Internet Access Regulations	Regulation 17 Open Internet Access Regulations
Consumer protection legislation falling within Part 8 of the Enterprise Act or enforcement of unfair contract terms under Schedule 3 of the Consumer Rights Act	Part 3 of Schedule 5 Consumer Rights Act

- 3.15 We have set out in our *Statement of Policy on Information Gathering*<sup>31</sup> how we will exercise our statutory information gathering powers and how we use information obtained under those powers.
- 3.16 Ofcom’s statutory information gathering powers are a critical tool in obtaining the information necessary to take appropriate enforcement action in the interests of citizens and consumers. We expect recipients to provide correct and complete information in response to formal information requests by the given deadline. Ofcom may take enforcement action against failures to respond properly to formal information requests, and may impose sanctions for non-compliance, including the imposition of financial penalties. Failure to respond properly to a formal information request can also constitute a criminal offence.<sup>32</sup>
- 3.17 Alternatively, where we consider it may be more appropriate to do so, rather than taking formal enforcement action against a failure to comply, Ofcom may instead take into account the failure to co-operate with Ofcom’s information request as part of our

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<sup>30</sup> Including any direction under section 89A or 116(2A) of the Postal Services Act 2000 (schemes as to terms and conditions for provision of postal services, and the Postcode Address File) or section 25(5) of the Consumers, Estate Agents and Redress Act 2007 (enforcement of requirements to give information to Citizens Advice, etc).

<sup>31</sup> Available at [https://www.ofcom.org.uk/consultations-and-statements/category-1/info\\_gathering](https://www.ofcom.org.uk/consultations-and-statements/category-1/info_gathering)

<sup>32</sup> Sections 138 to 144 of the Communications Act, Part 2 of Schedule 8 to the Postal Services Act, regulations 3 to 5A of the Mobile Roaming Regulations and regulations 19 to 23 of the Open Internet Access Regulations provide for Ofcom to impose financial penalties and give directions to secure compliance with a statutory information request, as well as criminal sanctions. Failure to comply with a request to provide information under Schedule 5 of the Consumer Rights Act is enforceable on an application to the court for a court order requiring the person who is subject to the notice to comply. The court can also require the recipient of the notice to pay the costs of making the application.

assessment of the appropriate level of penalty to impose for a breach of the regulatory requirement.<sup>33</sup> This will be decided on a case-by-case basis.

## Confidentiality

- 3.18 In accordance with our duties under the Communications Act, we are required to investigate and enforce in a transparent and accountable manner. Those duties must be balanced against the restrictions on disclosure contained in sections 26 and 393 of the Communications Act, section 56 of the Postal Services Act and section 237 of the Enterprise Act, and the legitimate interest of parties in ensuring that confidential and commercially sensitive information is protected.
- 3.19 Ofcom will always consider whether disclosure of information about a particular business is necessary for the purpose of facilitating the carrying out of our enforcement functions. In particular, Ofcom may judge that it is necessary to disclose information gathered from complainants or other third parties to the subject of the investigation in order to allow the subject's to respond to Ofcom's case. Similarly, Ofcom may judge that disclosure of information gathered from the subject of the investigation to a complainant and other third parties is justified in order to facilitate the carrying out by us of our functions.
- 3.20 Ultimately, it is for Ofcom to determine what is, and is not, appropriate to disclose in accordance with the statutory framework. 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, before making a final decision on whether to disclose the information.
- 3.21 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 the confidential information.

## Publicity

- 3.22 Ofcom is required to have regard to the principle under which regulatory activities should be 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. Consequently, publicising the investigations we are carrying out and our final decisions is an important part of carrying out our functions.
- 3.23 As explained at paragraph 2.26 above, when we open an investigation we will typically publicise it on the CCEB section of our website.<sup>34</sup>
- 3.24 We will also publish updates regarding the progress of an investigation on the CCEB when we reach key milestones (such when we issue a provisional breach notification,

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<sup>33</sup> See our Penalty Guidelines and the factors listed in paragraph 12:

[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0032/49685/penalty\\_guidelines\\_2015.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0032/49685/penalty_guidelines_2015.pdf)

<sup>34</sup> <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 emailed notifications of changes to the CCEB.

when we change the scope of an investigation, when we issue a final enforcement decision or when we close a case). This is explained in more detail in the relevant sections of these Guidelines.

- 3.25 We do not agree the text of CCEB updates with the subject of the investigation, or any complainant.
- 3.26 We will ordinarily inform the subject of the investigation shortly before (and no more than one working day before) publication on Ofcom's website that we will be doing so, and provide them with a copy of the intended text for information only at that stage.
- 3.27 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 7.00 am 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.
- 3.28 There may be certain cases which we consider it would be inappropriate to discuss publicly, for example because they are 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 in a relevant case. We would expect these cases to be exceptional.

## **Involvement of third parties**

- 3.29 Ofcom may consider it necessary to seek input from other relevant third parties – for example, from trade associations or competitors or customers of the business we are investigating, in order to assist us in reaching a decision on the case. Ofcom will involve third parties in an investigation to the extent necessary to carry out our functions fairly and effectively.

## **How to raise concerns with Ofcom**

- 3.30 If a subject of an investigation or a complainant 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.
- 3.31 Where engagement with the case leader / case supervisor does not resolve your concerns, you may contact the office of the Secretary to the Corporation ([corporationsecretary@ofcom.org.uk](mailto:corporationsecretary@ofcom.org.uk)) who will review your case.<sup>35</sup>

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<sup>35</sup> Further information on complaint escalations is set out on our website: <https://www.ofcom.org.uk/about-ofcom/contact-us/complaints-about-ofcom>

## Section 4

# Outcomes of regulatory investigations and the decision-making process

## Introduction

- 4.1 Ofcom's processes for making decisions covered by these guidelines vary depending on the type of decision being made. This section covers how Ofcom decides on the outcome of a regulatory investigation, meaning any enforcement processes covered by these Guidelines in which Ofcom is the final decision maker.
- 4.2 Ofcom is not the final decision maker in cases relating to enforcement of consumer protection legislation (i.e. cases under Part 8 of the Enterprise Act or Schedule 3 of the Consumer Rights Act). Ofcom's role there is to prepare a case for Court, and the possible outcomes and decision-making in those cases is discussed in Section 7 below.
- 4.3 In a regulatory investigation:
- We may decide that there are grounds for action. In such cases, we will first provide to the subject of the investigation a provisional decision explaining the reasons why we are minded to find a contravention of the relevant regulatory requirement(s) and the action that we propose to take as a result, and will give the subject the opportunity to make representations before proceeding to take a final decision. This may result in a final enforcement notification, which may also include the imposition of a financial penalty and/or a direction requiring steps to be taken to remedy a contravention or comply with a regulatory requirement. In other cases, we may find that there has been a contravention but that there is no need to impose a formal sanction.
  - We may decide that there is insufficient evidence of a contravention, and close the case on that basis (potentially subject to a period of compliance monitoring).
  - We may decide to close a case without having taken a final decision on the merits of a case. For example, we may decide to close the case for administrative reasons, such as where we consider that it is no longer appropriate to pursue the case in light of the factors set out at paragraph 2.4 above. Examples of relevant factors we might take into account could be where we are satisfied that the conduct we were concerned about has now ceased and the subject of the investigation has taken appropriate action to remedy any harm or has given appropriate assurances that it will be remedied.
- 4.4 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 in a regulatory case is discussed in Section 5 below.

## Decision making in regulatory investigations

- 4.5 The decision on whether there are grounds for pursuing formal enforcement action (in other words, whether to issue a provisional breach notification) will be taken by a senior member of Ofcom's executive with appropriate Board-delegated authority. Typically, this would be the person who is responsible for overseeing the investigation (the case supervisor).
- 4.6 Following the issue of a provisional breach notification and the receipt of any written submissions from the subject of the investigation (as explained further at paragraphs 4.7 to 4.14 below), except in cases where settlement discussions take place (as explained in Section 5), Ofcom will nominate a final decision maker who will be responsible for deciding on the final outcome of the investigation. This will be a senior member of Ofcom's executive with appropriate Board-delegated authority, who will not have been involved in the investigation and/or the preparation of the provisional breach notification.

## Provisional breach notifications

- 4.7 In cases where the decision is taken that there are reasonable grounds for believing that the subject of the investigation is contravening or has contravened the relevant regulatory requirements(s), Ofcom will notify the subject of the investigation of this finding, giving the reasons, and seek representations. This is a provisional view only and 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.
- 4.8 If the subject of the investigation is a company, Ofcom will deliver the notification in hard copy to the Company Secretary<sup>36</sup>, copied by email to our main contact, unless it has agreed otherwise with us.
- 4.9 Along with the notification we will provide to the subject of the investigation copies of or access to the evidence we have relied upon in reaching our provisional view. Wherever possible and appropriate, we would seek to do this by providing the subject of the investigation with copies of or access to the relevant documents in electronic form, but in some cases we may instead, or in addition, also provide hard copies. Where we have relied upon evidence provided to us by the subject itself, rather than providing copies of the relevant documents, we may instead list these in a schedule so that it is easy for the subject to cross-refer to its own copies.
- 4.10 Confidential information in the provisional decision and any accompanying documents will be marked. We will redact (or withhold as relevant) confidential third party information where appropriate in accordance with the relevant statutory framework (although as noted in paragraph 3.19 above, we may consider that it is necessary to disclose information provided by a third party to the subject of the investigation in order to be fair to it).
- 4.11 For some types of cases, where Ofcom is minded to impose a financial penalty, we are required by statute to include a provisional determination of penalty in any

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<sup>36</sup> In most cases, it is a statutory requirement to service notice on the Company Secretary of a company.

provisional breach notification.<sup>37</sup> For other types of cases, the matter is left to Ofcom's discretion.<sup>38</sup> Ofcom will, as a general rule, include with any proposed breach finding a provisional determination of penalty. In determining penalties, Ofcom will have regard to Ofcom's Penalty Guidelines.<sup>39</sup>

- 4.12 For some types of cases, Ofcom is also required by statute to specify in the notification the steps that we think should be taken by the subject of the investigation in order to comply with the relevant regulatory requirement and/or remedy the consequences of the contravention.<sup>40</sup> Again, for other types of cases the matter is left to Ofcom's discretion<sup>41</sup> but Ofcom will as a general rule include with any proposed breach finding a provisional view of the steps the subject should take. For example, we would generally expect the subject of an investigation to remedy the consequences of any breach to the fullest extent possible. Similarly, the notification will include details of any direction Ofcom is minded to give, where Ofcom has powers to give directions.
- 4.13 Ofcom will not publish provisional breach notifications but we will generally publish an update on the our CCEB section of our website. Our update will normally explain that we have issued a provisional breach notification, include a summary of the proposed contraventions that we are minded to find and, where relevant, of the steps we propose the subject of the investigation should take to comply and/or remedy the proposed contraventions, and will explain that the subject now has the opportunity to make representations on our proposed findings before we make our final decision.<sup>42</sup>

## Written submissions

- 4.14 The subject of the investigation will have the opportunity to make written representations to Ofcom on the proposed finding and on any proposed penalty,

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<sup>37</sup> These include notifications of contravention under section 96A of the Communication Act; notifications under section 110 of the Communications Act setting out Ofcom's determination that there are reasonable grounds for believing that a Code operator has contravened a requirement of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003; notifications of contravention of information requirements under section 138 of the Communications Act or under section 32C of the Wireless Telegraphy Act; notifications under regulation 3 of the Mobile Roaming Regulations and notifications under regulation 19 of the Open Internet Access Regulations

<sup>38</sup> These include, in relation to postal services, notifications under paragraph 4 of Schedule 4, paragraph 2 of Schedule 7 or paragraph 5 of Schedule 8 to the Postal Services Act determining there are reasonable grounds for believing, respectively, that a person has contravened a requirement to pay an administrative charge, to comply with a relevant regulatory requirement or to comply with an information requirement under section 55 of that Act. These also include notifications under section 128 of the Communications Act where Ofcom determines there are reasonable grounds to believe that a person has persistently misused an electronic communications network or service, or notifications under section 94 of the Communications Act in respect of an alleged contravention of an SMP apparatus condition or enforcement action relating to contravention of the Code of Practice for Premium Rate Services under section 123 of the Communications Act.

<sup>39</sup> These are available here:

[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0032/49685/penalty\\_guidelines\\_2015.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0032/49685/penalty_guidelines_2015.pdf)

<sup>40</sup> These include all the types of cases listed in footnote 37.

<sup>41</sup> For example, a notification under section 128 of the Communications Act, where Ofcom determines there are reasonable grounds to believe that a person has persistently misused an electronic communications network or service, may include a provisional view of the steps Ofcom would be minded to impose in an enforcement notification under section 129 of that Act.

<sup>42</sup>As noted at paragraph 2.28 above, in some cases we may not inform the subject of the investigation or announce that we are taking action until we have decided to issue a provisional breach notification.

proposed required steps and/or proposed direction as relevant. Typically, Ofcom will give the subject a period of at least four weeks for making written representations.<sup>43</sup> Ofcom will give a longer period in more complex cases.

- 4.15 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 provisional decision for the purposes of giving it the opportunity to make written representations on it. Similarly, where Ofcom's findings in relation to a potential breach of a regulatory requirement may have a direct impact on the economic interests of a third party, such as an agent or supplier of the subject of our investigation which has been responsible for the conduct giving rise to the potential breach, we may also consider that fairness in the carrying out of our functions requires that such third parties are given an opportunity to make submissions on it. In such cases, Ofcom would expect to give the complainant or the third party access to a non-confidential copy of the provisional decision 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 the complainant or third parties with copies of or access to the underlying evidence relied on.

### Further provisional breach notification

- 4.16 In some cases, new information or evidence may come to Ofcom's attention after we have issued a provisional breach notification and given the subject of the investigation the opportunity to comment on it, which leads us to consider making a material change to the nature of the proposed contravention findings (such as evidence of a different or more serious contravention) and/or increasing in the proposed level of penalty. In such circumstances, we would issue a further provisional breach notification on which we would give the subject the opportunity to comment as described above, before proceeding to reach a final decision.

### Oral hearings

- 4.17 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 provisional breach notification, which will be held after any written submissions have been provided.
- 4.18 The oral hearing will usually be held at Ofcom's offices in which the investigating case team is based and will be chaired by the final decision maker. 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 provided to the subject of the investigation.
- 4.19 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 the subject limits the number of persons attending the oral hearing on its behalf to a reasonable number.

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<sup>43</sup> In relation to notifications under the Postal Services Act or section 94 of the Communications Act, we are required to give a period of at least one month, beginning with the day after the one on which the notification was given, for representations to be made. In relation to persistent misuse cases, under section 128 of the Communications Act we are required to give a period of at least one month for representations to be made, except in urgent cases when the period must be at least 7 days.

4.20 Complainants and other third parties will not usually be invited to attend the oral hearing.

### Process for reaching a final decision

4.21 Following the oral hearing and, having considered all of the relevant evidence and any representations, the final decision maker will take a final decision on the case.

4.22 The possible outcomes at this stage are that:

- Ofcom issues a final decision confirming a finding of contravention. In some cases, we may issue a final enforcement notification imposing a financial penalty, requiring action to be taken to remedy the contravention or comply with the relevant regulatory requirement and/or confirming the proposed direction.<sup>44</sup> Any penalty imposed will be no greater than that set out in the provisional breach notification. In other cases, we may decide not to impose a financial penalty or to require the subject of the investigation to take action to bring itself into compliance and/or remedy the consequences of a contravention in the circumstances.
- A decision is taken that, in light of the subject's representations and/or review of further evidence, a finding of contravention as set out in the provisional breach notification cannot be maintained, and therefore the case should be closed without further action being taken.
- A decision is taken that the case should be closed for administrative reasons, in light of the factors set out at paragraph 2.4 above.<sup>45</sup> For example, we may decide that significant further investigation would be needed to decide whether to issue a final enforcement decision and that, due to other urgent or important work, our resources could be targeted more appropriately at other cases.

4.23 Ofcom will notify the subject of the investigation of our final decision. If the subject of an investigation that has led to a breach finding is a company, Ofcom will deliver the notification in hard copy to the Company Secretary,<sup>46</sup> copied by email to our main contact, unless the subject of the investigation has agreed otherwise with us.

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<sup>44</sup> This would include, under the Communications Act, confirmation decisions imposing a financial penalty or giving a direction under section 96C(2)(a) (relating to contraventions of regulatory requirements), section 111(2)(a) (relating to contraventions of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003) or section 139A (relating to contraventions of information requirements under section 135), or enforcement notifications under section 129 (relating to persistent misuse) or section 95 (relating to contraventions SMP apparatus conditions or enforcement action relating to contravention of the Code of Practice for Premium Rate Services under section 123 of the Communications Act). This would also include enforcement notifications under paragraph 6 of Schedule 4, paragraphs 5 and 6 of Schedule 7 and paragraph 7 of Schedule 8 to the Postal Services Act, enforcement notifications under section 32E(2)(a) of the Wireless Telegraphy Act, enforcement notifications under regulation 4A of the Mobile Roaming Regulations and enforcement notifications under regulation 22 of the Open Internet Access Regulations.

<sup>45</sup> In these circumstances, Ofcom would not reach a decision on the merits of the case.

<sup>46</sup> As noted above at footnote 36, in most cases, it is a statutory requirement to service notice on the Company Secretary of a company



## Publication of final contravention decisions

- 4.24 Once the final decision has been taken and notified to the subject of the investigation, Ofcom will close the case and update the details of the case on the CCEB section of Ofcom's website. This will generally include a summary of the contraventions Ofcom has found and details of any penalty and/or other measures imposed, such as any requirements imposed on the subject of the investigation to take action to bring itself into compliance or remedy the consequences of the contravention(s).
- 4.25 A non-confidential version of a final contravention decision will be published on the CCEB section of our website once we have finalised the relevant redactions of any confidential information. We will generally inform the subject of the investigation in advance of the intended date of publication of the final decision.

## Case closure without a final enforcement decision

- 4.26 If the relevant decision maker<sup>47</sup> concludes that Ofcom should not take any further action, we will close the case. As noted above this might be on the basis that:
- there is insufficient evidence of a contravention; or
  - we no longer consider it to be appropriate to pursue further enforcement action without having come to a decision on the merits of a case.
- 4.27 In both cases, we would typically follow the same process.
- 4.28 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 closed the case, which we would expect to publish on the CCEB section of our website. In some cases, if there is a good reason to do so, we may publish a reasoned case closure document setting out Ofcom's reasons for taking no further action – for example if we think it would be helpful for all stakeholders to clarify our interpretation of a particular regulatory condition or if we have accepted assurances about the steps the subject of the investigation will take to address the issue and we consider it would be in the interests of potentially affected customers or consumers to publicise these.
- 4.29 In certain cases, we may consider that fairness requires that we provide an opportunity for relevant stakeholders to comment before we finalise our decision to close the case. An example might be where the investigation was initiated following a complaint from a stakeholder, which may have further information relevant to the proposed decision.
- 4.30 In cases where we do not provide the opportunity to comment in advance of the final case closure decision being taken, we will inform the subject of the investigation of the case closure decision in advance of publishing the case closure notice on the CCEB section of our website.
- 4.31 A non-confidential version of a reasoned case closure decision will be published on the CCEB section of our website once we have finalised the relevant redactions of

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<sup>47</sup> Depending on the stage at which this decision is reached, this 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 maker.

any confidential information, and we will generally inform the subject of the investigation in advance of the intended date of publication.

## Compliance monitoring

- 4.32 Where Ofcom has taken enforcement action or closed a case having accepted 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 an investigation does not repeat behaviour that Ofcom has deemed to breach regulatory rules, that it complies with any direction, undertakings or commitments given, and that it implements any remedies required by Ofcom (for example, paying affected customers compensation).
- 4.33 The process that we follow during the compliance phases will differ from case to case. We may use formal information gathering powers to obtain data that can be used to measure compliance.
- 4.34 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 or notification, unless we receive an application prior to the expiry of the deadline together with an explanation of why the deadline should be extended including supporting evidence.
- 4.35 The CCEB section of Ofcom’s website includes a section for cases in compliance, where we will publish details of significant developments.<sup>48</sup>
- 4.36 Once we consider that compliance has been established, we will close the case and update the CCEB section of Ofcom’s website accordingly.

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<sup>48</sup> See: <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/cases-in-compliance>

## Section 5

# Settlement procedure

## Introduction

- 5.1 In some cases, Ofcom may consider that it is appropriate to settle a regulatory investigation. Settlement is a voluntary process in which the subject of the investigation admits it has breached relevant regulatory requirements and accepts that the remainder of the investigation will follow a streamlined administrative procedure. In such cases, Ofcom will impose a reduced penalty on the subject in light of its co-operation and the resource savings involved in following a streamlined administrative procedure.
- 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 not the same as resolving a case by giving assurances to change conduct which could lead to case closure without resulting in a final enforcement decision (as described in Section 4). It is a process for resolving a regulatory investigation which leads to a formal, legally binding regulatory decision.
- 5.4 Settlement discussions are not a negotiation with Ofcom about what Ofcom 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 regulatory 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 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.
  - 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.
  - In addition, Ofcom may follow up any new issues of regulatory concern which come to light during settlement discussions.

## Requirements for settlement

- 5.6 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 contravention. 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 contravention against it, it will pay a penalty set out at a maximum amount and will take any steps required to comply with relevant regulatory requirements and to remedy the consequences of the contravention (if relevant).
- Confirm that it accepts that it will no longer benefit from the settlement discount if it appeals the decision.
- Confirm that it will accept a streamlined administrative process. This will be decided on a case-by-case basis depending on the stage at which a settlement agreement is reached, but would include no written representations (except in relation to manifest factual inaccuracies) where settlement is concluded prior to a provisional breach notification being issued, and no oral hearing. In addition, the person responsible for deciding whether to issue a provisional breach notification would also be responsible for the final decision in a settlement case.

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

- 5.7 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 to make a provisional finding of contravention and come to a preliminary view on an appropriate level of penalty.
- 5.8 Ofcom will have regard to its statutory duties in deciding on whether it should settle a case on the basis of the admissions which the subject of an investigation is prepared to make. Ofcom will also consider other 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**

- 5.9 Where settlement discussions result in a final enforcement 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. The earlier the settlement, the greater the discount available, as the resource savings that Ofcom could achieve would be greater.
- 5.10 We would normally expect this discount to be:
- up to 30% for settlement discussions which are successfully concluded before the provisional breach notification is issued;

- up to 20% for settlement discussions which are successfully concluded after the provisional breach notification is issued but prior to written representations being received; or
  - up to 10% for settlement discussions which are successfully concluded after the provisional breach notification is issued and after written representations are received.
- 5.11 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.
- 5.12 Ofcom also recognises that in some cases businesses may proactively contact us to let us know about a potential breach of a regulatory requirement, may voluntarily take significant steps to address compliance following a breach of a regulatory requirement and/or to remedy the harm caused, and may provide us with significant co-operation in advancing our investigation (for example, providing us with relevant documents and evidence as a result of having undertaken their own internal investigations). In such cases, we would expect to take this co-operation into account in deciding on an appropriate level of penalty, in accordance with our Penalty Guidelines, whether or not the case results in a successful settlement in accordance with this process. The settlement discount is intended to reflect resource savings achieved by Ofcom as a result of following the settlement process, and would be taken into account in addition to any other forms of co-operation provided to Ofcom during the course of the investigation.

## Decision making in a settlement case

- 5.13 The decision maker in a settlement case will typically be the person responsible for deciding whether there are grounds for action and to issue a provisional breach notification, and therefore will usually be the person responsible for overseeing the investigation (the case supervisor). The relevant decision maker will then typically oversee settlement discussions. In contrast to our usual process, we would expect this decision maker to also be responsible for taking the final decision on the case in the event that settlement discussions are successful.

## Process

- 5.14 If the subject of an investigation wishes to discuss the possibility of exploring settlement, it should approach the case leader or case supervisor in the first instance.
- 5.15 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 contraventions and an appropriate level of penalty, and can engage meaningfully with the subject about our position during settlement discussions. We may therefore expect a business wishing to engage in early settlement discussions to help speed up the process by providing information in the meantime.

- 5.16 Settlement discussions will generally be conducted orally by members of the case team, involving others as appropriate in any particular case (for example, a senior legal director).
- 5.17 As noted at paragraph 5.10 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 three main stages at which a settlement may be reached:
- Prior to a provisional breach notification being issued;
  - Following a provisional breach notification being issued, but prior to the subject of the investigation making written representations in response; or
  - Following a provisional breach notification being issued, and after the subject of the investigation has made written representations in response.
- 5.18 In the event that settlement discussions are unsuccessful and the subject of the investigation wishes to seek further settlement discussions at a later stage of the process, it remains open for it to do so. However, as noted above, it is at Ofcom's discretion whether and on what bases to enter into settlement discussions at any stage of the process. We explain at paragraphs 5.31 to 5.35 what will generally happen in the event that settlement discussions break down.

### **Settlement prior to a provisional breach notification**

- 5.19 If the subject of the investigation indicates a willingness to consider settlement at this stage, 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.<sup>49</sup>
- 5.20 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.
- 5.21 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 provisional breach notification 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.

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<sup>49</sup> That discount would reflect the discount that Ofcom would be minded to apply to the penalty were settlement discussions successful and concluded swiftly. Were Ofcom minded to reduce the discount at any point on account of the time taken and the resources used in the discussions, we would give the subject of the investigation notice of our intention to do so.

## **Settlement following a provisional breach notification and prior to written representations**

5.22 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 provisional breach notification, 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 not make written representations on the provisional breach notification (except in relation to manifest factual inaccuracies). We would expect to set a deadline for the subject of an investigation to indicate to Ofcom its willingness to seek to settle the case on this basis at the time the provisional breach notification is issued.

## **Settlement following a provisional breach notification and following written representations**

5.23 In the event that the subject of the investigation wishes to make written representations on the provisional breach notification (which are more extensive than manifest factual inaccuracies), it may indicate to Ofcom that it wishes to enter into settlement discussions after doing so.

5.24 Ofcom would consider any written representations made to it in line with our usual process, including any representations as to the level of any penalty, before deciding whether or not to engage in settlement discussions and on what basis. As noted above, settlement discussions are not a negotiation. Therefore, in the event that we consider it appropriate to engage in settlement discussions after considering the written representations from the subject of the investigation, we would expect to provide it with a written summary of our revised position for the purposes of initiating settlement discussions. This would include setting out:

- the contraventions we remain minded to find; and
- an indication of what level of penalty we would be minded to impose, taking into account our revised assessment of the nature of the contraventions and after having applied a discount to reflect the subject of the investigation's co-operation at that stage of the process.<sup>50</sup>

5.25 As with the process prior to a provisional breach notification, 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 that basis. 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 the view as to whether it is likely to be productive to engage in further settlement discussions on that basis.

5.26 Ofcom would not expect to receive any further representations at this stage.

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<sup>50</sup> That discount would reflect the discount that Ofcom would be minded to apply to the penalty were settlement discussions successful and concluded swiftly. Were Ofcom minded to reduce the discount at any point on account of the time taken and the resources used in the discussions, we would give the subject of the investigation notice of that at that point.

## Successful conclusion of the settlement process

- 5.27 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.
- 5.28 If Ofcom had not already done so, we would proceed to issue a provisional breach notification<sup>51</sup> on the basis of the position reached during the settlement discussions. This would contain the proposed penalty amount, including the settlement discount.<sup>52</sup> The subject of the investigation would then be given a short time period to provide written representations on manifest factual inaccuracies in the provisional breach notification.<sup>53</sup>
- 5.29 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 enforcement decision which would reflect the position reached during the settlement discussions. The decision would contain the penalty amount, including the settlement discount.<sup>54</sup>
- 5.30 The relevant decision maker would then formally make Ofcom's final decision.

## What happens if settlement discussions are unsuccessful?

- 5.31 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.
- 5.32 If settlement discussions do not result in a settlement then the case will revert to the usual procedure.
- 5.33 The subject of the investigation would not have entered into the binding settlement agreement and therefore would not have made any formal admissions.
- 5.34 The final decision maker would not see any notes of any settlement discussions and the case team would not reveal details of the settlement discussions to the decision

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<sup>51</sup> This is generally a statutory requirement. For example, in a case relating to enforcement of a regulatory requirement imposed under section 45 of the Communications Act (with the exception of SMP apparatus conditions), this would be a notification under section 96A of the Act.

<sup>52</sup> 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.

<sup>53</sup> In some cases, such as under the Postal Services Act, section 94 of the Communications Act and section 128 of the Communications Act, we are usually required to give a period of at least one month for representations. However, we would expect the subject of the investigation to agree to respond before the statutory deadline as part of the settlement requirements.

<sup>54</sup> As noted above, the discount may be reduced in the event the discussions take longer, as set out above.



maker, so that the decision could be taken impartially on the basis of the relevant evidence.

- 5.35 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 enforcement decision even if settlement discussions break down. In addition, Ofcom may follow up any new issues of regulatory concern which come to light during settlement discussions.

### **Publicity in settlement cases**

- 5.36 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

# Urgent action

- 6.1 Ofcom has the power to take urgent action in relation to the following types of enforcement action:
- Investigation of a breach of a regulatory requirement imposed under section 45 of the Communications Act (except an SMP apparatus condition) under section 98 of the Communications Act;
  - Investigation of a breach of a requirement under the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 under section 111A of the Communications Act; or
  - Investigation of a breach of a regulatory requirement imposed under the Postal Services Act or other postal legislation<sup>55</sup> under paragraphs 8 to 10 of Schedule 7 to the Postal Services Act.
- 6.2 In accordance with those provisions, we can make a direction suspending or restricting a communications provider's or postal operator's activities<sup>56</sup> or suspending the application of powers granted in respect of the Electronic Communications Code<sup>57</sup>, as applicable. We can only do so if:
- we have reasonable grounds to believe that the relevant business which would be given the suspension/restriction direction is contravening or has contravened a relevant regulatory requirement; and
  - we have reasonable grounds to suspect that the contravention has resulted in, or creates an immediate risk of:
    - a serious threat to the safety of the public, to public health or to national security;
    - serious economic or operational problems for persons (other than the contravening provider) who are communications providers or persons who make associated facilities available, or who provide postal services (as applicable); or

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<sup>55</sup> Such as a direction given under section 89A or 116(2A) of the Postal Services Act 2000 (schemes as to terms and conditions for provision of postal services, and the Postcode Address File), or under section 25(5) of the Consumers, Estate Agents and Redress Act 2007 (requirements to give information to Citizens Advice, etc)

<sup>56</sup> See section 98(4) of the Communications Act. More specifically, 'a direction that [the provider's] entitlement to provide electronic communications networks or electronic communications services, or to make associated facilities available, is suspended (either generally or in relation to particular networks, services or facilities; or a direction that that entitlement is restricted in the respects set out in the direction.' Sections 98(5) to (8) also apply to such a direction. See also paragraph 8(4) and 9 of Schedule 7 to the Postal Services Act.

<sup>57</sup> See section 111A of the Communications Act

- serious economic or operational problems for persons who make use of electronic communications networks, electronic communications facilities or associated facilities, or for users of postal services (as applicable); and
  - we consider it is appropriate to take action given the urgency of the case.
- 6.3 Ofcom may exercise these powers following a request to do so by an applicant, or on its own initiative. For guidance on making a request for Ofcom to take urgent action, see our document “*Advice for complainants: Submitting a complaint to Ofcom*”.<sup>58</sup>

## Process for deciding whether to take urgent action

- 6.4 We will assess requests from applicants for urgent action against the relevant statutory criteria. If we consider the test is met then we may take urgent action at our discretion, and we may decide not to take urgent action 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 direction and any relevant third party interests, as well as on the interests of citizens and consumers.
- 6.5 The decision on whether to give a direction suspending or restricting the activities of the relevant provider/operator 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 take urgent action in response to a third party request, Ofcom will inform the provider or operator about which the request for urgent action has been made that we have received a request to restrict or suspend its activities and will give it the opportunity to make representations to Ofcom on a non-confidential version of the request.
- 6.7 Where we are minded to give a direction suspending or restricting the provider’s/operator’s activities (whether on our own initiative or in response to a third party request), we would also normally expect to inform it of this and provide it with an opportunity to comment. Given the circumstances in which we would normally be considering taking urgent action, Ofcom will normally give the provider/operator only a short period to comment.
- 6.8 In the event that Ofcom is minded not to grant a third party request for urgent action, Ofcom would normally inform the applicant and the relevant provider/operator and provide them with a brief opportunity to comment and submit any further information or evidence before reaching our final decision.
- 6.9 In some cases, where Ofcom is satisfied that the statutory criteria are met and that due to the nature of the risk of serious harm there is a need to take immediate action, we may decide to give a direction suspending or restricting a provider’s or operator’s activities without first consulting the provider/operator or giving it the opportunity to comment.<sup>59</sup>

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<sup>58</sup> [Link to be inserted when available]

<sup>59</sup> As noted below, in accordance with the relevant statutory requirements, in such a case the subject of the investigation would have an opportunity to make representations to Ofcom as soon as reasonably practicable after the direction has been given.

- 6.10 Where Ofcom decides to make a direction suspending or restricting the subject's activities we will notify the relevant provider/operator and the applicant as soon as reasonably practicable after making that decision. We would also normally publish an update on the CCEB section of our website stating that we have issued such a direction and would publish a non-confidential version of our decision. As one of the statutory criteria for taking urgent action is that we must have reasonable grounds for believing that the provider/operator is contravening or has contravened a relevant regulatory requirement, typically we would issue a provisional breach notification alongside the decision to give a direction suspending or restricting the subject's activities (the process for issuing a provisional breach notification is explained in more detail in Section 4).<sup>60</sup>
- 6.11 Ofcom is required, as soon as reasonably practicable after giving a direction to restrict or suspend a provider's or operator's activity, to give the provider/operator an opportunity of making written representations to Ofcom about the grounds on which it was given and its effect and an opportunity of proposing steps to remedy the situation.<sup>61</sup> Given the need to decide whether to confirm the direction as soon as reasonably practicable, we may set a short timeframe for representations. The provider/operator may also request an oral hearing.
- 6.12 As soon as reasonably practicable after the period for representations has ended (and, in respect of a direction under the Communications Act, in any event within 3 months of the date of giving the direction<sup>62</sup>), and after taking into account any representations, Ofcom must determine whether the relevant contravention did occur and whether the circumstances made it an urgent case justifying the direction. If Ofcom decides that the contravention occurred and the direction was justified, we may confirm the direction, but if not, we must revoke it (or in respect of a direction given under the Postal Services Act, modify the conditions).<sup>63</sup> We would expect to follow the same process for reaching our final decision as set out in Section 4 of these Guidelines.<sup>64</sup>
- 6.13 We will inform the relevant provider/operator (and the applicant if relevant) as soon as reasonably practicable of the outcome of our decision and would expect to publish details of our decision and a non-confidential version of it on the CCEB in line with our usual process (see Section 3 of these Guidelines).

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<sup>60</sup> For example, if we were taking urgent action under section 98 of the Communications Act, we would expect to issue such a direction alongside issuing a notification under section 96A of the Communications Act.

<sup>61</sup> See sections 99(1) and 111B(1) of the Communications Act and Schedule 7, paragraph 10(1) of the Postal Services Act

<sup>62</sup> This may be extended by up to a further 3 months if Ofcom requires additional time to consider the representations received or decides that it is necessary to obtain additional information from the provider to make the relevant determination.

<sup>63</sup> See sections 99(2) to (4) and 111B(2) to (5) of the Communications Act and paragraph 10(2) to (6) of Schedule 7 to the Postal Services Act

<sup>64</sup> For example, if we had issued a direction under section 98 of the Communications Act, we would expect to issue a decision as to whether to confirm or revoke the direction under section 99 of the Communications Act alongside considering whether to issue a notification under section 96C of the Communications Act.

## Section 7

# Consumer protection law enforcement

## Part 8 of the Enterprise Act 2002

- 7.1 Ofcom is a ‘designated enforcer’ under Part 8 of the Enterprise Act 2002 (“the Enterprise Act”).<sup>65</sup> This means we are empowered to take action to enforce certain consumer protection legislation in the communications sector, such as the Consumer Protection from Unfair Trading Regulations 2008 and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. We exercise these powers concurrently with a number of other regulatory bodies, including the Competition and Markets Authority (“CMA”). We may only take action where we consider the potential infringements may harm the collective interests of consumers in the United Kingdom.
- 7.2 In relation to cases brought under Part 8 of the Enterprise Act, Ofcom does not have powers to notify breaches or issue penalties. Instead, Ofcom can seek undertakings from a party under investigation under Part 8 of the Enterprise Act to cease the conduct, or can apply for a court order to put a stop to the harmful conduct.<sup>66</sup>
- 7.3 Before opening a case, we are likely to engage with the CMA (as the central co-ordinator of enforcement) to discuss who is best placed to take an investigation forward. We have entered into a Memorandum of Understanding with the CMA about how we will co-ordinate with them in respect of our concurrent powers to enforce consumer protection legislation.<sup>67</sup>
- 7.4 Except where urgent action is needed (as discussed in paragraph 7.11 below), in the event that we receive a complaint about allegations of contraventions of relevant consumer protection legislation, or where we are considering exercising powers on our own initiative, we would generally follow the same enquiry process as set out in paragraphs 2.11 to 2.17 of Section 2, giving the subject of the investigation the opportunity to comment on the concerns raised in the complaint or which we are considering investigating, as relevant. We would also follow the same decision making process in deciding whether or not to open an investigation, usually following consultation with the CMA. As with other regulatory investigations, when we open an investigation, we would normally inform the subject, and the complainant, if relevant, by sending out a case opening letter explaining the scope of Ofcom’s investigation and next steps, and would normally announce the opening of the case on the CCEB section of our website<sup>68</sup> and by entering the required information on the Trading Standards Sanctions Information Database.
- 7.5 We have powers to gather information for the purposes of exercising our functions under Part 8 of the Enterprise Act under paragraph 14 of Schedule 5 to the

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<sup>65</sup> Under the Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003, as amended

<sup>66</sup> See section 219 and sections 215 to 217 of the Enterprise Act

<sup>67</sup>

[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0028/83755/cma\\_and\\_ofcom\\_mou\\_on\\_use\\_of\\_concurrent\\_consumer\\_powers\\_webversion1.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0028/83755/cma_and_ofcom_mou_on_use_of_concurrent_consumer_powers_webversion1.pdf)

<sup>68</sup> See: <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins>

Consumer Rights Act. This involves Ofcom issuing a written notice to the person from whom the information is required, specifying the nature of the information required and the purpose for which the information is required.<sup>69</sup> We will also generally specify the time within which the information is required and the form in which the information must be provided. Such a notice may require the creation of documents and the provision of those documents to Ofcom. Where the recipient of an information request fails to comply with it, we can apply to court for an order requiring the recipient to comply with the notice, and can also require the recipient to meet the costs or expenses of such an application.<sup>70</sup>

- 7.6 We also have powers to take other forms of action to obtain information during our investigation in some cases, for example, the power to enter premises.<sup>71</sup> We would not expect to use these powers frequently.<sup>72</sup>
- 7.7 Decisions on how to progress the case would be taken by a senior member of Ofcom's executive with appropriate Board-delegated authority. Typically, this would be the person who is responsible for overseeing the investigation.
- 7.8 In most cases, except where we consider urgent action is required, where we consider that there is a potential infringement of the relevant consumer protection legislation, we would first seek to secure undertakings from the subject of the investigation which would ensure that the harmful conduct stops and is not repeated.<sup>73</sup> Undertakings may also include commitments to taking consumer redress measures, such as measures offering compensation or redress to consumers who have suffered a loss as a result of the harmful conduct, measures intended to prevent or reduce the risk of the harmful conduct recurring and measures enabling consumers to choose more effectively between suppliers of goods and services.<sup>74</sup> We will notify the CMA of any undertakings given by entering the required information on the Trading Standards Sanctions Information Database and will generally publish undertakings on the CCEB section of our website.
- 7.9 If undertakings cannot be agreed, or if the undertakings are subsequently broken, Ofcom can take action through the courts to enforce compliance by way of an enforcement order.<sup>75</sup> Prior to making an application for an enforcement order, we will consult the CMA, and we must also consult the subject of our investigation for a minimum of 14 days with a view to seeing if we can ensure that the harmful conduct is put a stop to and will not be repeated (for example, to see if we can agree undertakings with the subject at that stage).<sup>76</sup>

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<sup>69</sup> Paragraph 15 of Schedule 5 to the Consumer Rights Act

<sup>70</sup> Paragraph 16 of Schedule 5 to the Consumer Rights Act

<sup>71</sup> As set out in Schedule 5 to the Consumer Rights Act

<sup>72</sup> For further information on these powers, see Section 6 of the CMA's Consumer Protection: Enforcement Guidance, published 17 August 2016 (CMA58), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/546521/cma58-consumer-protection-enforcement-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/546521/cma58-consumer-protection-enforcement-guidance.pdf)

<sup>73</sup> Section 219 of the Enterprise Act

<sup>74</sup> Section 219A to 219B of the Enterprise Act

<sup>75</sup> Section 215 of the Enterprise Act

<sup>76</sup> Section 214 of the Enterprise Act. However, where the CMA thinks an application for an enforcement order should be made without delay, we would not be required to consult with the subject of the investigation prior to making the application

- 7.10 The court may grant an enforcement order requiring the cessation of the conduct and that it is not repeated, and may also require consumer redress measures to be taken or that the subject of the investigation publishes details of the order or a corrective statement.<sup>77</sup> Alternatively, the court may itself accept an undertaking from the subject of the investigation to cease and not repeat the conduct in question. It is contempt of court to breach the terms of an enforcement order and can lead to a fine or imprisonment.
- 7.11 We may seek an interim enforcement order from the court if we consider that it is expedient that the infringing conduct is prohibited or prevented immediately.<sup>78</sup> This is a temporary order which would remain in force until the court determines whether or not to make an enforcement order. Alternatively, the court can accept undertakings from the subject of the investigation in lieu of making such an interim enforcement order. We must give the CMA notice of our intention to apply for an interim enforcement order and, in most cases, we are required to engage in a period of consultation with the subject for a minimum of 7 days, unless the CMA considers that the application should be made without delay.<sup>79</sup>
- 7.12 We will announce on the CCEB section of our website the outcome of any application to the court and publish the terms of any enforcement order or interim enforcement order, or any undertakings given to the court, and will notify the CMA by entering the required information on the Trading Standards Sanctions Database.
- 7.13 In the event that we decide to close the investigation without obtaining undertakings or making an application for a court order, we would expect to follow a similar process to that set out in paragraphs 4.26 to 4.31 above and would announce the closure of the case on the CCEB section of our website.

## Unfair terms in consumer contracts

- 7.14 The provisions of the Consumer Rights Act relating to unfair terms in consumer contracts<sup>80</sup> are amongst the provisions of general consumer law which Ofcom may enforce under Part 8 of the Enterprise Act, as set out above. Alternatively, Ofcom may enforce those provisions under Schedule 3 of the Consumer Rights Act. Under that Schedule, Ofcom has powers to consider complaints about allegedly unfair terms included, or proposed to be included in consumer contracts, or in consumer notices. If we intend to consider a relevant complaint, we must notify the CMA that we intend to do so. We may also investigate on our own initiative where we consider terms of consumer contracts or consumer notices may be unlawful under the provisions of Part 1 or Part 2 of the Consumer Rights Act.
- 7.15 If we consider such a term to be unlawful or unfair within the meaning of Part 1 or Part 2 of the Consumer Rights Act (as relevant), we may seek undertakings from the person against whom the complaint has been made, or who we are investigating on our own initiative. If we are unable to secure such undertakings, and consider further action is required, we may make an application for an injunction (or interdict in

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<sup>77</sup> Section 217 of the Enterprise Act

<sup>78</sup> Section 218 of the Enterprise Act

<sup>79</sup> Section 214 of the Enterprise Act

<sup>80</sup> Which apply to terms in contracts between traders and consumers entered into from 1 October 2015. Contract terms entered into prior to that date remain subject to the Unfair Terms in Consumer Contracts Regulations Act 1999. Ofcom may also take action in respect of those terms under that legislation directly or under Part 8 of the Enterprise Act.

Scotland) preventing the party from using the term in its consumer contract or consumer notice. We are required to notify the CMA prior to making such an application, and must also inform the CMA of any undertakings we obtain and the outcome of any application to court for an injunction (which we would do by entering the required information on the Trading Standards Sanctions Information Database).

- 7.16 We have powers to obtain information for the purposes of exercising our functions under Schedule 3 of the Consumer Rights Act under paragraph 14 of Schedule 5 to that Act (as explained above).
- 7.17 As with our enforcement powers under Part 8 of the Enterprise Act, decisions on how to progress the case would be taken by a senior member of Ofcom's executive with appropriate Board-delegated authority. When considering whether to take enforcement action under Schedule 3 to the Consumer Rights Act, we would expect to follow the same process as for enforcement action under Part 8 of the Enterprise Act, as described at paragraph 7.4 above.
- 7.18 We would normally expect to publish any undertakings we obtain on the CCEB section of our website as well announcing the outcome of any application to court and the terms of any injunction obtained (if relevant).<sup>81</sup>
- 7.19 In the event that we decide to close an investigation without obtaining undertakings or making an application for a court order, we would also expect to follow the same process as with our enforcement powers under Part 8 of the Enterprise Act, as described at paragraph 7.13 above.

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<sup>81</sup> The CMA also has obligations under paragraph 7 of Schedule 3 to the Consumer Rights Act to publish details of any undertakings or injunctions we obtain and notify to it.



## Section 8

# Directions under General Condition 20.3

## Introduction

8.1 This section of these guidelines explains the process that Ofcom will usually follow when it issues a direction under General Condition 20.3 (“GC20.3”) requiring communications providers (“CPs”) to block access to telephone numbers and/or public electronic communications services (“PECS”) on the basis of fraud or misuse.

8.2 GC20.3 states that:

*“The Communications Provider shall, where requested by or on behalf of Ofcom on the basis of fraud or misuse, block access to Telephone Numbers and/or Public Electronic Communications Services and in such cases withhold revenue associated with such Telephone Numbers and/or Public Electronic Communications Services.”<sup>82</sup>*

8.3 GC20.3 was introduced to implement Article 28(2) of the Universal Service Directive,<sup>83</sup> which requires Member States to ensure that:

*“... the relevant authorities are able to require undertakings providing public communications networks and/or publicly available electronic communications services to block, on a case-by-case basis, access to numbers or services where this is justified by reasons of fraud or misuse and to require that in such cases providers of electronic communications services withhold relevant interconnection or other service revenues.”*

8.4 This section explains:

- the types of cases in which Ofcom may consider issuing a direction under GC20.3;
- the steps Ofcom will usually take before issuing a direction; and
- how affected stakeholders can request that Ofcom amend or withdraw a direction.

8.5 It does not cover:

- the action Ofcom will take against persistent misuse pursuant to section 128 of the Communications Act 2003 (“the Act”);
- requirements in relation to blocking and retaining revenue under the Phone-paid Services Authority’s Code of Practice; or

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<sup>82</sup> See [https://www.ofcom.org.uk/data/assets/pdf\\_file/0011/33041/gc-usc.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0011/33041/gc-usc.pdf), [https://www.ofcom.org.uk/data/assets/pdf\\_file/0027/37746/statement.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0027/37746/statement.pdf)

<sup>83</sup> Directive 2002/22/EC as amended by Directive 2009/136/EC (Citizen Rights' Directive).

- action taken by a CP to block access to numbers on a voluntary basis (for example, where they consider that a number is being used unlawfully or where requested by a customer).

## **Circumstances in which will Ofcom consider issuing a direction under GC20.3**

8.6 Directions under GC20.3 may have significant consequences for stakeholders and they are likely to be focussed on serious cases of suspected fraud or misuse. Ofcom considers that ‘fraud or misuse’ in this context may include the following types of conduct:

- Call-back scams – for example, where missed or short duration calls are made with a presentation CLI<sup>84</sup> that is associated with a premium rate, non-geographic or other revenue sharing number, so that where the called party seeks to return the call they incur a cost which, in the circumstances, is inappropriate (and often a cost that is not included in the called party’s monthly call allowance). This is also known as ‘Wangiri fraud.’
- Other artificial inflation of traffic schemes or scams. These generally include where calls:
  - are made, generated, stimulated and/or prolonged for the direct or indirect benefit of any body operating, hosting or otherwise connected with a telecommunication service as a result of any activity by or on behalf of such a body; and
  - result in a calling pattern which is disproportionate to the overall amount, duration and/or extent of calls which would be expected from good faith usage or from an acceptable and reasonable commercial practice relating to the operation of a telecommunication system.

These can include use of Private Automatic Branch Exchange (PABX) software modified by hackers to transit foreign fixed, mobile and satellite premium rate numbers, and scams that generate calls or texts from the customer without their direct action and/or knowledge (such as dialler scams, smartphone applications, virus or other mobile malware and texts generated without the user’s permission).

- Use of false or malformed CLIs<sup>85</sup> contrary to Ofcom published policies or other misuse of a CLI facility such as:
  - the withholding of CLIs by those making marketing calls, in breach of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (“PECRs”);

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<sup>84</sup> CLI is a facility by which the telephone number of a calling party is presented to the call recipient. For example, on a handset display screen prior to a call being established or where the recipient dials 1471 after receiving a call.

<sup>85</sup> For example, it is a false, ‘spoofed’, or random number which does not dial or where a connection cannot be established or it does not connect to the person or organisation calling.

- presenting a CLI which is unreturnable such that, when called,<sup>86</sup> the number does not connect to an agent or an automated message; or
- displaying a CLI which is a controlled premium rate service number.<sup>87</sup>
- Calls made following the use of services which were obtained by providing false information in the subscription or provision of electronic services, identity theft (or other kinds of theft), payment card cloning or manipulation of network parameters.
- Use of numbers in breach of the requirements set out in the National Telephone Numbering Plan<sup>88</sup> or GC17 (such as failing to provide necessary information about costs to callers/consumers or failure to comply with numbering conditions regarding use of non-geographic numbers).
- Use of a number to make calls or send messages which are in breach of the PECRs – for example, making unsolicited direct sales/marketing calls to recipients who have opted out of receiving them or leaving recorded messages without the recipient's consent; calls/messages which conceal the sender's identity; calls where, on request, the caller does not provide contact details; and marketing calls that fail to present accurate and authorised CLI numbers.
- Use of a number by a third party to whom the number was not allocated, without the consent of the allocatee (e.g. spoofing, PBX hijacking or phone hacking).

8.7 This is as a non-exhaustive list, however, and Ofcom will assess whether or not a particular conduct constitutes 'fraud or misuse' on a case-by-case basis. Some of the activities that may warrant the use of Ofcom's GC20.3 powers are motivated by a desire for unscrupulous or dishonest gain, and these guidelines do not fully describe them so as not to encourage their perpetration. In addition, Ofcom may decide to use its GC20.3 powers to address a new technology or new use of technology that allows for the operation of a form of fraud or misuse not previously known to Ofcom.

## Relationship with other forms of fraud or misuse

8.8 Some forms of fraud or misuse may also constitute 'persistent misuse' (see our *Statement of policy on the persistent misuse of an electronic communications network or service*<sup>89</sup>), and where appropriate Ofcom may additionally or alternatively decide to take action using our powers under sections 128 to 130 of the Act.

8.9 Given the breadth of the legislation, some forms of fraud or misuse may also represent contraventions of other consumer protection legislation, enforced by Ofcom or other authorities. Where such legislative overlap exists and Ofcom is faced by a particular instance of misuse, we are likely to determine in consultation with the

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<sup>86</sup> And although there may be a dialling tone.

<sup>87</sup> As defined in the condition regulating premium rate services under section 120 of the Act.

<sup>88</sup> The National Telephone Numbering Plan is an Ofcom document which provides information about UK Telephone Numbers available for adoption, restrictions on the adoption of Telephone Numbers and Telephone Numbers which are not available for adoption. The latest version of the National Telephone Numbering Plan (published on 1 July 2015) is available via this link:

[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0016/36070/numbering\\_plan\\_july2015.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0016/36070/numbering_plan_july2015.pdf).

<sup>89</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0024/96135/Persistent-Misuse-Policy-Statement.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0024/96135/Persistent-Misuse-Policy-Statement.pdf)

relevant competent authorities which set of legislative requirements is more appropriate and may be more effectively deployed.

### **When Ofcom will consider issuing a direction under GC20.3**

8.10 Where Ofcom has reasonable grounds to suspect that fraud or misuse is occurring in connection with the use of a number or a PECS and that this conduct has caused or has the potential to cause consumer harm, we will consider whether it may be appropriate and proportionate to issue a direction under GC20.3 requiring CPs to block access to that number or that service and to withhold associated revenue.

8.11 In doing so, Ofcom will consider all relevant evidence, which may include:

- complaints data (including complaints made to Ofcom’s Consumer Contact Team and the Telephone Preference Service);
- information requested from CPs about CLI numbers generating the greatest number of customer complaints;
- information provided to Ofcom using its formal information gathering powers under section 135 of the Act – for example, information requested from CPs about CLIs generating the most traffic to numbers which display characteristics that suggest potential fraud or misuse (e.g. large numbers of very short calls presenting premium rate or revenue-sharing CLI numbers); and
- individual reports to Ofcom provided by the ten CPs who are parties to the Nuisance Calls (Technical Measures) Memorandum of Understanding published on 8 February 2016 – these reports are in the form of a monthly network monitoring and call volume measurement exercise.<sup>90</sup>

8.12 In appropriate cases, Ofcom may also liaise with, among others, the Information Commissioner’s Office (“ICO”), which has primary responsibility for taking enforcement action against breaches of the PECRs, and the Phone-paid Services Authority, the enforcement authority with responsibility for enforcing the Premium Rate Services Code of Practice.<sup>91</sup>

8.13 A GC20.3 direction is an extraordinary measure, use of which is more likely to be appropriate and proportionate in cases where:

- there is evidence that there has been fraud (i.e. dishonest conduct) or misuse has occurred or is occurring deliberately and/or recklessly;
- there is evidence of ongoing serious or widespread consumer harm or a risk of such harm; and
- there appears to be a need to bring the conduct in question to an end to prevent ongoing harm.

8.14 Other relevant considerations may include whether:

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<sup>90</sup>[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0026/31859/nuisance\\_calls-tech-mou.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0026/31859/nuisance_calls-tech-mou.pdf).

<sup>91</sup>[http://psauthority.org.uk/-/media/Files/PSA/For-Businesses/Your-phone-paid-service/Code-of-Practice/PSA\\_Code\\_of\\_Practice\\_14th\\_Digital.ashx?la=en](http://psauthority.org.uk/-/media/Files/PSA/For-Businesses/Your-phone-paid-service/Code-of-Practice/PSA_Code_of_Practice_14th_Digital.ashx?la=en).

- there is evidence of previous conduct indicating repeat behaviour on the part of a CP or end-user of a number;
- relying only on other types of enforcement action may be inappropriate or ineffective given the harm or risk of harm involved and/or relevant parties previous conduct; and/or
- a new serious form of misuse or fraud has come to light and Ofcom needs to act quickly in order to stop the misuse or fraud and deter others from engaging in it.

8.15 Ofcom will usually take these considerations into account and make a judgment about whether we have reasonable grounds to suspect fraud or misuse within GC20.3 has occurred and it is reasonable and proportionate to issue a direction. We may issue directions at different points in time, depending on the circumstances of the particular case. These include:

- Where there is evidence of sufficiently serious and/or widespread harm that we judge it appropriate to act immediately pending further investigation, we may issue a direction to stop that harm while we carry out our investigation. Exceptionally, in the most serious cases a direction may be issued without notice to the party or parties whose use of numbers or services is blocked;
- In other cases, where we judge it appropriate to issue a direction alongside other measures. For example, where we impose a penalty under section 130 of the Act in a case of persistent misuse that also falls within GC20.3, we may decide that we should also issue a direction under that condition if there is a risk of repetition of the behaviour and of future harm that justifies that measure.

## The process

8.16 In most cases (see the exceptions in paragraph 8.20 below), before issuing a direction, we would usually issue a provisional notification to the originating CP/number range-holder, the terminating CPs and the relevant end-user of the number(s)/PECS provider setting out details of our proposal to issue a direction.<sup>92</sup> This would explain the proposed scope of the direction, including:

- details of the numbers to be blocked and whether this would include both calls to and from those numbers;
- whether the originating CP would also be required to withhold revenues and, if so, the nature of the revenues to be withheld;
- a summary of the reasons why Ofcom is proposing to issue the direction, including details of any service or conduct considered relevant to the alleged fraud or misuse;
- the proposed duration of the direction (which may be time-limited or until further notice from Ofcom as appropriate); and

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<sup>92</sup> Where we propose to issue a direction alongside other measures such as a penalty under section 130 of the Act in a case of persistent misuse that also falls within GC20.3, the notification of the proposed direction may be in the same document as the proposed penalty.

- how long Ofcom proposes that CPs would have to bring the direction into effect.

The notification would also set out a period in which representations could be made on the proposed direction. Where relevant, it may also request that the originating CP/number range-holder supplies Ofcom with a list of the range of numbers it has allocated to the relevant sub-allocatee or end-user/PECS provider.

- 8.17 The period in which parties have the opportunity to make representations may vary depending on the circumstances but is likely to be within 10 working days. In exceptional circumstances Ofcom may set a shorter period, but it will not usually be less than 1 working day. Representations should usually be made in writing but parties may request an oral hearing.
- 8.18 Ofcom will take into account any representations we receive on the proposed direction before deciding whether we have reasonable grounds to believe fraud or misuse has occurred and it is reasonable and proportionate to issue it (or an amended direction). If we decide to do so, we would issue the direction to the relevant CPs and copy it to the other recipients of the provisional notification. If not, we will inform the recipients of the provisional notification that no further action will be taken under GC20.3 at that stage.
- 8.19 Any direction will set out the nature, scope and duration of the obligations imposed on the relevant CPs, together with Ofcom's reasons for making it. It would also inform affected parties about the next steps and their rights to request a review of the direction (this is discussed further in paragraphs 8.24-8.29 below). We will normally publish the directions on our website.
- 8.20 Exceptionally, some cases may require Ofcom to act very quickly and issue a direction without first giving notice to the end-user and/or service provider whose use of numbers and/or services would be the subject of the direction.<sup>93</sup> We are only likely to do so in the most serious of all cases, where giving notice would defeat the object of issuing the direction and we judge this to be the appropriate and proportionate course of action. In particular, where it appears to us that:
- the fraud or misuse is causing such serious or widespread harm, or presents a serious risk of such harm, to consumers or the general public that it requires immediate corrective action and it would not be practicable or would cause undue delay to seek representations first; and
  - it would not be in the public interest to give the relevant end-user/service provider prior notice (for example, because of a risk of serious prejudice to the investigation and/or the effectiveness of any action if they were 'tipped off').

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<sup>93</sup> In most cases, we would still seek to give advance notice to the CPs who will be subject to the direction and allow them an opportunity to make representations, although we would be likely to set a very short deadline for responses (i.e. no more than one working day). In some cases this may not be practicable, but we would still seek to give CPs an appropriate time to comply with the direction.

Issuing a direction without advance notice may also be the appropriate course where we have not been able to identify and/or contact the relevant end-user or service provider (despite reasonable efforts to do so).<sup>94</sup>

8.21 In cases described in the previous paragraph:

- Ofcom would seek to take into account the need to ensure that any interim measure is limited to the minimum scope required to address the relevant harmful conduct;
- In making its decision Ofcom would consider all available facts material to our assessment, including any information or evidence which we consider might reasonably have been relied upon by the relevant end-user/service provider;
- Once a decision has been made to issue a direction without notice, Ofcom will use reasonable endeavours to provide the relevant party(ies), as soon as reasonably possible following the decision, with a copy of the direction.

8.22 A direction issued without notice will generally take the same form as one made with notice, setting out the nature, scope and duration of the obligations imposed as well as Ofcom's reasons for making it and the rights relevant parties have to request review of the decision. Such directions will also usually be published on our website.

8.23 Any direction, whether made giving advance notice or not, may be for a specified time or apply indefinitely. Prior to the expiry of any period set out in the direction, Ofcom will consider whether it is appropriate to extend it (for example, pending further investigation). Ofcom will at that time normally seek to give CPs and the relevant end-user of the number/the service provider the opportunity to make representations as to the appropriate course of action.

## Rights of review

8.24 Following the issuing of a GC20.3 direction by Ofcom, an affected party (which includes the end-user of a number, an affected service provider, a CP subject to the direction, the allocatee of the number in question or other relevant party) may apply to Ofcom to have the direction varied or lifted.

8.25 Such a request may be made in the following circumstances:

- the direction was issued without prior notice to the relevant end-user and/or service provider which is the subject of the direction and the request for review is made by that party;

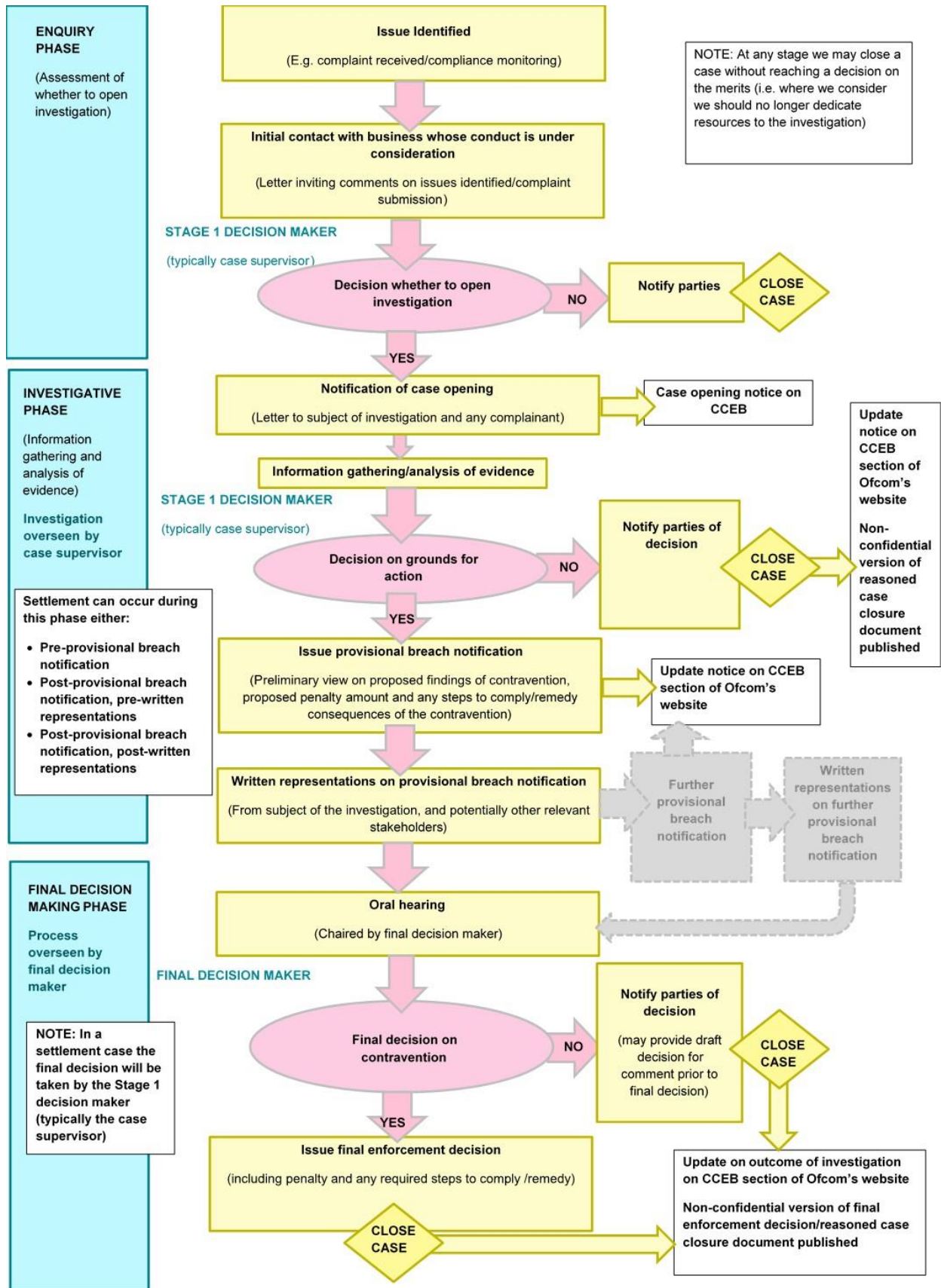
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<sup>94</sup> Although it is usually possible to identify the CP which has been allocated a telephone number, in some cases it can be very difficult to identify the end-user of a telephone number (i.e. the person who is in fact using the number to make calls). For example, sometimes presentation CLIs are spoofed (i.e. are being used without the permission of the allocatee of the number) and it can be very difficult to trace the call, particularly in the case of a VoIP call as only the (spoofed) presentation CLI will have been carried with the call, rather than the underlying network CLI. This can be a particular issue where the calling party may be located abroad and is using a UK presentation CLI.

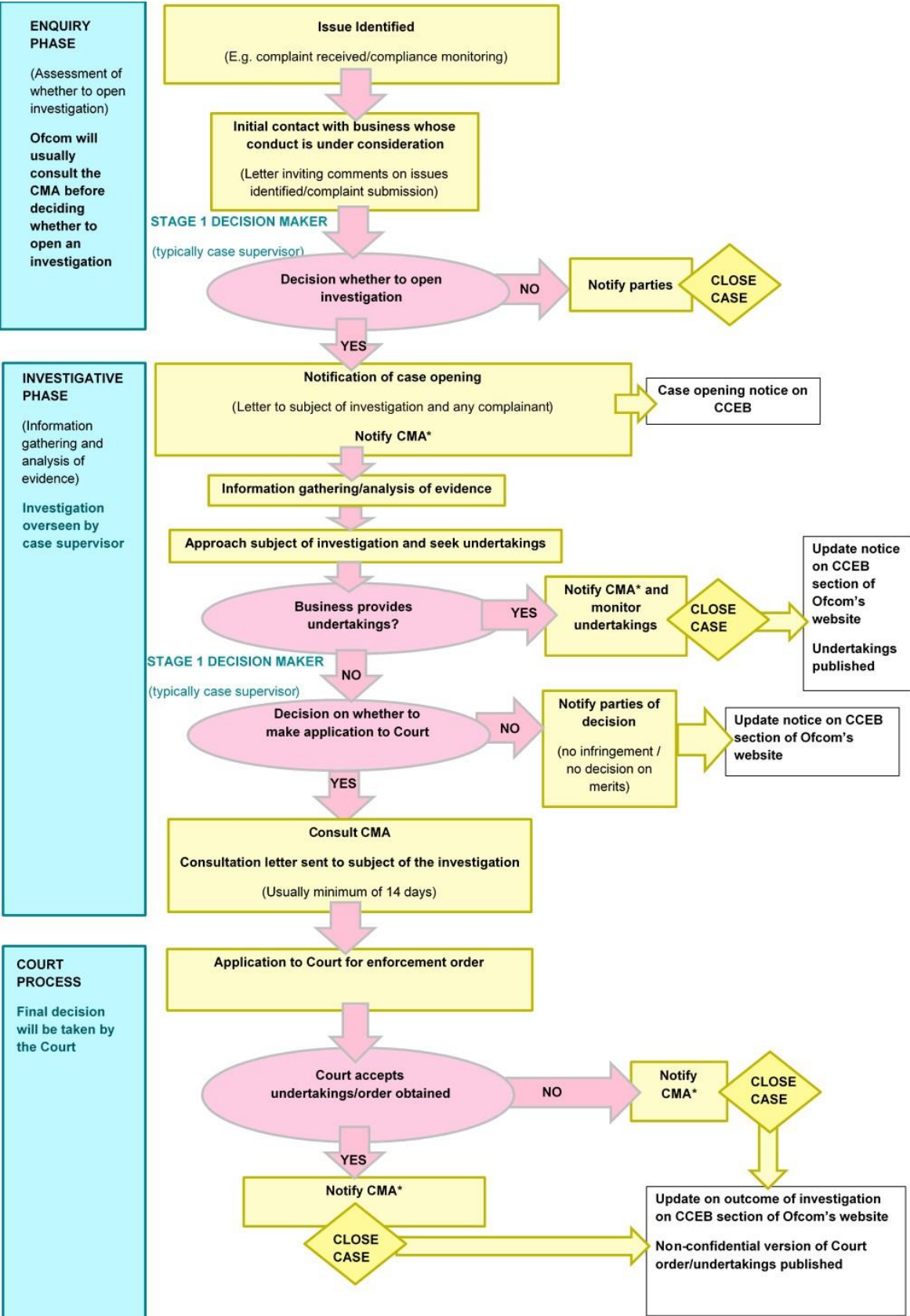
- new facts, evidence or circumstances have subsequently come to light which mean that access to the number / service should no longer be blocked and/or that revenues should no longer be withheld (as relevant); or
  - a CP wishes for the direction to be lifted for the purpose of reallocating the number to a new end-user.
- 8.26 A request must be made in writing and include all relevant supporting information and/or evidence, including setting out how the applicant is an affected party. It should set out the grounds on which the relevant party considers that the direction should not remain in place and any relevant new facts, evidence or circumstances. The affected party may also request an oral hearing.
- 8.27 The application of the direction will not usually be automatically suspended by an application for a review. In most cases, it is likely to remain in place pending the outcome.
- 8.28 Where Ofcom is satisfied that the applicant for the review is an affected party, it will write to the applicant to inform the applicant that its application for a review has been accepted and explaining any next steps. The applicant may also be asked to provide additional information for the purposes of the review.
- 8.29 Admissible applications for review will be considered by a review decision maker, who will be different from the person who decided to issue the direction. Subject to any requirement for further information, Ofcom's review decision maker will aim to consider the matter within five working days of receipt of an application for review or any oral hearing (if later) and will determine whether there are reasonable grounds for the direction to remain in force and, if so, in what form.



## Annex 1 - Overview of a regulatory enforcement case



**Annex 2 – Overview of a consumer protection enforcement case**



\*Ofcom will normally notify the CMA by entering the required information on the Trading Standards Sanctions Information Database