



Ofcom's approach to enforcement

Consultation on revising the Enforcement Guidelines
and related documents

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. We also have concurrent powers with the Competition and Markets Authority to investigate suspected infringements of competition law.

In this document we are consulting on changes to our Enforcement Guidelines, which set out how we investigate compliance with and approach enforcement of regulatory requirements relating to electronic communications networks and services, postal services, consumer protection legislation, competition law and certain competition-related conditions in broadcast licences.

We are publishing alongside this consultation draft documents setting out our new proposed procedures. These include draft revised Enforcement Guidelines, as well as draft guidelines for Competition Act investigations, draft guidelines for investigations into breaches of competition-related conditions in broadcast licences and a draft document providing advice to complainants and whistleblowers.

We invite stakeholders to respond to this consultation by **6 March 2017**. We are aiming to publish the revised procedures in spring 2017.

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Section 1

Introduction

Ofcom's approach to enforcement

- 1.1. Ofcom is the independent regulator and competition authority for the UK communications industries. Ofcom takes enforcement action across a number of industry sectors and is able to use a range of administrative powers granted by, amongst others, the Communications Act 2003 ("the Communications Act"), the Postal Services Act 2011 ("the Postal Services Act"), the Competition Act 1998 ("the Competition Act") and consumer protection legislation.
- 1.2. We take enforcement action for the benefit of citizens and consumers to:
 - promote and protect competition;
 - prevent consumer harm and enforce consumer protection law; and
 - encourage compliance.
- 1.3. We also have concurrent powers with the Competition and Markets Authority to investigate suspected infringements of competition law.
- 1.4. It is important that any such enforcement action is conducted fairly and transparently, that the subject of the investigation has a fair opportunity to respond to Ofcom's case as part of the administrative process, and that cases are completed efficiently and as promptly as possible.
- 1.5. Ofcom's current Enforcement Guidelines were last updated in July 2012.¹ They apply to most investigations Ofcom carries out into potential breaches of regulatory rules, consumer protection legislation and competition law (among other things) with the exception of:
 - Complaints from individual consumers;
 - Resolving regulatory disputes;
 - Investigations into complaints about broadcast content and video-on-demand ("VoD"), or investigations into compliance with Broadcasting Act licence conditions, including the BBC; and
 - Investigation of interference with radio spectrum.
- 1.6. We have reviewed our current Enforcement Guidelines with the aim of:
 - Increasing transparency and clarity as to how our investigations and enforcement processes will be run;
 - Ensuring that our enforcement processes are fair, efficient and timely;

¹ https://www.ofcom.org.uk/_data/assets/pdf_file/0034/79846/enforcement_guidelines.pdf

- Ensuring clear, practical advice is available for stakeholders about how they can make a complaint about potential breaches of regulatory conditions, competition law or consumer protection law;
 - Clarifying the procedures we will follow in respect of investigations under the Competition Act and ensuring that our guidelines reflect the most recent changes to the relevant statutory requirements.
- 1.7. We are proposing to revise and update our Enforcement Guidelines. Our substantive proposed changes include, in particular:
- Updating the Enforcement Guidelines to cover a number of new enforcement powers we have taken on since 2012;
 - Giving clearer guidance on how we expect decisions will be taken on the progress and outcome of investigations;
 - Giving clearer guidance on how we expect to publicise cases;
 - Giving guidance on a new procedure for the settlement of regulatory investigations.
- 1.8. We also propose to rationalise the suite of documents that cover our enforcement procedures, with a view to making it a little more intuitive where a reader should look for the information they need. We propose:
- Moving advice for stakeholders who want to make a complaint into a separate document, so that it is an easy point of reference, and so that it also covers other related issues including advice for whistleblowers and guidance on how to make a request for urgent action;
 - Moving our enforcement procedures in relation to competition-related conditions in broadcast licences to a separate document. This is because we publish separate enforcement procedures for all other types of breaches of broadcast licences. The change will mean that all procedures relevant to the enforcement of broadcast licences are contained in a separate sector-specific suite of documents.
 - Moving our procedures for Competition Act investigations into a separate document, and incorporating our Procedural Officer's procedures, which are currently separate.
- 1.9. The proposed changes are set out below and we have published alongside this consultation the following draft documents:
- Enforcement Guidelines for regulatory investigations (see Annex 4)
 - Enforcement Guidelines for Competition Act investigations (see Annex 5)
 - Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences (see Annex 6)
 - Advice for complainants: Submitting a complaint to Ofcom (see Annex 7)

Impact Assessment and Equality Impact Assessment

- 1.10. Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making. This is reflected in section 7 of the Communications Act, which means that generally we have to carry out impact assessments where our proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of our policy decisions.
- 1.11. We consider that the proposed changes set out in the procedures upon which we are consulting will either have no impact, or will tend to reduce the costs of our enforcement action by streamlining our administrative processes (and therefore reducing the level of our administrative fees overall) and/or by making it easier for our stakeholders to find information without having to ask us.
- 1.12. Ofcom is required by statute to have due regard to any potential impacts our proposals may have on particular "equality groups" i.e. persons sharing a protected characteristic, such as: sex, disability or race.² Our equality duties in Northern Ireland, under section 75 of the Northern Ireland Act 1998, require us to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.
- 1.13. We do not consider that any of the proposals on which we are consulting will have any equality impacts (whether in Northern Ireland or the rest of the UK), because we consider that the proposals in this document are likely to affect all citizens and consumers in the same way, and would not have any particular implications for the different equality groups.

Next steps

- 1.14. We invite representations from interested stakeholders on the matters set out in this consultation by no later than **5pm on 6 March 2017**. Following consultation, Ofcom will publish its new procedures. Our intention is that they will come into effect in spring 2017.

² See the Equality Act 2010

Section 2

Proposed changes to Ofcom's regulatory enforcement guidelines

Introduction

2.1 This section sets out the changes we propose to make to our Enforcement Guidelines document. As set out above, our objective is that any enforcement action is conducted fairly and transparently, that the subject of the investigation has a fair opportunity to respond to Ofcom's case as part of the administrative process, and that cases are completed efficiently and as promptly as possible.

Scope of the Enforcement Guidelines

2.2 We are proposing to clarify the scope of the Enforcement Guidelines so that it is clearer what types of enforcement processes would and would not be covered. This includes new enforcement functions we have gained since the last time these Guidelines were reviewed, as follows:

- 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;³
- 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;⁴
- Requirements under sections 105A to 105C of the Communications Act relating to the security of public electronic communications networks and services;⁵

³ 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)

⁴ Note that Ofcom does not have powers to enforce compliance with the Electronic Communications Code itself.

⁵ 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;⁶
- Compliance with the requirements of the EU Mobile Roaming Regulation and the Mobile Roaming (European Communities) Regulations 2007 (the "Mobile Roaming Regulations");⁷
- Compliance with the requirements relating to net neutrality under Articles 3, 4 and 5 of the EU Open Internet Access Regulation and the Open Internet Access (EU Regulation) Regulations 2016 ("the Open Internet Access Regulations");⁸
- 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. (This is a change to the existing procedures even though the enforcement function is not new. Although we have a separate statement of policy on how we would exercise our enforcement powers for persistent misuse⁹, that statement of policy sets out what we would enforce against rather than the procedures we would follow. In practice, to date we have dealt with persistent misuse as if our existing enforcement guidelines applied).

2.3 The new guidelines would 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

⁶ Under sections 120-124 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.

⁷ Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13th June 2012 on roaming on public mobile communications networks within the Union. 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.

⁸ Regulation (EU) No 2015/2120 of the European Parliament and of the Council of 25th 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.

⁹ See *Persistent Misuse: A statement of Ofcom's general policy on the exercise of its enforcement powers*, published 20 December 2016

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”).¹⁰
- 2.4 However, we note that the statutory process for enforcement of consumer protection legislation is different from the general process for enforcing against a breach of a regulatory obligation. In particular, Ofcom is not the final decision maker for deciding whether a breach of consumer protection legislation has occurred and, if so, what the remedy should be – that is ultimately up to the court. Therefore, we propose to set out separate guidance explaining the differences in the process for enforcing consumer protection in section 7 of the Guidelines, while certain other sections of the Guidelines (section 4 on outcomes of regulatory investigations, section 5 on settlement and section 6 on urgent action) are not applicable to consumer protection legislation enforcement.
- 2.5 We propose to move Competition Act investigation procedures, advice for complainants and procedures for the enforcement of fair and effective competition conditions in broadcast licences to separate documents.
- 2.6 The revised guidelines would **not** cover:
- Enforcement in relation to broadcasting licences, the BBC or video on demand.¹¹
 - Enforcement of statutory information requests made under the Competition Act 1998¹² 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 2011 or under the Communications (Access to Infrastructure) Regulations 2016.¹³
 - Enforcement of regulatory obligations relating to interference with radio spectrum or radio equipment.¹⁴

¹⁰ 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

¹¹ Guidance on Ofcom's existing 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>. We are also today consulting on enforcement procedures [relating to the BBC](#) and proposed changes to the enforcement procedures for handling content standards, broadcast licensing and on demand programme service investigations and sanctions, which apply to [all other licensed broadcasters and notified on demand programme service providers](#).

¹² We propose to explain how we would approach our powers to enforce statutory information requests made under the Competition Act in our *Enforcement Guidelines for Competition Act investigations*, as discussed further below.

¹³ Ofcom has published separate procedures relating to these: see our *Dispute Resolution Guidelines* (published 7 July 2011) 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. See also our *Guidance under the Communications (Access to Infrastructure) Regulations 2016* (published 6 December 2016): https://www.ofcom.org.uk/_data/assets/pdf_file/0025/95191/Guidance-under-the-Communications-Access-to-Infrastructure-Regulations-2016.pdf. We intend to review our procedures relating to dispute resolution in due course, following the outcome of this review.

¹⁴ See the relevant information on our website about our spectrum enforcement powers:

<https://www.ofcom.org.uk/spectrum/interference-enforcement>

- Compliance with undertakings given to Ofcom under Part 4 of the Enterprise Act.

¹⁵

2.7 We note that the Digital Economy Bill¹⁶ includes proposals for giving Ofcom certain new enforcement powers – for example, new powers to impose financial penalties for breaches of conditions of licences under the Wireless Telegraphy Act 2006 and new powers to take enforcement action against registered operators of Dynamic Spectrum Access databases for breaches of the terms and conditions of their registration. Should Parliament decide to give Ofcom these new powers we would be likely to seek to apply our Enforcement Guidelines to these enforcement powers.

Why and how Ofcom opens cases

2.8 Enforcement of statutory and regulatory requirements imposed in the interests of citizens and consumers is usually likely to further their interests. However, we cannot necessarily investigate every matter 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 against the resources that would be required, and the comparative benefits of using those resources in other ways.

2.9 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. We set out in paragraph 2.4 of the draft Enforcement Guidelines the matters we will generally consider in deciding whether or not to investigate on a case-by-case basis. These are essentially the same as those we list in paragraph 4.13 of the current Enforcement Guidelines, although we have proposed some changes to the drafting of these to draw out more clearly the overarching types of factors that we would usually expect to take into account, namely: the risk of harm arising from/seriousness of the alleged conduct; the strategic significance of addressing the alleged conduct and whether we are best placed to act; and the resource implications of conducting an investigation.

2.10 In section 2 of the draft Enforcement Guidelines, we also explain the sources of information that Ofcom may have regard to when deciding whether to investigate (including complaints from stakeholders), as well as the process that Ofcom will generally follow when deciding whether to open an investigation.

2.11 As currently, we will generally first carry out an enquiry phase, during which we will give the business we are considering whether to investigate the opportunity to comment and provide relevant information for our consideration. However, we may decide not to have an enquiry phase if we consider that we already have sufficient information to decide whether or not to open an investigation, for example as a result of previous engagement with the subject of the possible investigation, or where the scale of any possible consumer harm appears too low to merit the resource required to investigate. In some cases we may also not have an enquiry phase where there are reasons to proceed more quickly.

2.12 In the current Enforcement Guidelines, we state that we aim to complete the enquiry phase within 15 working days for all cases except those being conducted under

¹⁵ 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>

¹⁶ <http://services.parliament.uk/bills/2016-17/digitaleconomy.html>

competition law, which we aim to complete within 8 weeks.¹⁷ As part of our review of our enforcement processes, we have considered whether to retain this target for the purposes of our regulatory and consumer protection investigations. Due to the wide variety of different cases we handle, our preliminary view based on our experience to date is that it is unhelpful to focus on a specific 15 working day target for completing our enquiries. Therefore, although we will aim to complete an enquiry as quickly as possible, we propose instead that we would generally set a target for completing this process on a case-by-case basis and would inform the subject of the possible investigation and any complainant how long we expect the enquiry phase to take when we begin this process, as well as keeping them updated on progress.

- 2.13 We also explain that we may resolve some cases informally without proceeding to formal enforcement action, including giving some more detail about the type of information we may publish in this context.
- 2.14 Finally, we explain the next steps that will generally follow Ofcom's decision on whether to open an investigation, including what will happen in the event that we decide not to investigate. We propose to clarify in our revised Enforcement Guidelines that we will normally make a decision about whether or not to investigate without giving the subject of the investigation or the complainant further opportunities to make representations. This is because we expect complainants to tell us what we need to know in order to determine whether or not to investigate when making their complaint submission, and we will ask for any further information we consider that we need in order to decide whether to investigate during the enquiry phase where relevant.

Carrying out an investigation

Engagement

- 2.15 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.
- 2.16 In terms of the type of engagement that those involved in our investigations can expect with Ofcom, we state in the current Enforcement Guidelines that those we are investigating (and complainants) can expect: "*regular contact with the case leader and regular updates on the progress of investigations. Sometimes, this will mean just a short telephone call or email. At other times, particularly when Ofcom is gathering information, we may be in touch more frequently and may be able to provide more detailed updates*".¹⁸
- 2.17 We propose to amend the Enforcement Guidelines to be clearer about the information Ofcom will provide the subjects of our investigations and when. In particular, as set out in section 3 of the draft Enforcement Guidelines, we propose to explain that those involved in our investigations can generally expect the following type of engagement with Ofcom:

¹⁷ Current Enforcement Guidelines, paragraph 4.9.

¹⁸ Current Enforcement Guidelines, paragraph 5.17.

- When we decide to open an investigation, we will generally¹⁹ inform the subject of the investigation (and the complainant, if there is one), by sending a letter explaining the scope of Ofcom's investigation and next steps.
- This case opening letter will also usually set out who is acting as the case leader (who will be their main contact at Ofcom for the case during the course of the investigation) and who is acting as the case supervisor (who will be overseeing the investigation). We would also provide an update if this changes during the course of the investigation.
- 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.
- If we decide to widen or reduce the scope of an investigation, we will inform the subject of the investigation (and the complainant if there is one). This is a slight change from the current Enforcement Guidelines²⁰, where we say we will generally provide an opportunity for comment prior to taking the decision to change the scope of an investigation. This is because it is ultimately for Ofcom to decide the issues we will focus on during the course of an investigation, and if we uncover new information which we consider reveals an additional issue we should pursue or to narrow the focus of our investigation onto particular issues, in most cases we will not need further information from the subject of the investigation (or the complainant) in order to take this decision. For similar reasons, we would not normally give the subject or the complainant the opportunity to comment on the scope of the investigation at the point when we open it (although as noted above we usually will give the subject the opportunity to comment on the issues we are considering investigating during the enquiry phase). There may be specific cases where we think it would be helpful to obtain comments or information from the subject (or the complainant) before deciding whether to amend the scope of the investigation, and we would retain the discretion to do this where appropriate.

2.18 We also propose to set out some additional information about how subjects of our investigations and complainants can raise concerns with Ofcom about the way Ofcom is proceeding in carrying out the investigation. In particular, the draft Enforcement Guidelines explain that concerns should usually be raised with the case leader or case supervisor in the first instance, and where this engagement does not resolve concerns, these can be raised with the Secretary to the Corporation.²¹ This reflects our current practice, but we propose that it would be helpful to clarify this.

2.19 We propose to explain (in section 4 of the draft Enforcement Guidelines) the type of engagement that subjects of our investigations can expect with Ofcom in regulatory investigations when we reach key milestones, for example, if we decide there are grounds for action and to issue a provisional breach notification, in which case the subject would have the opportunity to make written and oral representations to Ofcom, before we decide on the final outcome. We also explain the circumstances in which we may invite written representations from complainants or other relevant third

¹⁹ There may be circumstances in which we decide not to do this until a later point in the investigation, for example where we consider this could prejudice the conduct of any subsequent investigation, such as in cases where we consider we may need to use our formal information gathering powers to obtain and preserve evidence prior to alerting the subject of the investigation.

²⁰ Current Enforcement Guidelines, paragraph 5.5.

²¹ See paragraph 3.31 of the draft Enforcement Guidelines.

parties. Similarly, we explain how we would expect to proceed if we decide to close the case without issuing a final breach decision. We discuss this further below.

- 2.20 The reason for the proposed changes is that we think that this will provide greater transparency as to the type of engagement that subjects of our investigations (and complainants) can expect with Ofcom during the course of the investigation, as discussed above.
- 2.21 The frequency, nature and extent of engagement which takes place during the course of an investigation will vary on a case-by-case basis, because there is a wide variety in the nature and length of the investigations we undertake. Some will have a relatively narrow focus, and can be completed relatively quickly, which may mean there is little need for contact during the course of investigation apart from in relation to formal requests for information or when key milestones are reached in the investigation (for example, where we issue a provisional breach notification or decide to close the case). In other cases, the issues we are investigating will be complex and/or of broader scope, which may mean that the investigation takes longer to complete and there may be a need for more frequent engagement with the subject, for example, to provide updates on progress or because we have questions about the information we are gathering which we think it would be helpful to discuss. Therefore, we think that it is important to be clear that we will decide whether and when it is appropriate to meet with the subject of an investigation and complainants, and/or provide written or verbal updates on a case-by-case basis and that we would generally expect to do so when it would assist the investigation (but not otherwise).

Timescales

- 2.22 Ofcom recognises that it is important for all stakeholders that if we open an investigation we complete it as soon as possible. This remains one of our key objectives whenever we take enforcement action.
- 2.23 In our current Enforcement Guidelines, we explain that we had set ourselves a non-statutory target to complete investigations within six months of the opening of the investigation.²²
- 2.24 As part of our review of our enforcement processes, we have considered whether to retain this target for the purposes of our regulatory and consumer protection investigations. Due to the wide variety of different cases we investigate, our preliminary view based on our experience to date is that it is unhelpful to focus on a specific 6 month target for completing our investigations. We think that in some cases a 6 month timeframe is too long and we should be more ambitious and aim to complete investigations more quickly wherever practicable, whereas in other cases it will be unrealistic to expect to complete an investigation within 6 months as we will need to undertake detailed evidence gathering and analysis.
- 2.25 Therefore, while we always aim to conclude investigations as quickly as possible, we think it is better for us to work towards a realistic timeframe for completing an investigation on a case-by-case basis. We will generally be unable to give an indication of the likely timescale involved in completing an investigation at the point when we open the investigation, but, as noted above, we will provide updates on the progress of investigations, including when we expect to reach a particular milestone, and will also provide updates where this changes.

²² Current Enforcement Guidelines, paragraph 5.7

Information requests

- 2.26 We propose to change the wording of our current Enforcement Guidelines which suggested that in an enforcement context we would ordinarily send information requests in draft before finalising them. The change is not intended to suggest, and should not be taken as suggesting, that we no longer propose to send information requests out in draft. However, in enforcement cases, where there may be risks of evidence destruction, we think it inappropriate to suggest that sending in draft will be our default position, and we propose to consider the need for this on a case-by-case basis. That is consistent with our policy statement on information gathering.²³

Confidentiality

- 2.27 We are proposing some changes to clarify our approach to how we handle confidential information provided to us during the course of an investigation. Where we are proposing to disclose information which a party considers to be confidential, it has been our general practice to take reasonable steps to inform that party and to give it a reasonable opportunity to make representations on our proposal, before making a final decision on whether to disclose the information. We consider that it would be helpful to be clear about this in the Enforcement Guidelines, so stakeholders understand what to expect.
- 2.28 In addition, in the current Enforcement Guidelines we indicate that stakeholders should generally supply non-confidential versions of submissions containing confidential information. While we generally request that complainants provide us with non-confidential versions of their complaint submissions, so that we can share these with the subject of the complaint, we will not necessarily require non-confidential versions of other submissions made to us during the course of an investigation. We therefore propose to clarify that we may request that stakeholders provide us with non-confidential versions of submissions, if needed for the purposes of publication and/or disclosure. We think this should help reduce unnecessary burden on stakeholders from having to prepare non-confidential versions of their submissions where this may not be necessary.

Publicity

- 2.29 When we enforce, Ofcom must have regard to the principles of transparency and accountability. It is also important in the interests of citizens and consumers that our regulatory activities deter non-compliance with regulatory rules, and help to educate others about what can go wrong. Consequently, publicising the investigations we are carrying out, and our final decisions, is an important part of the carrying out of our functions.
- 2.30 We recognise that those we investigate are particularly likely to be concerned about what we are going to say, when, and whether they will have any warning. We therefore propose to explain more clearly in our Enforcement Guidelines what we intend to do by way of publication at each stage of an investigation. In line with our current practice, we are proposing to include guidance explaining that 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, as

²³ Available at https://www.ofcom.org.uk/consultations-and-statements/category-1/info_gathering

well as giving guidance on our practice in respect of market sensitive announcements.

Involvement of third parties

- 2.31 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.
- 2.32 In the current Enforcement Guidelines, we say that third parties who wish to be involved in an investigation will need to demonstrate that they have a “sufficient interest” in the investigation, generally meaning that their economic interests are directly affected (positively or negatively) by the subject matter of an investigation.²⁴
- 2.33 We are proposing to simplify our guidance on involvement of third parties in investigations, as we consider that the current drafting risks making our approach to third parties seem overly complicated. In practice, we involve third parties in an investigation to the extent necessary to carry out our functions fairly and effectively, and we therefore propose to say this in the revised Enforcement Guidelines. It is more likely that where a third party would be directly affected by the subject matter of an investigation, we would consider such third party involvement to be of assistance to us during the course of an investigation (e.g. if we consider they may be able to provide us with relevant information on a particular issue), but the extent of any third party involvement in an investigation will depend on the circumstances of a particular case.
- 2.34 Stakeholders who are interested in following our investigations can do so through the Competition and Consumer Enforcement Bulletin (“CCEB”) section of our website²⁵ (which will give contact details of the case leader), and can also subscribe to receive emailed notifications of changes to the CCEB.

Decision-making in regulatory investigations

How decisions will be made

- 2.35 We consider it important, for the purposes of transparency, that those under investigation understand who will make decisions about them and what administrative process will be followed.
- 2.36 We therefore propose to include more detail on the face of the Enforcement Guidelines about how we make decisions – this is set out in particular in section 4 of the draft Enforcement Guidelines. In so doing, we also propose to change the way in which we have typically made decisions to date, as follows.
- 2.37 First, it has generally been Ofcom's practice to have two final decision makers. In our view, it is not necessary for fairness or any other reason to have more than one. We provisionally consider that to do so is an inefficient use of our most highly qualified and experienced people, because it requires a duplication of the effort needed to digest and come to a view on all the evidence in the case, and because our administrative timetables need to be designed around the availability of two busy people rather than one. We therefore propose to have only one decision maker for each decision in a case. That person will, of course, be exercising Board-delegated

²⁴ Enforcement Guidelines, paragraphs 5.35-5.37

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

authority, and will be sufficiently senior and experienced to take an appropriate view on the case. They will continue to have available to them specialist legal advisers and other specialist advisers (such as technical experts or economists).

2.38 Second, we propose that, in line with the process which applies in Competition Act investigations:

- There will be one person responsible for deciding on whether to open an investigation and who will also be responsible for overseeing the conduct of the investigation. Typically, this person would also take the decision on whether there are grounds for pursuing formal enforcement action – in other words, whether to issue a provisional breach notification (which would include a provisional view on the level of any penalty we would be minded to impose and on any steps to comply with the regulatory requirement or remedy the consequences of the breach as discussed below).
- Except in settlement cases, there will be a different person who would be responsible for deciding on the final outcome of the investigation and who will not have been involved in the investigation and/or the preparation of the provisional breach notification. This person would also be responsible for chairing the oral hearing and would take the final decision having considered all written and oral representations made.

Provisional breach notifications

2.39 We are proposing to include more detail on the face of the Enforcement Guidelines about what will happen when we issue a provisional breach notification. We are also proposing to make certain changes to the process we have generally followed to date, as follows.

2.40 First, it has typically been Ofcom's practice to include in provisional breach notifications a provisional penalty and/or a provisional view on the steps the subject of the investigation should take to comply with the relevant requirement or remedy the consequences of a breach only where we are required to do so by statute (for example in notifications of a provisional finding of breach of a regulatory condition imposed on an electronic communications network or service provider under section 96A of the Communications Act). We have not found that including any proposed penalty or any proposed steps for compliance or remedial action at this stage has any negative impact on the ability of those investigated to make full, robust representations. On the other hand, having a single stage process for notifying a provisional breach finding and a provisional penalty and any proposed steps significantly shortens the investigative timetable and reduces the resources required, to the benefit overall of citizens and consumers, those investigated and Ofcom itself. We therefore provisionally consider it appropriate to adopt this process for all investigations, whether or not we are required to do so. This affects, in particular, investigations into the persistent misuse of an electronic communications network or service, and investigations into breach of regulatory conditions in the postal sector.

2.41 In considering the appropriate sanctions to impose in respect of a breach of a regulatory requirement, we would aim to impose appropriate and proportionate sanctions to punish the breach and secure the right deterrent effect. In some cases, this may include appropriate and proportionate financial penalties, in accordance with our Penalty Guidelines.²⁶ In addition, in some cases this may include requirements

²⁶ https://www.ofcom.org.uk/_data/assets/pdf_file/0029/79823/penalty_guidelines_-_statement.pdf

for the subject of the investigation to take appropriate steps to comply with the relevant regulatory requirement and remedy the consequences of the contravention. For example, we would generally expect any business in breach of a relevant regulatory requirement to remedy to the fullest extent possible the consequences of any breach, and would exercise our statutory powers in that regard as fully as possible. In line with our Penalty Guidelines, a factor we would consider in the appropriate disposal of any case, including in any settlement, would be any voluntary commitments the subject of the investigation made, in addition to remedying the consequences of the breach, which would further the interests of consumers in relevant ways.

- 2.42 Second, it has typically been Ofcom's practice when notifying the subject of an investigation of the provisional breach notification, that we provide the subject with a hard copy file of the documents we have relied on. We consider that it may be more efficient and less burdensome if in future we seek to provide copies of or access to the relevant documents in electronic form (for example, by providing access to a secure data transfer system or by email), rather than in hard copy form by default. Our provisional view is therefore that we should seek to do this wherever possible and appropriate. In addition, we propose to clarify that, where we have relied upon evidence provided to us by the subject itself, we may list the relevant documents in a schedule (such that it is easy for the subject to cross-refer to its own copies) rather than providing copies of such documents. We consider this may be appropriate where, for example, the subject has provided large volumes of documents in response to information requests and it may not be necessary to provide copies of documents which the subject will have in its possession in any event.
- 2.43 We also propose to give more guidance on the face of the Enforcement Guidelines as to how we would treat confidential information in the provisional breach notification and any accompanying documents. In line with our current practice, we would expect to redact (or withhold as relevant) confidential third party information where appropriate in accordance with the relevant statutory framework (although we may consider that it is necessary to disclose information provided by a third party to a subject of the investigation in order to protect its rights of defence).
- 2.44 We also propose to be clearer in the Enforcement Guidelines as to how long a period we would typically grant for the subject of the investigation to make written representations. In line with our current practice, our provisional view is that we would normally expect to give a period of at least four weeks for making written representations, or a longer period in more complex cases.
- 2.45 We also consider it would be helpful to give further clarity as to the circumstances in which we would expect to give complainants or other relevant third parties the opportunity to make written representations on a non-confidential copy of the provisional breach notification. Our provisional view is that we would expect to do this where we consider that they may have further information relevant to the proposed decision. In addition, where our findings may have a direct impact on the economic interests of a third party, such as an agent or supplier of the subject of the investigation which has been responsible for the conduct giving rise to the potential breach, we may also consider that fairness requires that such third parties are given an opportunity to make submissions on it. In such cases, we would expect to give the complainant or third party access to a non-confidential copy of the provisional breach notification subject to its entering into appropriate agreements with us limiting its use of and onward disclosure of the document. Our provisional view is that we would not usually provide complainants or third parties with copies of or access to the underlying evidence relied on, as this would not typically be necessary in order for

them to be able to make informed comments on the proposed findings set out in the provisional breach notification.

2.46 We also propose to clarify what we would expect our practice to be in the event that 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 the proposed level of penalty. In such circumstances, we would expect to 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.

2.47 Finally, we propose to reflect our usual practice relating to oral hearings on the face of the Enforcement Guidelines:

- First, we propose to explain that the subject of the investigation will have 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. In the current Enforcement Guidelines, we say that we will offer the subject of the investigation the opportunity to make oral representations if we are considering imposing a financial penalty, but will also consider reasonable requests to make oral representations in cases where we are not imposing a penalty.²⁷ Based on our experience, we have not had problems with subjects making unreasonable requests for oral hearings in circumstances where we are not proposing to impose a penalty, and we recognise that there are cases where it would be entirely reasonable for the subject of an investigation to wish to make oral representations on our proposed findings even where we are not proposing to impose a financial penalty (for example, where we are proposing to find there has been a serious breach of a regulatory requirement which could have reputational impacts on the subject). We therefore propose to remove this distinction, as we consider it unnecessary.
- Second, we propose to clarify that 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 we may ask it to limit the number of persons attending to a reasonable number.
- Third, we propose to clarify that the oral hearing will be chaired by the final decision maker and a transcript of the hearing will be provided to the subject of the investigation.
- Fourth, we propose to clarify that complainants and third parties will not usually be invited to attend the oral hearing.

Case closure decisions

2.48 One of the possible outcomes of an investigation is that we close the case without reaching a final enforcement decision, for example on the basis that:

- there is insufficient evidence of a contravention; or

²⁷ Current Enforcement Guidelines, paragraph 6.5

- 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.
- 2.49 We propose to give more detail as to what our usual practice is in such cases. In particular, we propose to clarify that we are only likely to provide an opportunity for relevant stakeholders to comment before we finalise our decision to close the case where we consider that fairness requires this – 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.
- 2.50 In addition, we propose to clarify that 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. However, if there is 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).

Settlement

- 2.51 As part of our review of our Enforcement Guidelines, we intend to consult on a new settlement process for regulatory investigations. By settlement, we mean a voluntary process which would result in a legally binding, published formal enforcement decision, rather than some form of informal process for resolving a case (such as closing a case having accepted non-legally binding assurances).
- 2.52 There is no express statutory basis for settlement under the Communications Act or under the Postal Services Act. In order to make a final enforcement decision in a case which is resolved through settlement, we would still need to fulfil the relevant statutory requirements for issuing such a decision. For example, in the context of an investigation into a breach of a General Condition or SMP condition under the Communications Act, this would include issuing a provisional breach notification under section 96A setting out our proposed infringement findings and any proposed penalty and allowing an opportunity for representations, before issuing a final enforcement notification under section 96C.
- 2.53 We consider there would be benefits to introducing a settlement process in regulatory investigations in cases where the subject of the investigation is prepared to admit it has breached relevant regulatory requirements and accept that the remainder of the investigation will follow a streamlined administrative procedure. In particular, the aim of this process would be to secure administrative resource savings and certainty as a result of this form of co-operation by the subject, which would be reflected in a reduced financial penalty imposed on the subject in respect of the relevant breaches.
- 2.54 A settlement process is already established for investigations under the Competition Act in accordance with the CMA Rules.²⁸ We propose to adopt a similar process in respect of regulatory investigations. This is set out in section 5 of the draft Enforcement Guidelines

²⁸ The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014. See Rule 9.

2.55 We have already resolved two recent enforcement cases against Vodafone²⁹ and one against EE³⁰ by way of a settlement process which was substantially the same as our proposals in this consultation, and have mentioned this possibility to stakeholders in relation to other ongoing cases as well.

Settlement requirements

2.56 We propose that settlement will involve the subject of the investigation accepting the following requirements as a minimum:

- Make a clear and unequivocal admission of liability in relation to the nature, scope and duration of the contravention. This would need to reflect our position on the infringements we would be minded to find and the appropriate level of penalty.
- 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 would 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.

Settlement discounts

2.57 As noted above, where settlement discussions are successful and result in a final enforcement decision being issued, there would be a reduction in the level of penalty we would otherwise have been minded to impose, which would reflect the co-operation offered by the subject of the investigation and the resource savings we have achieved as a result of the settlement process. Our aim would be to conclude the settlement process as swiftly as possible. In line with this aim, we propose that the level of the discount would 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.

2.58 We propose that the discount which would apply would generally be likely to be:

²⁹ See https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01160 and https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01159

³⁰ See https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01174

- Up to 30% for settlement discussions which are successfully concluded prior to a provisional breach notification being issued;
- Up to 20% for settlement discussions which are successfully concluded after a provisional breach notification has been issued, but prior to written representations being received; or
- Up to 10% for settlement discussions which are successfully concluded after a provisional breach notification has been issued, but after written representations have been received.

Decision making in settlement cases

2.59 In settlement cases, our provisional view is that it would be appropriate for the person responsible for overseeing the investigation and leading any settlement discussions to also be responsible for taking the final enforcement decision in a case which is successfully resolved through the settlement process. This is because, as explained further in paragraph 2.53 above, one of the key aims of a settlement process is to achieve resource savings and in a successful settlement case we would expect the final decision to reflect the admissions made by the subject of the investigation.

Proposed settlement process

2.60 Settlement discussions would not be a negotiation with Ofcom about what contraventions Ofcom might be prepared to find or not to find – for example, it would not involve discussing whether Ofcom might be prepared to drop a more serious contravention on the basis that a business is prepared to admit to a less serious contravention. Nor would they be negotiations about the level of the penalty which Ofcom would impose.

2.61 In addition, settlement discussions would not be 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. The final enforcement decision would reflect the fact that settlement has been agreed and the substances of any admissions made by the subject of the investigation for the purposes of settlement. 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

2.62 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.

2.63 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; and
- Following a provisional breach notification being issued, and after the subject of the investigation has made written representations in response.

- 2.64 As noted above, the discount on the level of penalty as a result of settlement would depend on the stage at which settlement is successfully concluded.
- 2.65 In each case, we propose that settlement discussions would take place on the basis of a written statement on Ofcom's position regarding the contraventions that we are minded to find and the level of penalty that we would be minded to impose (including any settlement discount), as well as any steps we would be minded to require the subject of the investigation to take to bring itself into compliance or remedy the consequences of any contravention.³¹ This is explained further in section 5 of the draft Enforcement Guidelines.
- 2.66 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.
- 2.67 If Ofcom had not already done so, we would proceed to issue a provisional breach notification³² on the basis of the position reached during the settlement discussions. This would contain the proposed penalty amount, including the settlement discount.³³ 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.³⁴
- 2.68 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.
- 2.69 The relevant decision maker would then formally make Ofcom's final decision.
- 2.70 If settlement discussions do not result in a settlement then the case will revert to the usual procedure.

Publicity in settlement cases

- 2.71 We would not expect to comment publicly on the fact that settlement discussions are taking or have taken place, but (as noted above) we would expect to refer to this fact

³¹ This may be a statement of facts and initial findings in a pre-provisional breach notification case, as set out in the provisional breach notification, or a revised statement of position in the event that we have received and considered written representations from the subject of the investigation.

³² 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.

³³ 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. 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.

³⁴ 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.

in any final decision reached on the basis of a settlement and in any accompanying press release.

Urgent action

- 2.72 Ofcom's existing Enforcement Guidelines explain our powers to take urgent action under section 98 of the Communications Act and under paragraphs 8 to 10 of the Postal Services Act. In accordance with these powers, we can make a direction suspending or restricting a communication provider's or postal operator's activities where the relevant statutory criteria are fulfilled.
- 2.73 We propose to give more detail on the procedure we would expect to follow in considering whether to take urgent action (including in response to a request by a third party that we do so) in section 6 of the draft Enforcement Guidelines. We have developed our proposals in light of experience and practice in relation to requests for interim measures under the Competition Act 1998. In the most part, we propose to follow the process we would apply in considering requests for interim measures (see paragraphs 3.31 to 3.33 below), subject to differences as relevant to reflect the underlying statutory regime.

Consumer protection investigations

- 2.74 As noted above, the statutory process for enforcement of consumer protection legislation is different from the general process for enforcing against a breach of a regulatory obligation. In particular, Ofcom is not the final decision maker for deciding whether a breach of consumer protection legislation has occurred and, if so, what the remedy should be – that is ultimately up to the court. Therefore, we propose to set out separate guidance explaining the differences in the process for enforcing consumer protection legislation, which is in section 7 of the draft Guidelines.

Directions under General Condition 20.3

- 2.75 GC20.3 was introduced in May 2011 and gives effect to Article 28(2) of the Universal Service Directive³⁵ which requires Member States to ensure that, where this is justified by reasons of fraud or misuse, relevant authorities are able to require undertakings providing public communications networks and/or publicly available electronic communications services to block access to numbers or services and withhold relevant interconnection or other service revenues. GC20.3 provides that where requested by or on behalf of Ofcom on the basis of fraud or misuse, the communications provider ("CP") shall 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.
- 2.76 Unlike many General Conditions, GC20.3 does not necessarily relate directly to a CP's conduct, but may be concerned with the conduct of its customers or other service users. Ofcom's action under GC20.3 will usually entail a form of disciplinary proceedings as against such customers or users.
- 2.77 Even so, action Ofcom takes under GC20.3 may affect the interests of CPs – in relation, for example, to interconnection and termination charges, and to their contracts with subscribers – as well as those whose access to numbers or services is

³⁵ Directive 2002/22/EC as amended by Directive 2009/136/EC (Citizens Rights' Directive).

blocked. As such, it seems appropriate for Ofcom's Enforcement Guidelines to set out the process which we plan to follow in these cases, such that the relevant directions are issued fairly and in an appropriate and proportionate way that is consistent with the requirements of the Universal Service Directive and GC20.3.

- 2.78 We also take account that in 2016 Ofcom has received a number of complaints about conduct that is liable to fall within the scope of GC20.3. In particular, complaints about callers making large numbers of very short duration calls to consumers in order to generate return calls to premium rate or revenue-sharing numbers. This has given Ofcom cause to exercise the power under GC20.3. On that basis, it also appears to us appropriate to set out transparently the process we would generally follow.
- 2.79 Our proposed approach to relying on GC20.3 and the procedure associated with issuing a direction to block access and withhold associated revenues (including how blocking directions may be reviewed) are set out in Section 8 of the draft Enforcement Guidelines. It is, in our provisional view, no more or less onerous a process than is required to give the required effect in a fair way to Article 28(2) of the Directive and GC20.3.

Consultation question

Q1: Do you have any comments on the proposed draft Enforcement Guidelines published alongside this consultation document?

Section 3

Proposed changes to Ofcom's guidance on Competition Act investigations

Introduction

- 3.1 Ofcom currently includes in our Enforcement Guidelines, guidance on how we approach investigations under the Competition Act. A separate document sets out our Procedural Officer's procedures.³⁶
- 3.2 We propose to create a new document solely for Competition Act investigations, which will incorporate the Procedural Officer's procedures. As explained in section 2 of this consultation document, we propose to create a different new document setting out advice for complainants, including those who wish to make complaints about potential Competition Act infringements.
- 3.3 This section sets out the changes we propose to make to our guidance on how we carry out Competition Act investigations. We propose changes to:
- increase transparency and clarity as to the approach we would normally follow, in particular where the current procedures are silent; and
 - ensure that the procedures we follow in Competition Act investigations are fair, effective and timely, and reflect the most recent changes to the relevant statutory requirements.
- 3.4 As set out above, our objective is that any enforcement action is conducted fairly and transparently, that the subject of the investigation has a fair opportunity to respond to Ofcom's case as part of the administrative process, and that cases are completed as efficiently and promptly as possible. In carrying out Competition Act investigations, Ofcom is also subject to certain procedural requirements under the Competition Act, the Enterprise Act and the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 ("the CMA Rules").³⁷ The procedures we have proposed are in line our objective and these statutory requirements.

How and why Ofcom opens cases

- 3.5 As set out above, Ofcom has limited resources and cannot necessarily investigate every matter which comes to our attention. We therefore make decisions about whether or not to open investigations on a case-by-case basis, having considered all relevant matters. We set out in paragraph 2.3 of the draft Competition Act Guidelines the matters we will generally have regard to when deciding whether or not to investigate. These are essentially the same as those listed in paragraph 4.13 of the current Enforcement Guidelines, although consistent with our proposed changes in the draft Enforcement Guidelines, we have proposed some changes to the drafting of these to draw out more clearly the overarching types of factors that we would usually expect to take into account (see further paragraph 2.9 above). In addition, we also

³⁶ Available at https://www.ofcom.org.uk/_data/assets/pdf_file/0019/78103/procedural_officer.pdf

³⁷ These are available at www.legislation.gov.uk

propose to explain that before opening a Competition Act investigation, Ofcom must be satisfied that the threshold under section 25 of the Competition Act has been met, and that we must also consider whether we are the best placed competition authority to handle the case under the concurrency rules³⁸.

- 3.6 We also propose to set out the ways in which an alleged competition law infringement may come to Ofcom's attention (including through complaints and self-referrals), as well as the process that Ofcom will generally follow when deciding whether to open an investigation.
- 3.7 As currently, we are proposing to explain that we will generally first carry out an enquiry phase, during which we will give the subject of the possible investigation the opportunity to comment and provide relevant information for our consideration. As stated in paragraph 2.11 we may decide not to have an enquiry phase if we consider we have sufficient information to decide whether or not to open an investigation.
- 3.8 In the current Enforcement Guidelines we state that we generally aim to complete enquiries about Competition Act complaints within 8 weeks.³⁹ In line with our proposals discussed in paragraph 2.12 above, we are proposing that, rather than stating we will have an 8 week target for completing an enquiry as to whether to open a Competition Act case, we will instead seek to set a target on a case-by-case basis and will inform the subject of the possible investigation and any complainant how long we expect the enquiry phase to take when we begin this process, as well as keeping them updated on progress. This is because, based on our experience to date, our preliminary view is that it is unhelpful to focus on a specific 8 week target for completing our enquiries, given the wide variety of cases we handle. However, we will continue to aim to complete an enquiry as quickly as possible.
- 3.9 We also propose to explain how we may resolve cases informally without proceeding to formal enforcement action, including giving some more detail about the type of information we may publish in this context.
- 3.10 Finally we set out the next steps that will generally follow Ofcom's decision on whether to open an investigation, including what will happen in the event we decide not to investigate. In line with our proposals discussed at paragraph 2.14 above, we propose to that we will normally make a decision about whether or not to investigate without giving the subject of the investigation or the complainant further opportunities to make representations. This is because we expect complainants to tell us what we need to know in order to determine whether or not to investigate when making their complaint submission, and we will ask for any further information we consider that we need in order to decide whether to investigate during the enquiry phase where relevant.

Carrying out an investigation

Engagement

- 3.11 As stated above, 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. Ofcom is also required under the CMA Rules to provide those we are investigating with the opportunity to make representations at certain key stages of the investigation. In

³⁸ The Competition Act 1998 (Concurrency) Regulations 2014

³⁹ Current Enforcement Guidelines, paragraph 7.5

order to conduct efficient and prompt investigations, we will give those we are investigating a fair, but no more than a fair, opportunity to make representations to us and engage with us during the course of an investigation.

- 3.12 We also propose to clarify in the draft Competition Act Guidelines the level of engagement those involved in our investigations can expect with Ofcom at key stages of the investigative process. We state in the current Enforcement Guidelines that complainants and those we investigate can expect *“regular contact with the case leader and regular progress on the progress of investigations”*. We explain that *“sometimes this will mean just a short telephone call or email”* and that *“[a]t other times, particularly when Ofcom is gathering information, we may be in touch more frequently and may be able to provide more detailed updates”*. We also explain that in Competition Act investigations we will generally hold at least two ‘state of play’ meetings with the parties on the progress of the investigation, and may hold a third where we issue a statement of objections.⁴⁰
- 3.13 We propose to be clearer in the draft Competition Act Guidelines about the information Ofcom will generally provide to the subjects of our investigations and when. In particular, we propose to explain that those involved in our investigations can generally expect the following type of engagement with Ofcom:
- When we decide to open an investigation, we will generally inform the subject of the investigation and any complainant shortly afterwards by sending them each a case opening letter explaining the scope of Ofcom’s investigation and next steps.
 - The case opening letter will usually set out who is acting as the case leader (who will be the main contact at Ofcom for the case), who is acting as the case supervisor (who will be the person overseeing the investigation) and who is the Procedural Officer. We would also provide an update to the subject of the investigation and any complainant if this changes.
 - 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.
 - If we decide to widen or reduce the scope of an investigation, we will inform the subject of the investigation and any complainant. As set out above, this is a slight change from the current Enforcement Guidelines, and we propose this particular change for the reasons set out in paragraph 2.17 above.
- 3.14 We recognise that it is important, in the interests of transparency, to keep parties informed on the progress of our investigations, and that engagement with parties may assist us in progressing an investigation and the carrying out of our enforcement functions. However, our experience has shown that the frequency, nature and extent of engagement which takes place during the course of an investigation will vary on a case by case basis. In light of this, we think it is important that to be clear that we will not adopt a ‘one-size-fits-all’ approach to engagement and will decide whether and when it is appropriate to meet with the subject of an investigation and complainants, and/or provide written or verbal updates on a case-by-case basis. For this reason, we therefore propose that in future we would expect to decide whether to hold state of play meetings, and if we do, the relevant stage in the process to do so, on a case-by-

⁴⁰ Enforcement Guidelines, paragraphs 7.17 – 7.18

case basis, and that we would generally expect to do so when it would assist the investigation (but not otherwise).

- 3.15 We also propose to clarify in the draft Competition Act Guidelines, how and when we will invite representations from the subject of the investigation. This includes the factors we will take into account when setting deadlines for representations, and the process for representations at key stages. Specifically, we propose to clarify how we will invite representations from the subject of the investigation on the statement of objections, any supplementary statement of objections and any draft penalty statement (see section 4 of the draft Competition Act Guidelines). We propose to give further guidance on how we will set deadlines for written representations, how we expect to provide access to file (including the use of confidentiality rings and data rooms) and how and when we would conduct oral hearings. We also propose to explain how we would put any new evidence obtained following the statement of objections to the subject of the investigation for comment in a 'letter of facts'.
- 3.16 We are also proposing to clarify how and when we will invite written representations from complainants and other relevant third parties on the statement of objections or any supplementary statement of objections. Our provisional view is that we would expect to do this where we consider that they may have further information relevant to the proposed decision. In such cases, we would expect to give the complainant or third party access to a non-confidential copy of the statement of objections (or supplementary statement of objections). Our provisional view is that we would not generally offer complainants or third parties access to file, as this would not typically be necessary in order for them to be able to make informed comments on the proposed findings set out in the statement of objections.
- 3.17 We also propose explain how and when we will invite representations from the subject of the investigation and any complainant or other relevant third parties if we are minded to close an investigation, either because we are minded to issue a no grounds for action decision, or to close the case without making a decision on the merits.

Information gathering

- 3.18 We propose to set out in the draft Competition Act Guidelines the formal information gathering powers we have under the Competition Act, and to make it clear which of these powers we would likely use most often in Competition Act investigations.
- 3.19 In relation to written information requests, in line with our proposals for information gathering in regulatory investigations (see paragraph 2.26 above), we propose to explain that we may provide the recipient of a written information request with a draft for comment before it is issued in final form, but we will decide whether it is appropriate to issue a draft on a case-by-case basis. This is because we do not consider, in practice, it is appropriate to send a draft information request in all circumstances, and we will decide whether to do so on a case-by-case basis. For example, we may not consider it appropriate to send a draft where the request is straightforward, where the demands of the investigation require information to be provided quickly, or where there is risk of evidence destruction such that we think sending a draft may prejudice the progress of an investigation. We are also proposing to set out how we will set deadlines for responses and when we will consider requests for extensions to deadlines.
- 3.20 In relation to our other formal information gathering powers under the Competition Act, we are proposing to include more detailed guidance on these, reflecting the

statutory requirements and how we would expect to gather information using these powers in practice. Since the current Enforcement Guidelines were published in July 2012, we have new powers under section 26A of the Competition Act to require individuals connected with the subject of the investigation to answer questions in relation to the investigation, and we have proposed guidance in relation to this.

- 3.21 We are also proposing to include more detailed guidance on Ofcom's approach to non-compliance with our information gathering powers, and on how Ofcom may enforce compliance, including the likely process we will follow, in accordance with the relevant statutory provisions.⁴¹

Confidentiality

- 3.22 We are proposing some changes to clarify our approach to how we handle confidential information provided to us during the course of an investigation. In particular, we are proposing to explain the process we would expect to follow when Ofcom is considering disclosing confidential information in accordance with the relevant statutory framework.⁴²
- 3.23 In addition, in line with our proposals at paragraph 2.28 above, we are proposing to clarify that we may request that stakeholders provide us with non-confidential versions of submissions, if needed for the purposes of publication and/or disclosure, rather than indicating that we expect stakeholders to provide us with non-confidential versions of all submissions supplied to us.⁴³ We think this should help reduce unnecessary burden on stakeholders from having to prepare non-confidential versions of their submissions where this may not be necessary.

Publicity

- 3.24 Publicising the Competition Act investigations we carry out and our final decisions is important in the interests of transparency and accountability, and may assist in deterring others from breaching competition law. We are also required by the statutory framework to publish certain updates and documents.
- 3.25 As noted at paragraph 2.30 above, we also recognise that those we investigate are likely to be concerned with what we are going to say, when, and whether they will have any warning.
- 3.26 We therefore propose to set out, in our draft Competition Act Guidelines, our general approach to publication including how we will notify the subject of the investigation about information we intend to publish, and our approach to the publication of market sensitive information. In line with our current practice, we are proposing to include guidance explaining that 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.

Involvement of third parties

- 3.27 As with regulatory investigations, Ofcom may consider it necessary to seek input from relevant third parties in Competition Act investigations – for example, from trade

⁴¹ Competition Act 1998, section 40A; Enterprise Act 2002, sections 112 – 115

⁴² This is set out in Part 9 of the Enterprise Act 2002 and Rule 7 of the CMA Rules.

⁴³ See Current Enforcement Guidelines, paragraph 7.29

associations or competitors or customers of the business we are investigating, in order to assist us in reaching a decision on the case.

- 3.28 In the current Enforcement Guidelines, we say that third parties who wish to be involved in an investigation will need to demonstrate that they have a “sufficient interest” in the investigation, generally meaning that their economic interests are directly affected (positively or negatively) by the subject matter of an investigation.⁴⁴ In addition, in relation to Competition Act investigations, we explain that third parties deemed to have a sufficient interest will generally be offered the opportunity to comment on a non-confidential version of any statement of objections issued by Ofcom or any draft non-infringement decision⁴⁵, and that we will consider requests to have access to file.⁴⁶
- 3.29 We are proposing to simplify our guidance on involvement of third parties in Competition Act investigations for the reasons set out in paragraph 2.33 above.
- 3.30 In line with this proposed approach, we are also proposing to clarify how and when we will invite representations from relevant third parties, as explained further at paragraphs 3.16 and 3.17 above.

Taking urgent action

- 3.31 Ofcom's existing Enforcement Guidelines set out Ofcom's powers under section 35 of the Competition Act to impose interim measures, and how an undertaking may make an application for interim measures.
- 3.32 The statutory test under section 35 of the Competition Act has changed since our Enforcement Guidelines were published in July 2012, and we are proposing to reflect this in the draft Competition Act Guidelines. We are also proposing to include guidance on how to make an application for interim measures in our *Advice for Complainants* document (see paragraphs 5.8 – 5.10 of this consultation document).
- 3.33 In addition, in order to clarify the position for undertakings about whom a request for interim measures has been made, we are proposing to set out guidance on the process we expect to follow upon receiving a request for interim measures, and how we will reach a decision on whether to impose such measures. In particular, we propose to explain the following:
- How we expect to engage with the undertaking upon receiving the request. Our proposed guidance sets out that we will notify the undertaking that we have received the request and will give it the opportunity to make representations. This includes guidance on how we propose to deal with requests made before we have opened any investigation, including how we would gather information from the undertaking in these circumstances.
 - The process for issuing a provisional decision for interim measures, in accordance with the CMA Rules. This includes proposed guidance on the information and documents we would provide to the undertaking, and the process for inviting representations. We also set out how we would expect to engage with the applicant during this period.

⁴⁴ Current Enforcement Guidelines, paragraphs 5.35-5.37

⁴⁵ Current Enforcement Guidelines, paragraph 7.32

⁴⁶ Current Enforcement Guidelines, paragraph 7.33

- The process for reaching a final decision, including the requirement to inform the undertaking under the CMA Rules.

Decision-making in Competition Act investigations

- 3.34 We consider it important, for the purposes of transparency, that those under investigation understand who will make decisions about them in Competition Act investigations, and what administrative process will be followed. We therefore propose to include more detail in our guidance about how we make decisions, and who will make these decisions.
- 3.35 Ofcom must ensure that its decision making process in Competition Act investigations complies with the requirements under the CMA Rules, which provide that certain key decisions are made in certain ways. Specifically, the CMA Rules require:
- a) there to be a relevant person who oversees the investigation, and who decides whether to issue a statement of objections⁴⁷; and
 - b) there to be a different decision maker to decide whether to make certain key decisions following the statement of objections. This must comprise at least two individuals, who have not been involved in the investigation and who are not the person overseeing the investigation. These decision makers decide whether to:
 - issue a supplementary statement of objections;
 - make an infringement decision; and
 - impose a penalty.⁴⁸
- 3.36 We have therefore proposed, and set out in the draft Competition Act Guidelines, a transparent decision making process that complies with the requirements under the CMA Rules. We propose that the person who oversees the investigation and will decide whether to issue a statement of objections will be a senior member of Ofcom's executive with appropriate Board-delegated authority (we refer to this person as the case supervisor in the draft Competition Act Guidelines). We also propose that at least two senior members of Ofcom's executive with appropriate Board-delegated authority (who have not been involved in the investigation and who are not the person overseeing the investigation) will be appointed as the 'second stage' decision makers, and in practice this will normally be two individuals. These decision makers will decide whether to issue:
- a supplementary statement of objections;
 - a draft penalty statement; and
 - an infringement decision (including any penalty and/or directions).
- 3.37 There are also a number of key decisions which may be made during a Competition Act investigation, for which there are no statutory requirements as to decision makers. These decisions include decisions to open an investigation, impose interim measures, accept binding commitments, make a no grounds for action decision or to

⁴⁷ CMA Rules, Rule 3(1)

⁴⁸ CMA Rules, Rule 3(2), Rule 3(3)

close an investigation without making a decision on the merits of the case. We also propose, for transparency, to set out in the draft Competition Act Guidelines who is likely to take such decisions:

- We are proposing that decisions as to whether to open an investigation or to impose interim measures will be taken by a senior Ofcom executive with Board-delegated authority.
- We are proposing that, depending on the stage at which the relevant decision is reached, decisions on whether to accept binding commitments, to make a no grounds for action decision or to close an investigation without making a decision on the merits will generally be taken by the person responsible for deciding whether to issue a statement of objections (who, as noted above, will be the person responsible for overseeing the investigation), or the 'second stage' decision makers (as referred to at paragraph 3.36 above).

Commitments

- 3.38 We propose to include further detail on the process we would expect to follow when making a decision on whether to accept binding commitments from the subject of the investigation in relation to its future conduct. In addition to reflecting the guidance set out in the current Enforcement Guidelines⁴⁹, the draft Competition Act Guidelines set out the circumstances in which Ofcom is likely to consider it appropriate to accept commitments, and how a subject should engage with Ofcom about offering commitments. The draft Competition Act Guidelines also set out our proposal to provide the subject with a summary of competition concerns should it approach Ofcom about offering commitments before a statement of objections has been issued. They also set out the consultation process in accordance with the procedural requirements under the Competition Act.⁵⁰

Settlement

- 3.39 The CMA Rules provide that Ofcom may decide to follow a settlement process in a Competition Act investigation where the subject of the investigation admits it has infringed competition law and agrees to an expedited administrative procedure for the remainder of the investigation.⁵¹
- 3.40 The CMA Rules also provide that if a single individual takes a decision to follow a settlement procedure then this decision must be approved by two other individuals.⁵²
- 3.41 Where we decide to follow a settlement process, we would still be required, under the CMA Rules, to issue a statement of objections and an infringement decision.⁵³ The Rules provide that the individual taking the decision to follow the settlement procedure may make the decision to issue the statement of objections and an infringement decision, rather than the decision makers ordinarily required under the Rules, as set out in paragraph 3.35 above.

⁴⁹ Current Enforcement Guidelines, paragraphs 7.44-7.47

⁵⁰ Competition Act 1998, Schedule 6

⁵¹ CMA Rules, Rule 9(1)

⁵² CMA Rules, Rule 9(2), Rule 9(3)

⁵³ CMA Rules, Rule 9(5)

- 3.42 We also have power to impose a penalty on the target of the investigation and must provide the target with our reasons for doing so, and publish details of any penalty imposed.⁵⁴
- 3.43 We have therefore proposed, in the draft Competition Act Guidelines, a settlement procedure which complies with these statutory requirements.
- 3.44 As stated above (at paragraph 2.54), we are proposing to adopt a similar settlement procedure for regulatory investigations and Competition Act investigations. The procedure we have proposed for Competition Act investigations is substantially the same as that for regulatory investigations, for the reasons set out above, save for our proposals regarding decision makers and settlement discounts.
- 3.45 As regards decision makers, we are proposing in line with the process proposed for regulatory investigations, that the decision maker in a settlement procedure would typically be the person overseeing the investigation (i.e. the case supervisor). However, in line with the statutory requirements for Competition Act investigations, we propose that the decision maker must obtain approval from at least two members of Ofcom's executive with appropriate Board-delegated authority before (i) engaging in settlement discussions; and (ii) settling the case.
- 3.46 We propose, in line with the CMA's settlement process to set out the two main stages at which settlement can be reached i.e. prior to a statement of objections being issued and following the issue of a statement of objections. In accordance with the CMA's approach, we are proposing that the level of discount is capped at 20%, with a maximum discount of 20% available for settlement pre-statement of objections and 10% post-statement of objections, to take account of the relative resource savings in settling a case at these different stages of the investigation.

Procedural complaints about investigations

- 3.47 As stated above, to rationalise the suite of documents that cover our enforcement procedures, Ofcom is proposing to incorporate our current Procedural Officer's procedures into the draft Competition Act Guidelines. We are not proposing any substantive changes to the Procedural Officer's procedures.

Consultation question

Q2: Do you have any comments on the proposed draft Enforcement Guidelines for Competition Act investigations published alongside this consultation document?

⁵⁴ CMA Rules, Rule 9(6)

Section 4

Procedures for enforcing competition-related conditions in broadcast licences

Introduction

- 4.1 Ofcom has power under section 316 of the Communications Act to impose conditions in Broadcasting Act licences to ensure fair and effective competition in the provision of licensed broadcast services, to ensure compliance with codes of practice approved by Ofcom for the purpose of securing fair and effective competition⁵⁵ and to ensure compliance with directions given by Ofcom for those purposes.
- 4.2 Our current Enforcement Guidelines apply to enforcement of compliance with fair and effective competition conditions in licences under the Broadcasting Acts.⁵⁶ We are proposing to move our enforcement procedures in relation to competition-related conditions in broadcast licences to a separate document. This is because we publish separate enforcement procedures for all other types of breaches of broadcast licences.⁵⁷ The change will mean that all procedures relevant to the enforcement of broadcast licences are contained in a separate sector-specific suite of documents, which we consider will make it easier for stakeholders to find the information they need.
- 4.3 We also propose that these procedures would apply to investigations into breaches of other competition-related conditions in Broadcasting Act licences, namely conditions in television and radio multiplex licences imposed under sections 12(1)(e) and (f) and 54(1)(e) and (f) of the Broadcasting Act 1996, which require the multiplex licence holder not to show undue discrimination and not to restrict parties purchasing capacity on the multiplex from making arrangements with another person for the use of that capacity.
- 4.4 The draft Procedures are closely modelled on the draft Enforcement Guidelines, as we consider that it remains appropriate to follow similar procedures in respect of these types of investigations. This is because investigations into breaches of these types of competition-related conditions in Broadcasting Act licences are likely to raise similar issues as investigations into compliance with competition-related requirements imposed on providers of electronic communications networks and services under the Communications Act 2003, and may require similar analysis.
- 4.5 We therefore think it is appropriate to apply the same general procedures for investigations into breaches of competition-related conditions in Broadcasting Act

⁵⁵ For example, the provisions of the Code of Practice for Electronic Programme Guides (“EPG”) https://www.ofcom.org.uk/_data/assets/pdf_file/0031/19399/epgcode.pdf that sets out practices to ensure fair and effective competition and which apply to EPG providers.

⁵⁶ Enforcement Guidelines, paragraphs 2.22 to 2.24

⁵⁷ Guidance on Ofcom's existing 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>. We are also today consulting on enforcement procedures [relating to the BBC](#) and proposed changes to the enforcement procedures for handling content standards, broadcast licensing and on demand programme service investigations and sanctions, which apply to [all other licensed broadcasters and notified on demand programme service providers](#)

licences, including in relation to how we decide whether to open an investigation and our approach to decision making in such investigations. In addition, we are proposing to apply a similar settlement process in these cases as would apply for regulatory investigations (see paragraphs 2.51 to 2.71 above).

- 4.6 To date, we have never imposed a statutory sanction for a breach of a competition-related condition in a Broadcasting Act licence. In order to give greater transparency and clarity as to the process we would follow in such cases, we are proposing to set out in the draft *Procedures for the investigation of breaches of competition-related conditions in Broadcasting Act licences* the process that we would follow in determining a sanction for the breach of a competition-related condition.⁵⁸
- 4.7 In line with our approach to the determination of a penalty in cases covered by the *Enforcement Guidelines*, we are proposing that when we issue a provisional breach notification in an investigation into a breach of a competition-related licence condition, we would, as a general rule, include with any proposed breach finding a provisional determination of any statutory sanction we provisionally consider would be appropriate in the circumstances.⁵⁹ In addition, we would propose to set out details of any proposed direction which we provisionally conclude it would be appropriate to make in the circumstances.⁶⁰ This is for the same reasons as discussed at paragraph 2.40 above, as we consider that the nature of the issues which fall to be considered in cases concerning breaches of competition-related conditions in Broadcasting Act licences are likely to be similar to those which arise in investigations covered by our Enforcement Guidelines.

Consultation question

Q3: Do you have any comments on the proposed draft Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences published alongside this consultation document?

⁵⁸ The process which Ofcom will normally follow when considering the determination of a sanction against broadcasters (except for the BBC) for breaches of other requirements of their licence is set out in our *Procedures for the consideration of statutory sanctions in breaches of broadcast licences*, the current version of which is available here:

https://www.ofcom.org.uk/_data/assets/pdf_file/0030/71967/procedures_for_consideration.pdf. As noted above, we are currently [consulting on changes to those Procedures](#)

⁵⁹ The sanctions available to Ofcom in respect of a breach of a Broadcasting Act licence condition may include: financial penalties; shortening the licence period or suspending the licence (where permitted); and licence revocation. The specific provision which empowers Ofcom to impose statutory sanctions for the breach of licence conditions will depend on the type of licence held and some sanctions are only available in particular cases.

⁶⁰ In some cases, Ofcom will have power to give a direction, such as a direction requiring the broadcaster to take such steps to ensure fair and effective competition.

Section 5

Advice for complainants

Introduction

- 5.1 Ofcom's existing Enforcement Guidelines also contain advice for complainants on submitting a complaint to us.⁶¹ We propose to put this into a separate document, "*Advice for complainants: Submitting a complaint to Ofcom*", as the audience for it is different and we consider it would be clearer and easier to find by those stakeholders who wish to understand how they can complain to us about a potential breach of a relevant regulatory or legal requirement.
- 5.2 This document would not apply to complaints from individual consumers about communications services, postal services or radio and television programmes.⁶²

Making a complaint

- 5.3 The proposed guidance would be intended to apply to stakeholders, such as businesses, trade associations or consumer groups, who wish to make a complaint to Ofcom about potential non-compliance with:
- Regulatory requirements imposed under the Communications Act and postal sector regulation, which are covered by the scope of the Enforcement Guidelines;
 - Consumer protection legislation;
 - Competition law (i.e. Chapter I or II of the Competition Act or Articles 101 and 102 TFEU); and
 - Competition-related conditions in Broadcasting Act licences.
- 5.4 As noted at paragraph 2.7 above, the Digital Economy Bill includes proposals for giving Ofcom certain new enforcement powers – for example, new powers to impose financial penalties for breaches of conditions of licences under the Wireless Telegraphy Act 2006 and new powers to take enforcement action against registered operators of Dynamic Spectrum Access databases for breaches of the terms and conditions of their registration. Should Parliament decide to give Ofcom these new powers we would be likely to seek to apply this guidance in respect of complaints relating to these enforcement powers also.
- 5.5 Our proposed updated guidance for complainants is set out in section 2 of the draft *Advice for complainants* document, and at Annex 1 of that document we have also set out a proposed preferred format for submitting a complaint, which outlines the type of evidence we would expect to see in a complaint submission.
- 5.6 We propose some small changes to the advice. These are largely intended to streamline and clarify the guidance. In particular, we propose to include specific

⁶¹ See paragraphs 1.21, section 3 and section 8 of the Enforcement Guidelines

⁶² Those wishing to make a complaint to Ofcom as a consumer, viewer or listener about a communications provider, broadcaster or postal services provider should visit our website for advice on how to make a complaint: <https://www.ofcom.org.uk/complain-to-ofcom>.

guidance to complainants about confidential information and requests for anonymity, which is intended to reflect our current usual practice.

Advice for whistleblowers

- 5.7 We also propose to set out some advice for whistleblowers, which reflects our procedure for making a qualifying disclosure to Ofcom under the Public Interest Disclosure Act. This is set out at section 3 of the draft Advice for complainants document.

Urgent action and interim measures

- 5.8 In our Enforcement Guidelines we provide advice about how to make a request for Ofcom to take urgent action using our powers under Communications Act or the Postal Services Act or for interim measures under section 35 of the Competition Act.⁶³ Our proposed updated guidance on requests for urgent action is set out in section 4 of the draft *Advice for complainants* document.
- 5.9 Our proposed changes to this guidance are largely clarificatory. However, we consider that it is important to emphasise to stakeholders that consideration of requests for urgent action involves the commitment of significant resources by Ofcom, and that we therefore expect anyone making a request for urgent action to come to us with a well-reasoned submission, as soon as possible after the issue or conduct has arisen which you consider requires action to be taken, and providing as much information and evidence as possible in support of your application.
- 5.10 In order to assist stakeholders in preparing to make a request for urgent action or interim measures, we therefore consider that it is helpful to give additional guidance on the following points:
- We acknowledge that in certain cases organisations that are considering making requests for urgent action or interim measures may find it helpful to contact us in advance of making their submission for guidance on the type of information and evidence we would need in order to assess a request in a particular case.
 - If the request for urgent action relates to an alleged contravention which we are not currently investigating, in order to decide whether to grant the request, we will need to have sufficient information to determine whether to open an investigation, and, in the case of a request for urgent action under the Communications or Postal Services Acts, to determine whether we have sufficient grounds to issue a provisional breach decision. In such cases, we would therefore expect applicants to submit all the information we would normally expect to receive from a complaint submission in accordance with the guidance set out in this document, along with their request for urgent action.
 - We set out details of the type of evidence we would expect to see in a request for urgent action or interim measures in order to demonstrate that the relevant statutory criteria are met.
 - We expect applicants to provide a non-confidential version of their request submission for the purposes of sharing with the subject of the request, as in most

⁶³ Current Enforcement Guidelines, paragraphs 5.8 – 5.15 and 7.19 – 7.22

cases we would expect to give it the opportunity to make representations to us on it prior to making a decision on whether to grant the request.

- We expect applicants to provide us with timely co-operation in responding to any informal requests for information which we make in order to progress our assessment of their request for urgent action.

Consultation question

Q4: Do you have any comments on the proposed draft Advice for complainants document published alongside this consultation document?

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom would like to receive views and comments on the issues raised in this document, **by 5pm on 6 March 2017**.
- A1.2 We strongly prefer to receive responses via the online form at <http://www.ofcom.org.uk/consultations-and-statements/category-2/ofcoms-approach-to-enforcement>. We also provide a cover sheet (<http://stakeholders.ofcom.org.uk/consultations/consultation-response-coversheet/>) for responses sent by email or post; please fill this in, as it helps us to maintain your confidentiality, and speeds up our work. You do not need to do this if you respond using the online form.
- A1.3 If your response is a large file, or has supporting charts, tables or other data, please email it to enforcementprocedures@ofcom.org.uk, as an attachment in Microsoft Word format, together with the cover sheet (<http://stakeholders.ofcom.org.uk/consultations/consultation-response-coversheet/>). This email address is for this consultation only, and will not be valid after 6 March 2017.
- A1.4 Responses may alternatively be posted to the address below, marked with the title of the consultation.
- Elizabeth Holloway
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- A1.5 If you would like to submit your response in an alternative format (e.g. a video or audio file), please contact Elizabeth Holloway on 020 7981 3000, or email enforcementprocedures@ofcom.org.uk.
- A1.6 We do not need a paper copy of your response as well as an electronic version. We will acknowledge receipt if your response is submitted via the online web form, but not otherwise.
- A1.7 You do not have to answer all the questions in the consultation if you do not have a view; a short response on just one point is fine. We also welcome joint responses.
- A1.8 It would be helpful if your response could include direct answers to the questions asked in the consultation document. The questions are listed at Annex 3. It would also help if you could explain why you hold your views, and what you think the effect of Ofcom's proposals would be.
- A1.9 If you want to discuss the issues and questions raised in this consultation, please contact Elizabeth Holloway on 020 981 3000, or email enforcementprocedures@ofcom.org.uk.

Confidentiality

- A1.10 Consultations are more effective if we publish the responses before the consultation period closes. In particular, this can help people and organisations with limited resources or familiarity with the issues to respond in a more informed way. So, in the interests of transparency and good regulatory practice, and because we believe it is important that everyone who is interested in an issue can see other respondents' views, we usually publish all responses on our website, www.ofcom.org.uk, as soon as we receive them.
- A1.11 If you think your response should be kept confidential, please specify which part(s) this applies to, and explain why. Please send any confidential sections as a separate annex. If you want your name, address, other contact details or job title to remain confidential, please provide them only in the cover sheet, so that we don't have to edit your response.
- A1.12 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and try to respect it. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.13 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's intellectual property rights are explained further at <http://www.ofcom.org.uk/terms-of-use/>

Next steps

- A1.14 Following this consultation period, Ofcom plans to publish a statement in spring 2017.
- A1.15 If you wish, you can register to receive mail updates alerting you to new Ofcom publications; for more details please see <http://www.ofcom.org.uk/email-updates/>

Ofcom's consultation processes

- A1.16 Ofcom aims to make responding to a consultation as easy as possible. For more information, please see our consultation principles in Annex 2.
- A1.17 If you have any comments or suggestions on how we manage our consultations, please call our consultation helpdesk on 020 7981 3003 or email us at consult@ofcom.org.uk. We particularly welcome ideas on how Ofcom could more effectively seek the views of groups or individuals, such as small businesses and residential consumers, who are less likely to give their opinions through a formal consultation.

If you would like to discuss these issues, or Ofcom's consultation processes more generally, please contact Steve Gettings, Ofcom's consultation champion:

Steve Gettings
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA
Tel: 020 7981 3601
Email steve.gettings@ofcom.org.uk

Annex 2

Ofcom's consultation principles

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

Before the consultation

- A2.1 Wherever possible, we will hold informal talks with people and organisations before announcing a big consultation, to find out whether we are thinking along the right lines. If we do not have enough time to do this, we will hold an open meeting to explain our proposals, shortly after announcing the consultation.

During the consultation

- A2.2 We will be clear about whom we are consulting, why, on what questions and for how long.
- A2.3 We will make the consultation document as short and simple as possible, with a summary of no more than two pages. We will try to make it as easy as possible for people to give us a written response. If the consultation is complicated, we may provide a short Plain English / Cymraeg Clir guide, to help smaller organisations or individuals who would not otherwise be able to spare the time to share their views.
- A2.4 We will consult for up to ten weeks, depending on the potential impact of our proposals.
- A2.5 A person within Ofcom will be in charge of making sure we follow our own guidelines and aim to reach the largest possible number of people and organisations who may be interested in the outcome of our decisions. Ofcom's Consultation Champion is the main person to contact if you have views on the way we run our consultations.
- A2.6 If we are not able to follow any of these seven principles, we will explain why.

After the consultation

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

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing Name/contact details/job title

Whole response Organisation

Part of the response If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

Annex 3

Consultation questions

Q1: Do you have any comments on the proposed draft Enforcement Guidelines published alongside this consultation document?

Q2: Do you have any comments on the proposed draft Enforcement Guidelines for Competition Act investigations published alongside this consultation document?

Q3: Do you have any comments on the proposed draft Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences published alongside this consultation document?

Q4: Do you have any comments on the proposed draft Advice for complainants document published alongside this consultation document?

Annex 4

Draft Enforcement guidelines

- A4.1 Please see the separate PDF document published alongside this Statement entitled: “[DRAFT] Enforcement guidelines”. It is available here:
http://www.ofcom.org.uk/data/assets/pdf_file/0028/96805/Draft-main-enforcement-guidelines.pdf

Annex 5

Draft Enforcement guidelines for Competition Act investigations

- A5.1 Please see the separate PDF document published alongside this Statement entitled: “[DRAFT] Enforcement guidelines for Competition Act investigations”. It is available here: http://www.ofcom.org.uk/_data/assets/pdf_file/0025/96802/Draft-CA98-enforcement-guidelines.pdf

Annex 6

Draft Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences

- A6.1 Please see the separate PDF document published alongside this Statement entitled: “[DRAFT] Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences”. It is available here: http://www.ofcom.org.uk/_data/assets/pdf_file/0026/96803/Draft-fair-and-effective-competition-guidelines.pdf

Annex 7

Draft Advice for complainants

- A7.1 Please see the separate PDF document published alongside this Statement entitled: “[DRAFT] Advice for complainants: Submitting a complaint to Ofcom”. It is available here: http://www.ofcom.org.uk/data/assets/pdf_file/0029/96806/Draft-advice-for-complainants.pdf