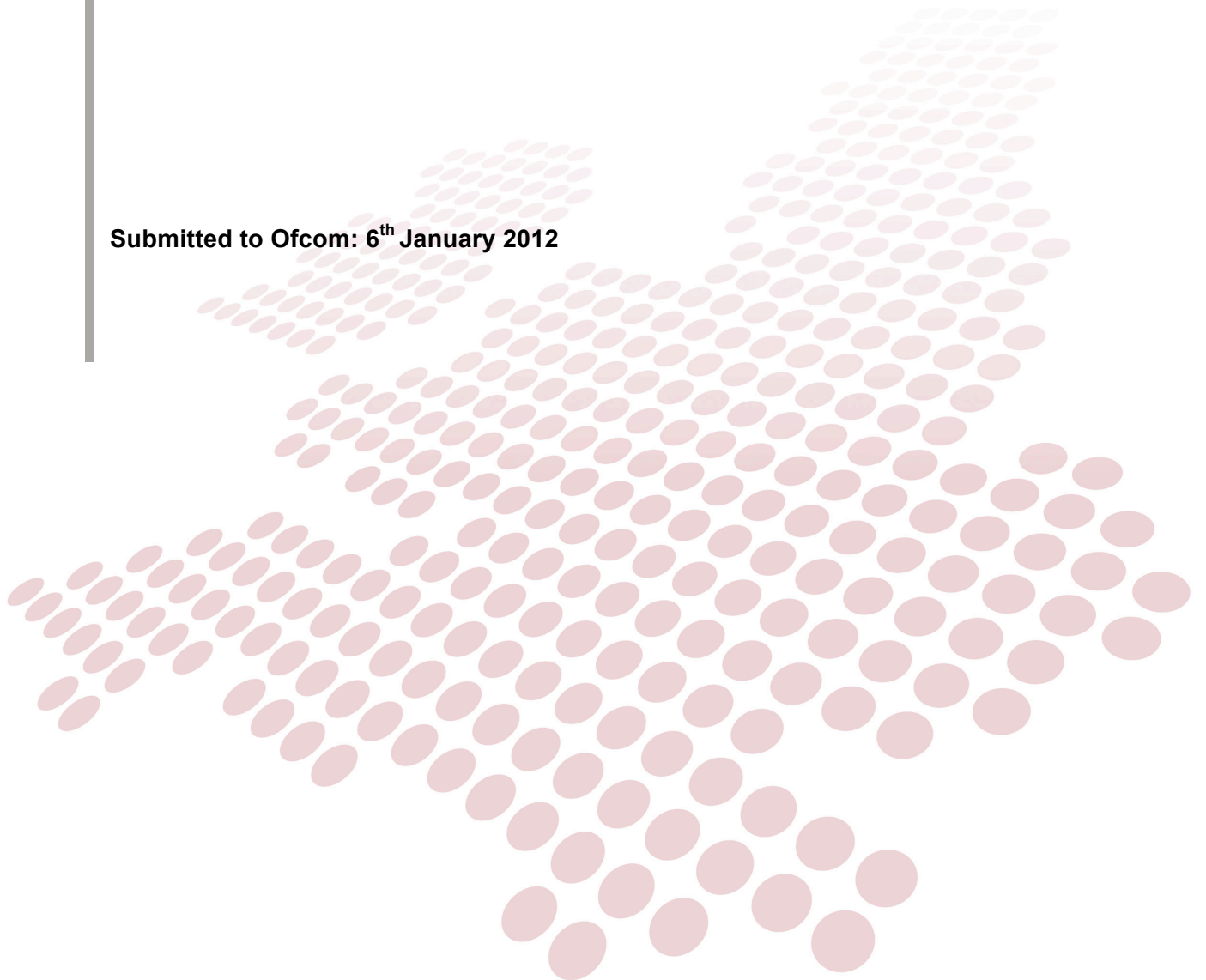


# Draft Enforcement Guidelines

UKCTA Response to Ofcom

Submitted to Ofcom: 6<sup>th</sup> January 2012



UKCTA is a trade association promoting the interests of competitive fixed-line telecommunications companies competing against BT, as well as each other, in the residential and business markets. Its role is to develop and promote the interests of its members to Ofcom and the Government. Details of membership of UKCTA can be found at [www.ukcta.com](http://www.ukcta.com).

UKCTA welcomes this consultation believing it is important to set out clear guidelines on the handling of competition complaints and complaints concerning regulatory rules. The previous draft guidelines were never formally confirmed by Ofcom, which led to some uncertainty around the applicable process. We would urge Ofcom to ensure that the draft guidelines are formally agreed as part of this consultation and that they are kept up to date. UKCTA members have direct experience of the enforcement regime and it is important that all stakeholders have a clear understanding of what to expect and how matters will be handled.

UKCTA members welcome any improvement in the process for handling Competition Act cases. Competition Act complaints are never considered unless they are a matter of last resort and UKCTA members understand the resource impact they have on Ofcom. Communication Providers have proved their willingness to commit resource when raising complaints and will provide as much information as possible, however Ofcom must take due account of the limited resources available within Communication Providers (particularly smaller providers), the amount of information likely to be available to them and the limited ability in some cases to fund external resource.

Often in Competition Act cases the complainant will only have access to limited information concerning the alleged behaviour (e.g. margin squeeze or predatory pricing) and much of it might be anecdotal with third party sources unwilling to provide information formally. While effort will be given to providing proxy or substitute information where it can be derived, Ofcom must accept that sometimes information will not be available and Ofcom should consider making use of its formal information gathering powers to fill in the gaps during the enquiry phase to ensure it can make an informed decision about opening an investigation or not. It would be unacceptable for Ofcom to reject a complaint on the grounds of insufficient information when the information sought is clearly outside the grasp of the complainant.

In all cases, Ofcom's enforcement duties should be a priority and Ofcom should consider how it can respond to complaints during the enquiry phase. Ofcom must also review how it treats requests for interim measures. The threshold for interim measures is set high but Ofcom should look for ways to try and ensure that no one party is at a disadvantage should an investigation take a considerable amount of time to complete, as failure to address immediate concerns is likely to encourage further delaying tactics on the part of the target of the complaint.

### **Own initiative investigations**

Ofcom states that it will explain how it identifies and decides whether to investigate potential problems on its own initiative (4.2) and does seek to provide some information (5.14-16) in the factors it might consider. However, UKCTA would welcome more openness regarding the criteria and competing priorities that are considered by Ofcom when a decision is taken to open an own-initiative investigation. We need transparency on the reasons for initiating these investigations and also any steps that have been taken to avoid a full investigation. In these draft guidelines, Ofcom has sought to provide more clarity on the factors that it will consider when deciding whether to accept a complaint submitted by a third party, and how that work is prioritised: the same level of detail should be provided for own initiative investigations, which in effect "compete" for the same Ofcom resources. So, for example, we understand that Ofcom takes CCT complaints into consideration, but we do not understand what the trigger points for action are or how these trigger points might be defined (if this is not a purely volume based exercise, for example). While we appreciate that Ofcom does not want to fetter its discretion in this regard, we do need to understand under what circumstances an issue may be considered an administrative priority.

We also need clarity on when Ofcom is likely to use its concurrent powers and also justification for doing so, for example the Guidance on Additional Charges issued by Ofcom in 2008 where Ofcom acted under the Unfair Terms in Consumer Contracts Regulations even although there already existed guidance from the OFT.

Own initiative investigations should not be reserved for consumer matters alone, they should also be considered in other situations where there would be wider benefit to industry where matters of concern have been brought to Ofcom's attention by stakeholders.

We would also like a better understanding of how Ofcom will decide on what powers to rely upon in specific cases, for example guidance as to when Ofcom might be expected to use the Competition Act as opposed to sector specific regulation.

We would also favour the addition of an enquiry phase on all own initiative investigations as this would allow stakeholders to provide input early in the process to avoid any future misunderstandings and may help to speed up the investigation in the long run. It is also necessary to ensure that the own initiative investigation is considered in the context of other issues which may also be demanding Ofcom resource (5.16).

### **Timescale for Competition Act Investigations**

While Ofcom are not proposing to set target timescales for Competition Act investigations, we would like to see more information provided during the life of the investigation. This could be by means of giving an indicative timescale for the next phase and an estimate of the likely completion date based on the circumstances and complexity of the particular case.

### **Administrative Priorities**

We would like Ofcom to consider the impact on the complainant's business as part of the decision criteria for opening an investigation. If the complainant's business is likely to be irreparably damaged, or forced to exit a particular market, it would be wrong not to proceed with an investigation purely on the grounds of administrative priority. It can't be in the consumer interest to have supplier choice damaged, and while Ofcom may choose to open an investigation in the event of the circumstances of the case being repeated, the evidence relating to the first complaint is unlikely to be available in a complete form in any future cases relating to similar activity, particularly if the first company to raise the matter has actually gone out of business in the interim.

### **Relationship between Policy & Enforcement**

We would welcome more clarity around the relationship between policy and enforcement - in particular, where Ofcom has declined to undertake enforcement activity as a result of a pending Market Review or policy initiative. If the Market Review is delayed, then the original complainant is likely to suffer greater harm and in such cases it would be wrong for Ofcom not to try and take steps to minimise or eliminate harm (possibly through interim measures). There is underlying tension through Ofcom's dual role as a policy body and enforcement authority. From a practical perspective, industry needs clarity on the interplay between the

different aspects of Ofcom's dual role. Ofcom should always try to avoid situations where an investigation is delayed because of a policy project or vice versa.

### **Bias against intervention**

Ofcom identifies the bias against intervention as a key principle of particular relevance to the work of Ofcom's Competition Group Investigation and Consumer Protection Teams. UKCTA believes that the bias against intervention principle is more appropriate in the context of policy intervention – we note that Ofcom has previously given some guidance about the approach it will take in its Impact Assessment Guidance: [http://stakeholders.ofcom.org.uk/binaries/consultations/better-policy-making/Better\\_Policy\\_Making.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/better-policy-making/Better_Policy_Making.pdf).

UKCTA does not support excessive intervention but firmly believes that there needs to be a willingness on the part of Ofcom to take action where justified which should not be coloured by a bias against intervention. It would be helpful to understand how Ofcom would see the principle of a bias against intervention actually applying in practice in enforcement scenarios.

### **Information gathering**

We fully agree it is essential that Ofcom has accurate information, which is provided in a timely manner and that is comprehensive, in order to carry out efficient investigations. We appreciate that this may mean that we have to work to challenging timescales but we are committed to fulfilling our duties. However, Ofcom should also be mindful of the resource challenges that information requests present for providers large and small when setting timescales. These need to be realistic in order to ensure that the information provided is complete and robust. To this end, Ofcom should issue information requests as early as possible in the investigation period to maximise the response time and should be mindful of issuing information requests over holiday periods, where key personnel may be on leave.

We are pleased to see that Ofcom is committed to issuing s135 requests in draft form as the norm and believe that this will also help to ensure an efficient investigation process.

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