1. Executive summary

This submission is on behalf of a large group of providers, serving most UK consumers

1.1 This submission responds to Ofcom's consultation, *Ofcom's approach to enforcement* (the '**consultation**'), and the accompanying revised *Enforcement guidelines* and *Enforcement guidelines for Competition Act investigations* (the '**draft guidelines**').

1.2 This submission is made jointly by British Telecommunications plc ('**BT**'), KCOM Group plc ('**KCOM**'), Sky UK Limited ('**Sky**'), Telefónica UK Limited ('**O_2**'), Virgin Media Inc ('**Virgin Media**') and Vodafone Limited ('**Vodafone**') and supported by the UK Competitive Telecommunications Association ('**UKCTA**') (the '**Enforcement Reform Group**' or the '**Group**').

1.3 Between us, we operate both the UK's two major fixed access networks and the three largest mobile access networks. Directly as retail suppliers, or indirectly through our wholesale divisions, we supply electronic communications services to tens of millions of people, comprising the substantial majority of UK consumers of fixed or mobile electronic communications, as well as the vast majority of enterprise customers.

1.4 This unusual step of a joint submission reflects the importance that the Group places on Ofcom's enforcement processes. Our aim is to assist Ofcom by providing consolidated feedback that reflects deep and broad consensus amongst the Group, all of whom are providers that Ofcom regulates using its enforcement powers.[1]

1.5 We strongly support Ofcom's role as an effective and proportionate enforcement agency. We have a shared interest in upholding a culture of compliance throughout the sector. We want to see consumers protected from rogue traders and unacceptable practices. We support the principle that providers who do not manage their own compliance properly should face incentives to improve.

1.6 We support Ofcom's decision to review its 2012 *Enforcement Guidelines*, and most of Ofcom's specific proposals. Annex 1 sets out a table responding in detail to Ofcom's proposals, but in summary, we welcome:

(a) Ofcom's efforts to increase transparency and provide greater clarity as to its practices, and keep the *Enforcement Guidelines* current with changes in legislation and Ofcom's practices as they have evolved through experience;

[1] The scope of this submission is the exercise of Ofcom's enforcement powers in relation to electronic communications, whether as a sector regulator under the European Framework for Electronic Communications (i.e. under ss.96A to 96C of the Communications Act 2003 (the '**Act**')) or as a concurrent competition authority exercising its powers in communications markets. In some cases, the issues we address are cross-cutting (e.g. transparency, consistency) but we make no specific submissions in relation to other matters, e.g. Ofcom's regulation of post or the enforcement of broadcasting licences, or other areas of Ofcom's work such as regulatory disputes.

(b) The settlement process, which, notwithstanding our submissions on some matters of detail, is a welcome addition to Ofcom's procedures;

(c) Streamlining to improve efficiency and eliminate unnecessary steps (for example, no longer requiring non-confidential versions of submissions that are unlikely to be needed);

(d) Moving to a single decision-maker during the first phase of investigations (from the enquiry phase through to a provisional decision) to aid procedural economy; and

(e) Simplifying the guidance and practices around areas such as third-party involvement, and moving to a consistent and simple approach on issues such as when an oral hearing will be offered.

1.7 We oppose some of Ofcom's proposals. In explaining our views, wherever we can, we suggest different approaches that could achieve Ofcom's objectives equally effectively. We particularly ask Ofcom to reconsider with an open mind:

(a) **Downgrading transparency on timing.** We oppose the proposals to drop references to Ofcom's commitment to 15 working day completion of the enquiry phase and seeking to complete investigations to a specific administrative timetable (currently, 6 months). A better approach would be to retain a commitment to timeliness but build in flexibility without losing transparency and confidence in Ofcom's processes. We feel especially strongly that Ofcom should retain the practice of giving an indicative timetable at the outset of an investigation, even if flexibility needs to be increased by setting that target at, say, 4, 6, 9 or 12 months on a case-by-case basis.

(b) **Reducing engagement.** During scoping and throughout the course of active investigations, Ofcom's proposals will result in less engagement and even less information being provided than is currently the case. Scoping is linked to Ofcom's planning of investigations, and we see risks in Ofcom removing opportunities to obtain feedback before it has committed to a particular scope (or revised scope). Once set, the scope is generally difficult to revisit and can determine the path of the investigation, including the resources needed. A 'measure twice, cut once' approach makes sense. In relation to 'state of play' meetings and other ways to keep those under investigation informed, Ofcom's approach is entirely focused on Ofcom's needs, and not the legitimate concern of a provider under investigation to understand what is happening in their case.

(c) **Removing references to providing information requests in draft form.** Ofcom and its stakeholders save an enormous amount of time and effort through the existing practice of providing a short window to comment on a proposed information request before it is issued as a statutory notice. We do not agree that doing so is 'inappropriate' in enforcement as a general proposition (although that may be true in specific exceptional cases). This practice should be maintained, not diluted or left unmentioned in Ofcom's guidelines.

(d) **Moving from two decision-makers to one decision-maker for the second (final) phase of investigations.** Ofcom's current guidelines (but not, always, its current practice) is that there ought to be two decision-makers for a final decision confirming a contravention and imposing a penalty. This is the absolute minimum that best practice requires, and is already adopted by Ofcom in relation to Competition Act investigations and exceeded by most other comparable regulators in their sector regimes.[2] We support Ofcom's move to streamline processes during the first phase of the investigation but we oppose the shift to a single decision-maker for confirmation decisions.

(e) **The need for a settling party to admit liability, rather than simply accepting an adverse decision.** Liability (for example, to third parties who may allege that they have been affected by events considered in an investigation) is distinct from the question of whether a decision is accepted. Ofcom ought to adopt the practice used in some other regimes, whereby an adverse decision is accepted by the undertaking to whom it is issued. This could make settlement easier to achieve in some cases, furthering Ofcom's objectives.

(f) **Weak protection for settlement discussions.** Rather than give (as some other regulators have) a clear and strong commitment to the 'without prejudice' nature of settlement discussions, Ofcom's proposals are ambiguous as to how the separation, if any, of the content of settlement discussions and the second-stage decision-making process will work. This will undermine scope for settlement and, at worst, create a fundamental problem of fairness if the contents of discussions about a possible settlement are not properly quarantined from Ofcom's statutory decision-making.

1.8 These points all rest on the need to ground Ofcom's enforcement activities in basic principles of regulatory and prosecutorial best practice (as well as full alignment with Ofcom's legal powers and fulfilment of its statutory duties). That means applying Ofcom's regulatory principles consistently and ensuring that there is a fair balance between swift enforcement and procedural economy on the one hand, and transparency, accountability and rigour on the other.

1.9 We also think that Ofcom's review could usefully consider some other proposals:

(a) **Widening the remit of the Procedural Officer** so that she can consider issues arising in regulatory investigations, as well as issues arising in relation to Competition Act investigations (currently, there is a 'two-track' process for the different types of case);

(b) **Considering the use of confidentiality rings in complex regulatory investigations** involving third-party confidential information, to balance the need for rigour – i.e. to allow the

[2] The CMA's Case Decision Group is made up of three members (see paragraph 11.30 of the CMA's CA98 Guidance CMA8). The FCA's Competition Decisions Committee will comprise *at least* three people (see paragraph 5.2 of the FCA's CA98 Guidance). Ofgem's decision making Panel consists of three members of the Enforcement Decision Panel (see paragraph 6.15 of Ofgem's Enforcement Guidelines).

party under investigation to fully exercise its rights of defence – with the need to protect commercially sensitive information (a principle we strongly support);

(c) **Adopting a 'commitments regime' for regulatory investigations**. In the same way that Ofcom has adopted administrative procedures for settlement in regulatory investigations that mirror the statutory arrangements applying to Competition Act investigations, it is worth considering whether some form of binding commitments regime could be adopted for regulatory investigations. Commitments provide a middle ground between informal assurances and settlement, giving Ofcom an additional tool to resolve matters in ways that further the interests of citizens and consumers.

1.10 These proposals and the other suggestions listed in this submission would be straightforward to implement, largely costless (or resource-neutral, when they are deployed) and none would require any changes to legislation. We hope that Ofcom gives these proposals due consideration. We would welcome the chance to engage further with the project team to flesh out these points and explore how these might work in law and in practice.

1.11 This submission is structured as follows:

(a) **section 2** provides some context and general points;

(b) **section 3** addresses the conduct of 'regulatory investigations' – that is, investigations conducted under Ofcom's sector powers as the national regulatory authority under the European Framework for Electronic Communications. These points relate to section 2 of Ofcom's consultation document and the draft *Enforcement Guidelines*.

(c) **section 4** addresses the conduct of competition law investigations. These points relate to section 3 of Ofcom's consultation document and the draft *Enforcement Guidelines for Competition Act investigations*.

1.12 A full table setting out the Group's positions with respect to Ofcom's proposals is set out in Annex 1. Section 3 and 4 focuses mainly on explaining why the Group opposes a minority of Ofcom's proposals. These comments are meant to be read in conjunction with our strong support for the bulk of Ofcom's proposals that are not discussed in detail.

2. Context

We support a culture of compliance and effective enforcement by Ofcom

2.1 We agree with Ofcom that enforcement can benefit citizens and consumers, by promoting and protecting competition, preventing consumer harm (and upholding standards set out in consumer law) and encouraging compliance.[3] Failure to enforce regulatory rules harms the interests of consumers and undermines competition by rewarding bad behaviour and poor compliance. *Effective* enforcement is therefore an important part of Ofcom's role.

2.2 We also agree with Ofcom that it is important that enforcement is undertaken fairly and transparently, and that the subject of the investigation has a fair opportunity to respond to Ofcom's case during the process.[4] These requirements of *fairness* are essential to the legitimacy and robustness of Ofcom's enforcement work.

2.3 It is also important to ensure that cases are completed *efficiently* – that is, as promptly as possible, subject to the need to ensure effectiveness and fairness.[5]

We welcome Ofcom's commitment to transparency and fairness

2.4 For all these reasons, we welcome Ofcom's decision to review its Enforcement Guidelines. We support Ofcom's aim of:

(a) Increasing transparency and clarify as to how Ofcom's investigations and enforcement processes will be run;

(b) Ensuring Ofcom's enforcement processes are fair, efficient and timely;

(c) Ensuring that 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;

(d) Clarifying the procedures Ofcom will follow in respect of investigations under the Competition Act and ensuring that Ofcom's guidelines reflect the most recent changes to the relevant statutory requirements.[6]

2.5 Wherever possible, we have framed our response to Ofcom's consultation in terms of these statutory requirements of *transparency* and *fairness*, and Ofcom's desire to achieve greater *efficiency*, as well as the need to ensure that information for complainants and those under investigation is up to date with the statutory framework.[7]

[3] Consultation at paragraph 1.2
[4] Consultation at paragraph 1.4
[5] Consultation at paragraph 1.4.
[6] Consultation at paragraph 1.6.
[7] The Act requires that Ofcom must carry out its functions having regard to '*the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed*' (Act, s.3(3)).

2.6 Ofcom must also act *consistently* in relation to enforcement activity – so that, wherever it reasonably can, for example, different types of investigations with similar stakes or similar demands (such as information or analytical requirements) have broadly similar approaches and processes. Such consistency brings coherence to Ofcom's enforcement programme and helps to minimise the risk that jurisdictional choices unduly affect processes or outcomes.

2.7 Ofcom's enforcement work may be influenced by the context within which Ofcom operates:

(a) **As one of the UK's economic regulators.** Many of Ofcom's proposals draw on approaches taken in other sector-specific regimes such as energy or financial services.[8] Useful material is also available through sector-specific reviews, such as the FSA's 2005 review of its enforcement powers.[9]

(b) **As a competition authority.** Ofcom is subject to the same general constraints and requirements as a competition authority when exercising its competition law powers. Given that its sector powers are often closely linked to competition law powers, this context affects Ofcom's other enforcement work, too. This is apparent on the face of Ofcom's proposals, with many closely modelled on processes adopted by the Competition and Markets Authority ('**CMA**') or European Commission (for example, in relation to oral hearings).

(c) **As a member of the community of sector regulators.** Ofcom operates as a member of the regional and global community of sector-specific telecoms and communications regulators (and spectrum management authorities).

2.8 These different contexts provide useful experience and examples on which to draw when designing Ofcom's own processes. They also highlight the importance of Ofcom developing and operating processes which are world class in terms of fairness, transparency and effectiveness.

Given Ofcom's policy to impose larger penalties, accountability and rigour in decision-making is critical

2.9 In December 2015, Ofcom issued revised *Penalty Guidelines* that signalled Ofcom's new policy to pursue larger penalties against major providers.

2.10 During the past 2 years, Ofcom has seen a substantial uptick in enforcement activity, particularly in the area of consumer protection.[10] During that time, Ofcom has issued the largest penalties in its history and, twice, used its nascent settlement process. At the same time, investigations have taken longer to complete, with a typical investigation now taking 12

[8] For example, Ofcom's proposed settlement process has many common features with the procedures adopted by Ofgem (see Ofgem's *Enforcement Guidelines*, published on 12 September 2014) or the Financial Conduct Authority ('**FCA**') (see the FCA's *Decision Procedure and Penalties Manual* ('**DEPP**'), which comprises one part of the *FCA Handbook*).

[9] Financial Services Authority ('**FSA**'), Enforcement process review: Report and recommendations, July 2005.

[10] This is in marked contrast to the long-term trend which has been reduced levels of activity from a peak in 2005/06 that has continued for a decade or more. See, for example, *Ofcom's Investigations Activity - Report on activity from 1 April and 30 September 2016*, published by Ofcom on 31 October 2016, which sets out analysis of the full set of Ofcom investigations (from 2003 to late 2016) at paragraphs 2.17 to 2.18.

to 16 months. This means that the periods of uncertainty and the resource commitments associated with investigations (and hence their cost to operators, regardless of the outcome) have increased.

2.11 Given this focus, it is essential that Ofcom looks to revise the Enforcement Guidelines in ways that increase the degree of rigour and transparency that it applies to its enforcement work.

3. Regulatory investigations

3.1 Ofcom's regulatory investigations fall into three broad categories:

(a) **Investigations of major providers**. These investigations typically involve major providers, either providers of electronic communications networks or large (mass market) retailers of electronic communications services. These cases compromise the substantial majority of all Ofcom's regulatory investigations and the lion's share of Ofcom's enforcement resources are devoted to them.

(b) **Enforcement programmes**. These are investigations which are launched to devote resources to a priority issue or concern, looking at an identified class of providers (e.g. calling card providers). There may be no reason to suspect that any individual provider is failing to comply – for example, Ofcom has launched enforcement programmes to accompany specific research that it has published[11], to monitor conduct in a part of the market[12], or to dovetail with an area of ongoing policy work.[13]

(c) **Investigations of 'rogue traders'.** These investigations typically involve small providers. They include cases where the harm to consumers may be very large for those affected, or where there is a need to act with extreme speed to prevent the perpetrator avoiding sanction. This can, for example, include allegations that the core business of the provider under investigation is built around unlawful or unacceptable practices.

3.2 These three categories of investigation have important differences. The focus of this submission is the first category (investigations of major providers). In these investigations:

(a) **Being under investigation itself causes reputational harm.** Major providers are generally well-known brands. Simply opening an investigation can generate substantial consumer and press interest. We appreciate that Ofcom's public statements will typically note that opening an investigation does not imply that a provider has done anything wrong, but in the eyes of customers and other stakeholders, there is little doubt that being under investigation by Ofcom is a substantially negative event.[14]

(b) **Investigations can take a long time.** Typically, the time Ofcom takes to conclude a regulatory investigation of a major provider is now 12 to 16 months. One reason is that these investigations often involve gathering substantial volume of information (such as internal documents, sales or transactional data or customer records such as billing information, CDRs or call recordings) from a large-scale consumer-facing business. It can

[11] For example, Ofcom's monitoring and enforcement programme into the advertisement and sale of international calling cards 2010-2011 (CW/01065)
[12] For example, Ofcom own-initiative investigation: monitoring and enforcement of Fixed-line Providers' compliance with rules concerning their sales and marketing and their use of Cancel Other (2014-2016) (CW/01137).
[13] For example, Ofcom's programme to consider the termination processes of fixed providers (CW/01158)
[14] We discuss Ofcom's practice of identifying a party under investigation (which is different to the approach taken by, for example, the CMA) at paragraph 3.5 below.

take a substantial amount of time for Ofcom to analyse and properly assess that data and reach a view as to whether a contravention may have occurred.

(c) **The target of the investigation has an ongoing relationship with Ofcom.** Major providers operate with a genuine culture of compliance, with a desire to do their best for their customers and to trade fairly with competitors. If a contravention is alleged, they face strong incentives to treat any investigation as part of an ongoing regulatory relationship and to engage thoroughly to address and/or respond to the claims made against them. It is not surprising that in such circumstances often Ofcom acknowledges that major providers have cooperated with Ofcom's investigations. This enables a degree of engagement that is entirely different to, say, dealing with a rogue trader.

(d) **Investigations are part of the wider process of developing the regulatory regime.** Unlike investigations of rogue traders, these investigations can turn on the questions of interpretation of the regulatory conditions, as well as or instead of issues of fact. Sometimes, the provider will have adhered to what it considered to be the compliant course of action, or has been obliged to deal with an aspect of regulation that has not previously been tested. Just as with dispute determinations, Ofcom's decisions in investigations form part of the regulatory regime, and can raise implications for Ofcom's policy work (triggering further policy work, for example).

3.3 These characteristics are relevant to the approach taken by Ofcom to issues arising under the *Enforcement Guidelines*. For example, because there can be wider policy implications, or complex evidence, the need for due rigour in decision-making is heightened. Ofcom is more able to consider and accept informal assurances where it knows that there is an ongoing stakeholder relationship. This does not affect the need for fairness (which applies in all cases), but these factors may shape the ways in which a fair process can operate.

The enquiry phase

3.4 The primary purpose of the enquiry phase is to decide whether to open an investigation.[15] We are concerned that Ofcom's proposals, in the round, will make the enquiry phase more uncertain and less transparent.

3.5 The Group strongly supports Ofcom's use of the enquiry phase. Most importantly, it allows Ofcom to consider whether an investigation is necessary. This is important because:

(a) past practice suggests that few, if any, opened investigations are ever closed on administrative priority;[16]

[15] In investigations involving major providers, the enquiry phase also allows a period during which the party whose conduct is under scrutiny to help Ofcom to understand the issues, and enable a complaint to be assessed to see whether on its face, there is a case to answer.

[16] Ofcom's own analysis is that only 3% of cases in the history of Ofcom's enforcement programme have ever been closed on administrative priority (as opposed to 25% where the 'target changed behaviour' roughly 50% of cases that proceed to a binding decision – see Ofcom's report *Ofcom's Investigations Activity: Report on*

(b) Opening an investigation also involves a public announcement that, for providers with well-known brands creates an immediate harmful impact (regardless of the outcome). We note that this practice (identifying the party under investigation at the outset) does not seem to be under review in this project, but an approach closer to the CMA's approach (identifying a party only where it is clear that there is a provisional 'case to answer') would avoid this issue which can be important given the possibility that an investigation may be closed with a No Grounds for Action decision or on the grounds of administrative priorities;[17] and

(c) every investigation involves committing Ofcom's (and providers') resources for an extended period – often a year or more. It is important to get it right.

3.6 The Group is concerned by Ofcom's suggestion that it may decide not to have an enquiry phase at all, if it considers that it already have sufficient information to determine whether to open an investigation or not, for example '*as a result of previous engagement with the subject of the possible investigation*'[18].

3.7 Ofcom's reference to '*previous engagement*' is ambiguous. At any given point in time, Ofcom and its industry stakeholders are typically 'engaged' with one another on a range of issues, and many of the policy issues on which Ofcom and providers are engaged are also areas of focus for enforcement as well as rule-setting projects. A willingness to skip the enquiry phase invites providers to adopt a defensive attitude, treating every contact they have with Ofcom as possibly leading to an investigation. The unintended consequence is to disincentivise informal engagement, raising the costs for Ofcom to obtain the information it needs to carry out its duties. In practice over time, the 'buffer zone' created by the enquiry phase has developed as a useful signal by Ofcom and an opportunity to address concerns. When Ofcom skips the enquiry phase (or truncates it), it often creates avoidable friction.

3.8 There is no formal restriction on Ofcom moving directly to an investigation (and in some scenarios, it may well be appropriate).[19] But experience suggests that when Ofcom uses the enquiry phase to develop and scope the basis for an investigation, it tends to avoid some problems that might otherwise arise. This benefits Ofcom but is also valuable to providers.

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activity between 1 April and 30 September 2016 (published on 31 October 2016) ('**October 2016 report**') at paragraph 2.19). 1 case in the past 8 years (out of 27) has been closed on administrative priority (as opposed to closed after securing informal assurances or other changes to the behaviour of the target) – CW0874 (Thompson Directories' complaint about the OSIS database)). 1 other case was closed when the target went into liquidation (CW1176 Reseller UK Ltd (trading under names including Atlas Business Services and Together Telecom).

[17] We note that other agencies take a different approach; the CMA, for example '*would not generally expect to publish the names of parties under investigation other than in exceptional circumstances*'. (CMA8 at paragraph 5.9. Ofgem's approach was the same in each of the Competition Act investigations it opened in January and October 2015 and October 2016).

[18] Consultation at paragraph 2.11

[19] For example, where there is a need for urgent action to avoid consumer harm arising.

The duration of the enquiry phase

3.9 Currently, Ofcom aims to complete an enquiry in 15 working days. This timetable can be extended at the discretion of the case supervisor. This commitment, which predates Ofcom, means that the party who faces an enquiry has at least a rough sense of when the enquiry is likely to conclude.

3.10 Ofcom proposes that '*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.*[20]' Ofcom proposes instead to set the target for completing the process on a case-by-case basis.

3.11 **We oppose this change.** We urge Ofcom to retain the 15 working day target as a default, varying it where necessary, using the flexibility Ofcom already has in the existing process. Even expanding that flexibility, it is still not necessary to 'throw the baby out with the bathwater' by dropping any guidance at all as to what a typical or aspirational period of time to conduct an enquiry should be.[21]

3.12 In terms of Ofcom's preliminary view that the commitment is 'unhelpful', we understand Ofcom to mean that setting it in the Guidelines is uninstructive because cases vary so much. But it is helpful to the party who has brought a complaint, and to the party who faces a possible investigation, to know how long an enquiry might take, and for prospective complainants to have some sense of how long Ofcom will take once a complaint is received – even if simply to provide some context to understand whether their enquiry is 'typical'.[22] Whilst enquiries can be, and routinely are, extended under administrative discretion, the timetable injects a sense of momentum into the process that a case-by-case approach without any expectation would not deliver. The effect would be that enquiries would likely become longer, without any corresponding benefit.

3.13 A better approach would be to adopt an explicit policy in the Enforcement Guidelines that the period set for an enquiry phase should be 15 working days '*unless there is a specific reason to require more (or less) time*'. This way, certainty in the process will not be undermined by Ofcom's desire to ensure flexibility.

Informal resolution during the enquiry phase

3.14 An enquiry can lead to clarifications or even changes in behaviour or assurances that obviate the need for an investigation.

3.15 We would welcome more guidance on Ofcom's approach to resolving cases without formal enforcement action (that is, through informal assurances). As noted below, we think that a

[20] Consultation at paragraph 2.12

[21] Note the biggest difference in cases is between competition and regulatory cases, and competition cases already have an extended enquiry period.

[22] Given that there is no public statement made by Ofcom in relation to enquiries, there is an inherent lack of transparency and any guidance is likely to be helpful.

more structured process of resolving issues through such assurances could be explored during investigations.

3.16 The revised Enforcement Guidelines notes that Ofcom '*may publish details of assurances that have been given about the steps the relevant business will take to address the issue, for example, where we consider this would be in the interests of potentially affected customers or consumers more generally.*[23]'

3.17 Given that an enquiry is generally not in the public domain, such disclosure would typically be the first 'announcement' that Ofcom's enforcement teams were engaged on a particular issue. We suggest that such disclosure by Ofcom would be limited to circumstances where the party giving the assurances is not, themselves, already making customers aware of any commitment or steps they are taking. It may undermine Ofcom's ability to secure changes to behaviour quickly and easily via the relatively low-key process of an enquiry if those giving the assurances are left in without any firm understanding as to whether Ofcom intends to make any public statement or not. It is certainly not likely to encourage good outcomes if Ofcom were to 'ambush' parties who have reached an accommodation with Ofcom without any finding against them with a subsequent public announcement.

A commitments regime for regulatory investigations?

3.18 The commitments regime for Competition Act investigations provides an important tool for competition authorities to resolve cases by securing changes in the behaviour of an undertaking under investigation, during an investigation where the authority has expressed a concern about conduct but before the authority has reached a concluded view on the lawfulness of conduct.[24]

3.19 Although Ofcom does not propose it in the consultation, we urge Ofcom to consider adopting a commitments regime for regulatory investigations.

3.20 We see very large benefits from such a scheme:

(a) It would aid *transparency*. Currently Ofcom treats any offers to change behaviour as 'informal assurances', which is not a firm footing on which to base any but the simplest and most straightforward arrangements;

(b) It would improve *effectiveness*. Critically, and enormously important (in terms of Ofcom's statutory objectives), such commitments would be enforceable; and

(c) It would contribute to *efficiency*. As with the competition law regime, such commitments would be entirely discretionary; Ofcom would never be obliged to accept them. But where it did so, particularly if an investigation had not yet progressed through a detailed provisional decision, but Ofcom had concerns that the commitments would address

[23] Draft Guidelines at paragraph 2.21
[24] See the CMA Guidelines at paragraphs 10.15 to 10.23

conclusively, then the resource savings to deliver a good outcome could be substantial. The settlement process is unlikely to be able to play the same role, at this earlier stage.

3.21 The obvious obstacle is that (unlike competition law commitments) there is no statutory basis for such a regime. This is not determinative: there is no statutory basis for Ofcom's adoption of a settlements regime, either, and yet it is widely recognised that it is within the regulatory discretion of economic regulators to do so. Other regulators have regimes that enable the regulator and the provider under investigation to agree what should happen, without having to agree the legal status of certain forms of conduct.

3.22 One option to create such a regime would be to rely on directions issued by consent. Some general conditions already have a 'directions power' built into them; there is no reason a priori reason why a 'commitment-making' directions power could not lawfully be part of the general conditions regime.[25] Protections afforded to providers by Ofcom (such as protection against further action in relation to the conduct under investigation except under specific circumstances[26]) could be given in writing by Ofcom in their case closure statement; while not affording absolute protection, providers would legitimately expect that such assurances would be treated as binding on Ofcom in most circumstances.

3.23 A second concern might be that commitments could interfere with the operation of the settlements regime. But we do not see how that could be the case: it would be a matter for Ofcom whether commitments were an appropriate option in any specific case. Clearly, Ofcom could take the view that, in a specific case, it had passed the point at which commitments were appropriate, and that the only options available were settlement or a concluded decision.[27] There is in any event no evidence that this has been a problem in competition law enforcement, and no reason, therefore, to expect any issue to arise.

Scoping

3.24 Scoping an investigation is best practice, but not all regulators do so. Initially the need for Ofcom (Oftel) to do so was driven by the need to meet the statutory requirement to resolve such disputes in 4 months and then introduced more widely by Ofcom as part of its reforms

[25] The exercise of that power would of course be subject to all of the restrictions applicable to Ofcom in the exercise of its functions generally, such as reasonableness, proportionality and being targeted at cases where action is necessary.

[26] As per the OFT Guidelines, *Enforcement* (OFT407), since adopted by the CMA, at 4.9: '*[o]nce binding commitments have been accepted in respect of an agreement or conduct, the OFT may not continue an investigation, make an infringement decision or give interim measures directions in respect of that agreement or conduct unless it has: • reasonable grounds for believing that there has been a material change of circumstances since the commitments were accepted • reasonable grounds for suspecting that a person has failed to adhere to one or more of the terms of the binding commitments, or • reasonable grounds for suspecting that information which led it to accept the binding commitments was incomplete, false or misleading in a material particular.*'

[27] OFT407 notes that the CMA '*will not accept binding commitments in circumstances: • where compliance with and the effectiveness of any binding commitments would be difficult to discern, and/or • where the OFT considers that not to complete its investigation and make a decision would undermine deterrence.*'

early in its tenure.[28] In administrative terms, the benefit in scoping an investigation is the self-imposed obligation on Ofcom to undertake a forward-looking assessment of the questions that are likely to arise in an investigation and to map out the resources (time and people) needed to answer those questions.

3.25 When opening an investigation, Ofcom proposes to drop the opportunity that is currently offered for the directly affected parties to comment on the scope of the investigation. Furthermore, if Ofcom decides to widen, reduce or change the scope of the investigation, under the proposal the subject will no longer have an opportunity to comment on Ofcom's decision to change the scope.

3.26 We oppose this change. The Group understands that Ofcom is seeking to streamline the investigation process. However, opening an investigation requires all parties to commit to a long and resource-intensive process. In circumstances where a major provider faces strong incentives to engage with Ofcom's processes, a better approach is to enable those affected by the investigation a degree of involvement in this process, unless there is some reason why that would not be appropriate in a particular case.

3.27 Ofcom notes this change is because '*it is ultimately for Ofcom to decide the issues we will focus on during the investigation and … in most cases we will not need further information from the subject of the investigation (or the complainant) in order to take this decision*' and that '*we expect complainants to tell us what we need to know in order to determine whether or not to investigate*'.

3.28 The Group is apprehensive about this proposal, on two levels.

(a) First, because the scope of an investigation is a consequential choice that – taken badly or without reference to useful information that can only be obtained from the relevant parties – can send all involved on a wild goose chase or misconceived exercise, wasting time and money. Ofcom typically resists efforts to revisit the scope of an investigation, once it is set (which is its prerogative) but the corollary is that it is worth taking the time and effort to get the scope right in the first place.

(b) Second, because of the 'Ofcom-centric' reasoning that Ofcom adopts – assuming that the only legitimate purpose for any action in the conduct of its enforcement activity is that the action favours Ofcom's specific objectives. This misses the fact that legitimacy derives in part from the fact that parties likely to be affected by a decision are given a chance to comment on it. This is worth doing even when it is not apparent to Ofcom that this action benefits *Ofcom*. An 'Ofcom-centric' approach is highly likely to lead to error, both in law (since in administrative law, failure to consult an affected party cannot be excused on the basis that the decision-maker felt that 'I couldn't see what was in it for me') and in fact (since inevitably, Ofcom 'doesn't know what it doesn't know' giving parties less input will increase the risk that something important is missed).

[28] See for example, the 2006 Draft Enforcement Guidelines published in 2006 at section 5 titled '*Ofcom will set a clear scope or statement of the subject of the investigation*'.

3.29 We acknowledge that Ofcom does not want to be weighed down with futile or repetitious processes. A better approach would be a compromise: to stick with the existing approach of offering an opportunity for comment, '*unless it is clear that this would do no more than revisit issues about which the relevant party has already had a chance to comment earlier in the enquiry phase*'.

During an investigation

Addressing problems: why not use the Procedural Officer for regulatory investigations?

3.30 The draft Enforcement Guidelines direct affected parties to raise concerns with the case leader or case supervisor in first instance, with an escalation path to the Secretary of the Corporation. Ofcom notes that, as this reflect current practice, the proposal is simply to clarify the current complaint procedure.

3.31 We think there is scope to improve and streamline the approach taken as between regulatory and competition law investigations. As far as we are aware, the current approach (i.e. escalation to the Secretary is little-used in the context of investigations.[29] The residual fall-back process of, in effect, escalating correspondence with the case team and senior Ofcom officials (backed by the risk/threat of a claim for judicial review) is not the best and most efficient way to deal with procedural issues. In summary, the status quo (reflected in the current and draft guidelines) will be inadequate for complex regulatory investigations and is unlikely to result in a fair outcome as a result of a review by experienced 'fresh eyes'.

3.32 A better approach would be to use Ofcom's established Procedural Officer to resolve procedural issues arising in regulatory investigations as well as in competition law matters. This will bring greater rigour, efficiency and consistency to addressing problems or issues raised by investigated subjects. Ensuring an arms-length assessment of issues is likely to be a more effective way to deal with issues, since it is more likely to be seen as having had a 'fair hearing' of the point even if the outcome is not what the person raising the issue is seeking.

3.33 We appreciate that the Procedural Officer's role in competition law investigations is a statutory role, and that this would not be the case in relation to regulatory investigations (instead, it would be a responsibility established by administrative practice). But (as far as we know) the same is true of the proposal for complaints to be escalated to the Secretary. And this is analogous to the situation with the settlement regime, where a statutory competition law regime is mirrored in administrative practice adopted in relation to regulatory investigations.

[29] This is the route which we understand to be Ofcom's general 'complaints handling escalation route' for all types of complaints about Ofcom in general, including, for example, consumer complaints. Without making any comment on its suitability for other types of issue, we note that, unlike the Procedural Officer, the office of the Company Secretary could not be expected to have any specialist capacity to deal with the specific issues arising in complex investigations.

Setting a timetable

3.34 One of Ofcom's most important innovations in regulatory enforcement, and a clean break with the work of the legacy regulators, was to set out - for the first time – administrative targets for the time Ofcom intended to take to complete regulatory investigations.[30] Administrative targets were not (and are not) binding. They have no legal force. But the fact that Ofcom today gives even a rough sense of how long it will take to complete its work was a substantial step forward on what was previously an opaque and poorly-performing set of processes.

3.35 In proposing an initial timetable, Ofcom obliged to ask itself questions in scoping during the enquiry phase, such as:

(a) What is the hypothesis to be tested in the investigation?

(b) What evidence will be needed (in broad terms) to test that hypothesis? Will Ofcom need internal company documents, call recordings, consumer survey evidence, material from third parties or some combination?

(c) How long will it take, in rough terms, to gather that evidence? Is it publicly available? Will it need to obtained under statutory powers?

(d) How long will it take to analyse that evidence? What specialist resources will be needed to complete that work?

(e) Are there any other known factors likely to affect the progress of the investigation?

3.36 Ofcom's premise in doing so was that by using scoping during the enquiry phase, it ought to be possible to map out what work was to be done during an investigation, and that having set a timetable, created a positive informal discipline on both case teams and Ofcom itself to complete investigations as quickly as they reasonably can. By making a commitment to complainants or to affected consumers that Ofcom would seek to complete its work within a set timetable, Ofcom would build confidence and help create a stronger deterrent, creating a virtuous circle and reducing the costs of future enforcement. For major providers, this indicative timetable also played a critical role in allowing them to set expectations with customers and other stakeholders about the period of uncertainty before any outcome would be known. The costs associated with reputational harm and uncertainty during an investigation can easily outstrip even very substantial fines, in some cases, even where no contravention is found to have occurred.

3.37 Ofcom now proposes to drop altogether the current administrative target to complete investigations within 6 months. Mirroring the wording used in relation to timetables for enquiries, Ofcom considers the target 'unhelpful'. Instead Ofcom proposes to 'aim to conclude investigations as soon as possible' and work towards a 'more realistic timeframe' determined on a 'case-by-case basis'.

[30] DEG 2006 – Table 1 at page 28. This excluded Competition Act investigations, which were recognised as raising more complex issues.

3.38 As well as dropping the 6-month target in favour of a case-by-case approach, Ofcom considers it will be unable to give any indication - at all - of the likely time it will take to complete an investigation at the point when Ofcom opens an investigation. The practical effect is that, with the best will in the world, case teams will have no imperative to complete an investigation within a specific deadline. More importantly, if the members of a case team do not know how long they expect an investigation might take, it seems very likely that the scoping exercise is incomplete (or poor). That is an indicator that more attention should be given to the planning of the investigation. It is better to face that issue at the outset than to leave it to become apparent, say, 18 months down the track.

3.39 **We are united in our opposition to this approach.** It would be enormously disappointing to see Ofcom, in effect, give up the idea of providing an indicative timetable for investigations from the outset. Removing even the informal procedural discipline under the current approach is almost certain to have the overall effect of making investigations that Ofcom accepts already take too long, take even longer. And by reducing the focus on the scoping phase, there is a greater risk of investigations that lack focus or rigour getting months down the track before those problems are apparent. By committing to at least an estimated timetable, Ofcom commits itself to consider those issues up-front.

3.40 This risk creates inefficiencies for Ofcom, as well as providers. Investigations cost resources (both monetary and otherwise) to the subject under investigation, to complainants and to Ofcom itself. Therefore, it is important for all stakeholders but particularly those under investigation to know, to the greatest extent reasonably possible, roughly when Ofcom anticipates reaching a conclusion. Particularly with regards to large or complex investigations, this can enable providers to organise their resources internally to assist Ofcom in the investigation.

3.41 That said, we agree that a single inflexible 6-month target has been conclusively demonstrated not to be achievable in large or complex cases. We support Ofcom's desire to provide more granular, more case-specific information about how long it expects each case to take.

3.42 As a possible balancing of these concerns, we urge Ofcom to consider the following approach:

(a) An administrative timetable could be set individually at the beginning of each investigation, on a case-by-case basis and dependent on the specific circumstances of that case. Alternatively, the timetable could be set for each phase of an investigation (e.g. opening to provisional decision/no grounds for action, provisional decision to final decision, etc.).

(b) This initial view on timing could inform a target date that would be communicated to the complainant and the provider under investigation so that those most directly affected will know how long Ofcom expects the next phase of investigation will take; and

(c) There could be explicit acknowledgement in the Enforcement Guidelines that Ofcom can revise the administrative timetable at any time, in light of developments in the case. This could be communicated, for example, during 'state of play' meetings that provide a

chance to understand in general terms how far Ofcom considers it has progressed and re-calibrate expectations. At an absolute minimum, such meetings ought to be available at least every six months (and of course may need to happen more often in many cases).

Information-gathering

3.43 Ofcom is proposing to change the wording on the current Enforcement Guidelines to remove the reference to Ofcom intending to issue a draft information request prior to finalising them. Instead Ofcom will consider whether doing so on a case-by-case basis. The cited danger behind this proposal is that of evidence destruction.

3.44 As far as the members of the Group are aware, this danger has never arisen as a significant concern in the context of regulatory investigations of major providers. Ofcom should not change its approach to cover for exceptional circumstances. In this respect, it is important that it strikes a reasonable balance between minimising risks and ensuring a fair process for the investigated subject.

3.45 The Group strongly urges Ofcom to keep the current wording (and existing practices) in relation to information-gathering.

Involvement of third parties

3.46 Ofcom considers that the current guidelines risks making their approach to third-parties involvement overly-complicated. It is proposing to add wording to the effect that third party involvement will to be limited and only considered to extent that it is necessary to enable Ofcom to carry out their function fairly and effective.

3.47 In the consultation document Ofcom implies it will only seek to admit third party involvement if it considers this to be of assistance *to Ofcom*.[31] In the draft Guidelines Ofcom makes this point clearly: '*Ofcom may consider it necessary to seek input from other relevant third parties*'.[32]

3.48 In general terms, we welcome simplifying the guidance on involvement of third parties in investigation. However, we are concerned that Ofcom's proposed approach is unduly 'Ofcom-centric' and does not recognise that involvement may be appropriate because there is an affected interest at stake that would warrant third-party involvement, rather than the holding of information that Ofcom would find helpful.

Decision-making

3.49 Ofcom is proposing a series of amendments that at their core, aim to change the way Ofcom takes decisions in regulatory investigation to streamline the enforcement process. Ofcom's main justification to introduce these reforms is to save its own resources. However, we are concerned that in doing so Ofcom will be departing from best practice.

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[31] Consultation at paragraph 2.33. Ofcom says '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 the investigation'.
[32] Draft Guidelines at paragraph 3.29

3.50 We support some of Ofcom's proposals on decision-making such as to have a single individual responsible for deciding whether to open an investigation, who then oversees the conduct of the investigation through to a provisional decision. We also support the proposal to have a different process for determining the outcome of the investigation. The Group considers that splitting the process of decision-making to have an independent view in the first and second stages will enhance fairness and reflects best practice.

3.51 We oppose the idea of having only one decision-maker as opposed to two at the second stage. Such a change seems likely to reduce effectiveness and fairness, in that it will result in compromising the level of scrutiny necessary to deal properly with often complex regulatory investigations.

Two decision-makers (at second stage)

3.52 Ofcom's guidelines currently provide for two decision-makers but do not distinguish between the first and second stages of the investigation. Ofcom is now suggesting that this requirement is no longer necessary. This change is billed as a way to eliminate '*duplication of efforts*', and an inefficient use of Ofcom's '*most highly qualified and experienced people*'.[33]

3.53 **We oppose this proposal**. Best practice for high-stakes/complex investigations is to have two or more decision-makers:

(a) The CMA, Ofgem and the FCA all have arms-length structures which ensure that not only do they have at least three decision-makers[34], they preserve independence between the case team and the second-stage decision-makers; and

(b) Ofcom itself has two decision-makers (as it is required to do) in relation to the second stage of its competition law investigations.

3.54 Large regulatory investigations can be as complex both in terms of facts and evidence as competition law investigations. The penalties faced by a provider under either type of investigation are equally severe.[35] The courts have recognised that in such cases, decision-makers ought to attract the same level of rigour and procedural discipline by Ofcom as a court would apply in determining criminal liability (for example, ensuring that the allegation cannot stand if there is a reasonable doubt).[36]

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[33] Consultation at paragraph 2.37.

[34] Cf. Footnote 2.

[35] Section 97 Communications Act 1998 A maximum penalty of 10 per cent of turnover in each case.

[36] As the Competition Appeal Tribunal noted in *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1 at 109 that '*the standard of proof in proceedings under the Act involving penalties is the civil standard of proof, but that standard is to be applied bearing in mind that infringements of the Act are serious matters attracting severe financial penalties. It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be.*'

3.55 For all these reasons, the Group strongly supports it is entirely appropriate to retaining the existing practice of having two decision-makers for the second stage of regulatory investigations, unless there is some compelling reason why it would not compromise effectiveness or fairness to have a single decision-maker.[37] A second decision-maker brings a level of rigour and quality control that no single decision-maker, no matter how scrupulous and diligent, can bring. Ultimately, two heads are better than one.

3.56 The only reason Ofcom gives for not adopting best practice and acting consistently with other economic regulators and the CMA is the issue of scheduling and resourcing. This is simply not a sufficient basis for such a substantial reduction in rigour. If resourcing is an issue, the Board could appoint additional decision-makers from outside Ofcom's management team (as is already the case for other regulators).[38] Ultimately, there is nothing stopping Ofcom from adopting best practice, as a regulatory body with wide legislative powers and the established ability to cope with a 'two decision-makers' model – already in regulatory investigations and on an ongoing basis in relation to competition investigations. The rationale that their administrative timetables becomes difficult to manage under the current model does not seem to stand up to scrutiny.

3.57 Therefore, the Group urges Ofcom to modify its approach so that there is:

(a) one decision-maker for the first stage (yielding efficiencies); but

(b) two decision-makers (for the reasons highlighted above).

Once a provisional decision is issued

3.58 The second stage of the investigation is triggered when a provisional decision is issued. At this point, the tenor of an investigation changes: Ofcom has laid out its provisional case against the provider and publicly announced that it has reached a provisional conclusion (although, entirely properly, the substance of that provisional decision remains confidential).

Access to documents and other evidence

3.59 Ofcom is proposing that it may be more efficient and less burdensome if it provides copies of or access to the relevant documents in electronic form rather than by default rule providing hard copies. Ofcom proposes to list in a schedule (rather than include) documents that the subject of investigation already has in their possession.

3.60 The Group supports in principle any steps to reduce duplication or inefficiency. We note that this arrangement is likely to fall within the scope of general arrangements for electronic service under the Act, which means that Ofcom can only do so where the requirements of s.395 are met (specifically, that the recipient has agreed to receive that document in electronic form). So

[37] One obvious basis for having a single decision-maker is where the provider under investigation has agreed to that.

[38] In the case of the CMA, for example, the Case Decision Group will have 3 members (who will not include the SRO), as will a similar group appointed by the FCA in CA98 matters. Decisions by Ofgem are taken by 3 members of Ofgem's Enforcement Decision Panel.

although Ofcom might indicate a general preference for electronic service in the Guidelines, in each case, it would be appropriate to confirm that with the receiving party so that any case-specific issues can be dealt with.

3.61 Compiling documents is currently an important discipline on the case team to ensure that they have identified everything they need and not to rely on extraneous/irrelevant evidence. There is no reason to work in 'hard copy' simply for this reason alone, but nor should the discipline of being precise about the evidence be lost. Our main concern is that teams may simply list every document obtained in during the investigation (as there is no downside and little effort involved in doing so), reducing the value of this exercise and increasing the burden on providers to understand the case against them, without any corresponding benefit.

3.62 The Group therefore suggests that as a safeguard Ofcom should include some wording in the Guidelines to the effect that only evidence directly relevant to the case should be listed. This will help guide case teams and ensure that the evidence includes each piece of evidence that is necessary to the case, but not additional material.

Confidentiality issues

3.63 Once a provisional decision is issued, the draft Enforcement Guidelines indicate that '*Ofcom will redact or withhold third party confidential information where appropriate in accordance with the relevant statutory framework*'.[39] The aim (as we understand it) is to provide clearer guidance on the treatment of third party confidential information but in doing so it jeopardises transparency in the process and can potentially affect investigated subjects ability to respond fully to their provisional notification.

3.64 While Ofcom provide assurance that it will disclose third party confidential information when is necessary to '*protect [the provider's] rights of defence*'[40]and '*to be fair to it*'[41], Ofcom will have to go through this process every time of determining whether the threshold in the Guidelines is met. This is likely to be a contentious and difficult process, triggering satellite disputes. Therefore, we suggest that adopting non-disclosure as default position is unnecessary and potentially liable to slow down enforcement action when there is disagreement as to disclosure.

3.65 A better approach may be to consider the use of confidentiality rings (as can be the case in Competition Act investigations) which allow an appropriate set of the advisers to the party under investigation to have access to all of the material being relied on by Ofcom, instead of adopting a default position of non-disclosure, in cases where such information is critical to the case. Confidentiality rings have a clearly understood basis in practice and their use in regulatory investigations could draw on this experience.

[39] Draft Guidelines at paragraph4.9
[40] Consultation at paragraph 2.43.
[41] Draft Guideline at paragraph 4.10

3.66 Previously, Ofcom has questioned its own ability to establish and enforce such confidentiality rings (at all).[42] In the context of regulatory investigations specifically, there are at least two distinct approaches that could give Ofcom suitable scope to make such obligations enforceable: a set of agreements between the parties, enforceable as contracts (which is how the OTA scheme was, and is, established[43]), or a direction given pursuant to the relevant condition, perhaps settled and issued with the consent of the parties. We have not explored these points further but it is sufficient to point out that if there is a shared will to adopt such a process, there may be a range of options lawfully available to Ofcom (or that the parties can establish with Ofcom taking those into account in its procedures) that may be worth exploring.

Oral hearings

3.67 The 2012 *Enforcement Guidelines* do not provide much detail about Ofcom's approach to oral hearings following written representations.[44]

3.68 We welcome the greater detail and Ofcom's intention to 'reflect [its] usual practice'[45] relating to oral hearings in the draft *Guidelines*.[46] The draft Guidelines provide valuable information, currently only available to those with recent case experience: clarifying that generally Ofcom will hold an oral hearing following written representations, that the oral hearing will be carried out at Ofcom's offices, that the subject of investigation may bring legal advisers and relevant experts and that complainants and other third parties will not usually be invited to attend the oral hearing.

3.69 Clarification on the conduct of oral hearings is welcomed by the Group. We support Ofcom's proposal to clarify that third parties will not be invited to the oral hearing unless the case merits this. We consider there is scope for further clarification and fine tuning of the guidance. We also ask Ofcom to consider whether it should:

(a) Recognise in the Guidelines that the notice period for an oral hearing should not be earlier than one working a day *after* written representations have been provided. This would ensure avoiding situations (as have arisen in several cases recently) where providers are pressed to agree a date for an oral hearing *before* filing their written representations. It is unreasonable in law and unworkable in practice to expect the period during which a provider is preparing written representations (which is, in substance, its answer to the case against it) to run concurrently with the time to prepare for an oral hearing. Given that Ofcom itself needs time to prepare for an oral hearing, a more sensible approach is to deal with those periods in sequence.

(b) Show restraint in limiting the number of attendees. A provider facing an adverse decision may often need a range of technical specialists and internal and external advisers to

[42] See, for example, the Dispute Resolution Guidelines Statement at paragraph 2.7.
[43] See, for example, the MOU establishing that scheme (http://www.offta.org.uk/OTA2MemorandumOfUnderstanding2010.pdf)
[44] 2012 Guidelines at paragrah 6.5.
[45] Consultation at paragraph 2.47
[46] Draft Guidelines at paragraphs 4.17-4.20.

make its points (and be ready to answer Ofcom's questions). The provider is likely to have better information about what personnel are necessary to conduct its defence (and hence, what constitutes the 'reasonable number of advisers') than Ofcom. Imposing a limit ought to be an absolute last resort. If a case is especially complex, then that may weigh in favour of, for example, agreeing a structured agenda to an oral hearing so that specialist staff might only be present for the sections in relation to which they are needed. Where (as is typically the case) Ofcom is not able to provide much information about what, specifically, it wishes to test in the oral hearing, the provider can and should bring the people it considers it needs to answer the case against it.

Settlement

3.70 We welcome Ofcom's proposed new settlement process in general terms. Settlement can provide a clear and effective way to save both Ofcom's and companies' resources by agreeing that the remainder of the investigation will follow a streamlined administrative procedure.[47] We note that Ofcom's procedures largely adopt similar process to the CMA, albeit in respect of settlements in regulatory investigations rather than competition law cases.[48]

3.71 We agree with Ofcom's aim '*to secure administrative resource saving and certainty as a result of this form of co-operation by the subject, which would be reflected in a reduced penalty*'.[49] We support Ofcom's view that the investigated subject must stop their contravening behaviour immediately (for example, this requirement helps ensure that consumers are not harmed in a more streamlined administrative procedure by enabling rouge rogue traders to settle disputes gaining a discounted penalty and continue their contravention).[50]

3.72 However, we do find that some of Ofcom's positions in the Draft Guideline to require further consideration. For example, It is not clear to us what Ofcom expect to be the basis for settlement when this is agreed with the investigated party before a provisional decision is issued.[51] This seems to be inconsistent with Ofcom's proposal that settlement leads to a decision that there has been a contravention, and is quite distinct from the approach taken by, for example, the CMA, Ofgem and the FCA, who will generally only consider settlement after they have a clear sense that they consider, at least to a provisional ('reason to believe') standard that a contravention has occurred.[52] These points are considered further below.

Requirement for an admission of liability

3.73 Paragraph 5.6 of the Draft Guidelines stipulate that as part of the requirement for settlement Ofcom will 'as a minimum' call the subject of investigation to '*make a clear and unequivocal admission of liability in relation to the nature, scope and duration of the contravention*'.

[47] Consultation at paragraph 2.53
[48] Consultation at paragraph 2.54
[49] Consultation at paragraph 2.53
[50] Draft Guidelines at paragraph 5.6.
[51] Draft Guidelines at paragraph 5.19.
[52] Draft guidelines at paragraph 5.6.

3.74 We are particularly concerned with this aspect of Ofcom proposal. We do not understand why it is necessary to include this requirement. In other sectors, for example in the financial services regime, settlement processes can encompass an adverse decision being accepted without such an admission of liability.[53] There is no reason for Ofcom could not do the same.

3.75 We appreciate that such an admission is a requirement of settlement in the competition law regime. But in that regime, settlement operates alongside other elements of enforcement, such as leniency and a commitments regime, that provide different ways of dealing with different circumstances. On Ofcom's proposals, settlement is the only mechanism available to streamline an investigation and Ofcom proposes using it quite differently to the CMA – for example, making settlement an option very early in the process, ahead of even a provisional decision or when evidence is sufficient to reach (as Ofcom puts it 'a sufficient basis to make a provisional finding of contravention and come up with a preliminary view on the appropriate level of penalty'. That changes the impact of Ofcom's approach quite materially, and is a much lower threshold for settlement than is applied by the CMA.[54] Having lowered the threshold, the corollary is that settlement must accommodate cases where the contravention is less clearly made out, and permitting 'shades of grey' as to the views of the case (as per the FCA's approach) seems more appropriate. Equally, if Ofcom is not minded to change its approach, it reinforces the need for something akin to the commitments regime, to avoid leaving a gap.

3.76 We would also like to draw attention to the potential risk this requirement may impose on the investigated company by opening the floodgate for third parties to bring follow-on claims. These are extra-statutory risks which go beyond Ofcom's mandate and there is no clear policy requirement for such an admission.

3.77 More importantly, by imposing this requirement, Ofcom may find that cases on the margins are harder to settle, undermining Ofcom's own objectives.

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[53] The DEPP notes at section 5.1 that the outcome will be agreed with the person, without any requirement of a statement of liability or admission: *'[t]he terms of any proposed settlement: … (3) may, depending upon the stage in the enforcement process at which agreement is reached, include an agreement by the person concerned to: (a) waive and not exercise any rights under sections 387 (Warning notices) and 394 (Access to Authority material) of the Act to notice of, or access to, material relied upon by the FCA and any secondary material which might undermine the FCA decision to give the statutory notice; (b) waive and not exercise any rights under section 387 of the Act or otherwise to make representations to the RDC in respect of a warning notice or first supervisory notice; (c) not object to the giving of a decision notice before the expiry of the 14 day period after the giving of a warning notice specified under section 387 of the Act; (d) not dispute with the FCA the facts and matters set out in a warning notice, decision notice, supervisory notice or final notice and to waive and not exercise any right under section 208 (Decision notice) of the Act to refer the matter to the Tribunal.'*

[54] As per its guidelines at 14.6, the CMA will only consider settlement if 'the CMA considers that the evidential standard for *giving notice of its proposed infringement decision is met*. The CMA will not proceed with settlement discussions unless it considers that this standard is met.' (Emphasis added). As is clear from the case law, an infringement decision is a conclusion requiring very substantial and compelling evidence, far higher than a provisional decision.

Settlements and appeals

3.78 Another 'minimum' condition for settlement that Ofcom is intending to introduce in the new Guidelines at paragraph 5.6 is to ask the company to '*confirm that it accepts that it will no longer benefit from the settlement discount if it appeals the decision*'.

3.79 The Group disagrees with Ofcom's proposal to include this requirement. Although the circumstances under which it may be relevant are likely to be very rare, it may well be reasonable and appropriate for a provider to settle the matter and subsequently to appeal – for example, where Ofcom and the provider agree on the *facts*, and that if Ofcom's understanding of the relevant condition is correct, a contravention has occurred, but that this understanding is disputed as a matter of law. The fastest and most efficient way to deal with that situation (for both Ofcom and the provider under investigation) would be to settle the matter quickly, but to appeal the point of law. If an appeal succeeds, the question of settlement falls away. On the other hand, if the appeal fails, the party will likely face paying Ofcom's costs. What mainly concerns us is that if the company fails in the appeal, Ofcom seems to suggest that it could 're-open' the settlement decision (that has been upheld and is a matter of record at that point) and impose a higher penalty. It is not clear that this is correct as a matter of law, and in any event, there is no necessity to adopt this approach, which can be considered on the facts of any subsequent decision.

Settlement discussions

3.80 In the consultation, Ofcom notes that '*settlement discussions would not be a negotiation with Ofcom about what contraventions Ofcom might be prepared to find or not to find'; 'nor will they be negotiations about the level of penalties*'[55] .

3.81 Taken at face value, this leaves little, if any, scope a 'discussion'; Ofcom seems to be envisaging a settlement process that will be carried on 'take it or leave it' basis. It is unclear to the Group on what basis Ofcom has for deciding in advance that it will not discuss those issues. There is no statutory necessity or policy rationale for Ofcom's inflexibility. It is markedly different to, for example, the approach taken by Ofgem, which has a long record of successfully using settlement to resolve investigations. Whilst we appreciate that Ofcom wants to set a strong expectation as to the tenor of its approach, the stance in the draft Guidelines risks being more detrimental than helpful in the settlement process. In setting penalties in particular, given the relatively lack of information about how Ofcom sets penalties in each case, it is hard to see how Ofcom will avoid the specific risk that any discounts will be, in substance, offset by simply setting higher penalties. This will undermine the incentive effects of the scheme and reduce the scope for settlements. This is one reason why a settlements policy is recognised as demanding greater 'discipline' (i.e. consistency and transparency) in setting penalties.[56] Understanding how

[55] Consultation at paragraph 2. 60.

[56] See for example in the FSA Review at paragraph 7.22 (when introducing that settlement policy) that '*[i]n order for this discount system to work, the FSA will have to be very disciplined about setting levels of penalty. First, the FSA must not start from a higher figure which, in effect, nullifies the discount…*'

Ofcom, today, arrives at a specific proposed penalty is generally not possible on the face of Ofcom's reasoning.[57] This may not be sustainable and, in any event, much more transparency would be welcome.

3.82 Even more important than this issue is the question of what protection is afforded to a provider who explores a possible settlement with Ofcom. We think it is essential that providers can discuss settlement with Ofcom in a way that does not risk or compromise their position should settlement not be reached and the matter revert to be resolved through the exercise of Ofcom's powers. Ofcom's observation in the consultation is that '*settlement discussions would not be equivalent to the type of discussions which take place…on a without prejudice basis for the purpose of seeking to resolve or avoid litigation*' [58].

3.83 This concern is particularly acute for cases where settlement might occur early in the investigation (and noting that the lack of a commitments regime means that the approach taken by Ofcom means that earlier settlement is more likely to be under discussion than in, say, competition law cases). The draft Guidelines refer to a 'statement of facts and initial findings' but this will only be issued where a party has indicated a willingness to settle. This leads to an odd, binary set of incentives:

(a) if the fact that a 'settlement willingess' can be indicated without prejudice to the provider's case, then parties might be expected *always* to do so (to see what Ofcom has in mind whilst the highest settlement discount is available); and

(b) if it is not without prejudice, then parties ought *never* to do so (since they can simply await Ofcom's provisional decision, and doing so is likely to guarantee that such a decision will be issued, since by definition, they will be seen to have been ready to admit to *something*).[59]

3.84 This is one reason why there is a strong policy imperative that indications about possible settlement and the subsequent discussions must be something at least analogous to 'without prejudice': to do otherwise will undermine the settlement regime, because parties are unwilling to indicate their position or explore options with Ofcom. This cannot be the outcome that Ofcom seeks.

3.85 Ofcom seems to want to offer *some* degree of protection by splitting the role of the first stage decision-maker (who will also consider settlement) from the second-stage decision-maker, but this protection is insufficient to meet Ofcom's own objectives:

[57] Ofcom generally sets out factors that it has taken into account, or had regard to, but without any way to establish how a change in one of those factors would affect the proposed penalty.
[58] Consultation at paragraph 2.61.
[59] In truth, these decisions will be much more complex than this simplification, which is intended to be illustrative of the dilemma, not a prediction of how providers will approach discussions (a party who rejects Ofcom's allegations, for example, may have strong views that they will not explore settlement no matter how much it may be tactically valuable or reveal fresh information, since they reject entirely the idea that they have done anything wrong).

(a) The Guideline refer to documents arising during settlement discussions as being explicitly unprotected – that is, Ofcom will use them as part of taking its decision.[60] This seems fundamentally inconsistent with the notion of a 'settlement discussion' as it is practised by any other agency.[61]

(b) The separation of the second-stage decision-maker may not be fully effective – for example, the identity of the second stage decision-maker may not be established until later, and that individual might be aware of first-stage settlement discussions already, prior to their appointment;

(c) There is no clarity as to whether communications between the case team and the second-stage decision-maker will be documented and disclosed, as occurs, for example, in the FCA's processes; and

(d) Ofcom disavows any suggestion that discussions will be protected, meaning that relying on Ofcom's invitation to discuss settlement is entirely at the risk of the investigated party.

3.86 We urge Ofcom to reconsider this approach, which seems contrary to the approach taken by other regulators. Settlement discussions are carried on with an express commitment to their 'without prejudice' basis in other regulated sectors (for example, by the FCA and Ofgem).[62] This constitute best practice as it affords a level of protection to the subject of investigation and enables a settlement to be achieved more easily. Furthermore, the courts have recognised the value in enabling 'without prejudice' discussions between regulators and those they regulate.[63]

3.87 We do not consider that Ofcom needs to go as far as, say, the FCA in formalising its processes. But a reasonable compromise would be something along the following lines:

[60] Consultation at paragraph 2.61.

[61] This seems to be adopting the approach set out in the CMA's settlement procedures but there is a basic difference with that process, in that in those documents, the reference to entering documents on the case file is part of the process of granting 'access to file' in Competition Act investigations (see, e.g. . CMA Guidelines at 14.21). No such analogous process applies for regulatory investigations.

[62] For example, Ofgem's 2014 Enforcement Guidelines note at 5.25 (in relation to Ofgem's sectoral investigations) that '*Settlement discussions will take place on a "without prejudice" basis. This means that if discussions break down, neither party can rely on admissions or statements made during the settlement discussions in any subsequent contested case.*'

[63] See, for example, Property Alliance Group Ltd v Royal Bank of Scotland plc [2015] EWHC 1557 at 87, where Birss J noted that '*The settlement discussions with the FCA which are labelled without prejudice take place along side the investigation process and along side the production to the FCA of documents and other material as part of its investigation process. In that sense there is an analogy between those discussions and normal without prejudice discussions in civil court proceedings, which also take place along side the exchange of pleadings and argument in court. The nature and extent of a without prejudice rule as it would apply to settlement discussions with the FCA is not exactly the same as the way the rule applies in court proceedings given the FCA's position as a regulator and its obligations but that is not a reason not to apply the same principles by analogy. In my judgment the public policy on which the without prejudice rule is based is capable of applying in order to promote settlement of FCA investigations.*' (emphasis added).

(a) A recognition that it is reasonable and important to protect settlement discussions and to ensure that the existence of, and contents of, unsuccessful settlement discussions do not influence the subsequent course of an investigation;

(b) Acknowledgement that, although settlement discussions are not the same as 'without prejudice' discussions in commercial litigation, Ofcom will do everything it reasonably can to preserve the nature of those discussions, unless there is some clear basis that requires Ofcom to do otherwise in an exceptional case; and

(c) Adopt stronger protections for the second-stage decision-making process so that, for example, an individual who has been made aware of the fact of settlement discussions (regardless of whether they have been involved in those discussions) would not be a suitable choice for a second-stage decision-maker.

4. Competition law investigations

The enquiry phase

Duration of enquiry

4.1 Ofcom proposes to remove reference to the current 8-week target for enquiries in Competition Act investigations.

4.2 We oppose this change, which reduces transparency in the same way as removing the 15 working day period for regulatory investigations.

Scoping

4.3 Ofcom proposes, in line with its approach in relation to regulatory investigations, to remove its current commitments to give affected parties an opportunity to comment on changes to the proposed scope of an investigation.

4.4 We oppose this change, on the same grounds we oppose the parallel changes in relation to regulatory investigations. There is no evidence that this practice has caused any issues in past cases thus far, and given the reputational and resourcing risks associated with competition law investigations (for complainants, those under investigation and third parties), the case for learning as much as one can through engagement before taking a decision on scope that commits Ofcom's resources is very strong.

During investigations

Third parties

4.5 Ofcom proposes, in line with its approach in relation to regulatory investigations, to shift emphasis in its approach to third parties 'when it would assist the investigation' (but not otherwise).

4.6 We oppose this change, for the reasons noted in the corresponding sections in relation to regulatory investigations.

Information-gathering

4.7 Ofcom proposes, in line with its approach in relation to regulatory investigations, to drop the references in the Guidelines to issuing information requests in draft form.

4.8 We oppose this change, for the reasons noted in the corresponding sections in relation to regulatory investigations.

ANNEX 1: FURTHER SUBMISSIONS OF ENFORCEMENT REFORM GROUP ON SPECIFIC PROPOSALS

Ref	Proposal	Detail	Group view	Notes
2.2	Scope/structure	Split into 4 documents, separate guidance for specific sorts of investigation	Support	
2.9	Criteria considered when opening a case	Emphasis 'overarching' criteria: risk of harm, 'strategic significance', whether best placed to act, resources.	Cautious	Why no assessment of chance of success?
2.11	May not always have an enquiry phase	'*If we consider we already have sufficient information to decide … for example as a result of previous engagement*'	Cautious	We support the use of the enquiry phase, which allows Ofcom to consider whether an investigation is truly necessary. Reference to 'previous engagement' ambiguous. Is all contact from Ofcom to be treated as possibly leading straight into an investigation? Where does that leave informal engagement on policy projects, for example?
2.12	Enquiry phase	Drop explicit reference to 15 working day target for enquiries	Oppose	There is already flexibility in the system. Why remove the assurance? At a minimum, the period should be '*15 working days unless there is a specific reason to require more a different timescale'*.
2.13	Informal resolution	More guidance on Ofcom's resolution of cases without formal enforcement action.	Cautious	We would welcome more transparency.
2.14	Decision to investigate	Will now be taken without giving the subject of the investigation further opportunities to make representations	Oppose	
2.17	Engagement during investigations	When opening an investigation, remove expectation that target will have a chance to comment on the scope	Oppose	There is no evidence this creates any specific problem, but opening an investigation commits all parties to a long

Ref	Proposal	Detail	Group view	Notes
				and resource-intensive process. So being cautious is sensible.
		When changing the scope of the investigation, remove any expectation of a right to comment before taking a decision	Oppose	As above
2.18		Escalation path for problems not resolved directly with case team/supervisor is to the Ofcom Company Secretary	Counter-proposal	Why not unite this role with the Procedural Officer, bringing greater rigour, efficiency and consistency to handling these questions?
2.24 – 2.2.5	Timescales	Drop reference to 6 months to complete investigations, in favour of 'case by case' approach	Oppose	Reduces transparency. The inevitably and predictable effect will be that investigations take longer. We are particularly concerned that Ofcom will make no commitment even to a case-specific timetable at the start of the investigation. This will mean that teams are under no specific deadline to complete their work.
2.26	Information requests	Change wording to remove reference to providing IRs in draft form in favour of 'case by case' basis	Oppose	Dangers cited (evidence destruction) have, as far as we know, never arisen in relation to major providers. Better to treat that as the exception than the rule.
2.27	Confidentiality	Clarify that if confidential information is to be disclosed, will contact the owner of that information and give them an opportunity to make representations before doing so.	Support	Although we note that this seems to be no more than what is required in law in any event.
2.28	Confidentiality	No longer require non-confidential versions of submissions (other than complaints) but Ofcom may ask for it if needed	Support	We support this change, which seems likely to increase efficient.
2.30	Publicity	Guidance codifying existing practice in terms of one day's notice of proposed announcement and in relation to market-sensitive announcements.	Cautious	It is important that announcements prior to a final decision are kept strictly to a minimalist position, given that there is a substantial risk of misunderstanding and reputational harm merely by being under investigation or facing a provisional decision.

Ref	Proposal	Detail	Group view	Notes
2.33	Involvement of third parties	Simplifying guidance on involvement of third parties	Cautious	Simplifying is sensible and there is no need to over-complicate things. But we are concerned that Ofcom's approach is entirely 'Ofcom-centric' and does not recognise that sometimes involvement may be appropriate because of an interest is at stake, rather than simply holding the information that Ofcom would find helpful.
2.37	Decision-making	Dropping 'two decision-makers' model in favour of one decision-maker	Oppose	Two decision-makers is best practice (and required in competition law cases as Ofcom's Competition Act 1998 guidelines acknowledge). A second decision-maker brings a level of rigour and quality control that no single decision-maker, no matter how scrupulous and diligent, can bring. This is more important at the second stage of an investigation (ahead of a final decision) than the first stage (see below). If resourcing is an issue, maybe the Board could appoint decision-makers from outside the Ofcom management team (e.g. Ofcom NEDs)?
2.38	Decision-making	Have one decision-maker for the decisions including opening an investigation through to a provisional decision and then a different decision-maker for the conduct of the oral hearing and final decision	Support	Support the splitting of decision-making so that an independent view is taken ahead of a final decision. Far better if that second stage has two decision-makers. A compromise might be to have a single decision-maker for the first stage (yielding efficiencies) and then two decision-makers for all but the simpler cases at the second stage (delivering rigour and quality control).

Ref	Proposal	Detail	Group view	Notes
2.41	Provisional decision notifications	Guidelines refer to taking into account 'any voluntary commitments made' to remedy consequences	Support	Suggest widening the language to make it clear that actions taken that are relevant under the Guidelines will also be considered (e.g. where money is not able to be returned to consumers, a donation to charity could have been made) which is not strictly a 'remedying of the consequences' but still relevant.
2.42		Provide access to documents in electronic form and simply to list, rather than include, documents that the target already has in its possession.	Cautious	Yes; but only where the recipient has agreed to receive those documents in electronic form (brings into line with process for e.g. other statutory notices). Clearly, any steps to reduce duplication or inefficiency is welcome, but compiling documents is currently an important discipline on the team to ensure that they have all the evidence that they need, and not to rely on extraneous/irrelevant evidence. At least, Ofcom should add some wording in the Guidelines to make it clear that where evidence has been obtained but it is not used directly to build the case for a contravention, it should not be listed (to avoid 'scope creep' or over-inclusion).
2.43		Redact confidential information from notifications	Counter-proposal	Ofcom's approach might make sense where the confidential information is not a main element of the case. Otherwise, why not use a confidentiality ring?
2.44		More information about the amount of time given to provide written representations	Support	4 weeks is very short and would only be appropriate for the simplest of cases. It would be instructive for Ofcom to publish an aggregated/averaged picture of how much time has, in fact, been allowed to respond to written representations, particularly in major cases.

Ref	Proposal	Detail	Group view	Notes
				For complex cases, the amount of time needed is likely to be similar to that for a competition law case.
2.45		Give third parties chance to comment only 'where they may have further information relevant to the proposed decision' or where 'fairness requires that such third parties are given an opportunity to make submissions on it'	Support	We are worried that the 'fairness' limb is quite ambiguous. We would welcome more clarity as to Ofcom's intended approach.
		Don't provide third parties with underlying evidence	Support	Support in principle but wonder whether it is workable in practice. May need case-by-case consideration.
2.46		Where there is new evidence leading to a material change to the case (or a higher penalty) that would need to be set out in a new notification	Support	We note that a material change that *reduces* the penalty might also still trigger the need for a further notification (rather than moving straight to a confirmation decision) if Ofcom has changed e.g. the legal basis for its case.
2.47		Clarify that oral hearings will normally be offered (not just in cases involving a penalty)	Support	We support this change. We also suggest that Ofcom ought to adjust its procedures to recognise that the notice period for an oral hearing should only run no earlier than the day after written representations have been provided (avoiding a situation where companies are pressed to agree a date before finalising, in effect, their defence).
		Clarify that companies can bring external advisers to oral hearings 'although we may ask the company to limit the number of persons attending to a reasonable number'.	Support	We note that what is 'reasonable' in the circumstances is generally best left to the company facing an adverse decision, and may often need a range of technical specialists, internal and external legal advisers, etc. Therefore, we urge Ofcom to show restraint and leave setting a limit on numbers as an absolute last resort.

Ref	Proposal	Detail	Group view	Notes
		Third parties and complainants not able to attend oral hearing	Support	
2.49	Case closure	Limit scope to comment on a decision to close a case to circumstances where Ofcom considers 'fairness requires this'.	Support	
2.50	Case closure	Case closure statement to be brief except where there are reasons to do otherwise	Support	The Guidelines should clarify the role of assurances, given that one of the reasons given for a more detailed statement is '*if we have accepted assurances about the steps from the subject of an investigation*'.
2.51	Settlement	A new settlement process for investigations	Support	
2.56	Settlement requirements	'Clear and unequivocal admission of liability in relation to the nature, scope and duration of the contravention'.	Oppose	We question whether this is necessary. Other sectors (e.g. financial services) allow a decision to be 'accepted' without such an admission of liability. Such an admission may expose companies to extra-statutory risks (such as third-party claims) that go beyond Ofcom's mandate and there is no clear policy requirement for such an admission.
		'Cease the contravening behaviour immediately'	Support	
		Accepts the decision and penalty and steps to comply/remedy	Support	This is the core element of settlement (not the question of an admission).
		Accepts that it will no longer benefit from the settlement discount if it appeals the decision	Oppose	It is not clear how this will work. If an appeal succeeds, and overturns the decision, the question of a settlement discount falls away. If the appeal fails, the party will likely face paying Ofcom's costs. And in either case, it is not clear on what statutory basis the decision that includes the penalty and settlement discount could be 're-opened' by Ofcom for the purpose of imposing a new higher penalty.

Ref	Proposal	Detail	Group view	Notes
				More substantively, while such occasions will be rare, there are some scenarios in which it is entirely reasonable to settle an enforcement matter but appeal the decision. For example, if Ofcom and the company agree on the facts, they may be able to agree promptly that if Ofcom's interpretation of the legislation or conditions is correct, there has been a contravention, but dispute that reading. Why should Ofcom and the party not agree a truncated investigations process (saving everyone time and money) and then bring an appeal against Ofcom's interpretation of the law? Settlement ahead of an appeal in that scenario would hasten the arrival of legal clarity (which serves all parties' interests, including Ofcom).
		Accept a streamlined process	Support	In principle, this is supported by the Group but specifically in relation to cases that have not yet had a provisional decision issued, it is unclear what, exactly, is the basis for settlement.
2.60	Proposed settlement process	Settlement discussions 'would not be a negotiation' and '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'.	Oppose	Ofcom's text implies some virtue to being inflexible on these issues that does not have any basis in statute or best practice for prosecutorial agencies. Why *not* negotiate about those things? Although the circumstances where there is overlap between regulatory provisions is likely to be rare (since such overlaps imply disproportionality in the drafting of the conditions), where there is discretion about what condition to apply, isn't the information as to whether a business is prepared to settle on a particular basis

Ref	Proposal	Detail	Group view	Notes
				information that is relevant and useful to Ofcom in the conduct of its duties? In relation to penalties – Ofcom's penalty setting is opaque at best. Why would a discussion about possible penalties not be in Ofcom's interest, if it reveals more information about the question of what settlement might be possible? Wouldn't that enable Ofcom to take a decision about what it was prepared to see as an outcome, possibly avoiding contested processes in some circumstances?
		Settlement discussions would not be 'without prejudice'. '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.'	Oppose	The courts have recognised the value in enabling 'without prejudice' discussions, including between economic regulators and those they regulate. Assuming the reference to 'documentary evidence' includes correspondence and notes of meetings, this approach puts a very substantial limit on the ability of either side to have a discussion other than a 'take it or leave it' discussion. It isn't clear why it is necessary for Ofcom to take such an inflexible approach, which might make settlement unable to be reached in some cases where a settlement might be possible.
2.65		Settlement discussions 'would take place on the basis of a written statement of Ofcom's position' regarding the contraventions and penalty proposed.	Cautious	This makes sense for cases that have progressed at least to the provisional decision stage or further, but it is unclear how this would work in relation to cases earlier in the process (which is the only period when the highest settlement discount is on offer). Para 5.19 of the revised Guidelines refer to a 'statement of facts and initial findings' but this will only be issued where a party has

Ref	Proposal	Detail	Group view	Notes
				indicated a willingness to settle. This leads to an odd, binary set of incentives: if the fact that a 'settlement willingness' can be indicated without prejudice to the case, then parties ought always to do so (to see what Ofcom has in mind); if it is not without prejudice, then parties ought never to do so (since they can simply await Ofcom's provisional decision, and doing so is likely to guarantee that such a decision will be issued, since by definition, they will be seen to have been ready to admit to *something*). This is one reason why such indications and the subsequent discussions must be without prejudice – since otherwise, settlements that are possible to reach might not be reached (or only reached later in the process), because parties are unwilling to indicate their position where it would be prejudicial to do so.
2.70		'If settlement discussions do not result in a settlement then the case will revert to the usual procedure'	Support	But note that this implies that discussions would be without prejudice – otherwise, the case cannot revert to the former process, since the Ofcom view of the case will have been changed by the existence and content of the settlement discussions.
2.73		Align processes for interim measures between regulatory and competition law	Support	
2.74	Consumer enforcement (under EA02)	Separate guidelines	Support	The guidelines appear to reflect prevailing law without any perceived changes
2.79	GC20.3	Set out proposals for dealing with GC20.3 matters	Cautious	These issues are complex and would merit consideration in a separate consultation that deals with the question of how to deal with GC20.3 issues, which involve multiple

Ref	Proposal	Detail	Group view	Notes
				stakeholders, and do not involve wrong-doing by providers. These are very much policy-like questions and a consultation on them would be the best way to deal with them.
Competition law investigations				
3.2	Competition law guidelines	Create new separate guidelines for CA98 investigations	Support	Note that they also likely to include investigations applying EU law (where applicable)
3.7	Enquiry phase	May decide not to have an enquiry phase, in line with approach at 2.11	Cautious	The case for caution is, if anything, even stronger in relation to competition law investigations, which can take longer and have far-reaching implications. Moving directly to an investigation should be the exception not the rule (and reserved generally for cases where Ofcom receives direct and compelling evidence of an infringement – i.e. Ch 1 not Ch 2 cases).
3.8		Drop 8-week enquiry phase in favour of a 'case-by-case' approach	Oppose	For all the reasons noted above. Unintended consequence is likely to be cases remaining in the enquiry phase for extended periods, creating uncertainty for all involved.
3.9		Greater transparency about how cases may be resolved without proceeding to formal enforcement action	Support	Greater transparency is welcome but what matters is the substance of the proposals – which could be better.
3.11	Engagement during 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'	Oppose	This formulation is misconceived, based on the premise that what is 'fair' can be determined with precision, in advance, by Ofcom. Fairness is not something to be doled out in meagre proportions; it is a basic and essential characteristic of prosecuting agencies and where there is scope for error or ambiguity about what will be sufficient to meet the standard of fairness, the

Ref	Proposal	Detail	Group view	Notes
				right course is to err on the side of being ready to engage more, not to run the risk of engaging insufficiently.
3.12		Commitment to engagement generally	Support	More transparency would be helpful.
3.13		Will inform the target and complainant when an investigation is opened, explaining the scope of the investigation and next steps	Support	
		Case opening letter will identify case team	Support	
		Will provide updates on progress including when we expect to reach a milestone	Support	But does it happen in practice?
		Decisions to change the scope will be communicated but generally not with a chance to comment first (as per 2.17)	Oppose	There is no evidence this causes an issue in practice today, and given the resourcing and reputational risks associated with competition law investigations, the case for learning as much as one can through engagement before taking a decision is very strong.
3.14		Engage with third parties on a case-by-case basis 'when it would assist the investigation (but not otherwise)'	Cautious	Clearly right that the approach ought to be adapted to the facts of each case. But concerning that this formulation is entirely 'Ofcom-centric' and fails to recognise that third parties may have legitimate interests at stake, which is not the same as their value to Ofcom as a supplier of information.
3.15		Guideline to include the factors Ofcom will take into account when setting deadlines for representations and the process for representations at key stages.	Support	Why not mirror this in regulatory investigations?
		Use of a 'letter of facts' to put new information obtained after an SO	Support	Why not mirror this in regulatory investigations?

Ref	Proposal	Detail	Group view	Notes
3.16		Will invite third party representations if 'we consider they may have further information relevant to the proposed decision'	Cautious	Should also refer to the *interest* they may have in the outcome.
3.17		Propose to explain how and when we will invite representations from the subject and complainant/relevant third parties if we are minded to close an investigation	Support	Why not mirror this in regulatory investigations?
3.19	Information-gathering	Drop the reference to issuing IRs in draft form	Oppose	Issuing in draft is a sensible and effective practice that saves all sides time and effort. The risks identified (e.g. evidence destruction) are relatively rare – where they are relevant, clearly, no draft should be issued. We are not aware of any case involving a mainstream provider in which Ofcom's sending an IR in draft has ever led to any suspicion of evidence destruction (which of course would be a very serious offence in its own right).
3.22	Confidentiality	Explain the process Ofcom would follow if Ofcom is considering disclosing confidential information	Support	It is vital that these processes proceed only with clear opportunities for any objections or risks to be identified and dealt with appropriately.
3.23		Only request non-confidential versions where necessary, as opposed to in general	Support	This seems likely to be more efficient.
3.26	Publicity	Include practices for giving one day's notice of Comp Bulletins	Support	
3.28	Involvement of third parties	Simplify guidance on third parties	Cautious	Simplifying is helpful, but shift from focus on 'sufficient interest' to whether it would be 'helpful to Ofcom' to include them should be re-considered.
3.33	Interim measures	Setting out the process Ofcom will take when it receives a request for interim measures	Support	

Ref	Proposal	Detail	Group view	Notes
3.35	Decision-making	Noting that the CMA Rules require 'at least two individuals' for second-stage decision-making (infringement/penalty)	Support	Why not mirror this in regulatory investigations?
3.37		Decisions whether to open a decision will be taken by a senior Ofcom executive with Board-delegated authority	Support	This already happens in practice
		Decisions whether to accept commitments, to make a NGFA decision or close a case on administrative priority will generally be taken by the same person who would make the decision to issue an SO or the 'second-stage' decision-makers	Support	
3.38	Commitments	Include further detail about the process to follow in deciding whether to accept commitments	Support	Why not mirror this in regulatory investigations?
3.44	Settlement	Settlement process for competition law investigations that follows the statutory requirements. Notes that the process for regulatory investigations is 'substantially the same as that for regulatory investigations … save for our proposals regarding decision-makers and settlement discounts'	Support	Support in relation to competition law cases, but note that we oppose both differences: it would be better to have consistency and best practice for second-stage decision-making (at least for large/complex cases).
3.47	Procedural complaints	Incorporate Procedural Officer guidance in guidelines	Support	But noting view that the PO could cover regulatory investigations in a more efficient and straightforward way than the current divergent paths to PO and Ofcom Company Secretary.


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