

**Ofcom**

making communications work  
for everyone

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

Guidelines

Guidelines

Publication date:

28 June 2017

## About this document

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

These Guidelines set out how Ofcom will investigate compliance with and approach enforcement of competition-related conditions in Broadcasting Act licences.

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

- Complaints from individual consumers about television, radio or on-demand programmes or services.
- Enforcement of any other conditions in relation to broadcasting licences.
- Enforcement in relation to the BBC or on-demand programme services.
- Enforcement of the Competition Act 1998.
- Enforcement of regulatory requirements relating to telecoms and postal services.
- Enforcement of consumer protection legislation.
- Compliance with undertakings given to Ofcom under Part 4 of the Enterprise Act 2002.

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

# Contents

Section		Page
1	Introduction	1
2	Why and how Ofcom opens cases	4
3	Investigating	10
4	Investigation outcomes	14
5	Settlement procedure	21
6	Procedural complaints about investigations	29
Annex		Page
1	Overview of an enforcement case under these Procedures	31

## Section 1

# Introduction

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

## What do these Guidelines cover?

1.2 These Guidelines set out how Ofcom will approach enforcement of competition-related conditions in licences under the Broadcasting Acts 1990 and 1996 (the “**Broadcasting Acts**”).

1.3 In particular, these Guidelines apply to enforcement of the following types of obligations under Broadcasting Act licences:

- Conditions in Broadcasting Act licences imposed under section 316 of the Communications Act 2003 (the “**Communications Act**”) to ensure fair and effective competition in the provision of licensed broadcast services. This includes requirements pursuant to such conditions to comply with:
  - Codes of practice approved by Ofcom for the purpose of securing fair and effective competition – for example the provisions of the Code of Practice for Electronic Programme Guides (EPG) that sets out practices to ensure fair and effective competition and which apply to EPG providers;<sup>1</sup> and
  - Directions given by Ofcom for the purposes of ensuring fair and effective competition.
- Conditions in television and radio multiplex licences imposed under sections 12(1)(e) and (f) and 54(1)(e) and (f) of the Broadcasting Act 1996 (respectively) for the purposes of securing:
  - that the multiplex licence holder does not show undue discrimination either against or in favour of a particular person or class of persons in contracting or offering to contract for the broadcasting of the relevant digital services on the multiplex (i.e. digital radio or television services or digital additional services);
  - that the multiplex licence holder does not, in any agreement for the broadcast of relevant digital services on the multiplex (i.e. digital radio or television services or digital additional services) which entitles the use of a specified amount of digital capacity on the multiplex, restrict the other party’s freedom to

---

<sup>1</sup> The *Code of Practice on Electronic Programme Guides*, available at: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0031/19399/epgcode.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0031/19399/epgcode.pdf), also sets out practices to be followed by EPG providers to (i) give appropriate prominence for public service channels and (ii) provide features and information needed to enable EPGs to be used by people with disabilities affecting their sight or hearing or both. In relation to enforcement of those provisions of the EPG Code, Ofcom will generally apply the *General procedures for investigating breaches of broadcast licences*: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0019/31942/general-procedures.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0019/31942/general-procedures.pdf)

make arrangements with another person as to the use of that digital capacity (i.e. 'sub-let' that capacity), subject to certain exceptions.

- 1.4 Ofcom has set out in separate guidance the procedures it will follow in relation to enforcement of other conditions in Broadcasting Act licences. Specifically:

<b>Category of regulatory requirement</b>	<b>Specific procedure</b>
Content standards objectives set out under section 319 of the Communications Act 2003 and applied in the Ofcom Broadcasting Code and other codes <sup>2</sup>	<i>Procedures for investigating breaches of content standards for television and radio</i> <sup>3</sup>  <i>Procedures for the consideration of statutory sanctions in breaches of broadcast licences</i> <sup>4</sup>
Fairness and/or privacy requirements set out under Part 5 of the Broadcasting Act 1996 and applied in the Ofcom Broadcasting Code	<i>Procedures for the consideration and adjudication of Fairness &amp; Privacy complaints</i> <sup>5</sup>  <i>Procedures for the consideration of statutory sanctions in breaches of broadcast licences</i>
All other categories of regulatory requirement imposed on broadcasters through their Broadcasting Act licences <sup>6</sup>	<i>General procedures for investigating breaches of broadcast licences</i> <sup>7</sup>  <i>Procedures for the consideration of statutory sanctions in breaches of broadcast licences</i>

- 1.5 In light of the nature of the types of issues which are likely to be considered when assessing compliance with competition-related licence conditions, there may be certain differences in the process Ofcom expects to follow in deciding whether to investigate and in conducting an investigation into compliance with competition-related conditions. These Guidelines set out the process we would normally expect to follow in such cases.

<sup>2</sup> Other codes include the *Cross-Promotion Code* and the *Code on the Scheduling of Television Advertising*. These codes and the Broadcasting Code can be found on Ofcom's website:

<https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes>

<sup>3</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0020/55109/breaches-content-standards.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0020/55109/breaches-content-standards.pdf)

<sup>4</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0030/71967/Procedures\\_for\\_consideration.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0030/71967/Procedures_for_consideration.pdf)

<sup>5</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0031/57388/fairness-privacy-complaints.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0031/57388/fairness-privacy-complaints.pdf)

<sup>6</sup> The relevant requirements include, for example, requirements placed on broadcasters to broadcast certain types of content (e.g. radio formats and delivery of news and regional programming quotas), provide Ofcom with information it has requested, pay fees, comply with the *Code of Television Access Services*, the *Code on Sports and Other Listed and Designated Events*, the *Code on Electronic Programme Guides* and technical codes for television and radio

<sup>7</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0019/31942/general-procedures.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0019/31942/general-procedures.pdf)

- 1.6 Ofcom has also separately set out the procedures it expects to follow when enforcing compliance by the BBC with competition-related requirements<sup>8</sup>, as well as other with other requirements.<sup>9</sup>

## Our objectives

- 1.7 We take enforcement action in respect of non-compliance with statutory or regulatory requirements, including competition-related conditions in Broadcasting Act licences, in order to prevent harm to consumers and competition and to remedy this where we can. We may also impose a sanction (such as a financial penalty) to deter non-compliance.
- 1.8 We seek to ensure that enforcement action is conducted in a fair, transparent, efficient and timely way.

## Status of these Guidelines

- 1.9 These Guidelines take effect from [28] June 2017. They set out Ofcom's general approach to enforcement in the areas covered by the Guidelines and they are designed to be flexible. Where we depart from the approach set out in these Guidelines, we will explain our reasons for doing so.
- 1.10 These Guidelines are not a substitute for any regulation or law and are not legal advice.

---

<sup>8</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0010/102520/Procedures-for-enforcement-of-BBC-competition-requirements.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0010/102520/Procedures-for-enforcement-of-BBC-competition-requirements.pdf)

<sup>9</sup> Available here: <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/guidance/procedures>

## Section 2

# Why and how Ofcom opens cases

## Why Ofcom opens cases

- 2.1 Ofcom's principal duties in carrying out our functions, as set out in section 3 of the Communications Act, are:
  - a) to further the interests of citizens in relation to communications matters; and
  - b) to further the interests of consumers in relevant markets, where appropriate, by promoting competition.
- 2.2 Taking action in respect of non-compliance with statutory and regulatory requirements is usually likely to further the interests of citizens and consumers by preventing or remedying consumer harm. It is also important that we take action in an efficient and effective way, that is evidence-based, proportionate, consistent, accountable and transparent, and targeted only at cases where action is needed.
- 2.3 We make decisions about whether to open investigations on a case-by-case basis, having regard to our statutory duties and having considered all the matters that appear to us to be relevant to whether or not we should do so. In doing so, we seek to exercise our discretion to target our action at the cases we think are most likely to produce good outcomes for citizens and consumers.
- 2.4 We cannot necessarily pursue every possible issue that comes to our attention and must make decisions about whether to open investigations by weighing up the likely benefits of conducting an investigation against the resources that would be required, and the comparative benefits of using those resources in other ways.
- 2.5 The matters we will generally consider include the following, so far as they are relevant to the case concerned:
  - a) The risk of harm arising from/seriousness of the alleged conduct. For example:
    - the risk to the interests of citizens or consumers resulting from the alleged breach (including whether that risk is immediate or not and whether it is direct or indirect), and conversely the direct and indirect benefit to consumers of our taking action (e.g. to deter similar conduct by others);
    - whether the conduct is on-going;
    - whether the allegation concerns conduct that is, or that appears to be, a repeated, intentional or particularly flagrant breach or infringement;
    - whether the business which is under investigation has a history of similar breaches or infringements, or a demonstrated record of poor compliance;
  - b) The strategic significance of addressing the alleged conduct and whether alternative proceedings are likely to achieve the same ends. For example:
    - whether an investigation would help clarify the regulatory or legal framework for stakeholders;

- whether the issue that has been identified directly relates to Ofcom's broader strategic goals or priorities (including those within Ofcom's Annual Plan);
  - whether there are other alternative proceedings that are likely to achieve the same ends, or deal with the same issues, as the potential investigation. This could include, for example, whether other agencies may be better placed to investigate the complaint or whether planned market reviews may address the potential harm; and
- c) The resource implications of our conducting an investigation, for example, what resources (in particular what specialist resources) are required to conduct an investigation, given the need to do justice to the interests of all parties likely to be affected.

2.6 Where appropriate we will also consider other factors as well.

2.7 Before exercising our Broadcasting Act powers for a competition purpose (which includes exercising any of our powers to enforce and obligation imposed under section 316 of the Communications Act or giving a direction for the purposes of securing fair and effective competition in accordance with such a condition), we must consider if a more appropriate way of proceeding would be under the Competition Act 1998. Where we decide that it is more appropriate to proceed under the Competition Act 1998 we will state our reasons for doing so.

## Sources of information

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

- where a broadcaster comes to us to let us know that they believe they have or may have breached a competition-related condition;
- in response to a complaint by an industry stakeholder or whistleblower;
- in response to information provided to us by other bodies (for example, where other regulatory bodies, MPs, consumer organisations or the press draw our attention to complaints they have received about a particular issue); and/or
- where we identify a particular concern through other areas of our work, for example, through routine monitoring or as a result of considering another licensing issue.

## Complaints and whistleblowing

2.9 As noted above, some of our investigations begin because we have received a specific complaint about potential non-compliance by a business with a relevant legal or regulatory requirement from another business or a trade association.

2.10 Guidance for stakeholders who wish to make a complaint is set out in the document "*Advice for complainants: Submitting a complaint to Ofcom*", available here: [https://www.ofcom.org.uk/data/assets/pdf\\_file/0013/102514/Advice-for-complainants.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0013/102514/Advice-for-complainants.pdf).



- 2.11 In addition, Ofcom has published guidance on how individuals working in the communications sector may contact us if they have concerns about possible wrongdoing at their own organisation (or their former organisation) and where they have been unable to raise or resolve those concerns internally.<sup>10</sup> Such disclosures can be made in confidence to Ofcom's Corporation Secretary. Further guidance for potential whistleblowers is set out in our *Advice for complainants* document.

## Initial assessment

- 2.12 Prior to opening an investigation, Ofcom will first carry out an initial assessment of the issue(s) to ascertain whether there is sufficient concern to warrant committing our resources to an investigation of the relevant matters, having considered all relevant factors. We do not make a substantive decision on whether or not there has been a breach of a requirement during this initial assessment phase.
- 2.13 As part of our initial assessment, we will normally give the broadcaster whose conduct we are considering the opportunity to comment on the relevant issue(s) and to provide information to assist us in deciding whether to open an investigation. Where we are carrying out an initial assessment following receipt of a complaint, we will also generally tell the broadcaster that we are doing so on the basis of a complaint and will generally share a non-confidential version of the complaint submission with the broadcaster for comment.
- 2.14 However, we may decide not to provide the broadcaster with the opportunity to comment and provide information if we consider that we already have sufficient information to conduct our initial assessment and decide whether to open an investigation. This could be, for example, as a result of routine compliance monitoring or through more informal engagement. We may also decide not to provide an initial opportunity for comment and to provide information where there are reasons to proceed to an investigation more quickly. This could be, for example, due to the risk of particular consumer harm or where we consider this may prejudice the conduct of any subsequent investigation, such as in cases where we may need to use our information gathering powers to obtain and preserve evidence prior to alerting the broadcaster.
- 2.15 Where we are assessing a complaint, there may also be cases in which we consider that it is not appropriate to provide the broadcaster with the opportunity to comment on the complaint submission. This could be, for example, for one or more of the reasons explained in paragraph 2.14 above. There may also be cases where it is important to safeguard the anonymity of the complainant such that it is not appropriate to share a copy of the complaint at this stage.<sup>11</sup> In such cases, where we decide to open an investigation, we would (subject to anonymity concerns) share a non-confidential version of the complaint submission with the broadcaster once we have opened the investigation (or at an appropriate point of time after we have done so, i.e. after we have exercised our information gathering powers).
- 2.16 Where we have sufficient information to decide that we should not open an investigation without obtaining comments or further information from the broadcaster (for example, because the scale of any possible consumer harm appears too low to

---

<sup>10</sup> <https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines/procedure-for-making-a-disclosure>

<sup>11</sup> Ofcom will consider requests from complainants to remain anonymous. However, it may not be feasible to carry out our initial assessment, or open or conduct an investigation, without revealing the identity of the complainant to the broadcaster. This does not apply to whistleblowers.

merit the resource required to investigate), we will normally only inform the complainant of our decision not to open an investigation and would not invite any further comment.

- 2.17 We aim to complete our initial assessment as quickly as reasonably possible, but the length of time that this will take is likely to vary on a case-by-case basis based on the issues under consideration. For example, where we are also considering whether it is more appropriate to open a case under the Competition Act 1998, it is likely to take longer for us to decide whether to open an investigation.
- 2.18 In cases where we decide that it is appropriate to give the broadcaster an initial opportunity to comment and to provide information on the issues under consideration (including in response to a complaint), we will write to the broadcaster setting out how long it will have to comment, and how soon after considering any comments or information received we aim to take our decision on whether to open an investigation. We will also provide contact details for the case leader who will act as the main point of contact while we are making our initial assessment. We will provide the same information to a complainant where we are completing our initial assessment of a complaint we have received. In those cases, we expect to keep the broadcaster and any complainant updated should our initial assessment take longer than expected.
- 2.19 We do not generally exercise our information gathering powers prior to opening an investigation, although we expect broadcasters we are considering investigating to ensure that the information they provide to Ofcom during our initial assessment is accurate. We may also ask complainants to provide further information, and also expect complainants to ensure that the information they provide to Ofcom during our initial assessment is accurate. In some cases, we may meet the subject of the possible investigation and/or a complainant where we consider this will assist us in reaching a decision on whether to open an investigation.
- 2.20 We do not publish details of, or comment publicly on the matters we are considering during our initial assessment phase.

## **Resolution through means other than formal enforcement action**

- 2.21 In some cases, Ofcom may be able to resolve an issue without the need for formal enforcement action. For example, we may be satisfied that the broadcaster has taken, or has offered assurances that it will take, appropriate steps to address any concerns we have identified such that there is no need for further action (although there may be a period of compliance monitoring).
- 2.22 In such cases, we will normally write to the broadcaster whose conduct we have been considering and any complainant to explain the basis on which we have decided not to proceed to formal enforcement action, and the circumstances in which we might reconsider the need to take formal enforcement action in future if relevant (for example, in the event that the organisation did not take the steps which it had said that it would or we received further evidence of a potential compliance issue).
- 2.23 Such informal action will generally not involve Ofcom taking any decision about whether, or not, any regulatory or legal provision has been breached.
- 2.24 Where Ofcom has decided not to pursue formal enforcement action in relation to an issue as a result of informal resolution, but we later become aware of further issues relating to the same or a similar issue, we may take formal enforcement action at that stage. If we did so, we would generally take into account any failure on the part of the

relevant business to abide by assurances previously given to us relating to this conduct.

- 2.25 We may publish details of assurances that have been given about the steps the broadcaster has taken and/or 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. We will usually inform the broadcaster shortly before (and no more than one working day before) publication on Ofcom's website that we will be doing so, and provide them with a copy of the intended text for information only at that stage.

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

- 2.26 A senior member of Ofcom's executive with appropriate Board-delegated authority will decide whether to open an investigation. Typically, this will be the person who will be responsible for overseeing the investigation.
- 2.27 Where we decide not to open an investigation following our initial assessment, we will normally inform the broadcaster, and any complainant, but will not usually give them the opportunity to comment before we take our decision.
- 2.28 Ofcom will not usually publicise a decision not to open an investigation unless the fact that a complaint has been made has been made public by either the complainant or the broadcaster that we were considering investigating, or a potential investigation is the subject of press speculation, and we consider we should clarify the position. In such cases, we would usually inform the broadcaster shortly before (and no more than one working day before) publication on Ofcom's website that we will be doing so, and provide them with a copy of the intended text for information only at that stage.
- 2.29 In most cases, when Ofcom decides to open an investigation, we will inform the broadcaster and any complainant by sending them each a case opening letter explaining the scope of Ofcom's investigation, who the case leader and case supervisor are (as discussed further at paragraph 3.5 below), and next steps. However, there may be some cases where we delay doing so if we consider it may prejudice our ability to carry out an investigation, for example in cases where we may need to use our information gathering powers to obtain and preserve evidence prior to alerting the broadcaster.
- 2.30 Shortly after sending the case opening letter(s), we will generally also announce that we have opened an investigation on our website (although we may delay doing so if we consider it may prejudice our ability to carry out an investigation). The case opening announcement will typically include the following details:
- the identity of the broadcaster;
  - the identity of any complainant;<sup>12</sup>

---

<sup>12</sup> If a complainant has concerns about being publicly identified on Ofcom's website, the complainant should raise this concern with us, ideally at the time of making its complaint submission. For the avoidance of doubt, Ofcom will not publish a copy of the complaint submission itself.

- the regulatory provisions to which the investigation relates;
- the scope of the investigation; and
- the case leader's contact details.

2.31 Announcing the beginning of an investigation does not imply that Ofcom has formed any view about whether or not any licence condition or other relevant obligation has been breached.

## Section 3

# Investigating

## Introduction

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

## Engagement with Ofcom during the investigation

3.2 We seek to ensure that enforcement action is conducted in a fair, transparent, efficient and timely way. As set out in the relevant sections of this document, Ofcom may request representations from, and engage with, complainants and other relevant third parties.

3.3 We will endeavour to keep the subjects of our investigations up-to-date on the progress of the investigation. If we receive a request to meet to discuss the case, we will consider it. We will be prepared to meet with the broadcaster we are investigating and complainants or other third parties, and/or provide written or verbal updates, where we consider it to be appropriate for reasons of fairness and transparency. We will decide whether and when it is appropriate to do so on a case-by-case basis depending on the nature of the investigation and the stage that we have reached in our analysis.

3.4 We explain in the following sections of these Guidelines the type of engagement that broadcasters we are investigating, complainants and third parties can generally expect to have with Ofcom at key points during the investigation.

## Case team

3.5 At the outset of the investigation, Ofcom will usually<sup>13</sup> inform the broadcaster, and any complainant, of:

- the case leader - this is the person who will be their main contact at Ofcom for the case during the course of the investigation; and
- the case supervisor - this is the person who will be overseeing the investigation.<sup>14</sup>

3.6 We will also explain how the Procedural Officer can be contacted – see further paragraph 3.32 and Section 6.

---

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

<sup>14</sup> As explained at paragraph 4.4 below, the case supervisor would typically be the person responsible for deciding whether there are grounds for action and whether to issue a provisional breach notification.

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

## Timescales

- 3.10 Ofcom recognises that it is important for all stakeholders that if we open an investigation we progress it in a timely manner and conclude it as soon as reasonably possible. We will give the broadcaster, and any complainant, an indication of the likely timescale involved in completing an investigation – this will normally be at the point when we open the investigation.<sup>15</sup>
- 3.11 We will provide updates to the broadcaster and any complainant on the progress of investigations, including when we expect to reach a specific milestone, and will also provide updates where this changes.
- 3.12 We will also aim to publish on the CCEB section of our website details of how long we expect to take to reach key milestones in an investigation.

## Changing the scope of an investigation

- 3.13 We may widen the scope of an investigation if we become aware of new issues that warrant investigation, or reduce the scope if we decide that it is no longer appropriate to pursue particular aspects of the case. When we change the scope of an investigation, we will inform the broadcaster and any complainant, and will update the notice on Ofcom's website. Where we consider it necessary for reasons of fairness, we will give the broadcaster and/or the complainant the opportunity to comment prior to deciding to change the scope of the investigation.

## Information gathering

- 3.14 Ofcom relies on accurate information, provided in a timely manner, to carry out efficient investigations. We may require the broadcaster to provide us with information to assist an investigation, or to assist us in deciding whether to open an investigation in accordance with the relevant condition of their licence.
- 3.15 If the broadcaster does not comply with a request to provide us with information, we may take enforcement action in accordance with our *General procedures for investigating breaches of broadcast licences*.<sup>16</sup>

## Confidentiality

- 3.16 In accordance with our duties under the Communications Act, we are required to investigate and enforce in a transparent and accountable manner. Those duties must

---

<sup>15</sup> Although we may delay doing so where we consider this may prejudice the conduct of the investigation, such as in cases where we may need to use our information gathering powers to obtain and preserve evidence prior to alerting the broadcaster about our investigation.

<sup>16</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0019/31942/general-procedures.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0019/31942/general-procedures.pdf)

be balanced against the restrictions on disclosure contained in sections 26 and 393 of the Communications Act and the legitimate interests of parties in ensuring that confidential and commercially sensitive information is protected.

- 3.17 Ofcom may consider it appropriate to disclose information notwithstanding that a party has asserted confidentiality over it. Ofcom will always consider whether disclosure of information about a particular business is necessary for the purpose of facilitating the carrying out of our enforcement functions. In particular, Ofcom may judge that it is necessary to disclose information gathered from complainants or other third parties to the broadcaster in order to allow the broadcaster to respond to Ofcom's case. Similarly, Ofcom may judge that disclosure of information gathered from the broadcaster to a complainant and other third parties is justified in order to facilitate the carrying out by us of our functions. We will decide on the best means of dealing with confidential information on a case by-case basis, in accordance with the relevant statutory framework, having regard to the respective interests of the party that has provided the confidential information, and of the subject.
- 3.18 If Ofcom is proposing to disclose information which a party considers to be confidential, we will take reasonable steps to inform that party and will give it a reasonable opportunity to make representations on our proposal, before making a final decision on whether to disclose the information. This decision will be made by the case team and/or the case supervisor, and will be communicated to the party concerned in advance of the disclosure being made. Where the decision is to disclose the information despite the party whose information it is continuing to object to such disclosure, we would give that party the opportunity to escalate its concerns to the Procedural Officer (in accordance with Section 6). We would expect to delay disclosing the information until the Procedural Officer has reached his/her decision. If we intended to proceed to disclose the information after taking these steps, we would inform the party concerned in advance.
- 3.19 We may request that we are provided with a non-confidential version of a submission if needed for the purposes of publication and/or disclosure. Such a non-confidential version should normally include suggested non-confidential summaries of information (for example "confidential details of contracts") or ranges of numbers, rather than simply removing the confidential information.

## Publicising cases

- 3.20 Ofcom is required to have regard to the principle under which regulatory activities should be transparent and accountable. Publicising the action we take can also usefully draw it to the attention of parties who have relevant information, can help deter non-compliance in future and educate others about what can go wrong. Consequently, publicising the investigations we are carrying out and our final decisions is an important part of carrying out our functions.
- 3.21 As explained at paragraph 2.30 above, when we open an investigation we will typically publicise it on our website.
- 3.22 We will also publish updates regarding the progress of an investigation on our website when we reach key milestones (such as when we issue a provisional breach notification, when we change the scope of an investigation, when we issue a final enforcement decision or when we close a case). This is explained in more detail in the relevant sections of these Procedures.



- 3.23 We may also issue media releases regarding the outcome of our investigations, for example where we consider this would be in the interests of potentially affected customers or consumers more generally.
- 3.24 We do not agree the text of website updates or media releases with the broadcaster, or any complainant.
- 3.25 We will ordinarily inform the broadcaster shortly, and no more than one working day, before publication on Ofcom's website that we will be doing so, and provide it with a copy of the intended text of the website update for information only at that stage.
- 3.26 Where we consider an announcement to be potentially market sensitive, we will generally inform the broadcaster after markets have closed, with publication at 7.00am on Ofcom's website and via the Regulatory News Service, just before markets open. Where the broadcaster is a listed company in other jurisdictions, we will, where possible, seek to avoid publication during stock exchange hours in those jurisdictions.
- 3.27 There may be certain cases which we consider it would be inappropriate to publicise, for example because they are particularly sensitive and/or publicity could have a detrimental impact on third parties. We would inform the broadcaster and any complainant if we intend to take this approach to an investigation. We expect these cases to be exceptional.

### **Involvement of third parties**

- 3.28 Ofcom recognises that in some cases third parties may be directly affected by the outcome of an investigation and can play a valuable role by drawing issues to our attention and by providing us with relevant information during the course of an investigation.
- 3.29 Ofcom may seek input from relevant third parties, for example, from trade associations, competitors or customers of the broadcaster we are investigating, in order to assist us in reaching a decision on the case.
- 3.30 Ofcom will involve third parties in an investigation to the extent we consider appropriate in order to carry out our functions fairly, transparently and effectively.

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

- 3.31 If the broadcaster, a complainant or a third party (where relevant) is dissatisfied with the way in which Ofcom is proceeding, they should usually raise their concerns in writing with the case leader or case supervisor in the first instance.
- 3.32 Where engagement with the case leader/case supervisor does not resolve a party's concerns about a significant procedural issue, it may contact the Procedural Officer. The process for doing so is set out in Section 6.



## Section 4

# Investigation outcomes

## Introduction

- 4.1 There are a number of possible outcomes in an investigation into a breach of a competition-related requirement in a Broadcasting Act licence:
- We may decide that there are grounds for action. In such cases, we will first provide the broadcaster with a provisional decision explaining the reasons why we are minded to find a breach of the relevant requirement(s) and the action that we propose to take as a result. We will give the broadcaster the opportunity to make representations before proceeding to take a final decision. This may result in a final enforcement decision, which may also include the imposition of a statutory sanction, such as a financial penalty, and/or, where we have power to do so, a direction requiring steps to be taken to remedy a breach or comply with the relevant requirement. In other cases, we may find that there has been a breach but that there is no need to impose a formal sanction.
  - We may decide that there is insufficient evidence of a breach, and close the case on that basis (potentially subject to a period of compliance monitoring).
  - We may decide to close a case without having taken a final decision on the merits of a case.<sup>17</sup>
- 4.2 In some cases, we may be able to reach a settlement with the broadcaster as a way of resolving a case, in circumstances where we have grounds to reach an enforcement decision. The process for settlement is discussed in Section 5 below.
- 4.3 This section also sets out who will make key decisions during an investigation.

## Decision making

- 4.4 The decision on whether there are grounds for pursuing formal enforcement action (in other words, whether to issue a provisional breach notification) will be taken by a senior member of Ofcom's executive with appropriate Board-delegated authority. Typically, this would be the person who is responsible for overseeing the investigation (the case supervisor).
- 4.5 Following the issue of a provisional breach notification and the receipt of any written submissions from the broadcaster, Ofcom will nominate a final decision maker who will be responsible for deciding on the final outcome of the investigation. This will be a senior member of Ofcom's executive with appropriate Board-delegated authority,

---

<sup>17</sup> For example, we may decide to close the case for administrative reasons, or where we are satisfied that the conduct we were concerned about has now ceased and the broadcaster has taken appropriate action to remedy any harm or has given appropriate assurances that it will be remedied, and we judge that there is no further purpose to be served by continuing with the investigation in the particular circumstances of the case.

who will not have been involved in the investigation and/or the preparation of the provisional breach notification.

## Provisional breach notifications

- 4.6 In cases where Ofcom's provisional view is that the broadcaster has not complied with the relevant competition-related requirement, Ofcom will notify the broadcaster of this provisional finding and our reasons for provisionally concluding the requirement has been breached, by providing it with a provisional breach notification. This provisional view may change in light of subsequent representations made, or material provided by, the broadcaster (or complainants or other third parties where relevant), or any further evidence which comes to light.
- 4.7 Ofcom will, as a general rule, include with any proposed breach finding a provisional determination of any statutory sanction we provisionally consider would be appropriate in the circumstances. The sanctions available to Ofcom in respect of a breach of a Broadcasting Act licence condition include:
- financial penalties;<sup>18</sup>
  - shortening the licence period<sup>19</sup> or suspending the licence<sup>20</sup> (where permitted);
  - licence revocation.<sup>21</sup>
- 4.8 Where, at this stage, Ofcom provisionally concludes that it would be appropriate to impose a financial penalty, Ofcom will have regard to Ofcom's Penalty Guidelines<sup>22</sup> in making the provisional determination of penalty.
- 4.9 In cases where Ofcom has power to give a direction, such as a direction requiring the broadcaster to take such steps to ensure fair and effective competition and Ofcom provisionally concludes that it would be appropriate to give such a direction, as a

---

<sup>18</sup> The specific provision which empowers Ofcom to impose financial penalties for the breach of licence conditions will depend on the type of licence held. For example, in relation to television broadcasting: s.41(1) of the Broadcasting Act 1990 (in respect of Channel 3, Channel 4 or Channel 5), s.17 of the Broadcasting Act 1996 (television multiplex licences), s.23 of the Broadcasting Act 1996 (digital television programme service licences), s.237 of the Communications Act 2003 (TLCS licences), and in relation to radio broadcasting: s.110(1) of the Broadcasting Act 1990 (national or local analogue radio licences), s.59 of the Broadcasting Act 1996 (radio multiplex licences) and s.62 of the Broadcasting Act 1996 (digital sound programme service licences)

<sup>19</sup> As noted above, the specific provision which empowers Ofcom to shorten a licence period will depend on the type of licence held and this sanction is only applicable in certain cases. These include under s. 41(1) and 110(1) of the Broadcasting Act 1990

<sup>20</sup> This sanction is only applicable in certain cases, for example under s.110(1) of the Broadcasting Act 1990.

<sup>21</sup> As noted above, the specific provision which empowers Ofcom to revoke a licence will depend on the type of licence held. These include: s.111 of the Broadcasting Act 1990 (in respect of most radio broadcasting licences), s.238 of the Communications Act 2003 (TLCS licences), s42 of the Broadcasting Act 1990 (Channel 3, Channel 5, television multiplex licences and digital sound programme service licences). Note that licence revocation is not applicable to the BBC, SC4 or Channel 4.

<sup>22</sup> These are available here:

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

general rule, the provisional breach notification will also set out details of the proposed direction.

- 4.10 If the broadcaster is a company, Ofcom will deliver the notification in hard copy to the Company Secretary<sup>23</sup>, copied by email to our main contact, unless it has agreed otherwise with us.
- 4.11 When we issue the provisional breach notification we will also provide the broadcaster with copies of, or access to, the evidence that we have considered during the course of the investigation and which we have taken into account in reaching our provisional view, excluding any internal Ofcom documents or any routine administrative documents (e.g. routine correspondence). Wherever possible and appropriate, we will provide the broadcaster with copies of, or access to, the relevant documents in electronic form, but in some cases we may provide hard copies (for example where requested by the broadcaster in a particular case). Where we have relied upon evidence provided to us by the broadcaster itself, rather than providing copies of the relevant documents, we may instead list these in a schedule so that it is easy for the broadcaster to cross-refer to its own copies.
- 4.12 Confidential information in the provisional breach notification and any accompanying documents will be marked. We will redact (or withhold as relevant) confidential third party information where appropriate in accordance with the relevant statutory framework (although as noted in paragraph 3.17 above, we may consider that it is necessary to disclose information provided by a third party to the broadcaster in order to be fair to it).
- 4.13 Ofcom will not publish provisional breach notifications but we will generally publish an update on Ofcom's website. Our update will normally explain that we have issued a provisional breach notification, include a summary of the proposed breach findings and, where relevant, any proposed direction we are minded to impose. The update will also state that the broadcaster will have the opportunity to make representations on our proposed findings before we make our final decision.

### **Written representations**

- 4.14 The broadcaster will have the opportunity to make written representations to Ofcom on the proposed finding and on any proposed sanction (such as a proposed financial penalty) and/or proposed direction. Typically, Ofcom will give the broadcaster a period of at least 20 working days for making written representations. Ofcom will give a longer period in more complex cases.
- 4.15 Where we consider it to be appropriate for reasons of fairness, we may provide complainants or relevant third parties with the opportunity to comment on a non-confidential copy of the provisional breach notification. This will typically be where they may have further information relevant to the proposed decision and therefore could provide informed comments on the provisional breach notification. Another example may be where Ofcom's provisional findings could have a direct impact on the economic interests of a third party, such as where we comment in the notification on the conduct of an agent of the broadcaster which we consider has given rise to the potential breach.

---

<sup>23</sup> In most cases, it is a statutory requirement to service notice on the Company Secretary of a company.

- 4.16 In such cases, Ofcom would expect the complainant or the third party to enter into appropriate agreements with us limiting its use of and onward disclosure of the document. We will set deadlines for representations depending on the circumstances of the case.
- 4.17 We will not usually provide a complainant or third parties with copies of, or access to, the underlying evidence relied on, but may do so where appropriate for reasons of fairness.

### **Oral hearings**

- 4.18 Ofcom will offer the broadcaster the opportunity to attend an oral hearing to make oral representations on matters referred to in the provisional breach notification. The oral hearing provides the broadcaster with an opportunity to highlight directly to the final decision maker issues of particular importance to its case and/or to clarify the detail set out in its written representations.
- 4.19 Ofcom will normally ask the broadcaster to confirm by a given date if it wishes to make oral representations, and will then set a date for the oral hearing, which will normally be held 10 to 20 working days after the deadline for written representations has elapsed.<sup>24</sup>
- 4.20 The oral hearing will usually be held at the Ofcom offices in which the investigating case team is based and will be chaired by the final decision maker. The case supervisor, case leader and other members of the case team may also be present and may comment during the course of the hearing. Other personnel from Ofcom may attend as appropriate, for example, legal advisers, economic advisers and/or technical experts, depending on the circumstances of the case.
- 4.21 The broadcaster may bring legal advisers or other relevant expert advisers to the oral hearing to assist in presenting its oral representations, although Ofcom may ask that the subject limits the number of persons attending the oral hearing on its behalf to a reasonable number.
- 4.22 Complainants and other third parties will not usually be invited to attend the oral hearing.
- 4.23 Ofcom will agree an agenda with the broadcaster in advance of the oral hearing, which will include reasonable periods of time for the broadcaster to make oral representations and for the Ofcom personnel present to ask the broadcaster questions on its representations.
- 4.24 The hearing will be transcribed and the transcript will be provided to the broadcaster, giving an opportunity for comment on its factual accuracy.

### **Further provisional breach notification**

- 4.25 In some cases, new information or evidence may come to Ofcom's attention after we have issued a provisional breach notification and given the broadcaster the opportunity to comment on it. We will adopt an appropriate process to deal with such evidence which ensures fairness to the broadcaster.

---

<sup>24</sup> However, if the broadcaster provides its written representations prior to the deadline and requests that the oral hearing takes place earlier, in that case the oral hearing may be earlier.

4.26 Where such new information or evidence leads us to consider making a material change to the nature of the proposed breach findings<sup>25</sup> and/or increase the proposed level of penalty, we will withdraw the initial provisional breach notification and issue a new provisional breach notification. The broadcaster would have the opportunity to comment on the new provisional breach notification as described above, before we proceed to reach a final decision.

## Process for reaching a final decision

4.27 Following the oral hearing (if there is one) and, having considered all of the relevant evidence and any representations, the final decision maker will take a final decision on the case.

4.28 The possible outcomes at this stage are:

- Ofcom issues a final decision confirming a finding of a breach of the relevant competition-related requirement. The final decision will set out Ofcom's reasons for concluding that the broadcaster has breached the relevant requirement, and the evidence that Ofcom has relied on. It will also (as relevant):
  - set out any statutory sanction Ofcom has imposed on the broadcaster such as a financial penalty (including the amount of any penalty);<sup>26</sup> and/or
  - set out any required action that Ofcom has directed the broadcaster to take, for example to secure fair and effective competition.
- A decision is taken that, in light of the representations received and/or review of further evidence, a finding of breach of the relevant requirement(s) cannot be maintained, and therefore the case should be closed with no further action.
- A decision is taken that the case should be closed without Ofcom having reached a decision on the merits of the case.<sup>27</sup>

4.29 Ofcom will notify the broadcaster of our final decision. If the broadcaster is a company, Ofcom will deliver the notification in hard copy to the Company Secretary, copied by email to our main contact, unless it has agreed otherwise with us.

4.30 Ofcom will also normally inform any complainant that we have reached a final decision on the investigation.

---

<sup>25</sup> Such as evidence of a different or more serious breach or a material change in our reasoning for proposing to find a contravention.

<sup>26</sup> Specific considerations apply in connection with licence revocation, as discussed at paragraph 4.33 below.

<sup>27</sup> For example, we may decide to close the case: (i) for administrative reasons, such as where significant further investigation would be needed to decide whether to issue a final enforcement decision and we consider that, due to other urgent or important work, our resources could be targeted more appropriately at other cases; or (ii) where we are satisfied that the conduct we were concerned about has now ceased and the subject of the investigation has taken appropriate action to remedy any harm or has given appropriate assurances that it will be remedied, and we judge that there is no further purpose to be served by continuing with the investigation in the particular circumstances of the case.

## Publication of final breach decisions

- 4.31 Once the final decision has been taken and notified to the broadcaster, Ofcom will close the case and update the details of the case on Ofcom's website. This will generally include a summary of the breaches Ofcom has found and details of any penalty and/or other measures imposed.
- 4.32 Ofcom will publish a non-confidential version of the final breach decision on Ofcom's website once we have finalised the relevant redactions of any confidential information. We will generally inform the broadcaster and any complainant in advance of the intended date of publication of the final decision.

## Licence revocation

- 4.33 In cases where Ofcom issues a final breach decision and considers that the sanction to be imposed should be revocation of the licence, we will follow the statutory provisions governing the revocation of that licence.<sup>28</sup> In the majority of cases, this will require Ofcom to serve a notice indicating that the licence will be revoked if the steps specified in the notice are not taken. If, at the end of the period specified in the notice, Ofcom is satisfied that the specified steps have not been taken and that it is necessary in the public interest to revoke the licence, it shall serve a notice revoking the licence.<sup>29</sup> The notice revoking the licence takes effect when it is served on the broadcaster.

## Case closure without a final breach decision

- 4.34 If the relevant decision maker<sup>30</sup> concludes that Ofcom should not take any further action, we will close the case. As noted above this might be on the basis that:
- we do not have sufficient evidence to find a breach; or
  - we no longer consider it to be appropriate to pursue further enforcement action without having come to a decision on the merits of a case.
- 4.35 In both cases, we would typically follow the same process.
- 4.36 In the majority of cases, a case closure decision of this type is likely to be a brief statement indicating case closure and the basis on which we have closed the case, which we would expect to publish on Ofcom's website. In some cases, if there is a good reason to do so, we may also publish a reasoned case closure document setting out Ofcom's reasons for taking no further action – for example if we think it would be helpful for stakeholders to clarify our interpretation of a particular licence condition or if we have accepted assurances about the steps the broadcaster will

---

<sup>28</sup> See, for example, sections 42 and 111 of the Broadcasting Act 1990 and sections 238 and 239 of the Communications Act.

<sup>29</sup> The precise procedure we will follow will depend on the relevant statutory provisions. For example, the provisions may require the broadcaster to be given a second opportunity to make representations before a notice of revocation is served.

<sup>30</sup> Depending on the stage at which this decision is reached, this may be the person responsible for deciding whether there are grounds for action (i.e. whether to issue a provisional breach notification), who, as noted above, will typically be the person responsible for overseeing the investigation, or it may be the final decision maker.

take to address the issue and we consider it would be in the interests of potentially affected customers or consumers to publicise these.

- 4.37 In certain cases, we may consider that fairness requires that we provide an opportunity for relevant stakeholders to comment before we finalise our decision to close the case. An example might be where the investigation was initiated following a complaint from a stakeholder, which may have further information relevant to the proposed decision.
- 4.38 In cases where we do not provide the opportunity to comment in advance of the final case closure decision being taken, we will inform the broadcaster of the case closure decision in advance of publishing the case closure notice on Ofcom's website. Ofcom will also normally inform any complainant that we have reached a final decision on the investigation.
- 4.39 A non-confidential version of a reasoned case closure decision will be published on Ofcom's website once we have finalised the relevant redactions of any confidential information, and we will generally inform the broadcaster and any complainant in advance of the intended date of publication.

## Compliance monitoring

- 4.40 Where Ofcom has taken enforcement action or closed a case having accepted assurances, we may decide to "put it into compliance". The purpose of the compliance phase is to ensure that the broadcaster does not repeat behaviour that Ofcom has deemed to breach relevant requirements and that it complies with any direction, undertakings or assurances given and/or that it complies with any direction given by Ofcom (for example, to take steps to secure fair and effective competition).
- 4.41 The process that we follow during the compliance phases will differ from case to case. We may gather information from the broadcaster in order to obtain information to assess compliance.
- 4.42 The length of the compliance phase will depend on the circumstances of the case and the measures that are to be monitored. Generally, Ofcom will not grant extensions to any deadline set for compliance with a direction, unless we receive an application prior to the expiry of the deadline together with an explanation of why the deadline should be extended, including supporting evidence.
- 4.43 Once we consider that compliance has been established, we will close the case and update Ofcom's website accordingly.

## Section 5

# Settlement procedure

## Introduction

- 5.1 In some cases, Ofcom may consider that it is appropriate to settle an investigation into a breach of a competition-related requirement. Settlement is a voluntary process for resolving such an investigation which leads to a formal, legally binding regulatory decision.<sup>31</sup> It involves the broadcaster admitting it has breached a relevant regulatory requirements and accepting that the remainder of the investigation will follow a streamlined administrative procedure. In such cases, Ofcom will apply a discount to the level of the penalty imposed on the broadcaster in light of the resource savings involved in following a streamlined administrative procedure.
- 5.2 Those who we are investigating are not under any obligation to enter into a settlement process or to settle, and Ofcom has broad discretion to decide whether a case is appropriate for settlement or to agree to settlement.
- 5.3 Where the settlement process is successful, the legally binding regulatory decision will refer to the fact that settlement has been agreed and will reflect the substance of any admissions made by the broadcaster for the purposes of the settlement.
- 5.4 In the event that the settlement process is unsuccessful, the case will revert to the usual process and the content of any settlement discussions will not be revealed to the final decision maker. However, any additional documentary evidence provided during the settlement process would go onto the case file and could be taken into account by Ofcom for the purposes of our final enforcement decision. In addition, Ofcom may follow up any new issues of regulatory concern which come to light during the settlement process.
- 5.5 For the avoidance of doubt, settlement is not a negotiation with Ofcom about what breaches Ofcom might be prepared to find or not to find. Nor is it a negotiation about the level of the penalty which Ofcom would impose, nor is it equivalent to the type of discussions which take place between parties to litigation or potential litigation on a “without prejudice” basis for the purposes of seeking to resolve or avoid litigation.

## Requirements for settlement

- 5.6 As a minimum, Ofcom will require the broadcaster to:
- Make a clear and unequivocal admission of liability in relation to the nature, scope and duration of the breach. This would need to reflect Ofcom’s position on the nature of the breaches we are minded to find and the appropriate level of penalty (as explained further below);

---

<sup>31</sup> Settlement is therefore not the same as resolving a case by giving assurances to change conduct which could lead to case closure without resulting in a final enforcement decision (as described in Section 4).



- Cease the contravening behaviour immediately from the date it enters into a settlement process with Ofcom and refrain from engaging again in the same or similar contravening behaviour;
- Confirm that it accepts that there will be a formal and published finding of breach against it, will pay a penalty and will take any steps required to comply with the relevant competition-related requirements and to secure fair and effective competition (if relevant); and
- Confirm that it will accept a streamlined administrative process. This will be decided on a case-by-case basis depending on the stage at which the settlement process is commenced, but may include no written representations (except in relation to manifest factual inaccuracies)<sup>32</sup>, and will include no oral hearing. The person responsible for deciding whether to issue a provisional breach notification will also be responsible for the final decision in a settlement case.

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

- 5.7 Ofcom may consider settlement for any investigation in which we have reached a stage where we believe that we have a sufficient basis to make a provisional finding of breach and come to a preliminary view on the appropriate sanction, including an appropriate level of penalty.
- 5.8 Ofcom will have regard to its statutory duties in deciding on whether it should settle a case. In determining whether a case is suitable for settlement, Ofcom will also consider other factors such as the likely procedural efficiencies and resource savings that can be achieved through settlement.<sup>33</sup> We may decide that a case is not suitable for settlement due to public policy reasons (for example due to the nature of the harm caused by the breach), or due to the previous conduct of the broadcaster during the course of the investigation (for example, where the broadcaster has been obstructive or failed to co-operate).

## Settlement discounts

- 5.9 Where the settlement process results in a final enforcement decision being issued, that decision will contain the penalty amount, which will include a settlement discount. Our aim will be to conclude the settlement process as swiftly as possible. In line with this aim, the earlier the settlement process is commenced, the greater the discount available, as the resource savings that Ofcom could achieve would be greater.
- 5.10 The discount will be considered on a case-by-case basis. We would normally expect this discount to be:
- up to 30% where a successful settlement process is commenced before the provisional breach notification is issued;

---

<sup>32</sup> We expect this to be a requirement in cases set out in paragraphs 5.19 to 5.27 below.

<sup>33</sup> Taking into account, among other things, the stage at which settlement is initiated, whether settlement would result in shortening the case timetable and a reduction in resources, and whether settlement is likely to be reached in a reasonable timeframe.

- up to 20% where a successful settlement process is commenced after the provisional breach notification is issued but prior to written representations being received; or
  - up to 10% where a successful settlement process is commenced after the provisional breach notification is issued and after written representations are received.
- 5.11 Where we are concerned that the process is not progressing as swiftly as possible due to delays or inefficiencies caused by the broadcaster or that it is not showing its full co-operation with the settlement process, Ofcom is likely to bring the settlement process to an end or reduce the available discount on account of the time taken and resources used. We would give the broadcaster notice that we are minded to do so at that point.
- 5.12 Ofcom also recognises that in some cases broadcasters may proactively contact us to let us know about a potential breach of a regulatory requirement, may voluntarily take significant steps to address compliance following a breach of a regulatory requirement and/or to remedy the harm caused, and may provide us with significant co-operation in advancing our investigation.<sup>34</sup> In such cases, we would expect to take this co-operation into account in deciding on an appropriate level of penalty, in accordance with our Penalty Guidelines. The settlement discount is a separate matter, intended to reflect resource savings achieved by Ofcom as a result of following the settlement process, and is applied after such other mitigating factors have already been taken into account in determining the appropriate level of the penalty.

## Decision making in a settlement case

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

## Process

- 5.14 If the broadcaster wishes to discuss the possibility of exploring settlement, it should approach the case leader and/or case supervisor in the first instance.
- 5.15 While we will engage positively with a broadcaster that indicates an early willingness to settle, we will need to have reached a stage in our analysis where we are able to come to a provisional view on the nature of the breaches and an appropriate sanction (or sanctions), including appropriate level of penalty.
- 5.16 The settlement process will be conducted by the case supervisor and members of the case team.

---

<sup>34</sup> For example, providing us with relevant documents and evidence as a result of having undertaken their own internal investigations

- 5.17 As noted at paragraph 5.10 above, the level of discount on the level of penalty as a result of settlement will depend on the stage at which a successful settlement process is commenced. There are three main stages at which a settlement process may be commenced:
- prior to a provisional breach notification being issued;
  - following a provisional breach notification being issued, but prior to the broadcaster making written representations in response; or
  - following a provisional breach notification being issued, and after the broadcaster has made written representations in response.
- 5.18 If the settlement process is unsuccessful and the broadcaster wishes to enter into a further settlement process at a later stage of the investigation, it remains open for it to do so. However, as noted above, it is at Ofcom's discretion whether and on what bases to enter into a settlement process at any stage.

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

- 5.19 If the broadcaster approaches Ofcom about settlement prior to a provisional breach notification being issued, and Ofcom considers it to be an appropriate case in which to consider settlement, we will normally provide details of our initial thinking on the case in general terms to the broadcaster where we consider this will be of assistance in order for the broadcaster and Ofcom to decide whether to engage in a settlement process.
- 5.20 Following this, if Ofcom and the broadcaster wish to continue with the settlement process, we will send to the broadcaster a statement of facts, setting out Ofcom's provisional findings and the evidence on which we are relying. We will also provide an indication of the provisional level of penalty that Ofcom would be minded to impose, including the settlement discount.<sup>35</sup> We will also provide access to key documents we are relying on, if appropriate for reasons of fairness and transparency.
- 5.21 The broadcaster will be asked if it would be prepared in principle to agree to make admissions on the basis of the statement of facts. The timeframe for doing so will be set on a case-by-case basis having regard to possible resource savings through the settlement process. If the broadcaster wishes to pursue settlement on the basis set out in the statement of facts, it will be asked to make written representations on manifest factual inaccuracies in the statement of facts. If its representations appear to go beyond this (for example into the merits of Ofcom's provisional findings or on the level of the penalty), we would reassess whether the case remained appropriate for settlement at this stage.
- 5.22 If the broadcaster is not prepared to agree to a settlement on the basis of the position set out in the statement of facts, it is unlikely to be appropriate to pursue settlement at this stage and Ofcom would normally expect to proceed to issue a provisional breach notification in accordance with its usual process. If the broadcaster wishes to enter into a further settlement process at a later stage of the investigation, it remains

---

<sup>35</sup> That discount would reflect the discount that Ofcom would be minded to apply to the penalty were the settlement process successful and concluded swiftly. Were Ofcom minded to reduce the available discount at any point on account of the time taken and the resources used during the settlement process, we would give the broadcaster notice of our intention to do so.

open for it to do so (subject to Ofcom also considering this to be appropriate), although a lower settlement discount would then apply.

- 5.23 If the broadcaster indicates that it does wish to pursue settlement on the basis set out in the statement of facts, we would proceed to issue a provisional breach notification, which would contain the proposed penalty amount.<sup>36</sup>
- 5.24 As noted above, one of the settlement requirements would be that the broadcaster agrees not to make written representations on the provisional breach notification, except in relation to manifest factual inaccuracies. As the provisional breach notification will take account of representations made on manifest factual inaccuracies in the statement of facts, we would not expect to receive any further representations at this stage and would expect the broadcaster to provide written confirmation of admissions and its acceptance of the settlement requirements, as discussed further below.

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

- 5.25 If the broadcaster is in principle prepared to agree to the settlement requirements and admit to the breaches as set out in the provisional breach notification, it may inform Ofcom that it wishes to enter into a settlement on that basis. In such a case, one of the settlement requirements would be that the broadcaster agrees not to make written representations on the provisional breach notification except in relation to manifest factual inaccuracies.
- 5.26 We will provide the broadcaster with an indication of the level of the settlement discount on the penalty which we would be minded to apply if a successful settlement process is commenced at this stage. We expect to set a deadline for the broadcaster to indicate its willingness to settle the case and will provide a short period of time for representations on manifest factual inaccuracies in the provisional breach notification. The timeframe for doing so will be set on a case-by-case basis having regard to possible resource savings through the settlement process.
- 5.27 We then expect the broadcaster to provide written confirmation of admissions and its acceptance of the settlement requirements as discussed further below.

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

- 5.28 If the broadcaster wishes to make written representations on the provisional breach notification (which are more extensive than identifying manifest factual inaccuracies), it may nonetheless indicate to Ofcom that it wishes to enter into a settlement process after doing so.
- 5.29 Ofcom would consider any written representations made to it in line with our usual process, including any representations as to the level of any penalty, before deciding whether or not to engage in a settlement process and on what basis. As noted

---

<sup>36</sup> This would not typically include the settlement discount because, as discussed further below, we would not typically expect settlement to be formally agreed until after we have issued the provisional breach notification. We would, however, expect to confirm the level of the available settlement discount at this stage which would, for example, be the same amount as previously proposed to the broadcaster were the settlement process successful and concluded swiftly. The available discount may be reduced in the event the settlement process takes longer, as set out above.

above, settlement is not a negotiation. Therefore, in the event that we consider it appropriate to engage in a settlement process after considering the broadcaster's written representations, we would expect to provide it with a written statement of our revised position. This would set out:

- the breaches we are minded to find; and
- an indication of the level of penalty we would be minded to impose, taking into account our revised assessment of the nature of the breaches and after having applied the settlement discount on the penalty at that stage of the process.<sup>37</sup>

5.30 We would expect to set a deadline for the broadcaster to indicate to Ofcom its willingness to settle the case on the basis of the written statement. The timeframe for doing so will be set on a case-by-case basis having regard to possible resource savings through the settlement process.

5.31 Ofcom would not expect to receive any further representations at this stage, and will expect the broadcaster to provide written confirmation of admissions and its acceptance of the settlement requirements as discussed further below. As set out above, one of the requirements for settlement would be that the broadcaster agrees that there would not be an oral hearing.

### **Successful conclusion of the settlement process**

5.32 If the settlement process is successful and the broadcaster has indicated to Ofcom that it is prepared to agree to the settlement requirements and to make admissions on a basis which reflects Ofcom's position, it must provide written confirmation of its admissions and acceptance of the settlement requirements. That letter should be sent by its Chief Executive Officer or another senior member of its executive.

5.33 Before the broadcaster provides its written confirmation letter, we will provide the broadcaster with a draft of the terms of the decision we would expect to take, reflecting the broadcaster's admissions and having taken into account any representations from the broadcaster on manifest factual inaccuracies:

- Where settlement is agreed prior to the broadcaster making substantive written representations on the provisional breach notification, this will normally be in the form of the provisional breach notification. We normally expect in such cases that the final enforcement decision would be in the same terms as the provisional breach notification (subject to any corrections of factual inaccuracies). We therefore expect the broadcaster to provide its written confirmation of its admissions and acceptance of the settlement requirements following receipt of the provisional breach notification.
- Where settlement is agreed after the broadcaster has made substantive written representations on the provisional breach notification, this will normally be in the form of a draft of the final enforcement decision. In practice, this is likely to be the written statement setting out Ofcom's position following consideration of the broadcaster's written representations (as set out in paragraph 5.29 above), as we would normally expect in such cases the final enforcement decision would be in

---

<sup>37</sup> That discount would reflect the discount that Ofcom would be minded to apply to the penalty were the settlement process successful and concluded swiftly. Were Ofcom minded to reduce the available discount at any point on account of the time taken and the resources used during the settlement process, we would give the broadcaster notice of this at that point.

the same terms as that written statement (subject to any corrections of factual inaccuracies). We therefore expect the broadcaster to provide its written confirmation of its admissions and acceptance of the settlement requirements following receipt of Ofcom's written statement of position.

- 5.34 Once we have received the broadcaster's written confirmation of its admissions and acceptance of the settlement requirements, the relevant decision maker will then formally make Ofcom's final decision, reflecting the position agreed during the settlement process and the broadcaster's admissions.

### **What happens if the settlement process is unsuccessful?**

- 5.35 The broadcaster may withdraw from the settlement process at any time before confirming that it has accepted the requirements for settlement and confirming its admission in writing (in accordance with paragraph 5.32 above). Ofcom may also withdraw from the settlement process at any stage, though prior to doing so, we would notify the broadcaster and give it the opportunity to respond.
- 5.36 If settlement is unsuccessful then the case will revert to the usual procedure.
- 5.37 The broadcaster would not have entered into the settlement agreement and therefore would not have made any formal admissions.
- 5.38 The final decision maker may be aware of the fact that the possibility of settlement has been discussed between Ofcom and the broadcaster. However, neither the substance of any oral discussions between the broadcaster and Ofcom, nor any correspondence relating to, or written records of, such discussions would be disclosed to the final decision maker, so that the decision could be taken impartially on the basis of the relevant evidence.
- 5.39 As noted above, settlement is not akin to "without prejudice" negotiations for the purposes of seeking to resolve litigation. Any additional documentary evidence provided during the settlement process would be placed on the case file and could be taken into account by Ofcom for the purposes of its final enforcement decision even if the settlement process is unsuccessful. In addition, Ofcom may follow up any new issues of regulatory concern which come to light during the settlement process.

### **Publicity in settlement cases**

- 5.40 Ofcom's standard practice is not to comment publicly on the fact that settlement discussions are taking place, or that settlement discussions have been unsuccessful.
- 5.41 Following the conclusion of a successful settlement process, Ofcom will close the case and update the details of the case on Ofcom's website. This will generally refer to the fact that a settlement has been agreed and include a summary of the contraventions Ofcom has found and details of the penalty (including the level of the settlement discount) and any other measures imposed (such as any requirements imposed on the broadcaster to take action to bring itself into compliance and/or remedy the consequences of the contravention(s)). Ofcom may also publicise the outcome of the case in a media release relating to the case. Ofcom will normally share in advance a copy of the website update with the broadcaster for information only shortly (and no more than one working day) before publication.

5.42 Ofcom will also publish a non-confidential version of final contravention decision, in accordance with our standard practice.<sup>38</sup>

---

<sup>38</sup> See paragraph 4.32 above.

## Section 6

# Procedural complaints about investigations

## Introduction

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

## The Procedural Officer

- 6.3 A number of appropriately experienced Ofcom staff have Board-delegated authority to act as the Procedural Officer for the purposes of an investigation. The relevant Procedural Officer will be appointed on a case-by-case basis, if a relevant procedural complaint is made.
- 6.4 The Procedural Officer will be independent from the investigation, case team and decision makers, and will not have been involved in the investigation (other than as the Procedural Officer). The role of the Procedural Officer is intended to ensure that procedural issues can be addressed quickly, efficiently and cost effectively, and independently of the case team.

## Types of complaint which can be made to the Procedural Officer

- 6.5 Complaints about the procedure followed by Ofcom when conducting an investigation can be made to the Procedural Officer by the broadcaster, complainant or a third party (where relevant) once the investigation has been formally opened.
- 6.6 The Procedural Officer will deal with complaints which relate to the following:
- a) deadlines for parties to respond to information requests, submit documents or provide representations;
  - b) requests for redaction of confidential information in documents that Ofcom proposes to publish or disclose;
  - c) requests for disclosure or non-disclosure of certain documents or information on Ofcom's case file;
  - d) issues relating to the process for oral hearings; or
  - e) other significant procedural issues that may arise during the course of an investigation.



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

## **Making a complaint to the Procedural Officer**

- 6.8 If a party is not satisfied with the decision of the case supervisor regarding the procedural issue it has raised, then it may refer its concerns to the Procedural Officer. If it wishes to do so, it should make an application to the Procedural Officer as soon as possible after receiving the decision from the case supervisor, and in any event within five working days.
- 6.9 The application should be no longer than five sides of A4 paper and should include:
- a) the name and contact details of the applicant;
  - b) the name and contact details of the lawyers acting for the applicant (where relevant);
  - c) the Ofcom case name and reference number;
  - d) the date of decision made by the case supervisor; and
  - e) a short summary of the issues including a summary of the case team's original decision, the decision of the case supervisor, the reason the applicant wants a review of that decision and the outcome the applicant is seeking.
- 6.10 The applicant should also provide copies of relevant correspondence between it and Ofcom relating to the issue in question and copies of any relevant information or documents which the applicant holds.
- 6.11 The application should be submitted by email to [Procedural.Officer@ofcom.org.uk](mailto:Procedural.Officer@ofcom.org.uk).
- 6.12 The Procedural Officer will provide members of the case team and the case supervisor, and the applicant, the opportunity to present their arguments orally on the telephone or at a meeting.

## **The Procedural Officer's decision**

- 6.13 The Procedural Officer will deal with the application as quickly as possible, and will aim to take a decision in most cases within 10 working days from receipt of the application. In any event the Procedural Officer will reach a decision within 20 working days from receipt of the application. The Procedural Officer may extend this timeframe by no more than 20 working days if there are special reasons to do so.
- 6.14 The Procedural Officer's decision will be submitted in writing to the applicant, and it will be binding on the case team and decision makers. A non-confidential version of the Procedural Officer's decision, or a summary of it, will be published on Ofcom's website, generally at the time the decision is made or at the end of Ofcom's investigation.

Annex 1

# Overview of an enforcement case under these Procedures

