

On 23 January 2017, the UK's Office of Communications (Ofcom) published a [consultation document](#) on potential changes to its 2012 [Enforcement Guidelines](#). On the same day, Ofcom published a separate [consultation document](#) on new guidelines for the enforcement of BBC requirements.

These consultation documents are relevant for all stakeholders in three main respects. First, they provide an opportunity to comment on Ofcom's future enforcement procedures before they are finalised. Second, this consultation signals more clarity in the way in which Ofcom may take enforcement action. Third, once adopted, departure from these guidelines may form one of the grounds for judicial review of Ofcom's decisions.

Background

The Enforcements Guidelines set out how Ofcom approaches compliance and enforcement of its wide-ranging statutory enforcement powers. They were last updated in July 2012. Since then, Ofcom has acquired new statutory enforcement powers, for example, in connection with net neutrality, misuse of telephone numbers and the BBC.

The proposed changes are aimed at introducing more transparency in, and to streamline, Ofcom's procedures across the various enforcement areas that fall within Ofcom's remit. Some of the proposed changes to the Enforcement Guidelines would also have the effect of aligning Ofcom's enforcement processes to the enforcement practice of the Competition and Markets Authority (CMA).

Summary of Proposed Changes

The consultation on the recast of the Enforcement Guidelines proposes to divide the existing Enforcement Guidelines into three separate documents, each dealing with the following types of enforcement actions respectively:

- *New Enforcement Guidelines* for investigating breaches of regulatory conditions, such as for example Significant Market Power (SMP) conditions under the Communications Act and net neutrality obligations under the Open Internet Access Regulations, and consumer protection rules under the Enterprise Act
- *New Competition Enforcement Guidelines* for investigating breaches of UK/EU competition law under the Competition Act and Articles 101 and 102 of the Treaty on the Functioning of the EU
- *New Procedures* for investigating breaches of competition-related conditions in Broadcasting Act licences

The proposed substantive changes across all three documents include the following:

- Giving clearer guidance on how Ofcom expects to open cases and take decisions regarding the progress and outcome of investigations on a case-by-case basis
- Giving clearer guidance on how Ofcom expects to publicise cases and engage with the parties under investigation
- Giving guidance on the use of interim measures in urgent cases and settlement procedures

As part of the consultation on the recast of the Enforcement Guidelines, Ofcom has published draft advice for complainants and whistleblowers – most enforcement cases come from a complaint or whistleblower. For self-referrals of companies involved in a suspected cartel, Ofcom will instead continue to apply the CMA leniency guidance.

The common thread to the proposed changes is making Ofcom's enforcement processes more transparent and streamlined. In many cases, the proposed changes have the effect of bringing Ofcom's enforcement practice more in line with the CMA's enforcement practice, not only with respect to competition law investigations – where the CMA and Ofcom have concurrent powers to enforce competition rules – but also with respect to regulatory investigations – where Ofcom has sole jurisdiction. In particular, Ofcom has for the first time set out guidance on its settlement procedure. Although the practice of reaching a settlement in order to close an investigation is not a novel practice for the regulator, having guidance on this will help to make the process more transparent for companies and their advisors.

Separately, Ofcom has also published guidelines for consultation on the enforcement of BBC requirements dealing with procedures for (a) investigating breaches by the BBC of certain requirements set out in the BBC Agreement in areas of BBC activity that could lead to competition concerns; and (b) investigating a failure by the BBC to comply with enforcement action by Ofcom in accordance with any of Ofcom's enforcement procedures applicable to the BBC.

Will the Proposed Changes Lead to More Enforcement Action?

The timing of these consultations is no coincidence. At the end of last year, Ofcom adopted new [penalty guidelines](#) and recruited Gaucho Rasmussen from the CMA (where he was a senior enforcement director) to lead the regulator's enforcement team. This comes after Ofcom was criticised by the Audit Office at the end of 2016 for not doing enough in bringing enforcement cases, in particular competition law cases. Ofcom currently only has one open investigation under competition rules in relation to the prices, terms and conditions on which Royal Mail Group Limited is offering to provide access to certain letter delivery services. Under the concurrency regime introduced by the UK government almost two years ago, UK sector regulators are now at risk of losing their competition law enforcement powers if they are perceived as not using them to their full extent (the so-called "use it or lose it" rule). Along with the recruitment of an enforcement director from the CMA, the publication of new penalty and enforcement guidelines could be read as the first signal of more transparent enforcement to come on the part of Ofcom, particularly under competition rules.

Ofcom Enforcement Priorities

One of the priorities in Ofcom's proposed [Annual Plan 2017/18](#) is "to enforce the regulatory conditions that we impose on communications providers which have a competition focus" and "to assess complaints and determine disputes between providers of electronic communications networks and services and conduct investigations under competition law".

Based on recent EU enforcement trends in the sector, the headlines of potential target areas where we might see more enforcement on the part of Ofcom in 2017/18 under sector specific regulation and/or competition rules may include any of the following:

- SMP market analyses and conditions
- Openreach legal separation
- Net neutrality and zero rating agreements
- Roaming agreements and alliances
- Co-investment and sharing of spectrum, network and passive infrastructure elements

- Revenue sharing and unbundling of non-geographic numbers usage tariffs
- Pricing and bundled fixed-mobile broadband offers by dominant players
- Access agreements with a dual distribution component where the access provider and access seeker are also competitors at retail level (e.g. MVNO agreements)
- Oligopolistic markets
- Access to content and Pay TV
- The impact of the BBC's activities on competition
- Competition-related conditions in broadcasting licences
- Competition concerns in adjacent content and device markets

Post Brexit, one might expect that the legal frameworks that apply in telecoms and broadcasting might be amended, through further legislation tailored to benefit UK consumers (e.g. with respect to international roaming). This might also have an impact on Ofcom's enforcement procedures and priorities. However, this process will take time. It will require parliamentary resources and decisions about how to prioritise between different sectors.

Next Steps

The closing date for responses is 5 p.m. GMT on 6 March 2017. Following the consultation, Ofcom will publish its new procedures.

In the meantime, as Ofcom gears up for more transparent enforcement, companies in the communications sector should make sure that their regulatory and competition compliance programmes are up to date.

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