



# Advice for complainants

Guidance on submitting a complaint to Ofcom

Guidance

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# About this document

This document gives advice to stakeholders that consider they may be affected by a suspected breach of a regulatory requirement, consumer protection legislation, competition law or a competition-related condition in a broadcast licence about how they can submit a complaint to Ofcom, and explains the steps we expect complainants to take before making a complaint to Ofcom.

This document also sets out a suggested format for submitting a complaint about an alleged breach of a regulatory requirement, consumer protection law, competition law or a competition-related condition in a broadcast licence (see Annex 1).

This document also provides information for whistleblowers and guidance on making a request for Ofcom to take urgent action or impose interim measures.

The advice given in this document does not apply to complaints from individual consumers about communications services, postal services or radio and television programmes. If you want to make a complaint to Ofcom as a consumer, viewer or listener about a telecoms provider, broadcaster or postal services provider, please visit our website for advice on how to make a complaint <https://www.ofcom.org.uk/complain-to-ofcom>.

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## Section 1

# Introduction

- 1.1 This document gives advice to stakeholders that consider they may be affected by a suspected breach of a regulatory requirement, consumer protection legislation, competition law or a competition-related condition in a broadcast licence about how they can submit a complaint to Ofcom, and explains the steps we expect complainants to take before making a complaint to Ofcom.
- 1.2 This document also sets out a suggested format for submitting a complaint about an alleged breach of a regulatory requirement, consumer protection law, competition law or a competition-related condition in a broadcast licence (see Annex 1). We may not be able to investigate a complaint which fails to include the requested information or supporting evidence.
- 1.3 This document also provides information for individuals working in the communications sector who contact us because they have concerns about possible wrongdoing at their own organisation, and guidance on making a request for Ofcom to take urgent action or impose interim measures.
- 1.4 The advice given in this document does not apply to complaints from individual consumers about communications services, postal services or radio and television programmes. If you want to make a complaint to Ofcom as a consumer, viewer or listener about a telecoms provider, broadcaster or postal services provider, please visit our website for advice on how to make a complaint <https://www.ofcom.org.uk/complain-to-ofcom>.

## What does this guidance cover?

- 1.5 This guidance provides advice to stakeholders, such as businesses, trade associations or consumer groups on how to submit a complaint to Ofcom regarding compliance with most regulatory requirements relating to telecoms and postal services, including:
  - complaints relating to compliance with regulatory requirements imposed on telecoms providers under the Communications Act 2003 (the “**Communications Act**”);<sup>1</sup>
  - complaints relating to compliance with restrictions or conditions applicable to companies with powers under the electronic communications code, as set out in the Electronic Communications Code (Conditions and Restrictions) Regulations 2003;<sup>2</sup>

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<sup>1</sup> Such as general conditions, access-related conditions, universal service conditions and SMP conditions imposed under section 45 of the Communications Act or requirements under section 105A of the Communications Act

<sup>2</sup> Note that Ofcom does not have powers to enforce compliance with the Electronic Communications Code itself.

- complaints relating to compliance by mobile operators with the requirements of the EU Mobile Roaming Regulation<sup>3</sup> and the Mobile Roaming (European Communities) Regulations 2007 (the “**Mobile Roaming Regulations**”);
- complaints relating to compliance with the requirements relating to net neutrality under Articles 3, 4 and 5 of the EU Open Internet Access Regulation<sup>4</sup> and the Open Internet Access (EU Regulation) Regulations 2016 (the “**Open Internet Access Regulations**”);
- complaints about persistent misuse of electronic communications networks and services;<sup>5</sup> and
- compliance with a regulatory requirement imposed under the Postal Services Act 2011 (the “**Postal Services Act**”) or other postal legislation<sup>6</sup> on postal operators.

1.6 It also applies to complaints relating to compliance with consumer protection legislation, specifically:

- compliance by telecoms providers or postal operators with consumer protection provisions in Part 8 of the Enterprise Act 2002 (the “**Enterprise Act**”), including the Consumer Protection from Unfair Trading Regulations 2008; and
- potentially unlawful or unfair terms in consumer contracts under the Consumer Rights Act 2015.

1.7 Finally, it applies to complaints relating to competition issues, specifically:

- compliance with competition law and alleged anti-competitive conduct contrary to the Competition Act 1998 (the “**Competition Act**”) and/or Article 101 and/or Article 102 of the Treaty on the Functioning of the European Union; and
- compliance with competition-related conditions in Broadcasting Act licences.<sup>7</sup>

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<sup>3</sup> Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13th June 2012 on roaming on public mobile communications networks within the Union. Ofcom has powers to enforce this under the Mobile Roaming (European Communities) Regulations 2007 (as amended), available on [www.legislation.gov.uk](http://www.legislation.gov.uk).

<sup>4</sup> Regulation (EU) No 2015/2120 of the European Parliament and of the Council of 25<sup>th</sup> November 2015 laying down measures concerning open internet access. Ofcom has powers to enforce the provisions relating to net neutrality under Articles 3, 4 and 5 of the Open Internet Access (EU Regulation) Regulations 2016, available on [www.legislation.gov.uk](http://www.legislation.gov.uk).

<sup>5</sup> Ofcom has power to take enforcement action against ‘persistent misuse’ of an electronic communications network or service under sections 128 to 130 of the Communications Act. These guidelines explain the enforcement procedures we will generally follow where we take action against such misuse. Ofcom’s statement of general substantive policy on how we use our persistent misuse powers is available here: [https://www.ofcom.org.uk/data/assets/pdf\\_file/0024/96135/Persistent-Misuse-Policy-Statement.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0024/96135/Persistent-Misuse-Policy-Statement.pdf).

<sup>6</sup> Such as section 89A or 116(2A) of the Postal Services Act 2000 (schemes as to terms and conditions for provision of postal services, and the Postcode Address File), or under section 25(5) of the Consumers, Estate Agents and Redress Act 2007 (requirements to give information to Citizens Advice, etc)

<sup>7</sup> These include conditions imposed under section 316 of the Communications Act in licences under the Broadcasting Acts 1990 and 1996 relating to securing fair and effective competition in licensed

- 1.8 Ofcom has separately published guidance on its procedures for investigating compliance with and enforcing regulatory requirements and consumer protection law (see Ofcom's *Enforcement Guidelines for regulatory investigations*<sup>8</sup>), its procedures for Competition Act investigations (see Ofcom's *Enforcement Guidelines for Competition Act Investigations*<sup>9</sup>) and its procedures for taking enforcement action in cases relating to potential breaches of competition conditions in broadcast licences (see Ofcom's *Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences*<sup>10</sup>). Potential complainants should refer to those documents for further information about how Ofcom investigates complaints.
- 1.9 The advice set out in this document does not apply to the following types of complaints which are covered by separate procedures:
- complaints from individual consumers about communications services, postal services or television and radio programmes, as noted above;<sup>11</sup>
  - complaints about broadcast content<sup>12</sup> or compliance by holders of Broadcasting Act<sup>13</sup> licences with conditions of their licence, including complaints about compliance with Broadcasting Act licence conditions relating to broadcast content (except for competition-related conditions in Broadcasting Act licence conditions);<sup>14</sup>
  - complaints about video-on-demand content;<sup>15</sup>
  - complaints about compliance by the BBC with relevant requirements;<sup>16</sup>

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broadcast services and other competition-related conditions in Broadcasting Act licences, including non-discrimination obligations in multiplex licences

<sup>8</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf)

<sup>9</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0014/102515/Enforcement-guidelines-for-Competition-Act-investigations.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0014/102515/Enforcement-guidelines-for-Competition-Act-investigations.pdf)

<sup>10</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0017/102518/Procedures-for-investigating-breaches-of-competition-related-conditions-in-Broadcasting-Act-licences.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0017/102518/Procedures-for-investigating-breaches-of-competition-related-conditions-in-Broadcasting-Act-licences.pdf)

<sup>11</sup> For advice to individual consumers as to how they can complain to Ofcom as a viewer or listener about a broadcaster, please visit our website for advice on how to make a complaint <https://www.ofcom.org.uk/complain-to-ofcom>.

<sup>12</sup> Ofcom has published procedures for investigating breaches of content standards for television and radio which are available at [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). Separate procedures apply to the consideration of Fairness and/or Privacy complaints and are available at [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>13</sup> Broadcasting Act 1990 and Broadcasting Act 1996.

<sup>14</sup> Ofcom has published general procedures for investigating breaches of broadcast licences, which are available at [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) and which explain how these types of complaints can be made to Ofcom.

<sup>15</sup> Ofcom has published procedures for investigating breaches of rules for on-demand programme services, which are available at: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0033/74499/procedures-investigating-breaches.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0033/74499/procedures-investigating-breaches.pdf) and which explain how these types of complaints can be made to Ofcom

<sup>16</sup> Guidance on Ofcom's procedures for enforcement of BBC requirements may be found here: <https://www.ofcom.org.uk/consultations-and-statements/ofcom-and-the-bbc>. The exception to this is enforcement action under section 198ZA of the Communications Act for breach of information

- super-complaints made by designated consumer bodies;<sup>17</sup>
  - complaints about interference with radio spectrum.<sup>18</sup>
- 1.10 This document also does not give guidance about how to submit a regulatory dispute to Ofcom. Guidance on making dispute submissions to Ofcom are set out in Ofcom's *Dispute Resolution Guidelines and Guidance under the Communications (Access to Infrastructure) Regulations 2016*.<sup>19</sup>
- 1.11 Some types of complaints connected to telecoms services or postal services may fall within the jurisdiction of another agency which is better placed to deal with the concern, for example:
- the Phone-paid Services Authority (previously known as PhonepayPlus) has responsibility for the day-to-day regulation of premium rate phone services and deals with complaints about compliance with the Code of Practice for Premium Rate Services;<sup>20</sup>
  - the Information Commissioner's Office (ICO) is principally responsible for dealing with concerns about certain types of nuisance calls and messages, such as unsolicited direct marketing calls, texts and faxes and recorded marketing messages and concerns about data protection breaches;<sup>21</sup>
  - Trading Standards may be better placed to deal with certain complaints about consumer protection legislation;<sup>22</sup>
  - concerns about scams or fraud can be reported to Action Fraud.<sup>23</sup>

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gathering requirements conferred on Ofcom under the BBC Charter and Agreement relating to our BBC functions, by persons other than the BBC, which is covered by these Guidelines.

<sup>17</sup> The Competition and Markets Authority (CMA) has published guidance (originating from the Office of Fair Trading) for designated consumer bodies on how to make super-complaints which is available here: <https://www.gov.uk/government/publications/how-consumer-bodies-can-make-super-complaints>

<sup>18</sup> See the relevant information on our website about our spectrum enforcement powers: <https://www.ofcom.org.uk/spectrum/interference-enforcement>

<sup>19</sup> See <http://stakeholders.ofcom.org.uk/binaries/consultations/dispute-resolution-guidelines/statement/guidelines.pdf> and [https://www.ofcom.org.uk/data/assets/pdf\\_file/0025/95191/Guidance-under-the-Communications-Access-to-Infrastructure-Regulations-2016.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0025/95191/Guidance-under-the-Communications-Access-to-Infrastructure-Regulations-2016.pdf)

<sup>20</sup> Further information about the Phone-paid Services Authority can be found here: <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/policy/premium-rate-services>; <http://psauthority.org.uk/>

<sup>21</sup> Further information about the ICO can be found here: <https://ico.org.uk/>. See also the Letter of Understanding we have entered into with the ICO: <https://www.ofcom.org.uk/about-ofcom/how-ofcom-is-run/organisations-we-work-with>

<sup>22</sup> Information about your local Trading Standards office can be found here: <https://www.gov.uk/find-local-trading-standards-office>. Citizens Advice also provides advice to consumers about types of concerns which should be reported to Trading Standards: <https://www.citizensadvice.org.uk/consumer/get-more-help/report-to-trading-standards/>

<sup>23</sup> [http://www.actionfraud.police.uk/report\\_fraud](http://www.actionfraud.police.uk/report_fraud)

## Status of this guidance

- 1.12 This guidance takes effect from [28] June 2017.
- 1.13 This document provides general advice to complainants on how to submit a complaint to Ofcom. Where we depart from the approach set out in this document, we will explain our reasons for doing so.
- 1.14 This document is not a substitute for any regulation or law and is not legal advice.



## Section 2

# Making a complaint to Ofcom

## Before submitting a complaint to Ofcom

2.1 Before making a complaint to Ofcom, we expect complainants to:

- **Try to resolve matters through commercial discussions wherever possible:** Ofcom may not take a complaint forward if the complainant has not made appropriate attempts to resolve problems directly with the subject of your complaint.<sup>24</sup>
- **Speak to us first:** We are open to listening to concerns and discussing emerging issues. We cannot give a view on whether the conduct is likely to amount to a breach of a relevant requirement but may be able to refer you to previous policy decisions or investigations that have dealt with similar issues or explain the type of information we may need in order to investigate your complaint.
- **Consider any relevant decisions:** The issue you want to complain about may have been the subject of previous investigations or policy decisions. Details of investigations are published in the Competition and Consumer Enforcement Bulletin (CCEB) section of Ofcom's website.<sup>25</sup>
- **Gather as much evidence and information as possible:** We may decide not to pursue complaints where the complainant does not provide any evidence to support an allegation. We realise that, in some cases, complainants will not have access to all relevant information (for example competitors' cost data). However, you should provide as much evidence as you can.
- **Be prepared:** We expect organisations to commit appropriate resources to an investigation, for example, in meeting deadlines for information requests. If you submit a complaint, we will assume that you have considered and are prepared to meet this commitment.

## How to submit a complaint to Ofcom

2.2 Complaints should be submitted to:

Investigations Programme Manager

Competition Group Investigations Team

Ofcom

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<sup>24</sup> We recognise that there may be cases where this is not possible or appropriate, depending on the circumstances of the relationship between the complainant and the subject of the complaint, and the nature of the relevant concern. However, we would normally expect the complainant to explain to us why they had not sought to resolve the matter with the subject of the complaint prior to coming to us, if relevant.

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

Riverside House

2A Southwark Bridge Road

London SE1 9HA

e-mail: [competition.complaints@ofcom.org.uk](mailto:competition.complaints@ofcom.org.uk)

Telephone: 020 7783 4100

- 2.3 Annex 1 sets out a format for submitting a complaint relating to a potential breach of a regulatory requirement, a competition-related condition in a broadcast licence, consumer law or alleged anti-competitive conduct. Where relevant, complainants may make a single complaint submission which includes allegations of breaches of regulatory requirements and/or a competition-related condition in a broadcast licence and/or consumer protection law and/or competition law. In such a case, a complainant should provide all relevant details needed in support of each element of the complaint.
- 2.4 We may not be able to investigate a complaint which fails to include the requested information or supporting evidence. Further information on the type of evidence we expect to see in a complaint submission is also set out in Annex 1.
- 2.5 Reasons why we may not be able to take forward a complaint submission include because:
- the complaint submission does not explain which provision the complainant considers has been infringed, or, if it does, does not provide any evidence or reasoning to explain why;
  - the complainant makes a general complaint about 'anti-competitive' behaviour without specifying the conduct in question, explaining why they consider it is unlawful or explaining the impact they consider it has had on competition and the consumer interest; or
  - the complaint is about a commercial or contractual disagreement between organisations and is unrelated to regulatory issues.
- 2.6 Some of the complaints we receive fall within the jurisdiction of another agency which is better placed to handle the complaint, for example the Phone-paid Services Authority (previously known as PhonepayPlus), Trading Standards or the Information Commissioner's Office. We will tell you if we think your complaint would more appropriately be handled by another agency.
- 2.7 We expect stakeholders to make adequate, well-reasoned submissions and back up allegations with evidence. We acknowledge that some stakeholders, particularly smaller companies and individuals, may need our help in formulating complaints and we will provide guidance to less experienced complainants. Complainants requiring such guidance should contact the Investigations Programme Manager.
- 2.8 We require complainants to submit a statement by a senior member of the complainant's executive, preferably the Chief Executive Officer, that due care has been taken to ensure that the evidence submitted with a complaint is correct and complete.

- 2.9 We recommend that anyone considering making a complaint takes legal advice on their submission. If you want to make a complaint about competition law issues, you may want to consider the Competition Pro Bono Scheme (which is independent of Ofcom), which offers free independent legal advice to individuals or businesses who believe that their rights under competition law have been infringed or who are concerned that they may be in breach of the competition law prohibitions.<sup>26</sup>

## Acknowledgement of submissions

- 2.10 We will normally acknowledge receipt of a complaint within two working days. This does not necessarily mean that we think the complainant has provided all the necessary information and/or the complaint submission is in the appropriate format.
- 2.11 If a complaint submission does not meet our requirements or we consider we require additional information, we will advise you on what else may be needed before we will consider the submission.

## Confidential information and requests for anonymity

- 2.12 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 be balanced against the restrictions on disclosure contained in sections 26 and 393 of the Communications Act, section 56 of the Postal Services Act and section 237 of the Enterprise Act 2002, and the legitimate right of parties to ensure that confidential and commercially sensitive information is protected.
- 2.13 Unless a complainant asks Ofcom not to do so, we will usually disclose the complainant's identity to the business whose conduct is the subject of the complaint as well as sharing a non-confidential version of the complaint submission with it for comment.
- 2.14 We will consider requests from complainants for anonymity on a case by case basis, but we may decide that it is not feasible to open, or to conduct, an investigation without the complainant revealing its identity to us or without us revealing the complainant's identity to the subject of the complaint.
- 2.15 We ask complainants to confirm that their complaint submission is non-confidential, or, if a complaint submission contains confidential information, we require complainants to submit a non-confidential version of the complaint which can be shared with the subject of your complaint.
- 2.16 You should clearly identify any information you consider to be confidential and explain why you consider the relevant information to be confidential. The non-confidential version should also include suggested non-confidential summaries of information (for example "confidential details of contracts") and non-confidential ranges of numbers rather than simply removing the confidential information. A blanket marking of "confidential" on all information supplied is unhelpful.
- 2.17 It is for us to determine what is, and is not, appropriate to disclose within the relevant statutory framework and Ofcom may consider it appropriate to disclose information notwithstanding that a party has asserted confidentiality over it. We will decide on the best means of dealing with confidential information on a case-by-case basis, in

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<sup>26</sup> More information can be found here: <http://www.probonogroup.org.uk/competition/>

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. 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.

- 2.18 If we decide to open an investigation into matters raised in the complaint, unless you ask us not to do so, we would usually expect to publish details of the identity of the complainant, and of the matters raised in the complaint which Ofcom is investigating when we publicly announce that we have opened an investigation on the CCEB section of our website.<sup>27</sup> If you have a concern about being publicly identified on Ofcom's website, you should raise this 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.
- 2.19 Special considerations apply for whistleblowers (see below).

## Next steps

- 2.20 Ofcom has limited resources and cannot investigate every complaint that we receive. We make decisions about whether or not to open investigations on a case-by-case basis, having considered all the matters that appear to us to be relevant to whether or not we should do so.
- 2.21 Further information on the types of considerations that Ofcom takes into account when deciding what to investigate, on how we decide whether to open an investigation and on how we investigate is set out in Ofcom's *Enforcement Guidelines for regulatory investigations*<sup>28</sup> (which give guidance on how Ofcom will take enforcement action in most cases relating to telecoms and postal services), Ofcom's *Enforcement Guidelines for Competition Act Investigations*<sup>29</sup> (which gives guidance on how Ofcom will take enforcement action in relation to breaches of competition law) and Ofcom's *Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences*<sup>30</sup> (which explain how Ofcom will take enforcement action in cases relating to potential breaches of competition conditions in broadcast licences). Complainants should refer to those documents for more information.

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<sup>27</sup> <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins>

<sup>28</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf)

<sup>29</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0014/102515/Enforcement-guidelines-for-Competition-Act-investigations.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0014/102515/Enforcement-guidelines-for-Competition-Act-investigations.pdf)

<sup>30</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0017/102518/Procedures-for-investigating-breaches-of-competition-related-conditions-in-Broadcasting-Act-licences.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0017/102518/Procedures-for-investigating-breaches-of-competition-related-conditions-in-Broadcasting-Act-licences.pdf)

## Section 3

# Advice for whistleblowers

- 3.1 Ofcom recognises that those working in an organisation are often the first to realise that there may be something wrong and therefore encourages all individuals to raise genuine concerns about malpractice (unprofessional or illegal behaviour) at the earliest practicable stage rather than wait for proof. This is known as 'whistleblowing'.
- 3.2 Ofcom is required to put in place a procedure under which individuals working in the communications sector may contact Ofcom 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>31</sup>
- 3.3 Ofcom has published guidance on how to make a disclosure under the Public Interest Disclosure Act, which is available on Ofcom's website.<sup>32</sup>
- 3.4 Ofcom is a "prescribed person" to which "qualifying disclosures"<sup>33</sup> can be made by those working in the communications industry on matters relating to:
  - a) the provision of electronic communications networks and services and the use of the electro-magnetic spectrum;
  - b) broadcasting and the provision of television and radio services;
  - c) media ownership and control; and
  - d) competition in communications markets.
- 3.5 A "qualifying disclosure" means a disclosure, made in good faith, of information which, in the reasonable belief of the individual making the disclosure, tends to show one or more of the following has been committed, is being committed or is likely to be committed:
  - a criminal offence;
  - a breach of a legal obligation;
  - a miscarriage of justice;
  - a danger to the health and safety of any individual;
  - damage to the environment; or
  - deliberate covering up of information tending to show any of the above five matters.

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<sup>31</sup> Under Part IVA of the Employment Rights Act 1996 (as inserted by the Public Interest Disclosure Act 1998)

<sup>32</sup> <https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines/procedure-for-making-a-disclosure>

<sup>33</sup> As set out in the Public Interest Disclosure (Prescribed Persons) Order 2014. Note that Ofcom is not a "prescribed person" in relation to every area that we regulate. For example, we are not a "prescribed person" for disclosures relating to matters concerning the provision of postal services.

- 3.6 “Qualifying disclosures” can be made by all workers, including temporary agency staff (although not the self-employed or volunteers) and can also be individuals who are no longer currently working at the organisation.
- 3.7 Under the Employment Rights Act 1996 individuals making a qualifying disclosure may benefit from legal protection against being dismissed or penalised by their employers as a result of disclosing the relevant information. However, it is up to an employment tribunal to decide after the event whether or not a disclosure was protected under the Act. Ofcom does not have any powers to determine whether a disclosure is protected, or to intervene in employment relations and Ofcom cannot provide legal advice.
- 3.8 Individuals with concerns are encouraged to make a disclosure (blow the whistle) within their organisation in the first instance. Ofcom is an alternative route for individuals, who have raised a concern to their organisation and are concerned by the response, or lack of response, from their organisation or for those who feel unable to talk to anyone at their organisation for whatever reason. Individuals finding themselves in this situation should follow Ofcom’s procedure for making a disclosure as referred to in paragraph 3.3 above. That procedure is not to be used by individuals seeking to make a grievance about their personal employment situation. Ofcom is particularly interested in live concerns or matters of recent history rather than past issues.
- 3.9 Disclosures may be made in confidence to the Ofcom’s Corporation Secretary who is Ofcom’s “Designated Officer” for the purposes of the Act.
- 3.10 Any information received by Ofcom will be treated sensitively and Ofcom will investigate matters raised under its whistleblowing procedure in a responsible manner. The Act does not require Ofcom to investigate every disclosure received. The decision whether or not to investigate is based upon various criteria designed to ensure the most effective use of the resources at Ofcom’s disposal (as explained further in paragraph 2.20 above and in our *Enforcement Guidelines for regulatory investigations*, *Enforcement Guidelines for Competition Act investigations* and *Procedures for investigating breaches of competition-related conditions in Broadcasting Act licences*).
- 3.11 When contacting Ofcom to make a “qualifying disclosure”, whistleblowers are encouraged to try and provide as much supporting information and evidence as possible. Whistleblowers are also asked to disclose any personal interests they have in relation to the disclosure when contacting Ofcom and to confirm their current employment status.

## Section 4

# Requests for urgent action

## Ofcom's power to take urgent action in regulatory cases

- 4.1 Ofcom has the power to take urgent action in relation to the following types of enforcement action:
- under section 98 of the Communications Act in relation to a breach of a regulatory requirement imposed under section 45 of the Communications Act 2003 (except an SMP apparatus condition);
  - under section 111A of the Communications Act in relation to a breach of a requirement under the Electronic Communications Code (Conditions and Restrictions) Regulations 2003; or
  - under paragraphs 8 to 10 of Schedule 7 to the Postal Services Act 2011 in relation to a breach of a regulatory requirement imposed under the Postal Services Act 2011 or other postal legislation<sup>34</sup>.
- 4.2 In accordance with those provisions, we can make a direction suspending or restricting a communications provider's or postal operator's activities<sup>35</sup> or suspending the application of powers granted in respect of the Electronic Communications Code<sup>36</sup>, as applicable. We can only do so if:
- we have reasonable grounds to believe the subject of the request for urgent action is contravening or has contravened a relevant regulatory requirement; and
  - we have reasonable grounds to suspect that the contravention has resulted in, or creates an immediate risk of:
    - o a serious threat to the safety of the public, to public health or to national security;
    - o serious economic or operational problems for persons (other than the contravening provider) who are communications providers or persons who make associated facilities available, or who provide postal services; or

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<sup>34</sup> Such as a direction given under section 89A or 116(2A) of the Postal Services Act 2000 (schemes as to terms and conditions for provision of postal services, and the Postcode Address File), or under s.25(5) of the Consumers, Estate Agents and Redress Act 2007 (requirements to give information to Citizens Advice, etc).

<sup>35</sup> See section 98(4) of the Communications Act. More specifically, 'a direction that [the provider's] entitlement to provide electronic communications networks or electronic communications services, or to make associated facilities available, is suspended (either generally or in relation to particular networks, services or facilities; or a direction that that entitlement is restricted in the respects set out in the direction.' Sections 98(5) to (8) also apply to such a direction. See also paragraph 8(4) and 9 of Schedule 7 to the Postal Services Act.

<sup>36</sup> See section 111A of the Communications Act.

- o serious economic or operational problems for persons who make use of electronic communications networks, electronic communications facilities or associated facilities, or for users of postal services; and
  - we consider it is appropriate to take action given the urgency of the case.
- 4.3 Ofcom may exercise these powers following a request to do so by an applicant, or on its own initiative.
- 4.4 We would expect to use these powers rarely, since the statutory criteria impose a high threshold for exercising them.

## Ofcom's power to take urgent action in competition cases

- 4.5 Under section 35 of the Competition Act, Ofcom has the power to require a person to comply with temporary directions (referred to as "interim measures") after we have opened an investigation and before we complete our investigation. We can impose interim measures where we consider that it is necessary to act as a matter of urgency for the purpose of:
- preventing significant damage to a particular person or category of person; or
  - protecting the public interest.
- 4.6 In such a case, we may give such directions as we consider appropriate for preventing significant damage or protecting the public interest. Possible examples could include requiring a provider to:
- continue supplying particular goods, services or other inputs (such as access to infrastructure);
  - temporarily suspend or reverse a change in a contractual term or condition, such as a price increase or decrease.
- 4.7 Again, Ofcom may exercise these powers following a request to do so by an applicant, or on its own initiative.

## Making a request for urgent action

- 4.8 Consideration of requests for urgent action involves the commitment of significant resources by Ofcom. We therefore expect anyone making a request for urgent action to come to us with a well-reasoned submission, as soon as possible after the issue or conduct has arisen which you consider requires action to be taken, and providing as much information and evidence as possible in support of your application. We also expect applicants to assist our consideration of their request by providing timely co-operation in responding to any requests for further information.
- 4.9 You are unlikely to persuade us that we should consider taking urgent action if you have not acted urgently in bringing us your request. However, we recognise that in certain cases organisations that are considering making requests for urgent action or interim measures may find it helpful to contact us in advance of making their submission for guidance on the type of information and evidence we would need in order to assess a request in a particular case. If you require such guidance, you should contact the Investigations Programme Manager.



- 4.10 If the request for urgent action relates to an alleged contravention which we are not currently investigating, in order to decide whether to grant the request, we will need to have sufficient information to determine whether to open an investigation, and, in the case of a request for urgent action under the Communications or Postal Services Acts, to determine whether we have sufficient grounds to issue a provisional breach decision. In such cases, we would therefore expect applicants to submit all the information we would normally expect to receive from a complaint submission in accordance with the guidance set out in this document, along with their request for urgent action.
- 4.11 In making a request for urgent action, you should provide as much information and evidence as possible for the purposes of demonstrating that there has been a contravention of a condition or infringement of competition law (as relevant), that the statutory criteria for taking urgent action or imposing interim measures are met in your case, and that the alleged contravention or infringement justifies the commitment of significant resources by Ofcom to pursue the issue as a matter of urgency. Relevant evidence should include:
- evidence which demonstrates why the damage caused will be significant or why serious economic or operational problems will be caused (as applicable) and/or why the conduct would be contrary to the public interest<sup>37</sup> or give rise to a serious threat to public safety, public health or national security (as applicable); and
  - evidence which demonstrates why urgent action is required and why the requested action will prevent, limit or remedy the harm identified.
- 4.12 Evidence on damage or economic/operational problems could include:
- an assessment of the financial losses directly attributable to the behaviour complained about, by reference to the person's or category of persons' size or financial resources (although financial loss on the part of a person bringing the complaint may not be sufficient to demonstrate that a case has met the statutory criteria);
  - an explanation of the impact of the issue on the business of a person or category of persons, for example restriction on their ability to obtain supplies or access to customers or damage to their goodwill or reputation;
  - details of any other stakeholders likely to be affected and/or the likely consumer harm which would arise as a result of the conduct.
- 4.13 Concerns about proposed or recent changes in agreements or conduct are generally more likely to present grounds for urgent action than allegations about established behaviour or agreements.
- 4.14 We will look to handle a request for urgent action expeditiously, but it is also important to ensure that the provider about whom the request for urgent action has been made has a fair opportunity to comment on and respond to the request. This means that in most cases, where time allows, we will notify that provider that we have received such a request, provide a non-confidential version of the request submission and give the subject of the request the opportunity to make representations to Ofcom prior to making a decision on whether to grant it.

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<sup>37</sup> For example, harm to competition or consumers as a result of the suspected infringement.

- 4.15 Ofcom expects applicants making requests for urgent action to provide a non-confidential version of their request which we can share with the subject of the request at the same time as submitting their request to us. Any delay in providing a non-confidential version of the request is likely to lead to delay in allowing us to progress consideration of the request.
- 4.16 Ofcom may also need to gather further information from the applicant in order to assess whether the statutory criteria are met and whether it is appropriate to take urgent action. In circumstances where Ofcom is considering a request for urgent action or interim measures prior to having opened an investigation, Ofcom may request such information informally, rather than using our statutory information gathering powers (in particular, we cannot use statutory information gathering powers under section 26 of the Competition Act until we have opened an investigation). Ofcom expects applicants to provide timely co-operation in responding to such informal requests for information, and failure to do so is likely to lead to delay in allowing us to progress consideration of the request. Assuming we decide that the threshold for opening an investigation has been met and we proceed to open an investigation, we would expect to follow up with statutory requests for information as relevant.

### Process for considering a request for urgent action

- 4.17 We will assess requests from applicants for urgent action under the Communications Act or Postal Act or for interim measures under the Competition Act against the relevant statutory criteria. If we consider the test is met then we may take urgent action or grant interim measures at our discretion. In exercising this discretion, we consider that we should have regard to other relevant considerations including the impact on the person who would be subject to the direction and any relevant third party interests.
- 4.18 Further details on the process we would expect to follow in considering a request for urgent action are set out in Section 6 of our *Enforcement Guidelines for regulatory investigations*<sup>38</sup>, in respect of requests for urgent action under the Communications or Postal Services Acts, and in Section 6 of our *Enforcement Guidelines for Competition Act investigations*<sup>39</sup>, in respect of requests for interim measures under the Competition Act.

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<sup>38</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf)

<sup>39</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0014/102515/Enforcement-guidelines-for-Competition-Act-investigations.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0014/102515/Enforcement-guidelines-for-Competition-Act-investigations.pdf)

## Annex 1

# Format for submitting a complaint to Ofcom

## Contents of a complaint submission

A1.1 A complaint submission should contain the following information. Note that the information set out in Sections A, B, C, E and F should be provided in the case of a complaint relating to relating to an alleged breach of a relevant regulatory requirement, consumer protection law, competition law or a competition-related condition in a Broadcasting Act licence, while the information set out in Section D is only required if the complaint includes an allegation relating to a potential infringement of competition law:

### Section A: Preliminary information

A1.2 Please provide:

- **a summary of the complaint**, including the background, undertakings concerned, products/services, key dates, alleged infringement, harm done, relief sought);
- **complainant contact details**: the name, address, telephone number, e-mail address of your business / organisation and the contact details of a person who can discuss the detail of a complaint with Ofcom;
- **complainant's business**: a brief explanation of the nature of your business and its scale (local, national, international, approximate turnover) / details of your remit and membership if you are a trade organisation / details of your remit and who you represent if you are a consumer group;
- **details about the subject of the complaint**: the name and contact details of the subject(s) of the complaint (to the extent known) and details of the relationship between the complainant and the subject of the complaint, for example whether the complainant is a competitor.

### Section B: Legal basis for the complaint

A1.3 Please specify what provision you believe has been breached, for example:

- a general condition or an SMP Condition;
- a universal postal service provider ("USP") condition;
- a consumer protection provision, for example the Consumer Protection from Unfair Trading Regulations 2008;
- a provision contained in an EU Regulation (such as the EU Mobile Roaming Regulation);
- a competition-related condition in a Broadcasting Act licence;

- Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) or Chapter I of the Competition Act 1998 / Article 102 TFEU or Chapter II of the Competition Act 1998.

A1.4 Please explain clearly why you believe this provision has been breached.

### **Section C: Details of the complaint**

A1.5 Please provide:

- an explanation of the reasons for the complaint;
- the products and/or services concerned by the complaint;
- details of the structure of supply and demand for the products/services concerned;
- relevant dates and incidents;
- details of any relevant contact with the subject of the complaint, including details of any relevant commercial negotiations relating to the matter concerned;
- a chronology of events;
- how your business or those you represent have been affected by the alleged activity;
- evidence of actual or potential effect on consumers;
- relief/remedy sought, including any request for urgent action or interim measures,<sup>40</sup> and details of the timing/urgency of the complaint and reasons; and
- names of other industry members who can support the complaint.

### **Section D: The relevant market**

This information is only needed for complaints relating to alleged infringements of competition law.

A1.6 In order to carry out its investigation, Ofcom will have to obtain certain information from the complainant, the subject of the complaint and potentially others, to enable it to reach a view on the relevant economic market(s). Information about the markets involved is fundamental to any investigation of alleged anti-competitive behaviour. For example, in order to take action against an abuse of a dominant position, it is necessary to establish the market(s) - if any - in which the dominant position exists, identify the firm(s) that hold that position and then assess the effect of the alleged abuse on competition.

A1.7 We therefore ask for complainants to set out their understanding of the relevant market(s) into which the products/services that are the subject of the complaint fall and the nature of competition in the relevant market(s). The following is a non-

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<sup>40</sup> See Section 4 of this document for further guidance on making a request for urgent action or application for interim measures.

exhaustive list of the type of information that may be helpful for the purposes of an economic analysis of the relevant market(s):

- (i) Details of the characteristics and intended use of the relevant products/services and their applications.
- (ii) Details of any close substitutes for the product or service in question, i.e. whether they are interchangeable with other products/services and what the actual and potential alternatives are (if any).
- (iii) Any information the complainant can provide about how customers would react if the price of the products/services increased (e.g. any market research on whether they would be likely/able to buy alternative products/services more cheaply or would continue to purchase the more expensive products/services).
- (iv) Details of the target customers and whether any particular features of the product or service are important to different categories of target customers (e.g. residential customers, business customers).
- (v) The identity of, and contact details for, the main customers of the product/service concerned.
- (vi) Details about the geographic scope of supply and demand for the product/service concerned (e.g. is this regional/national/cross-border?).
- (vii) Any information about how easily and quickly undertakings could switch to supplying (or buying) an alternative product – for example if an existing supplier increased the price of the product/service, would another supplier provide the same or similar products more cheaply? What factors would be relevant in making the decision to start to supply the products/services more cheaply? Could any other firms switch existing capacity to supply the product (e.g. would a need for a government authorisation materially delay supply)?
- (viii) Details of the approximate total size of the market (in value and volume terms) and how it has changed in recent years.
- (ix) Information about the key market participants and their approximate market shares (by value and by volume), as well as how market shares have changed in the last 2-5 years.
- (x) Information on the manner in which firms in the market compete. For example, mainly on price or on quality/service? Are there formal tendering processes? Are there long-term contracts?
- (xi) Information about the structure of supply and demand for the relevant products/services.
- (xii) Any available information about how prices differ between firms and what the price history of the market is (for example, upward or downward trends).
- (xiii) Information about barriers to entry or exit, and any evidence of market entry and exit or market consolidation in the last three years.

## **Section E: Verification by a senior member of the organisation:**

- A1.8 Please include a declaration by a senior member of the executive of the organisation, with appropriate delegated authority, preferably the CEO, CFO, General Counsel or equivalent, stating:

The information provided in this submission is correct and complete to the best of my knowledge and belief.

Signed:

Position in the Organisation:

Date:

## **Section F: Other relevant information**

- A1.9 Please include any supporting information you think is relevant, for example:

- copies of any relevant documentation (e.g. minutes of meetings, board papers etc) or communications (e.g. emails or notes of telephone conversations) involving the subject of the complaint/complainant that provides evidence of the alleged behaviour;
- copies of any relevant industry reports/consumer surveys;
- details of any similar complaints/investigations/proceedings concerning the same or similar products/services (for example, an investigation by the European Commission).