ofgem Making a positive difference for energy consumers

Draft Enforcement Guidelines

Consultation

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Overview:

As part of our duty to regulate the way in which energy businesses behave, it is important that we can act decisively to put things right if businesses breach their obligations. This document is a draft for consultation. It describes how we propose to use our enforcement powers in such situations, how we will provide redress and remedies for consumers, and how breaches or infringements will be punished or deterred. It also sets out a number of enforcement tools we may use as an alternative to exercising our statutory enforcement powers. The consultation questions relating to this draft can be found in the accompanying open letter.

The aim of these guidelines is to bring greater clarity, consistency and transparency to our enforcement polices and processes, and to reflect changes that we intend to make to maximise the impact and efficiency of our work.

Contents

Executive Summary

The Gas and Electricity Markets Authority (the Authority) regulates the gas and electricity markets in Great Britain.[1] We are the Office of Gas and Electricity Markets (Ofgem). We carry out the day-to-day work of the Authority and investigate matters on its behalf. The Authority has powers to take enforcement action, including imposing financial penalties and consumer redress, for breaches of relevant conditions and requirements under the Gas Act 1986 and the Electricity Acts 1989. It has concurrent powers with the Competition and Markets Authority to deal with anti-competitive behaviour, including imposing financial penalties, under the Competition Act 1998. It may also apply to the court for an order to stop breaches of certain consumer legislation under Part 8 of the Enterprise Act 2002, the Unfair Terms in Consumer Contracts Regulations 1999 and the Business Protection from Misleading Marketing Regulations 2008.

Enforcement is a core part of our role and is essential to the delivery of our overall mission to make a positive difference for consumers. Our vision is to achieve a culture where businesses put energy consumers first and act in line with their obligations.

These guidelines set out our general approach to enforcing the above legislation and the key stages of the investigation process that we will usually follow. Investigations may be started on our own initiative, as a result of a complaint, whistleblowing, information from industry participants, self-reporting or referral from another regulator or consumer body. We cannot investigate in every case. These guidelines explain how we prioritise cases and decide whether or not to open or continue a case. They describe our enforcement powers in the cases covered by these guidelines and the alternative enforcement tools that we may use.

These guidelines reflect a number of significant changes to the way we work, including:

- changes to the regulatory landscape, in particular those made by the Enterprise and Regulatory Reform Act 2013 which strengthens the primacy of competition law
- the appointment of a new Enforcement Decision Panel (EDP) to decide contested cases on behalf of the Authority, an Enforcement Oversight Board (EOB) to provide strategic governance and oversight to our enforcement work, and a new composition of Settlement Committees
- changes to our approach to making cases public

[1] The enforcement powers under the Electricity Act 1989 extend to the renewable energy zone. The Northern Ireland Authority for Energy Regulation is responsible for the regulation of the gas and electricity industries in Northern Ireland.

- changes to our procedures for settling cases including the introduction of discount schemes and settlement windows
- new powers that we have been given to order companies to make redress (both financial and non-financial).

The changes reflected in these guidelines will help to improve transparency in our enforcement processes. They will enable us to act proportionately and target our enforcement resources so as to achieve the greatest positive impact.

Section 1

Introduction

What do these guidelines cover?

1.1 As the sector regulator, we have a number of roles identifying and responding to conduct in the gas and electricity markets which may be unlawful, anti-competitive, or otherwise harm consumer interests. Our investigations may start in a number of ways, for example on our own initiative, as a result of a complaint, whistleblowing, information from industry participants, self-reporting, or referral from another regulator or a consumer body.

1.2 We handle the following types of investigations which are covered by these guidelines:

- compliance with relevant conditions and requirements as defined in the Gas Act 1986 (the Gas Act) and the Electricity Act 1989 (the Electricity Act)[2]
- alleged anti-competitive behaviour in the gas and electricity sectors under the Competition Act 1998 (the Competition Act)
- compliance with consumer protection provisions under Part 8 of the Enterprise Act 2002 (the Enterprise Act) including the Consumer Protection from Unfair Trading Regulations 2008
- potentially unfair terms in consumer contracts under the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs)
- compliance with misleading marketing provisions in the Business Protection from Misleading Marketing Regulations 2008 (the BPMMRs).

1.3 These guidelines set out our general approach to enforcing the legislation mentioned above. We have limited resources. We cannot investigate in every case. These guidelines also set out how we prioritise cases and decide whether or not to open or continue a case.

1.4 Separate guidance on how we enforce REMIT requirements can be found in the 'Procedural Guidelines on the Authority's use of its Investigatory and Enforcement Powers under REMIT' and 'The Authority's Statement of Policy with respect to Financial Penalties under REMIT'.[3]

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[2] Which includes requirements treated as such under other legislation.

[3] The EU Regulation No 1227/2011 prohibits insider trading and actual or attempted market manipulation in wholesale energy markets. The guidance is at: https://www.ofgem.gov.uk/ofgem-publications/84347/remitproceduralguidelines8november.pdf and

1.5 Also, in certain cases conduct may amount to an offence which we have the power to prosecute (subject to any requirements for consent).[4] When dealing with criminal cases we will follow, where applicable, 'The Code for Crown Prosecutors' issued by the Crown Prosecution Service.[5]

1.6 These guidelines refer (in section 3) to other work that we carry out as a possible source of information for our investigations, such as super-complaints and market monitoring. They mention the power that we have to make a market investigation reference, as this is related to our monitoring and enforcement work. While these references are made in order to provide context, the remainder of the processes and procedures set out in this document are not intended to apply to these activities.

1.7 We do not deal directly with individual disputes between consumers and energy companies and these guidelines are not intended for individual consumers. If you are worried about an issue concerning your energy supplier or network provider or have a complaint you wish to make as a consumer, please see the **'Factsheet: Domestic customer complaints and enquiries'** and the **'Factsheet: Non-domestic (micro-business) customer complaints and enquiries'** that can be downloaded from our website.[6] The factsheets provide information about what to do if you have a complaint or enquiry and have details about the Ombudsman Services: Energy and the Citizens Advice consumer service.

Our objectives and regulatory principles

1.8 The Authority's principal objective in carrying out its functions is to protect the interests of existing and future gas and electricity consumers. The interests of consumers include their interests in the reduction of gas and electricity supply emissions of greenhouse gases and the security of their supply of gas and

https://www.ofgem.gov.uk/ofgem-publications/84346/remitpenaltiesstatement8november2013.pdf. We expect to incorporate the REMIT Guidelines and Statement into these Enforcement Guidelines when our REMIT powers have had further time to develop.

4 Under the Gas Act, Electricity Act or Competition Act, eg carrying on licensable activities without a licence or without the benefit of an exemption, failing to provide information required under a notice, making false statements. Note that, by virtue of section 45 of the Gas Act, section 108 of the Electricity Act and section 72 of the Competition Act, an officer of a company may be personally liable to prosecution.

5 http://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf.

6 https://www.ofgem.gov.uk/ofgem-publications/64005/409-domestic-customer-complaints-factsheetweb-18213.pdf and https://www.ofgem.gov.uk/ofgem-publications/84676/471nondomesticfactsheetenglishweb.pdf. Hard copies can be requested in writing from the Ofgem library, Ofgem, 9 Millbank, London, SW1P3GE or by telephoning the library via the main switchboard on 020 7901 7000.

electricity.[7] The Authority must carry out its functions in the manner best calculated to further that objective, wherever appropriate by promoting effective competition.[8] Before exercising its functions to promote competition, it must consider whether the interests of consumers would be better protected by exercising its functions in other ways.[9]

1.9 We will have regard to Better Regulation principles of transparency, accountability, proportionality, consistency, targeting regulatory activities only at cases in which action is needed, and to other principles we consider represent best regulatory practice.[10]

1.10 Our vision for our enforcement work is to **achieve a culture where businesses put energy consumers first and act in line with their obligations**.

1.11 Our strategic objectives are to:

- deliver credible deterrence across the range of our functions
- ensure visible and meaningful consequences for businesses who fail consumers and who do not comply
- achieve the greatest positive impact by targeting enforcement resources and powers.

1.12 We aim to achieve these objectives by:

- using a range of enforcement tools
- identifying poor behaviour early and taking action
- being transparent and fair in the enforcement process and visible in the actions that we take
- learning from everything we do.

1.13 Enforcement is carried out within a changing environment. The Authority therefore sets annual strategic priorities for enforcement to enable us to respond to changes in the regulatory landscape and market environment, and to target issues causing consumer detriment as they arise.

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7 Section 4AA of the Gas Act and section 3A of the Electricity Act.

8 Note that the Authority's principal objective does not apply when it is exercising functions under the Competition Act, consumer protection legislation and REMIT.

9 Section 4AA(1C) of the Gas Act and section 3A(1C) of the Electricity Act.

10 Section 4AA(5A) of the Gas Act and section 3A(5A) of the Electricity Act.

Status of these guidelines

1.14 These guidelines take effect from [*insert date*]. They apply to all current and future investigations. If the circumstances of a particular case justify it, we may depart from the general approach to enforcement set out in these guidelines. If we do, we will be prepared to explain why.

1.15 These guidelines are not a substitute for any regulation or law. They should not be taken as legal advice. If you are concerned about a complaint that has been made against you or your company, you should consider seeking independent legal advice.

1.16 These guidelines will be kept under review and amended in the light of further experience and developing law and practice.

Section 2

Our enforcement powers

2.1 This section sets out our enforcement powers under the legislation listed below. It explains the legal basis for the main types of investigations we conduct which are covered by these guidelines.

2.2 It also describes our enforcement options under the different pieces of legislation. Note that, in appropriate cases, instead of or before using our enforcement powers, we may take other action to try to resolve issues that arise (see paragraphs 3.24 and 3.25).

2.3 Our powers in relation to the matters covered by these guidelines are principally derived from the following legislation:

- the Gas Act 1986 (the Gas Act)
- the Electricity Act 1989 (the Electricity Act)
- the Utilities Act 2000
- the Competition Act 1998 (the Competition Act)
- the Enterprise Act 2002 (the Enterprise Act)
- the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs)
- the Business Protection from Misleading Marketing Regulations 2008 (the BPMMRs).

The Gas and Electricity Acts

Compliance with relevant conditions and requirements

2.4 Under the Gas and Electricity Acts, the Authority has powers to ensure that regulated persons comply with relevant conditions and requirements.[11]

2.5 Relevant conditions are those contained in any licence held by a regulated person. Some licences contain conditions which require the regulated person to comply with industry codes and agreements.[12] Breaches of obligations under

[11] 'Regulated person', 'relevant condition' and 'relevant requirement' are defined in section 28(8) of the Gas Act and section 25(8) of the Electricity Act. 'Regulated person' includes, eg licence holders, distribution exemption holders and supply exemption holders.

[12] Examples of codes include the Balancing and Settlement Code, the Connection and Use of System

these codes and agreements may amount to breaches of licence conditions. We can take enforcement action in respect of these breaches under the relevant legislation. Other obligations have been implemented by amending or inserting conditions into existing licences or new licences, for example the Standards of Conduct described below and the Feed-in Tariffs Scheme.[13]

Standards of Conduct[14]

a) We have introduced the Standards of Conduct (SOC) which are of particular note because we have used a principles-based approach to regulation[15] and there is a bespoke approach to their enforcement.

b) The SOC is an enforceable obligation (enforced as a breach of licence conditions) on suppliers and their representatives to treat consumers fairly. It covers three broad areas: behaviour, information and process.

c) The onus is on suppliers to embed fair treatment of consumers in every level of their organisation so that they behave in an honest, fair, transparent, appropriate and professional manner. Suppliers will also have to provide information that is clear, accurate, complete, appropriate, relevant and not misleading. They will have to ensure that they are easily contactable, and act promptly and courteously to put things right. A supplier's customer service arrangements and processes must be complete, thorough, fit for purpose and transparent.

d) Guidance[16] has been published on key terms used in the SOC. It explains how terminology used in the licence conditions SLC 25C (Domestic SOC) and SLC 7B (Non Domestic SOC) should be interpreted.

Code, the Uniform Network Code, and the System Operator – Transmission Owner Code.

13 This is a government programme designed to promote the uptake of a range of small-scale renewable and low-carbon electricity generation technologies.

14 See the Implementation of Standards of Conduct – decision to make licence modifications at: https://www.ofgem.gov.uk/ofgem-publications/84946/implementation-domestic-standards-conduct-decision-make-licence-modifications.pdf. The SOC has been implemented by amending SLC 1 and inserting the new licence conditions SLC 25C and SLC 7B.

15 This differs from rules-based regulation in that regulated persons are left to decide how best to implement the principles rather than being given a set of prescriptive rules.

16 See Appendix 1 of the Implementation of Standards of Conduct – decision to make licence modifications at: https://www.ofgem.gov.uk/ofgem-publications/84946/implementation-domestic-standards-conduct-decision-make-licence-modifications.pdf.

e) As noted above, we will use a bespoke approach to enforcement in relation to the SOC, which is set out here. When assessing the seriousness of a potential breach, we will consider whether a reasonable person, intent on complying with the SOC, would have acted in the way the supplier did in its interactions with consumers.

f) To this end we will have regard to the supplier's actions and considerations (including at a senior level) in:

- developing new policies or processes and amendments to existing policies and processes
- monitoring its implementation of new initiatives and operation of existing policies and processes
- taking remedial action where any adverse consequences for customers come to light.

g) Before taking enforcement action, we will consider alternative actions (like those set out in paragraph 3.25). We will usually ask suppliers for contemporaneous documents so that we can make an assessment of their actions and considerations before opening cases. Whilst we understand that suppliers' actions in relation to the SOC will evolve over time, we expect suppliers to take account of consumers' needs and ensure they are treated fairly.

h) A breach of the SOC may result from system failures or relate to the unfair treatment of individual consumers. As is the case in our other enforcement work, we will not usually take enforcement action in response to isolated consumer complaints unless there is evidence of systemic weaknesses. That said, we do not rule out the possibility of investigating instances of particular detriment affecting small groups, particularly where those affected are vulnerable.

2.6 The provisions that impose obligations on regulated persons, enforceable as relevant requirements for the purposes of Part 1 of the Gas Act and Part 1 of the Electricity Act, are specified in schedules to the Gas and Electricity Acts.[17] We

[17] Schedule 4B to the Gas Act and Schedule 6A to the Electricity Act.

also have powers to enforce obligations or requirements treated as relevant requirements under other legislation.[18]

2.7 In these guidelines, "sectoral cases" refers to cases where obligations or requirements are enforced as breaches of relevant conditions or requirements.

2.8 If we believe that a regulated person may be in breach of any of their obligations, we may decide to investigate. We will consider alternatives to exercising our statutory enforcement powers as described in paragraphs 3.24 and 3.25.

Provisional orders

2.9 A provisional order may be used, if considered necessary, to require a regulated person to do or not do something to prevent loss or damage that might arise before a final order can be made.[19] This may include where a company is not taking steps to secure compliance, where behaviour needs to be stopped urgently, or where consumers are suffering continuing harm.

2.10 In deciding whether the imposition of a provisional order is appropriate in any case, we will seek to ensure that:

- we make a provisional order only where we suspect or have identified specific behaviour, conduct or outcomes for consumers, that we consider are causing or likely to cause loss or damage to a particular person or category of person
- the terms of the order sought prevent, limit or remedy the loss or damage that we have identified, and are proportionate for the purpose of preventing, limiting or remedying that loss or damage.

[18] For example breaches under the rules and regulations implementing the Electricity Market Reform (EMR) [not yet in force], and environmental schemes that we administer on behalf of government (eg Warm Home Discount and Energy Companies Obligations). Note that where appropriate, the Authority may also use other prescribed sanctions available in the relevant statutory instruments.

[19] Section 28(2) of the Gas Act and section 25(2) of the Electricity Act. For example, a provisional order has been used to prevent serious consumer harm to those at risk of being off electricity and/or gas supply during cold weather. The order required the company not to wrongfully block customers from switching suppliers; required improvements to its customer handling services; and prevented it from taking on new customers until it had satisfied us that it was able to handle its current customer complaints. A provisional order has also been used to require an energy company to lodge sufficient credit and pay any outstanding debts, and to provide us with a business plan and monthly update on measures taken to comply with payment and credit requirements of industry codes. In another case, an order was used to require an energy company not to disconnect customers and to provide the option of prepayment meters for customers in payment difficulties.

2.11 The making of a provisional order will lapse after a maximum of three months if not subsequently confirmed.[20]

Final decisions

2.12 If the Authority is satisfied that a regulated person is contravening or is likely to contravene any relevant condition or requirement, it can impose a final order or confirm a provisional order to bring the breach to an end, after complying with certain procedural requirements.[21]

2.13 If satisfied that a contravention has occurred or is ongoing, or that a regulated person has failed or is failing to achieve any relevant standard of performance,[22] the Authority may impose a financial penalty, after complying with certain procedural requirements.[23] It may also, or instead, make a consumer redress order where one or more consumers have suffered a detriment as a result of contravention of a relevant condition or requirement, after complying with certain procedural requirements.[24] How decisions are made and issued is described in Section 6. Further information about penalties and consumer redress can be found in paragraphs 6.40 to 6.48.

2.14 If the Authority concludes that the regulated person has not committed any breach, the case will be closed.

2.15 The Authority need not make a final order or confirm a provisional order if the regulated person has agreed to take, and is taking, appropriate steps to comply, or where it considers that the breach is trivial.[25]

2.16 The Authority's sectoral enforcement powers to impose a final order, confirm a provisional order, impose a penalty or make a consumer redress order, cannot be exercised if the Authority is satisfied it would be more appropriate to proceed under the Competition Act.[26]

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[20] Section 28(8) of the Gas Act and section 25(8) of the Electricity Act. It can be confirmed (with or without changes) for example if the company is continuing to commit breaches or it is suspected that further breaches are likely.

[21] Sections 28(1) and 29 of the Gas Act and sections 25(1) and 26 of the Electricity Act.

[22] Those prescribed in regulations made under sections 33A or 33AA of the Gas Act (standards of performance for gas suppliers and transporters) and sections 39 or 39A of the Electricity Act (standards of performance for electricity suppliers and distributors).

[23] Section 30A of the Gas Act or 27A of the Electricity Act. It may not impose a financial penalty for a contravention that is likely to occur.

[24] Section 30G and 30I of the Gas Act and section 27G and 27I of the Electricity Act.

[25] Section 28(5A) of the Gas Act and section 25(5A) of the Electricity Act.

[26] Sections 28(4A) and (4B), 30A(2) and (2A), and 30N(2) of the Gas Act and sections 25(4A) and (4B), 27A(2) and (2A), and 27N(2) of the Electricity Act require the Authority to consider this before

2.17 Note that if a regulated person fails to comply with a final order, confirmed provisional order or does not pay any financial penalty, we may decide to revoke a licence.[27] The Authority can enforce a final order, provisional order or consumer redress order by civil proceedings.[28] Any outstanding financial penalty (and interest) may be recovered by the Authority as a civil debt.[29]

2.18 An outline of the process that we will usually follow in sectoral cases is set out in a flowchart entitled 'Sectoral cases' that can be found in the Appendix.

The Competition Act

Prohibited agreements or conduct

2.19 Under the Competition Act and the Treaty on the Functioning of the European Union (TFEU), the following are prohibited:

- agreements that may affect trade in the UK that have, or had, as their object or effect, the prevention, restriction or distortion of competition within the UK (the Chapter I prohibition of the Competition Act) unless they are exempt in accordance with the provisions of the Competition Act
- agreements that may affect trade between Member States that have, or had, as their object or effect, the prevention, restriction or distortion of competition within the European Union (Article 101(1) TFEU) unless they are exempt in accordance with the provisions of Article 101(3) TFEU)
- conduct that amounts to an abuse of a dominant position which may affect trade in the UK (the Chapter II prohibitions of the Competition Act)
- conduct that amounts to an abuse of a dominant position which may affect trade within the European Union (Article 102 TFEU).

2.20 We have concurrent powers[30] with the Competition and Markets Authority (CMA) to enforce these prohibitions, in relation to commercial activities in the gas and electricity sectors.[31]

exercising its powers. In practice this is likely to be considered much earlier. See paragraph 2.26.

[27] See the list of revocation conditions at: https://www.ofgem.gov.uk/licences-codes-and-standards/licences/revoking-licence.

[28] Sections 30(8) and 30L of the Gas Act and sections 27(7) and 27L of the Electricity Act.

[29] Section 30F of the Gas Act and section 27F of the Electricity Act.

[30] This means that more than one regulator has the power to take enforcement action to deal with any potentially anti-competitive behaviour in these sectors. Note that we do not have powers to deal with

2.21 The relevant competition law provisions apply to agreements between, and conduct by, 'undertakings'. In these guidelines, the word 'company' should be understood to include all forms of undertaking (eg a sole trader, partnership, company or a group of companies).

2.22 A case may be opened under the Competition Act where there are reasonable grounds for suspecting that the prohibitions in the Competition Act or TFEU have been infringed.[32]

2.23 Before exercising investigatory powers, we are required to consult with the CMA and any other concurrent regulator to decide which authority having concurrent powers will investigate the case. The process set out in the Competition Act (Concurrency) Regulations 2014[33] (the Concurrency Regulations) and associated CMA's guidance, 'Regulated Industries: Guidance on concurrent application of Competition law to regulated industries'[34] (the Concurrency Guidance) will be followed to decide who will investigate the case.

2.24 Where a case raises issues under Article 101 and/or Article 102, we apply the case allocation principles set out in the European Commission's 'Notice on Cooperation within the Network of Competition Authorities' (the Network Notice)[35] to determine whether Ofgem, the CMA, a national competition authority (NCA) from another Member State, or the European Commission will investigate. We will notify the European Commission before, or without delay after, using our powers of investigation[36] in a competition case raising Article 101/102 issues.[37] In the context of an Ofgem investigation raising such issues, we will cooperate with the European Commission and other NCAs in the European Competition Network (ECN) following the Network Notice. This may include the exchange of information by us within the ECN.

2.25 The matters described in paragraphs 2.23 and 2.24 mean that although we may initially identify a competition concern, or receive a complaint that raises the

criminal cartel offences (section 188 of the Enterprise Act).

31 Section 36A of the Gas Act and section 43 of the Electricity Act set out the precise extent of the Authority's jurisdiction.

32 The full test is set out in section 25 of the Competition Act.

33 [Coming into force on 1 April 2014.]

34 https://www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-industries.

35 Commission Notice on cooperation within the Network of Competition Authorities, 2004/C 101/03 at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427(02):EN:NOT.

36 Sections 26 to 28A of the Competition Act.

37 Article 11(3) of the Modernisation Regulation (EC Regulation 1/2003).

issue of concern, the investigation might ultimately be carried out by another authority. Transfers between regulators may also occur at any stage.[38]

2.26 As noted above (at paragraph 2.16) the Authority must also, before taking certain enforcement action using its sectoral powers, consider whether the use of its competition law powers is more appropriate. We will consider this at an early stage in the process.

2.27 When dealing with Competition Act cases we will follow the applicable parts of the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014[39] (the CA98 Rules). Further advice and information about the factors we will take into account when considering how to exercise our powers under the Competition Act, can be found in the Office of Fair Trading (OFT)/Ofgem joint competition law guideline, 'Application in the energy sector'[40] which should be read alongside applicable CMA guidance including the Concurrency Guidance.[41]

2.28 If appropriate, we may consider alternatives to exercising our statutory enforcement powers as described in paragraphs 3.24 and 3.25.

2.29 Note that we also have concurrent powers with the CMA to make a market investigation reference.[42] This is to determine whether the process of competition is working effectively in markets as a whole and to seek to remedy industry or market-wide competition problems.

Interim measures directions

2.30 Where a case under the Competition Act has been opened, the Authority may impose interim measures in order to prevent significant damage to a particular person or category of person, or to protect the public interest.[43]

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38 Regulation 7 of the Concurrency Regulations.

39 [Coming into force on 1 April 2014.]

40 OFT 428 at: http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft428.pdf;jsessionid=8222F1310AF111718FD04943FDDC548E. This document should be read in the light of changes to legislation.

41 https://www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-industries.

42 Under Part 4 of the Enterprise Act 2002.

43 Section 35 of the Competition Act and rule 13 of the CA98 Rules. Further information on interim measures can be found in Chapter 3 of the CMA's adopted guidance, 'Enforcement' (OFT 407) at: https://www.gov.uk/government/publications/competition-law-application-and-enforcement. The section on procedures is at paragraph 3.12. This OFT guideline, like any others referred to hereafter, has been adopted by the CMA Board but must be read in the light of changes to the legislation and the applicable CMA guidance and may be replaced or superseded. Check the CMA's website for the most recent and applicable document.

2.31 In deciding whether the imposition of interim measures is appropriate in any case, we will seek to ensure that:

- we impose interim measures only where we suspect or have identified specific behaviour or conduct that we consider is causing or is likely to cause significant damage to a particular person or category of person, or is or is likely to be contrary to the public interest
- the particular interim measures sought prevent, limit or remedy the significant damage that we have identified, and are proportionate for the purpose of preventing, limiting or remedying that significant damage.

2.32 Further information about the factors that we may take into account when deciding whether to impose interim measures can be found in Chapter 8 of the 'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (the CMA's guidance).[44]

Commitments

2.33 We may accept binding commitments from a company that it will take appropriate action to address the competition concerns which we have identified.[45] We are required to have regard to the CMA's adopted guidance, 'Enforcement' when considering whether to accept commitments.[46]

2.34 In line with the above guidance, we are only likely to accept commitments once the competition concerns are readily identifiable,[47] where the concerns are fully addressed by the commitments offered and the commitments are capable of being implemented effectively, and if necessary, within a short space of time. We will not, other than in very exceptional circumstances, accept commitments in cases involving secret cartels between competitors which include price-fixing, bid-rigging, establishing output restrictions or quotas, sharing and/or dividing markets, or cases involving the serious abuse of a dominant position.[48]

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44 https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases.

45 Section 31A of the Competition Act.

46 OFT 407 in Chapter 4 at: https://www.gov.uk/government/publications/competition-law-application-and-enforcement. Further information is also contained in Chapter 8 of the CMA's guidance available at: https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases.

47 This means that if, for example, the full extent of the competition concerns are not yet identifiable because further investigation is needed, we are unlikely to accept commitments at this stage.

48 See footnote 16 in OFT 407 at: https://www.gov.uk/government/publications/competition-law-application-and-enforcement.

2.35 It is for a company under investigation to offer commitments to us. Commitments can be accepted at any time up until an infringement decision is made. We are unlikely to consider it appropriate to accept them at a very late stage in our investigation (eg after we have considered representations in response to the Statement of Objections). We may accept commitments in respect of some competition concerns and continue our investigation in respect of others arising from the same agreement or conduct.

2.36 Where we propose to accept commitments, we will comply with the procedural requirements[49] for notification and consultation. This is so that interested third parties and those likely to be affected by the commitments have an opportunity to make representations. Once accepted, commitments will usually be published on our website (after taking account of the appropriate confidentiality considerations under Part 9 of the Enterprise Act).

2.37 If a person fails, without a reasonable excuse, to adhere to commitments, the Authority can seek a court order for compliance (and costs).[50]

Final decisions

2.38 If the Authority finds that a prohibition has been infringed, it may issue written directions requiring the appropriate person to bring the infringement to an end.[51]

2.39 If the Authority does not find sufficient evidence of an infringement, it may publish a reasoned no grounds for action decision when closing the case.[52] Please also see paragraph 7.5 which describes other ways in which a Competition Act case may be closed.

2.40 In addition to issuing directions, or instead of doing so, if satisfied that the infringement was committed intentionally or negligently, the Authority may impose a financial penalty on the infringing party (subject to certain exceptions[53]). How decisions are made and issued is described in Section 6. Further information about penalties is set out in paragraphs 6.51 to 6.54.

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[49] These are described in Chapter 4 of OFT 407 at: https://www.gov.uk/government/publications/competition-law-application-and-enforcement.

[50] Section 31E of the Competition Act.

[51] See sections 32 (modification or termination of a prohibited agreement), 33 (modification or ceasing of prohibited conduct) and 54 (functions exercisable by concurrent regulators) of the Competition Act.

[52] Rule 10 of the CA98 Rules sets out the notice requirements should the Authority make such a finding.

[53] Sections 36(4) and (5), 39 and 40 (reasonable assumption of immunity).

2.41 If a person fails, without a reasonable excuse, to comply with written directions (or interim measures directions), the Authority can seek a court order to obtain compliance (and costs).[54] Any outstanding penalty sum may be recovered as a civil debt.[55]

2.42 An outline of the process that we will usually follow in Competition Act cases is set out in a flowchart entitled 'Competition Act cases' that can be found in the Appendix.

The Enterprise Act

2.43 We are a "designated enforcer" under Part 8 of the Enterprise Act.[56] This means that we are empowered to take action to enforce certain consumer protection legislation,[57] including the UTCCRs, the Consumer Protection (Distance Selling) Regulations 2000 and the Consumer Protection from Unfair Trading Regulations 2008.

2.44 We have powers to obtain an enforcement order (similar to an injunction) from the County Court or High Court (or before the Sheriff or Court of Sessions in Scotland) to prohibit a respondent (a company) from carrying on a particular course of conduct.[58]

2.45 Part 8 only applies to an infringement which harms or has the potential to harm the collective interest of consumers. It is not a means of pursuing individual redress. It follows that the breach must affect, or have the potential to affect, consumers generally or a group of consumers. This must be established by the evidence that we gather, which demonstrates how a particular infringement has, or may in the future have, an adverse effect on consumers. Further information on matters we may take into account when investigating under Part 8 can be

54 Section 34 of the Competition Act.

55 Section 37 of the Competition Act.

56 Schedule to the Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003.

57 These are specified under section 211 of the Enterprise Act (Domestic infringements relate to breaches of a wide range of UK laws in statutory instruments made under Part 8) and section 212 (Community infringements harm the collective interest of consumers and breach the UK's and other European Economic Area EEA states legislation and other provisions implementing the European Directives listed in Schedule 13 to the Act).

58 Section 215 of the Enterprise Act. Proceedings are issued in the High Court for more complex cases (Civil Procedure Rules (CPR) Practice Direction 7A), and otherwise in the County Court in the area which is most convenient for the company. CPR Part 8 is used for claims where there is unlikely to be a substantial dispute of fact (e.g. where the only issue is one of law). The CPR Part 7 procedure is used in all other cases. Note that in certain cases, conduct may amount to an offence which could be prosecuted by Trading Standards or the CMA .

found in the CMA's adopted guidance, 'Enforcement of consumer protection legislation: Guidance on Part 8 of the Enterprise Act'.[59]

2.46 We may investigate if we believe that the evidence demonstrates a business practice that infringes the legislation, which we consider may be harming the collective interests of consumers.

2.47 We have adopted the CMA's general principles for the enforcement of this legislation.[60] These principles are that:

- action is necessary and proportionate
- companies will normally be given a reasonable opportunity to put matters right
- wherever possible, court action will only be taken after undertakings have been sought
- proceedings will be brought by the most appropriate body
- action is coordinated (so that the company is not subjected to unnecessary multiple approaches)
- publicity will be accurate, balanced and fair.

2.48 Before opening a case, we are required to notify the CMA (as the central co-ordinator for enforcement) of our intention to open a case.[61] A decision will be made by the CMA about who is best placed to take the investigation forward.

2.49 Except where urgent action is necessary, companies will be contacted and provided with details of the alleged infringements. They will be given a reasonable opportunity to respond to the allegations and to stop the infringement before we seek a court order.

Interim enforcement orders

2.50 We may seek an interim enforcement order from the court only if it is expedient that the infringing conduct is prohibited or prevented.[62] This is a temporary

[59] OFT 512 at: https://www.gov.uk/government/publications/enforcement-of-consumer-protection-legislation.

[60] Originally published by the Office of Fair Trading (OFT), the predecessor of the CMA.

[61] This is currently done via the Consumer Regulation Website operated by Trading Standards but this is expected to change from 1 April 2014 to the National Anti-Fraud Website.

order made to continue until the court finally determines whether or not to make an enforcement order. We must give notice to the CMA of our intention to apply for an order. A minimum of seven days' consultation with the business is required unless the CMA thinks that the application should be made without delay.[63] The CMA is likely to approve immediate action without consultation if the case is urgent and immediate action is vital to safeguard consumers' interests. This is unlikely to be a frequent occurrence.[64]

Undertakings

2.51 Instead of (or before seeking an enforcement order) we may secure undertakings under the Enterprise Act to ensure that a company does not continue or repeat conduct that constitutes an infringement.[65] The terms of the undertaking will be agreed in discussion with the company. There is no power to require a company to provide individual redress to consumers through undertakings.

2.52 We will notify the CMA of any undertakings given.[66] We will usually publish undertakings on our website (after taking account of the appropriate confidentiality considerations under Part 9 of the Enterprise Act).[67]

2.53 In appropriate cases, we may consider other alternatives such as those set out in paragraph 3.25.

Enforcement orders

2.54 Where suitable undertakings are not obtained, or are given but subsequently breached or found to be inadequate, an enforcement order may be sought to put a stop to the harmful conduct.

2.55 In assessing whether to seek an Enforcement Order the relevant factors are likely to include the:

- intent of the company and whether the breach was deliberate
- history of breaches by the company

62 Section 218 of the Enterprise Act.
63 Section 214 of the Enterprise Act.
64 See paragraph 3.40 of OFT 512 at: https://www.gov.uk/government/publications/enforcement-of-consumer-protection-legislation.
65 Section 219 of the Enterprise Act. Undertakings may be obtained in respect of a Domestic infringement if the conduct has occurred or is occurring, and in respect of a Community infringement also if the conduct is likely to occur (ie even before the conduct has occurred).
66 Section 219(6) of the Enterprise Act.
67 Factors that we may take into account when considering publicity can be found in paragraph 3.85 of the CMA's adopted guidance OFT 512 at: https://www.gov.uk/government/publications/enforcement-of-consumer-protection-legislation.

- damage being done to consumers.

2.56 If seeking an enforcement order, we must consult the CMA and a minimum of 14 days' consultation with the business is required, unless the CMA thinks that the order should be made without delay.[68] We will draw the court's attention to any breach of the undertaking and the court will have regard to this when deciding whether to make an enforcement order.

2.57 We will set the length of any consultation period with the company based on the complexity of the issues.

2.58 If we bring proceedings against a company, it will be notified and will have an opportunity to dispute the Authority's case and to make representations to the court. We will comply with our duties of disclosure under the Civil Procedure Rules (CPR).[69]

2.59 If satisfied that the person named in the application has engaged or is engaging in conduct which amounts to a Community or Domestic infringement, or in the case of a Community infringement, is likely to engage in such conduct, the court may make an order.[70] The order will indicate the nature of the infringing conduct, and direct the person not to continue, repeat or engage in the conduct, or consent or connive with another body corporate in the carrying out of the particular behaviour. If appropriate, the order may require the person to publish the order and a corrective statement. The court can alternatively accept undertakings from the person, which may also include a requirement to publish the undertaking and a corrective statement.[71] There is no power to impose a penalty. We will notify the CMA of any undertakings given or court order made, which it may publish.[72]

2.60 Breaching an enforcement order or undertaking to the court is a contempt of court and can lead to a fine or imprisonment.

2.61 An outline of the process that we will usually follow in cases under Part 8 of the Enterprise Act is set out in a flowchart entitled 'Cases under Part 8 of the Enterprise Act, UTCCRs and BPMMRs' that can be found in the Appendix.

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[68] Section 214 of the Enterprise Act. Any representations made to us by a company about why it failed to comply with any undertaking will be shared with the CMA when consulting on whether to seek an enforcement order.

[69] CPR Part 31.

[70] Section 217 of the Enterprise Act.

[71] Section 217(9) and (10) of the Enterprise Act.

[72] Section 215(9) of the Enterprise Act.

Unfair Terms in Consumer Contracts Regulations (UTCCRs)

2.62 We also have the power to enforce the UTCCRs directly (as a "Qualifying body" under the UTCCRs) rather than under the provisions of Part 8 of the Enterprise Act. If we agree to consider a potentially unfair contract term, we must notify the CMA of this, and are then under a duty to consider the matter.[73]

2.63 We will generally consider potentially unfair contract terms in standard consumer contracts (between a consumer and a seller or supplier) under the UTCCRs directly. We will usually use our Part 8 of the Enterprise Act powers to enforce the UTCCRs only where there is evidence that the collective interests of consumers in the UK are being harmed or the supplier's conduct raises issues under other consumer protection legislation as well as the UTCCRs.

2.64 Under both the UTCCRs and Part 8 of the Enterprise Act, we will seek undertakings from a party that it will cease using an unfair term in its contracts with consumers. If the party fails to comply with those undertakings, we may apply to the court for an injunction.[74] Proceedings may be issued in the same courts as they are for cases under Part 8 of the Enterprise Act (see paragraph 2.44)[75] and our disclosure duties are the same (see paragraph 2.58). We are required to give reasons for our decision to apply or not apply for an injunction, and in making that decision may have regard to any undertakings given.[76]

2.65 If seeking an injunction (or interim injunction), we must give the CMA at least 14 days' notice before the date of the application, unless the CMA consents to a shorter period.[77] The injunction granted by the court may relate to the particular term complained about or to any similar term.[78] The court can instead accept undertakings from a party. There is no power to impose a penalty. We will notify the CMA of any undertakings given or court order made, which it may publish.[79]

2.66 Failure to comply with any injunction or undertaking made to the court is a contempt of court and can lead to a fine or imprisonment.

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[73] Regulation 10 of the UTCCRs.
[74] Regulation 12 of the UTCCRs.
[75] Regulation 3(1) of the UTCCRs.
[76] Regulation 10 of the UTCCRs.
[77] Regulation 12 of the UTCCRs.
[78] Regulation 12 of the UTCCRs.
[79] Regulations 14 and 15 of the UTCCRs.

2.67 An outline of the process that we will usually follow in cases under the UTCCRs is set out in a flowchart entitled 'Cases under Part 8 of the Enterprise Act, UTCCRs and BPMMRs' that can be found in the Appendix.

The Business Protection from Misleading Marketing Regulations 2008 (BPMMRs)

2.68 Under the BPMMRs, the following are prohibited:

- advertising which misleads traders (regulation 3)
- misleading comparative advertising (regulation 4)
- promotion by a code owner of misleading advertising and comparative advertising which is not permitted (regulation 5).

2.69 We have concurrent powers with the CMA and other regulators to enforce the BPMMRs to protect business customers from misleading marketing.[80] Our powers to enforce the above regulations are set out in regulation 13.

2.70 If more than one regulator is contemplating bringing proceedings to enforce the BPMMRs, the CMA may decide that it is best-placed to proceed or direct that another regulator proceeds.[81]

2.71 If we consider that there may have been breaches of the regulations, we will follow similar initial procedures to those in cases under Part 8 of the Enterprise Act (see paragraph 2.49).

2.72 If this does not secure compliance we may:

- seek undertakings from brokers or other organisations to put a stop to misleading marketing activity[82]
- apply to the court for an injunction (or interim injunction) to secure compliance with the regulations.[83]

[80] Note that a trader may also be guilty of an offence under regulation 6 if they engage in advertising which is misleading which could be prosecuted by Trading Standards or the CMA.
[81] Regulation 17 of the BPMMRs.
[82] Regulation 16 of the BPMMRs.
[83] Regulation 15 of the BPMMRs.

2.73 We must give the CMA at least 14 days' notice before the date of the application of our intention to apply for an injunction (or interim injunction), unless the CMA consents to a shorter period. Our disclosure duties are as described in paragraph 2.58.

2.74 We can apply for an injunction if there has been or is likely to be a relevant breach and we think it is appropriate to do so. The court can grant an injunction even without proof of actual loss or damage, or intention or negligence by the advertiser. It may relate to particular advertising and any in similar terms or likely to convey a similar impression.[84] When granting the injunction, the court may require the person against whom the order is made to publish the injunction and a corrective statement.[85] The court can alternatively accept undertakings. There is no power to impose a penalty. We will notify the CMA of any undertakings given or court order made, which it may publish.[86]

2.75 Breach of the injunction or undertaking given to the court is a contempt of court and can lead to a fine or imprisonment.

2.76 An outline of the process that we will usually follow in cases under the BPMMRs is set out in a flowchart entitled 'Cases under Part 8 of the Enterprise Act, UTCCRs and BPMMRs' that can be found in the Appendix.

[84] Regulation 18 of the BPMMRs.
[85] Regulation 18 of the BPMMRs.
[86] Regulations 19 and 20 of the BPMMRs.

Section 3

Opening a case

3.1 This section describes how we identify and decide whether to investigate issues of concern and the sources of information that we most frequently use. It provides information about how we handle information (including confidential information). It also sets out a number of enforcement tools we may use as an alternative to exercising our statutory enforcement powers (see paragraphs 3.24 and 3.25).

3.2 It explains how we prioritise cases and decide whether or not to open (or continue) a case. We assess whether there is a case to answer and whether, if there is, it would be consistent with our criteria and strategic priorities to open a case. There is a bespoke approach to enforcement of the Standards of Conduct (SOC), which has already been described in paragraph 2.5. The prioritisation criteria that we apply are set out in paragraphs 3.30 to 3.40.

Sources of information

Self-reporting

3.3 A case may start because of self-reporting by a company[87] which has, for example, realised when carrying out internal checks that it may have breached a licence condition, code or relevant legislation.

3.4 Any company that wishes to self-report a potential breach should contact the enforcement team.[88] The company should give as much detail as possible about the breach(es) and the steps that have or will be taken to remedy the situation.

3.5 The fact that the breaches came to light as a result of self-reporting may count in a company's favour when we decide what action to take. In the event that a finding of breach is made, prompt, accurate and comprehensive self-reporting is a factor that would tend to decrease the amount of any penalty (see the

[87] The Gas Act and Electricity Act impose obligations on 'regulated persons'. The Competition Act refers to 'undertakings' and consumer protection legislation refers to 'traders' or 'sellers or suppliers'. For simplicity we refer to the 'company' from this section onwards, except when describing specific decisions or appeals in Section 6.

[88] By writing to the Enforcement Team, Ofgem, 9 Millbank, London, SW1P 3GE, emailing enforcement@ofgem.gov.uk or by telephoning via the main switchboard on 020 7901 7000.

Authority's 'Statement of Policy on Penalties and Consumer Redress' (the Penalties and Redress Policy).[89]

Whistleblowers

3.6 Whistleblowing is when a person raises a concern about a wrongdoing, risk or malpractice that they are aware of through their work (eg licence breaches such as disconnecting vulnerable consumers in winter, or misselling of energy contracts identified by a customer services operative or a sales agent of the company). It is also sometimes described as making a disclosure in the public interest. We invite contact from all parties who may have such information relating to the gas and electricity markets. Disclosures made to "blow the whistle" about concerns regarding potential breaches of relevant regulations or legislation may lead to a case being opened.

3.7 To facilitate such disclosures, government has issued whistleblowing guidance,[90] applicable to people considering disclosing information, which:

- sets out the circumstances in which disclosure would entitle a person to benefit from the legal protections (against victimisation or unfair dismissal by their employer) offered to whistleblowers
- details the process which should be followed in dealing with whistleblowers.

3.8 We have also produced our own guidance document. If you are considering making such a disclosure to us, please look at our 'Whistleblowing Guidance'.[91]

Own-initiative investigations

3.9 We have a general duty to monitor the gas and electricity markets for the purposes of considering whether any of our functions are exercisable.[92]

3.10 We also conduct own-initiative investigations to address issues concerning gas and electricity companies and across the industry on a particular regulatory requirement or industry risk. We use monitoring programmes to ensure compliance with a new regulation when it is introduced (eg to help industry

[89] To be issued for consultation shortly.

[90] https://www.gov.uk/whistleblowing/dismissals-and-whistleblowing. The documents include a list of prescribed people and bodies to whom you can blow the whistle. Please note that Ofgem is The Gas and Electricity Markets Authority for these purposes.

[91] https://www.ofgem.gov.uk/ofgem-publications/83570/whistleblowingguidance.pdf.

[92] Section 34 of the Gas Act 1986 and section 47 of the Electricity Act 1989.

understand new requirements) or where we are assessing compliance with an existing regulation/obligation across industry.

3.11 Some licence conditions and regulations require companies to send us regular (eg quarterly) reports on their activities. Breaches may be identified when we analyse the information provided or arise from a failure to comply with the reporting requirements.

3.12 Where our monitoring work reveals information that suggests it may be appropriate for us to investigate a particular company or multiple companies, we will use our prioritisation criteria (see paragraphs 3.30 to 3.40) to decide whether or not to open a case. We may, instead, carry out alternative compliance work with a company.

Other sources of information

3.13 We collect information and data from a range of sources as part of our market monitoring activity. We may receive super-complaints from designated consumer bodies about a feature, or combination of features, that is, or appears to be, significantly harming the interests of consumers.[93] Complaints made by consumers to organisations such as the Citizens Advice consumer service, Ombudsman Services: Energy, and Consumer Futures[94] are a key source of information to identify issues of concern. Along with information that we are given by industry participants and any individual complaints (usually received through our consumer affairs team), this information helps us to identify potential issues that may lead to an investigation.

3.14 If we receive an individual complaint, we will add the information to our database of intelligence. We analyse this material and keep it under review to help us decide if we need to take action. For this purpose, it is helpful if a complaint to us is specific, well-reasoned, clear, and supported by evidence.[95] Due to resource constraints we will not be able to enter into individual correspondence with all complainants, although we will confirm receipt of a complaint in writing.

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93 Under section 11 of the Enterprise Act 2002.

94 To be integrated with the Citizens Advice consumer service in April 2014 [subject to Parliamentary approval].

95 Where the complaint concerns an alleged breach of the Competition Act 1998, complainants should have regard to the CMA's adopted guidance, 'Involving Third Parties in Competition Act Investigations' OFT 451 at: https://www.gov.uk/government/publications/involving-third-parties-in-competition-act-investigations.

3.15 If we need any further information, we will contact a complainant and tell them what we require. If we decide to take a case forward, the opening of the case will usually be published on our website (see paragraphs 4.7 to 4.12) and we will notify complainants of this.

Handling information

3.16 If you make a complaint or otherwise provide information to us you should be aware that to take a case forward we may need to disclose the information provided, either to the company you are complaining about or to others connected to the subject matter of the complaint.

3.17 Where information is confidential or you do not wish it to be disclosed, please make this clear and give your reasons in writing.

3.18 If a person or company thinks that any information they are giving us or that we have acquired is commercially sensitive or contains details of an individual's private affairs, and that disclosing it might significantly harm the interests of the business or person, they should submit a separate non-confidential version of the information in which any confidential parts are removed. They should also, in an annexe clearly marked as confidential, set out why the information that has been removed should be considered confidential. Non-confidential versions of documents should be provided at the same time as the original document or at an alternative time as required by us. If such a version is not provided within the timescale set by us we will presume that the provider of that information does not wish to continue to claim confidentiality.

3.19 We will make our own assessment of whether material should be treated as confidential. We may not agree that the information in question is confidential. This will depend on the circumstances and will be assessed on a case-by-case basis. Any request that information is treated as confidential will be considered in accordance with the appropriate legislation.[96]

3.20 In all cases, even if a person does not wish for certain information to be disclosed, there may still be circumstances in which its disclosure is required. Information provided, including personal information, may be published or disclosed in accordance with the access to information regimes (primarily the Data Protection Act 1998, the Freedom of Information Act 2000 and the

[96] We will comply with section 105 of the Utilities Act 2000 and Part 9 of the Enterprise Act 2002 when deciding whether information is confidential and/or whether it should be disclosed. We will also have regard to section 35 of the Gas Act 1986 and section 48 of the Electricity Act 1989 as appropriate in relation to the publication of information and advice.

Environmental Information Regulations 2004) or to facilitate the exercise of our functions.

Initial enquiry phase

3.21 Before a decision is taken to open a case, we may seek further information from a complainant or from third parties, such as other stakeholders or competitors, and consumer bodies, so that we can assess whether a case should be opened.

3.22 We may also contact the company in question to seek clarification or information to help us assess whether there is a case to answer. Prompt responses may speed up the resolution of the issue and might avoid the need to take enforcement action.

3.23 In relevant cases, we will consider whether the use of our competition law powers is more appropriate.

Alternative action that we will consider

3.24 When deciding how best to progress an investigation, we will consider alternatives to seeking to establish a breach or infringement or other use of our statutory enforcement powers.

3.25 This could include engaging with a company to bring about compliance. For example:

- entering into dialogue or correspondence with a company and warning them about potentially harmful or unlawful conduct
- as above and agreeing a period of reporting by the company either to ensure that behaviour is not repeated or to show that they have taken certain action to address the issue
- the company engaging independent auditors or other appropriately skilled persons to conduct a review focussed on a particular area of concern
- agreeing other voluntary action, eg the company implementing certain remedial or improvement actions, issuing a press notice and/or making voluntary payments to affected consumers
- accepting non-statutory undertakings or assurances from a company to comply with a particular obligation.

3.26 When deciding whether an issue can properly be resolved without the need to seek a finding of breach or infringement or other use of our statutory enforcement powers, we will have regard to our prioritisation criteria (these are set out in paragraphs 3.30 to 3.40). This type of resolution could be achieved either instead of opening a case, or after we have opened a case and before we seek a finding of breach or non-compliance.

3.27 If we seek and obtain a non-statutory undertaking or other agreed action from a company, this may result in the case being closed either immediately or after a period of compliance monitoring (see paragraph 7.9).

3.28 Failure to comply with non-statutory undertakings or assurances or any other agreed action could lead to enforcement action, and we may take a more serious view of any breach found to have occurred following such undertakings or assurances (see paragraph 3.36(6)).

3.29 If we consider that a case cannot be resolved without the use of our statutory enforcement powers, the case may still be settled by agreement. This is dealt with in Section 5.

Our prioritisation criteria for deciding whether to open (or continue) a case

3.30 This section includes a non-exhaustive list of the factors that we will generally take into account in deciding whether to open (or continue) a case.

3.31 We will consider the specific facts of the matter, the legal context and our available resources.

3.32 We will make decisions on a case-by-case basis. We will have regard to the relevant regulatory principles (see paragraph 1.9).

3.33 To help us make a decision, we will generally consider the following:

- Do we have the power to take action and are we best placed to act (see paragraphs 3.34 and 3.35)?
- Is it a priority matter for us, due to its apparent seriousness and impact, or potential impact, on consumers or competition (see paragraph 3.36)?

Do we have the power to take action and are we best placed to act?

3.34 This means asking whether the case falls within the scope of the relevant provisions of the legislation so that we have the power to take enforcement action, and whether the tests set out in the relevant legislation can be fulfilled. This means:

- in cases under the Gas Act 1986 and the Electricity Act 1989, assessing if it appears likely that the behaviour in question could constitute a breach of any relevant condition or requirement
- in Competition Act 1998 cases, considering whether there are reasonable grounds for suspecting that there has been an infringement of the applicable prohibitions
- in cases under Part 8 of the Enterprise Act 2002 (the Enterprise Act), assessing whether it appears likely that there has been a breach of any of the consumer protection legislation which we have the power to enforce and, if so, whether that breach harms or has the potential to harm the collective interests of consumers
- for the Unfair Terms in Consumer Contracts Regulations 1999, assessing whether it appears likely that there is a potentially unfair contract term in a standard consumer contract
- for the Business Protection from Misleading Marketing Regulations 2008, assessing whether it appears likely that there has been any prohibited advertising which is misleading to traders.

3.35 Where there is a concurrent power to take enforcement action with another regulator, a decision will be made about who is best placed to act. This may result in the case being referred to another regulator for investigation (see paragraphs 2.23, 2.24, 2.48, and 2.70). Equally, sometimes other regulators will refer cases to us.

Is it a priority matter for Ofgem?

3.36 We will look at a range of factors to decide whether it is a priority matter. These include:

1) the annual strategic priorities for enforcement set by the Authority
2) the harm or potential harm:
    - to consumers (including business consumers)
    - to our ability to regulate effectively

- to competition

that resulted or could have resulted from the alleged breach

3) whether the company has derived or is deriving a financial gain from the alleged breach
4) whether the alleged breach is ongoing and/or whether the company is taking action to address the situation
5) whether the allegation concerns conduct that is, or appears to be, an intentional or reckless breach
6) whether there has been a failure to comply with a previous undertaking or assurances made to us (see paragraph 3.28)
7) whether the company has a history of similar breaches, or a demonstrated record of poor compliance
8) whether there have been a series of concerns raised over time (including issues brought to the attention of the Ombudsman) none of which in isolation might be considered serious enough to warrant opening a case
9) whether the type of breach is a widespread problem
10) the strength of the evidence and what other evidence is or may be available
11) the likely impact of enforcement action and whether action would be likely to discourage similar behaviour in the future, either by the same company or by others
12) the resources required to open (or continue) a case and those available
13) any action already taken, or to be taken, by another body to remedy the situation (see paragraphs 3.42 to 3.45).

3.37 The list of criteria set out above for deciding whether to investigate is not exhaustive and we may consider other factors where relevant. This is because we may not have anticipated every scenario that could arise in a case. We also do not know what further changes there may be to the enforcement landscape. Not all of the above factors will apply in every case.

3.38 The extent to which factor 4) above may impact on a decision to open a case will depend on other factors such as the harm, or potential harm, to consumers. Even if a company has taken steps to address an issue of concern and the alleged breach has stopped, we may still consider taking action.

3.39 When considering factor 12) above the most serious potential breaches will be prioritised.

3.40 Note that we may not open a case where we are focussing resources on a relevant policy project which we consider may better address the identified harm.

3.41 Having applied the relevant criteria, a decision will be made about whether to open (or continue) a case.

Action by another body (paragraph 3.36(13))

3.42 Where we coordinate with other regulators under concurrency arrangements, we do not or cannot investigate if another regulator is already taking action. This ensures that a company is not financially penalised for the same breach twice.

3.43 Where there are breaches of a code and a code owner or panel[97] is already dealing with the matter, we will take into account the impact of any action already taken, or to be taken by another body, before deciding whether to launch a case into any breach of a licence condition also occasioned by the activity.

3.44 In cases where we are considering taking action at the same time as another body (including those cases falling under paragraph 3.43), the sorts of reasons that might make a separate investigation by us more likely include:

- that the breach is still continuing
- that there have been repeated breaches
- that the action being taken by the other body appears to be inadequate or does not cover all of the matters about which we have concerns
- a financial penalty or consumer redress order may be merited (which the other body does not have the power to impose)
- separate action should be taken as a deterrent to the company or others.

3.45 We may still decide to open a case even if the company is no longer breaching a condition, if one or more of the other stated reasons apply.

[97] Code owners are network operators required by licence to provide codes or agreements. Panels are comprised of consumer and industry representatives and are responsible for administering the code.

Section 4

Conducting investigations

4.1 This section sets out the general procedures we will follow once we have decided to open a case. It explains how we will deal with making cases public that we open and close. It also outlines the investigation powers that we may use in a case.

Notification that we are opening a case

4.2 If we decide to open a case we will normally inform the company under investigation. We may not, for example, where we consider that alerting the company before making an information request or conducting a dawn raid might prejudice the investigation. In these cases, we will notify as soon as it is appropriate to do so.

4.3 When notifying the company of the case, we will provide an outline of the allegations and the scope of the investigation. We will give a provisional timeline for the key steps of the investigation and when we expect to give updates. Companies under investigation can expect regular updates often by telephone or email. The timeline may change as the case progresses. If it does we will notify the company. The scope of the inquiry may widen if we become aware of other matters requiring investigation.

4.4 We may invite the company for an initial meeting, to discuss the nature of the allegations, the timeline and how we intend to proceed. The company may comment on the allegations at this stage (eg to say that it admits or denies breaches, or cannot say yet). It may wish to raise other matters (eg inviting us to visit a company site).

Ofgem's timescales for carrying out an investigation

4.5 We aim to carry out investigations as quickly as possible. The cases that we investigate vary enormously in type, complexity and size. The provisional timeline provided to the company at the outset of every investigation will be set on a case-by-case basis. It will be updated as the case progresses.

Making cases public

4.6 We believe that making cases public is important to ensure transparency of our work. It also serves to inform consumers about the work that we are doing, helps

identify possible witnesses and maximises the deterrent effect of enforcement action by encouraging industry compliance.

4.7 In line with our commitment to transparency, we will publish on our website every case that we open unless this would adversely affect the investigation (eg where it may prejudice our ability to collect information, harm consumers' interests or is subject to confidentiality or other considerations).[98]

4.8 Publishing the opening of a case does not imply that we have made any finding(s) about non-compliance.

4.9 We will exclude information from publication only if we consider that failure to do so would harm consumers' interests or might seriously harm the interests of the company under investigation. We will consider these factors when deciding whether to offer anonymity to any company under investigation.[99]

4.10 In Competition Act 1998 (the Competition Act) cases, any notice that we have opened a case may include any of the information set out in section 25A of the Competition Act (our decision to open a case, the section that the investigation falls under, the matter being investigated, the identity of any company being investigated, the market affected).

4.11 In Competition Act cases, in line with the Competition and Markets Authority's approach, we will normally publicly announce the issue of the Statement of Objection.[100]

4.12 We will also usually publish case closures on our website. Findings of breach or infringement, penalties and/or consumer redress orders in settled and contested cases (subject to any confidentiality and other legal issues) will also be published. Note that when a case has been made public on opening, then if we close it with no finding of breach or infringement (eg due to lack of evidence, on the grounds of administrative priorities or because of alternative action taken as described in paragraph 3.25) we will also make this fact public.[101]

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98 Section 35 of the Gas Act 1986 (the Gas Act) and section 48 of the Electricity Act 1989 (the Electricity Act). We will comply with any duties under section 105 of the Utilities Act 2000 and Part 9 of the Enterprise Act 2002 (the Enterprise Act), in respect of confidential information.

99 When deciding on anonymity, we will have regard to the applicable legislation.

100 In the case of market sensitive announcements, where appropriate, we will apply the Financial Conduct Authority's (FCA) 'Guideline for the control and release of price sensitive information by Industry Regulators' originally published by the Financial Services Authority, the predecessor of the FCA.

101 We are required to do this under section 25A of the Competition Act and we are committing to do it for all other types of cases covered by these guidelines.

Contact with the case team

4.13 When we decide to open a case we will provide the company under investigation and any relevant third parties with contact details of the person who will be the main point of contact at Ofgem during the investigation (Ofgem contact).

4.14 Any specific queries should be addressed to the Ofgem contact.

4.15 We will comply with our duties in respect of confidential information when providing updates.

Interim orders

4.16 Where there is a need for immediate action, for example where consumers are suffering detriment that needs to be stopped, we may take steps to make a provisional order or interim measures direction, or obtain an interim enforcement order or interim injunction as appropriate. These orders have already been described in Section 2 (at paragraphs 2.9, 2.30, 2.50, 2.65 and 2.72).

4.17 We will usually engage with companies under investigation before making an order, and where appropriate, we may invite written representations from them. However, there may be circumstances (such as where an ongoing or likely contravention requires immediate intervention to prevent detriment to consumers or competition) in which it may be necessary to make an order without representations from the company affected.

4.18 This does not apply to Competition Act cases, where we are required to give written notice to the proposed recipients of the interim measures direction before the direction is made, and offer them an opportunity to make representations and inspect documents on file.[102] Also, in cases under Part 8 of the Enterprise Act 2002 (the Enterprise Act) (as described in paragraph 2.50), consultation with the company before seeking an order is usually required.

Information gathering

4.19 We have wide-ranging powers to require the provision of information. These include powers under the following legislation:

[102] Section 35 of the Competition Act and rule 13 of the CA98 Rules.

- the Gas and Electricity Acts[103]
- the Competition Act[104]
- the Enterprise Act[105]
- the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs)[106]
- the Business Protection from Misleading Marketing Regulations (BPMMRs).[107]

4.20 We will use these powers to collect the information and evidence which we need to progress an investigation. It will usually be necessary to issue several information requests in the course of an investigation, although we will aim to avoid requesting information more than once without good reason. We may ask for additional information after considering material submitted in response to an earlier request. The request will set out how the information should be submitted and the deadline.

4.21 We will set the length of any deadline based on the complexity of the issues raised and the breadth and amount of information required. We will give a reasonable amount of time for responses.

4.22 Failure to comply with notices to produce documents or information will be taken seriously. It may amount to a criminal offence.[108]

4.23 We may share drafts of the request with the company to give the company an opportunity to comment on the scope or form of the request (eg as to whether the data or documentation is available in the form requested), and on whether there is any practical issue with the deadline. After considering any comments

[103] Section 38 of the Gas Act and section 28 of the Electricity Act. Note that there are other powers to require information: for monitoring purposes under section 34A of the Gas Act and section 47A of the Electricity Act, in the standard licence conditions and in the statutory instruments relating to the environmental schemes.

[104] Sections 26 of the Competition Act.

[105] Section 225 of the Enterprise Act.

[106] Regulation 13 of the UTCCRs.

[107] Regulation 21 of the BPMMRs.

[108] If a person fails to produce required documents or information; or alters, suppresses or destroys such documents, they may be guilty of a criminal offence and liable on conviction to a fine (section 38(2) and (3) of the Gas Act and section 28(4) and (5) of the Electricity Act). Also, if a person intentionally or recklessly destroys, falsifies or conceals a required document; or provides false or misleading information, they may be guilty of a criminal offence and liable to a fine and in some cases to imprisonment for up to two years (sections 43 and 44 of the Competition Act).

and making any amendments we consider necessary, we will issue the actual information request.

4.24 If there are problems understanding an information request or queries about the scope of it, these should be raised with the Ofgem contact. Representations about the deadline should be made to the contact in writing as soon as possible. Companies should not wait until just before the deadline to request more time. We may allow further time if there are good reasons for needing an extension. These reasons should be set out in the request for an extension. We will aim to deal with all requests promptly and reasonably.

4.25 Delays in the provision of information can have an impact on overall timescales for the investigation. We therefore expect stakeholders to respond within deadlines to the notices served upon them. Note that failures to cooperate fully with reasonable requests from the investigation team may be considered an aggravating factor when the level of any penalty is set (see the Authority's 'Statement of Policy on Penalties and Consumer Redress'[109]).

4.26 We may gather information by making a site visit. A visit may be made, either at the request of the company or Ofgem, if we think that this might help to clarify matters or is appropriate for some other reason. Any site visit should be arranged through the Ofgem contact.

4.27 In Competition Act cases, we may also ask questions of an individual connected with a company under investigation,[110] and enter and in some instances search, business and domestic premises.[111]

4.28 In sectoral cases and those under the Enterprise Act, UTCCRs and BPMMRs, the Authority may apply to the court for an order requiring any default in complying with a notice to be made good (and costs).[112]

4.29 In Competition Act cases, the Authority may impose a civil sanction by way of a financial penalty on a person who fails to comply with a requirement imposed under section 26, 26A, 27, 28 or 28A.[113]

[109] To be issued for consultation shortly.
[110] Section 26A of the Competition Act [coming into force on 1 April 2014].
[111] Sections 27, 28 or 28A of the Competition Act.
[112] Section 38(4) of the Gas Act, section 28(6) of the Electricity Act, section 227 of the Enterprise Act and regulation 21(6) of the BPMMRs.
[113] Section 40A of the Competition Act.

Meetings

4.30 Meetings with a company under investigation may be held as part of an information or evidence-gathering exercise or be used for updates on the progress of the investigation. The company and Ofgem may deal with procedural or substantive issues, raise concerns or issues, for example in advance of the settlement phase (case direction meeting), or to discuss settlement terms (see Section 5).

4.31 If we think a meeting is necessary or would be helpful, we will contact the company to request a meeting. We will make the arrangements and confirm them. We will say who (from Ofgem) will attend. We may request that particular people attend from the company (eg those with knowledge about particular matters or with the authority to speak for the company).

Other sources of information

4.32 We may seek information and evidence from third parties (eg consumer bodies, industry competitors, whistleblowers or other witnesses, other stakeholders), or from publicly available records. Sometimes we instruct experts (eg to provide economic analysis or carry out a survey to help us establish detriment).

4.33 We may consider (where available):

- complaint statistics and any qualitative data
- market data
- market monitoring and surveillance material
- statistical reports
- economic or technical analysis
- information relating to how other parties have secured compliance
- any other relevant evidence.

Section 5

Settling or contesting a case

5.1 This section describes our procedures for settling or contesting in sectoral and Competition Act cases. Sectoral cases are dealt with in paragraphs 5.3 to 5.40. Many of the processes described are the same for Competition Act cases. However, certain obligations in the Competition Act and associated legislation require us to adopt some differences of approach when dealing with competition cases. Paragraphs 5.41 to 5.70 explain how we deal with settling or contesting Competition Act cases. If a matter is not raised in those paragraphs, unless otherwise required by the relevant legislation, we will follow the procedures set out in the preceding (sectoral) paragraphs.

5.2 Note that this section and Section 6 do not apply to cases under the Enterprise Act 2002, the Unfair Terms in Consumer Contracts Regulations 1999 or the Business Protection from Misleading Marketing Regulations 2008. Different procedures apply in these cases as orders are sought from a court and are not decisions of the Authority. We have set out these procedures in Section 2 starting at paragraphs 2.43, 2.62 and 2.68.

Sectoral cases

Settling a sectoral case

5.3 To settle a case, a company under investigation must be prepared to admit to the breaches that have occurred. The settlement will lead to a finding of breach. The company will be expected to agree with this finding and to any penalty and/or consumer redress order.

5.4 The company will also be expected to agree not to appeal any finding of breach, penalty or consumer redress order that is agreed to as part of the settlement.

5.5 Note that this settlement process is distinct from the resolution of a case by, for example, the acceptance of undertakings or other agreed action as described in paragraph 3.25.

5.6 It is important to appreciate that settlement in the regulatory context is not the same as the settlement of a commercial dispute. An Ofgem settlement is a regulatory decision taken by us, the terms of which are accepted by the company under investigation. In sectoral cases, we must have regard to our statutory

objective when agreeing the terms. We must also have regard to our statutory obligation to consult on proposed penalties.

5.7 It is also important to note that settling does not reduce the seriousness of any breach. It will, however, result in a lower penalty than would likely be imposed if the matters were contested, and the case will be dealt with more quickly.

5.8 Settlement is a voluntary process. There is no obligation on companies to enter into settlement discussions or to settle. Any decision to settle should be based on a full awareness of the requirements of settlement (described above) and the consequences of settling, including that a finding on breach will be made.

5.9 Companies should consider whether to obtain legal or other advice before settling a case. Note that the fact that we have settled a case with a company does not prevent us from taking future action if further breaches occur, or if actions agreed by the company to reach settlement are not carried out.

5.10 Although there may be exceptional cases[114] where settlement is not appropriate, generally we will consider settlement in all cases.

5.11 Companies may ask to enter into settlement negotiations. Whilst we will engage positively with a company that indicates a willingness to enter into early settlement negotiations, in many cases it may not be possible to start such negotiations until we have sufficient information to assess the nature and extent of the breaches and the harm caused. To speed up our investigations, we may ask the company to cooperate with us by providing information in the meantime.

5.12 We will expect companies to take appropriate steps to secure compliance irrespective of the stage at which the case is at. Similarly, in suitable cases we will also expect satisfactory arrangements for consumer redress to be put in place. The fact that a company has not completed such steps will not be a bar to settlement discussions taking place, so long as the company has shown a real commitment to resolve the outstanding issues. If actions are agreed and not carried out, enforcement action may be undertaken.

Settlement discounts

5.13 Early settlement results in cases being resolved more quickly, and saves resources for both the company and Ofgem. It may also result in consumers

[114] Certain cases may not be suitable for settlement (for example, where a point of law is at issue).

obtaining compensation earlier than would otherwise be the case. In recognition of the benefits of early settlement, we have a discount scheme.

5.14 The discount is applied to a penalty amount that has been agreed in the settlement. It is available on a sliding scale, depending on when the settlement agreement is reached (the earlier the settlement, the greater the percentage discount).[115] The Authority has provided for three settlement windows, as follows:

- **Early settlement window**: greatest discount

  opens when the draft penalty notice and/or redress order and press notice are served on the company (see paragraph 5.17)

  closes on expiry of the reasonable period notified to the company when the draft notice etc are served (see paragraph 5.17)

- **Middle settlement window**: medium discount

  opens after the early settlement window has closed

  closes on expiry of the period for making written representations on the Statement of Case notified to the company when the Statement of Case is served (see paragraph 5.24)

- **Late settlement window**: smallest discount

  opens after the middle settlement window has closed

  closes on a date notified to the company by the EDP Secretariat[116] (see paragraphs 5.34 and 5.40).

5.15 The percentage discounts are set out in the Authority's 'Statement of Policy on Penalties and Consumer Redress' (the Authority's Penalties and Redress Policy).[117]

The settlement framework

5.16 In most cases, after we have carried out our enquiries to assess the breaches and any harm caused, we will serve the company with a Summary statement of initial

[115] Note that the discount does not apply to any consumer redress payment. Also any final penalty amount and/or consumer redress order is subject to consultation in accordance with statutory requirements (see paragraph 6.24).

[116] The body that supports the Enforcement Decision Panel (EDP). The decision-making structure is described in Section 6.

[117] To be issued for consultation shortly.

findings (the Summary) (unless we have already served a Statement of Case, see paragraph 5.23). This will be followed by an optional case direction meeting (or other contact) where we can discuss the company's views on settlement discussions.

5.17 Following that meeting (or contact), we will obtain a settlement mandate from a Settlement Committee.[118] The company will then be provided with a draft penalty statement and/or consumer redress order, and press notice and it will be notified at this point that the early settlement window has opened. At the same time, it will be told the date that this window closes.

5.18 If a company wishes to take advantage of the greatest settlement discount, it will have this reasonable period (set on a case-by-case basis) to agree a settlement. This agreement is subject to the approval of the Settlement Committee or senior partner, if required, and consultation (see paragraph 6.24) which need not happen before expiry of the deadline. There will be no extension to the deadline that we set, apart from in very exceptional circumstances.

5.19 We will contact the company to make the necessary arrangements for discussions to take place. Settlement discussions may take place over a number of meetings and/or telephone calls. They will take place on a "without prejudice" basis. This means that if negotiations break down, neither party can rely on admissions or statements made during the settlement discussions in any subsequent contested case.

5.20 The aim of discussions will be to reach agreement on the facts of the breaches (where appropriate) and the proposed terms of the penalty notice and/or consumer redress order.[119] We may also agree other terms with the company as part of a settlement.

5.21 If a settlement is not agreed by the close of the early settlement window, the company may still receive a lesser discount for an agreement subsequently reached, according to the sliding scale already described (further information about the windows are set out below in paragraphs 5.24, 5.34 and 5.40).

[118] The bodies with delegated powers to issue a settlement mandate prior to settlement discussions are described in Section 6. Note that in sectoral cases where the penalty amount is below £100,000, a senior partner may be appointed to set the mandate with advice from the Enforcement Oversight Board.

[119] This means that (unlike in contested cases) we will seek to reach agreement with the company on the wording that will appear in the penalty notice/consumer redress order. There will also be an exchange of press notices before they are published.

5.22 If a settlement is agreed, the company will be expected to sign a settlement agreement. The settlement decision will be made and issued as described in paragraphs 6.21 to 6.26. If a settlement cannot be reached, the case will move to the contested route.

Contesting sectoral cases – the Statement of Case

5.23 If a case is not settled within the early settlement window we will serve a Statement of Case on the company which sets out our findings and the case alleged against the company. The company's written representations are invited. We will also disclose any relevant documents (see paragraph 5.26 to 5.28).

5.24 We will usually write to the company to advise that the Statement of Case is being drafted and serve an updated timeline for the case. We may invite the company to attend a case direction meeting for discussions to take place. The Statement of Case will be peer-reviewed by a lawyer who is not part of the case team before being sent to the company. When the Statement of Case is ready we will serve it on the company, and notify them of the deadline for any written representations and the closure of the middle settlement window (which will be the same date).

5.25 If the case is to be contested, we will inform the EDP Secretariat so that a Panel can be selected from the Enforcement Decision Panel (EDP) to deal with the case.[120]

Disclosure

5.26 We will disclose a list of all of the documents that we will rely on. Many of them are likely to be documents that the company already has and may have provided to us in the course of the investigation. However, we will produce copies of any other documents reasonably requested by the company, subject to any legal restrictions on disclosure including questions of confidentiality and privilege.

5.27 In some cases, we may rely on information contained in confidential documents. In these cases our disclosure list will note the documents where full disclosure is not possible. It may be necessary to limit the description of the documents themselves. We will explain the alternative arrangements, which will allow the recipient to review the evidence on which we rely. Typically this will mean that confidential material will be removed so that confidence is maintained, and alternative arrangements may sometimes be required.

[120] The decision making structure is described in Section 6.

5.28 We will also disclose, by list, documents in the knowledge or possession of the case team or the relevant policy team, which might undermine the case advanced in the Statement of Case. Again, we will note those documents where full disclosure is not possible and the alternative arrangements which will be made. Privileged documents may be listed by class, and will not be disclosed.

Written representations

5.29 Making written representations in response to the Statement of Case is the company's opportunity to examine and seek to rebut some or all of the allegations against it. The company should submit the evidence it wishes to put forward to support its representations. There is no obligation to submit a response, but please note paragraph 6.31.

5.30 The time to respond will depend on the number and complexity of the issues raised in the Statement of Case. In cases with extensive disclosure of material not previously seen by the recipient, we will take this into account when setting the period of time for submitting a response. We will usually allow at least 28 days and we may agree an extension, if reasonably required, to be decided on a case-by-case basis.

5.31 Once we have received any written representations and supporting evidence from the company, we will review the material and our case. This may lead to us deciding that issues raised may no longer be of concern and we may close the case or withdraw from parts of it. It may lead to us making a further information request to the company or replying to the company's representations.

5.32 If there is a material change in the nature of the breaches in the light of the written representations, we may prepare a Supplementary or Revised Statement of Case. The company will be given an opportunity to respond in writing to the new document. We will usually allow a further 28 days for this, and we may shorten or extend the time subject to the complexity of the issues.

5.33 If there are difficulties meeting any deadline, a request for an extension should be made in writing to the Ofgem contact (or in urgent cases by telephone). We will deal with requests for extensions as described in paragraph 4.24.

5.34 If a company has not requested the opportunity to make oral representations to the decision-making body (the Panel) and the case is to be decided on the papers, the EDP Secretariat will issue a notice to the company informing it of the date that the late settlement window closes and any other relevant deadlines.

Oral representations

5.35 A company may, if it wishes, make oral representations to the Panel. There is no obligation to do so. A company may decide not to for reasons of convenience or to save costs. A company may choose to have legal representation when oral representations are made, although this is not required.

5.36 If the company does wish to make oral representations, this should be clearly stated in the response to the Statement of Case. The EDP Secretariat will then arrange a date for oral representations to be heard.

5.37 Even where a company has not requested the opportunity to make oral representations, we may do so. The Panel may also invite further representations, in any case, if it needs further clarification on the papers. It may request that these clarifications are made orally. It cannot compel attendance, so it will always be possible to submit clarifications in writing. Whether oral representations are necessary is a matter for the discretion of the Panel.

5.38 The form, length and procedures of any hearing will be decided by the Panel, taking account of all the circumstances of the case.

5.39 The EDP Secretariat will fix the date taking into account the parties' availability. The EDP Secretariat will aim to find a date convenient to all parties where possible.

5.40 At least 28 days prior to the fixed date, the Panel will issue directions in writing to the parties via the EDP Secretariat, indicating how it intends to conduct the hearing. The directions will also contain the date that the late settlement window closes. The parties may make written representations on the directions about the hearing within the time period set out in the directions (at least seven days). If the parties raise any issues, these will be resolved on the papers and the decision notified to the parties in writing.

Competition Act cases

Settling in Competition Act cases

5.41 Settling in Competition Act cases follows a similar process to the one above for sectoral cases, however there are a number of differences of approach that are

set out here.[121] These differences exist because of requirements imposed by relevant legislation including the Competition Act 1998 (Competition and Markets Authority Rules) 2014 (the CA98 Rules). Where different terminology is used in Competition Act cases to describe a similar or the same process, that terminology is also set out below.

5.42 Due to the different legal framework for Competition cases, the nature of the allegations and the number of parties that may be involved, we will retain a broad discretion in determining which cases to settle. The assessment of whether a case is suitable for settlement will be made on a case-by-case basis. We will consider factors such as whether the evidential standard for giving notice of a proposed infringement decision is met (we will only enter into discussions where we consider that that standard is met) and the likely procedural efficiencies and resource savings that can be achieved.

5.43 For enforcement cases under the Competition Act, settlement is the process whereby a company under investigation is prepared to admit the infringement, stop the infringing behaviour, agree to a streamlined administrative process for the remainder of the investigation[122] and confirm that it will pay a maximum penalty amount.[123] These are minimum requirements in order to settle. These will form part of the mandate obtained from the Settlement Committee. If a company meets the minimum requirements, a reduced penalty will be imposed in accordance with the CMA's adopted guidance, 'The OFT's guidance as to the appropriate amount of a penalty'.[124]

5.44 The company must agree that the settlement discount set out in the infringement decision will no longer apply if it appeals the infringement decision to the Competition Appeal Tribunal (CAT),[125] and that we will remain free to use the admissions made by it and any documents, information or witness evidence provided by it.

5.45 Settlement is a voluntary process as described in paragraph 5.8. In Competition Act cases, the company should satisfy itself that, having seen the key evidence

[121] Note that the following sectoral paragraphs have no application to Competition Act cases: 5.3 to 5.4, 5.10, 5.13 to 5.18, 5.20 to 5.22.

[122] The streamlined procedure (intended to achieve efficiencies and resource saving) would include, for example, streamlined access to file by access to key documents only, no written representations (except limited representations identifying manifest factual inaccuracies – see paragraph 5.56) or oral representations.

[123] This will be reduced by a settlement discount, provided that the company proposing to settle follows any continuing requirements of settlement.

[124] OFT 423 at: https://www.gov.uk/government/publications/appropriate-ca98-penalty-calculation.

[125] The CAT has full jurisdiction to review the appropriate level of penalty (see paragraph 6.63).

on which the Authority is relying, it is prepared to admit to the infringement, including the nature, scope and duration of the infringement.

5.46 If the company does not follow the requirements for settlement we may withdraw from the settlement procedure. Before doing so, we will notify the company and will give it an opportunity to respond.

5.47 When deciding how to deal with settling or contesting a Competition Act case, we will have regard to the CMA's guidance, 'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (the CMA's Guidance).[126]

5.48 Note that in Competition Act cases we will comply with requirements under the CA98 Rules for there to be a Procedural Officer to whom complaints about the investigation procedures can be made, if not adequately resolved by the Senior Responsible Officer (SRO)[127] in the case.

Early settlement discounts

5.49 We will apply the CMA's settlement discounts as described in the above guidance.[128] There are two settlement windows as follows:

- **Early settlement window**: greater discount up to a maximum

  opens when the draft penalty notice is served on the company (see paragraph 5.54)

  closes just before the date for service of the Statement of Objections (see paragraph 5.54)

- **Late settlement window**: lesser discount up to a maximum

  opens on service of the Statement of Objections (see paragraph 5.63)

  closes on a date notified to the company by the EDP Secretariat (see paragraphs 5.69 and 5.70).

[126] https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases.

[127] Rule 8 of the CA98 Rules. Further information on the Procedural Officer's role and the sorts of complaints that may be referred for resolution can be found in Chapter 15 of the CMA's Guidance at: https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases.

[128] Chapter 14 of the guidance at: https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases.

5.50 The percentage discounts are set out in the CMA's guidance. The amount of any settlement discount to be applied (up to a maximum) will depend on how early in the settlement window an agreement is reached, the procedural efficiencies and resource savings resulting from the settlement, and the extent to which the company follows the requirements of settlement.

The settlement framework

5.51 Where a case is suitable for settlement, the SRO will generally lead settlement discussions on our behalf. The Enforcement Oversight Board must provide approval for the SRO to engage in settlement discussions.

5.52 If settlement discussions take place before service of the Statement of Objections, each company that enters into settlement discussions will be provided with a Summary statement of initial findings (the Summary) and access to the key documents on which we rely. We will also comply with the requirement to provide access to the documents held on our file.

5.53 This will be followed by an optional case direction meeting (or other contact) where we can discuss the company's views on settlement discussions.

5.54 Following that meeting (or contact), we will obtain a settlement mandate from a Settlement Committee.[129] The company will then be provided with a draft penalty statement and it will be notified that the early settlement window has opened. At the same time, it will be told that the window will close just before the date for service of the Statement of Objections. We will write to the company subsequently to say when we expect to serve the Statement of Objections and set the date for closure of this window.

5.55 If a company wishes to take advantage of the greater settlement discount, it will have up until the early settlement window closes to agree a settlement. The agreement is subject to the approval of the Settlement Committee, which may be given after that date. We will not extend the early settlement window for the purposes of reaching an agreement, apart from in very exceptional circumstances.

5.56 During discussions, the company will be given the opportunity to provide limited representations, including identifying manifest factual inaccuracies, on the Summary (or Statement of Objections if already served) within a specified time frame. If the representations amount to a wholesale rejection of the alleged facts

[129] The bodies with delegated powers to issue a settlement mandate prior to settlement discussions are described in Section 6.

or rejection of any important part of the case, we will reassess, on a case-by-case basis, whether the case remains suitable for settlement. It will also be given the opportunity to make limited representations on the draft penalty calculation within a specified time frame, provided that they are not inconsistent with the company's admission of liability. We will not enter into negotiations or plea-bargaining during settlement discussions.[130] We may also agree other terms with the company as part of a settlement.

5.57 If a settlement is not agreed by the close of the early settlement window, the company may still receive a lesser discount for an agreement subsequently reached before the late settlement window closes (notified as described in paragraphs 5.69 and 5.70).

5.58 If the company is willing to settle on the basis of the requirements of the procedure covered in settlement discussions with us, it will confirm in a letter (with its company letterhead) its acceptance of those requirements which includes its admission. Even if a settlement is reached, we are still required to serve the Statement of Objections upon which the infringement decision will be based.[131]

5.59 If a settlement is agreed, the settlement decision will be made and issued as described in paragraphs 6.21 to 6.26. If a settlement cannot be reached, the case will move to the contested route.

Contesting Competition Act cases – the Statement of Objections

5.60 Contested Competition Act cases follow similar procedures to those in sectoral cases (see paragraphs 5.23 to 5.40). The main differences, which are set out below, relate to documents served on the company, disclosure (which is called access to file in Competition cases), and the usual time allowed for responses to the Statement of Objections.

5.61 The case team will produce a Statement of Objections.[132] This is a notice to the company under investigation that the Authority proposes to make an infringement decision.

[130] Although we will seek to reach agreement with the company on the wording that will appear in the penalty notice. There will also be an exchange of press notices before they are published.

[131] Rule 9(5) of the CA98 Rules.

[132] Note that Ofgem will ensure compliance with rule 3 of the CA98 Rules that the person responsible for overseeing the investigation and for deciding to issue a Statement of Objections must be a different person from the person responsible for deciding whether to issue a Supplementary Statement of Objections, an infringement decision or penalty decision.

5.62 The document must set out the prohibition that we consider has been infringed, the facts we rely on, our reasons for considering that the conduct breaches competition law, the action we intend to take and our reasons, the period for written representations on the confidentiality of information in the document, and the period for written representations on the content of the document.[133] It will set out any proposed action such as imposing a financial penalty and/or issuing directions and the reasons for taking the action. It will also provide the deadlines for any written representations.

5.63 If the case involves more than one party, each party will receive a copy of the Statement of Objections. We will also notify the company that the late settlement window has opened. Information that is confidential will be disclosed through the Statement of Objections to other parties only if disclosure is strictly necessary in order for them to exercise their rights of defence.

5.64 We may also offer third parties with a sufficient interest the opportunity to consider and make representations[134] on a non-confidential version of the Statement of Objections. We may, in the event of a request, consider granting access to documents on the file where that is permissible under Part 9 of the Enterprise Act 2002.

5.65 Before disclosing any confidential information, we will consider whether there is a need to exclude any information where disclosure would be contrary to the public interest or might significantly harm the interests of the company or individual it relates to. If this is the case, we will consider the extent to which disclosure of that information is nevertheless necessary for the purpose for which we are allowed to make the disclosure.

Access to file

5.66 At the same time as we serve the Statement of Objections we will give the company access to certain documents on the case file as required by the legislation.[135] We may withhold any document to the extent that it contains confidential information or which is an internal document. In many instances we may have to remove any confidential information before disclosing

[133] The procedure we must follow is set out in rules 5 and 6 of the CA98 Rules.

[134] Non-confidential versions of these representations will be disclosed to the company/companies for comment.

[135] Rule 6(2) of the CA98 Rules.

documents.[136] We will adopt a similar procedure to handling confidential information as is described in paragraph 5.27.

Written representations

5.67 We will usually allow at least 40 working days and no more than 12 weeks for a company to respond in writing to the Statement of Objections. If there is a material change in the nature of the breaches in the light of the written representations, we may prepare a Supplementary or Revised Statement of Case. The company will be given an opportunity to respond in writing to the new document. We will usually allow a further 28 days for this, and we may shorten or extend the time subject to the complexity of the issues.

5.68 If the case is to be contested, we will inform the EDP Secretariat so that a Panel can be selected from the EDP to deal with the case.[137]

5.69 If a company has not requested the opportunity to make oral representations to the Panel and the case is to be decided on the papers, the EDP Secretariat will issue a notice to the company informing it of the date that the late settlement window closes.

Oral representations

5.70 If oral representations are to be heard, the Panel will issue written directions as described in paragraph 5.40, containing the date that the late settlement window closes.

[136] See also paragraphs 3.16 to 3.20 on the handling of confidential information.
[137] The decision making structure is set out in Section 6.

Section 6

Decision making and appeals

6.1 Decisions on breaches or infringements, the use of its enforcement powers, and the imposition of penalties or consumer redress payments may be delegated by the Authority. The Authority's decision-making bodies include the Enforcement Oversight Board (EOB), Settlement Committees, the Enforcement Decision Panel (EDP) and, in certain circumstances, senior partners.

6.2 This section explains the Authority's power to delegate its decision-making powers and describes the Authority's decision-making bodies. It sets out how settlement decisions and final decisions in contested cases are made and issued. It also deals with appeals.

The decision makers

The power to delegate

6.3 The Authority is authorised to delegate its decision-making powers to any member or employee of the Authority, or any committee of the Authority which consists entirely of members or employees of the Authority, as long as they are authorised for that purpose by the Authority.[138]

The Enforcement Oversight Board (EOB)

6.4 The EOB provides strategic oversight and governance to our enforcement work and oversees the portfolio of cases. Changes in the regulatory landscape and market environment mean that the priority of a case may change over time. The EOB recommends annual strategic priorities for case prioritisation and selection to the Authority. It takes case handling decisions such as whether to open or close a case, and is consulted on whether interim orders should be made or commitments accepted. It may also decide whether we should seek to exercise our Competition Act 1998 (the Competition Act) powers in a particular case.[139]

6.5 The members of the EOB are usually senior civil servants from across Ofgem. It is chaired by the senior partner with responsibility for enforcement.

[138] Paragraph 9(1) and (3) of Schedule 1 to the Utilities Act 2000.

[139] Note that decisions about whether to seek a court order under the Enterprise Act 2002, Unfair Terms in Consumer Contracts Regulations 1999 or Business Protection from Misleading Marketing Regulations 2008 are reserved to the Authority.

The Settlement Committee

6.6 A Settlement Committee may deal with any sectoral or Competition Act case which is settling. In sectoral cases where the penalty amount is below £100,000,[140] the case may be handled by a senior partner, as described in paragraph 6.10.

6.7 A Settlement Committee consists of one member of the EDP and one member of the Executive[141] and is constituted as and when required to deal with a case.

6.8 The membership of the Committee will be provided to the company in writing by the EDP Secretariat.

6.9 If settlement negotiations break down, an EDP member will not hear the contested case if they have been on an earlier Settlement Committee that has considered the same case.

Senior partners

6.10 For sectoral settlement cases where the penalty amount is below £100,000 the EOB can appoint a senior partner, advised by them, to set the settlement mandate and approve any final settlement decision (where necessary).[142]

6.11 Cases will usually only be delegated to a senior partner where the issues raised are non-contentious and where there is a low level of consumer harm. Note that Competition Act cases cannot be dealt with by this route.

6.12 The identity of the senior partner will be provided to the company in writing.

The Enforcement Decision Panel (EDP)

6.13 The EDP consists of a pool of members who are employees of the Authority, one of whom is appointed as the EDP chair.

6.14 EDP members are independent from the case team.

6.15 Contested cases are decided by a decision-making Panel of usually three members appointed from the EDP by the EDP chair. A Panel is constituted as and when required to deal with a particular case. There will be a Panel chair who will

[140] Note that for these purposes the amount of any consumer redress payment is not taken into account.
[141] This means a member who is the chief executive, a senior partner or a managing director of Ofgem.
[142] Further references in these guidelines to the "Settlement Committee" also encompasses a "senior partner" in these cases.

chair the decision making discussions, and who has the casting vote in the event of a deadlock.

6.16 In contested cases where it must exercise its decision-making powers in respect of the Competition Act, the EDP Chair appoints at least one legally qualified member to the Panel. In Competition Act cases, a Procedural Officer is also required to chair the oral hearing and report to the Panel on procedural fairness.[143]

6.17 EDP Terms of Reference will be published.

6.18 The identity of the Panel members (and the Procedural Officer in Competition Act cases) will be notified to the parties in writing by the EDP Secretariat.

6.19 The EDP Secretariat provides administrative and procedural support to the EDP members. This includes the management of correspondence, case papers and evidence.

6.20 The EDP Secretariat is independent of the case team. It liaises with the parties on behalf of the Panel. The Panel, or its individual members, should not be contacted directly by any party or their representatives outside of any oral representations.

Settlement decisions

6.21 At the case team's request, a Settlement Committee will be constituted to provide a settlement mandate to the case team before discussions commence. The mandate will not be disclosed to the party under investigation.

6.22 When setting the mandate (or subsequently approving an agreement where necessary), the Settlement Committee will have regard to the Authority's 'Statement of Policy on Penalties and Consumer Redress' (the Authority's Penalties and Redress Policy).[144] In Competition Act cases they will have regard to the CMA's adopted guidance, 'The OFT's guidance as to the appropriate amount of a penalty'[145] and applicable parts of the CMA's guidance, 'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases'.[146]

[143] Rules 6(5) and (6) of the Competition Act 1998 (Competition and Markets Authority's Rules) 2014 (CA98 Rules). Note that the Procedural Officer will not have been involved in the investigation and is not a decision-maker in the case.

[144] To be issued for consultation shortly.

[145] OFT 423 at: https://www.gov.uk/government/publications/appropriate-ca98-penalty-calculation.

[146] See Chapter 14 of the CMA's guidance at: https://www.gov.uk/government/publications/guidance-on-

6.23 Details of the procedural steps involved in settling a case are set out in paragraphs 5.3 to 5.22 and 5.41 to 5.59.

6.24 In sectoral cases, if after settlement discussions any agreement reached between the company and the case team falls outside the settlement mandate (eg because new material has come to light during the negotiations), the case team will go back to the Settlement Committee to seek approval of the proposed agreement. The Settlement Committee may accept or reject the terms or require changes as a condition of agreement. This may mean that the case team has to go back to the company to see if agreement can be reached on amended terms. If, however, the agreement reached is within the terms of the mandate already approved by the Settlement Committee, the decision and penalty notice and/or consumer redress order will be published in accordance with the statutory requirements,[147] for the purposes of consultation. Following the close of the consultation, any representations will be considered. The consultation process may lead to the need to propose a change in the agreement if, having received representations or objections, the Settlement Committee proposes to vary the decision or the proposed penalty notice. If so, the consultation process must be repeated. If any proposed changes cannot be agreed with the company, it may withdraw from the agreement, and the case will move to the contested route.

6.25 In Competition Act cases, all settlement agreements will have to be approved by the Settlement Committee. We are still required to serve the Statement of Objections.[148] As in sectoral cases, the Settlement Committee may accept or reject the terms or require changes as a condition of agreement. Once the settlement is agreed in terms that have been approved, an infringement decision and notice of penalty will be issued and published.[149]

6.26 The Authority will retain strategic oversight over settlement decisions taken in an annual review. Its role is as described in paragraph 6.34.

the-cmas-investigation-procedures-in-competition-act-1998-cases.

147 Section 30A of the Gas Act 1986 (the Gas Act) and section 27A of the Electricity Act 1989 (the Electricity Act).

148 Rule 9(5) of the CA98 Rules.

149 Rule 12 of the CA98 Rules.

Contested decisions

What decisions can a Panel make?

6.27 EDP members have delegated powers to make decisions in contested cases concerning the Gas and Electricity Acts and the Competition Act. A Panel will decide:

Sectoral cases

- whether there is or has been a contravention of any relevant condition or requirement, or a failure to achieve a standard of performance
- whether to make a final order or confirm a provisional order
- whether to impose a financial penalty and/or consumer redress order and, if so, the amount of any penalty or compensation and time for payment/compliance.

Competition cases

- whether there has been an infringement of competition law
- whether to issue written directions
- whether to impose a financial penalty and, if so, the amount and time for payment.

How will a Panel make decisions?

6.28 A Panel will act within the Authority's statutory powers. It will take account of any relevant guidance (including these guidelines).

6.29 If the Panel has not been asked to hear oral representations, whether representations are necessary or whether the case can be dealt with on the papers is a matter for the discretion of the Panel. The Panel may request further assistance from the parties as described in paragraph 5.37.

6.30 The Panel will decide, on a case-by-case basis, whether it will exercise its decision-making powers on liability and penalty at the same time or separately. This will be decided at an early stage and communicated to the parties with the case directions (issued via the EDP Secretariat). In Competition Act cases we would usually expect these to be dealt with separately.

6.31 Where oral representations are made, neither Ofgem nor the company will be permitted to introduce new material in oral representations save in exceptional circumstances or where the Panel requests additional material. If a party wishes

to introduce new material, notice must be given to any other party and the permission of the Panel should be sought before it is introduced. No evidence can be introduced after the hearing other than at the request of the Panel.

6.32 Details of the procedural steps involved in contesting a case are set out in paragraphs 5.23 to 5.40 (sectoral cases) and 5.60 to 5.70 (Competition Act cases).

6.33 When making decisions, the Panel will consider all of the relevant available information presented to it including, and not limited to:

- the Statement of Case or Statement of Objections and any Supplementary or Revised Statements
- any relevant evidence submitted to support the findings of the Statement of Case or Statement of Objections
- the affected parties' written representations and any other relevant evidence
- any oral representations of the case team and the affected parties and their respective legal representatives
- any information or evidence received in answer to a request from the Panel.

6.34 The Authority will not seek to influence the outcome of particular matters or change any decision of a Panel. The Authority will retain oversight of the EDP by its annual review of the decisions taken by the members. It may, if appropriate, issue further guidance to the EDP to inform future determinations.

Outcome of the decision making process – sectoral cases

6.35 If the Panel concludes that the regulated person has not committed any breach, the company will be informed of the case closure and a statement will normally be published on our website (see paragraph 4.12).

6.36 If the Panel is satisfied that a regulated person is or is likely to be in contravention of a licence condition or relevant requirement, a notice will be published on our website setting out the decision that:

- a breach is ongoing, or likely to occur, and that the Panel proposes to confirm a provisional order or make a final order; and/or
- a breach has occurred (or is ongoing) and that the Panel proposes to impose a financial penalty and/or consumer redress; and/or

- a breach has occurred, and the Panel does not intend to propose a financial penalty and/or consumer redress.

A notice will also be served on the regulated person along with a copy of any order.

6.37 Where the Panel proposes to make a final order or confirm a provisional order the notice will set out:

- that the Panel proposes to make the order
- the relevant condition or requirement with which it seeks compliance
- the acts or omissions which constitute contraventions of it
- any other facts to justify the order
- the time (not less than 21 days) for representations or objections to be made.[150]

6.38 Following the close of the consultation, the Panel will consider any representations and decide whether to exercise the Authority's powers to confirm or make an order.

6.39 As soon as is practicable after making an order, a copy of the order will be served on the regulated person and it will be published.[151]

Imposing a financial penalty or consumer redress order

6.40 The Panel may exercise the Authority's power to impose a financial penalty and/or make a consumer redress order in the circumstances set out in paragraph 2.13.

6.41 In deciding whether to do so, and if so, the amount of any penalty or compensation (under a consumer redress order), it will have regard to the Authority's Penalties and Redress Policy.[152]

6.42 If the Panel imposes:

1) a penalty;
2) compensation; or

[150] The procedural requirements are set out in section 29 of the Gas Act and section 26 of the Electricity Act. Note that representations may be made by anyone, including consumers.
[151] See section 29(7) of the Gas Act or section 26(5) of the Electricity Act.
[152] To be issued for consultation shortly.

3) both;

the amount in each case (combined if both are imposed) in respect of a contravention must not exceed 10 per cent of the regulated person's turnover.[153]

6.43 Under a consumer redress order, the Panel may require a regulated person to take necessary action to remedy the consequences of the contravention or prevent a contravention of the same or similar kind being repeated. The Panel might order:[154]

- the payment of compensation to affected consumers (ie those consumers that have suffered loss or damage, or been caused inconvenience, as a result of the contravention)
- the preparation and/or distribution of a written statement setting out the contravention and its consequences
- the variation or termination of contracts with affected consumers
- some other remedial action as considered necessary.

6.44 If proposing a penalty or a consumer redress order, a notice[155] setting out relevant details will be served on the regulated person (and in the case of a consumer redress order, on each affected consumer, or published in such a manner to bring it to their attention[156]) and published in line with statutory requirements.[157] The notice will include the time (not less than 21 days) for representations or objections to the penalty amount or consumer redress order.

6.45 If both a penalty and consumer redress order are proposed, the Panel may serve a joint notice.

[153] Section 30O of the Gas Act and section 27O of the Electricity Act. Turnover is determined in accordance with the Electricity and Gas (Determination of Turnover for Penalties) Order 2002.

[154] Section 30H of the Gas Act and section 27H of the Electricity Act. Note that in the event that it is impractical to identify all affected consumers, payment could, for example, be ordered to a proxy group or to a suitable fund to recognise wider detriment to the market.

[155] Under section 30A(3) of the Gas Act and section 27A(3) of the Electricity Act (penalties) and under section 30I of the Gas Act and section 27I of the Electricity Act (consumer redress orders). Note that there are certain time limits on the imposition of penalties (section 30C of the Gas Act and section 27C of the Electricity Act) and time limits for making consumer redress orders (section 30K of the Gas Act and section 27K of the Electricity Act).

[156] Section 30I(5) of the Gas Act and section 27I(5) of the Electricity Act.

[157] Sections 30A(7) and 30I(5) of the Gas Act and sections 27A(7) and 27I(5) of the Electricity Act.

6.46 Following the close of the consultation period, the Panel will consider any representations or objections, which are duly made and not withdrawn, and decide whether to exercise the Authority's powers to impose, vary or withdraw the proposed penalty and/or consumer redress order.

6.47 Before varying any proposal, a further notice to this effect must be given[158] for consultation, and any further representations or objections must be considered.

6.48 Notice of the final decision and the period for compliance (minimum 42 days for payment of a penalty, minimum seven days for compliance with the requirements of a consumer redress order) will be published and served on the regulated person.[159]

Outcome of the decision making process – Competition Act cases

6.49 If the Panel finds an infringement of the Competition Act, it will make an infringement decision. Notice of the decision will be given to each person who is or was a party to the agreement and/or is or was engaged in conduct.[160] A final opportunity will be given to the addressee of the decision to make confidentiality representations. The non-confidential version of the decision and any summary will be published on our website.

6.50 If an infringement decision is made, the Panel will also decide whether to give written directions, and if so, decide the content of the directions.[161] When giving directions to a person, they must be informed in writing at the same time of the facts on which the direction is based and reasons for it.[162]

Imposing a financial penalty

6.51 Where the Panel intends to make an infringement decision, the Panel may also decide to impose a financial penalty if satisfied that the infringement was committed intentionally or negligently.[163] The Panel may impose a financial penalty on the infringing party of up to 10 per cent of the company's applicable turnover.[164]

[158] Section 30A(4) of the Gas Act and section 27A(4) of the Electricity Act.
[159] Sections 30A(5) and 30G(5) of the Gas Act and sections 27A(5) and 27G(5) of the Electricity Act.
[160] Rule 10 of the CA98 Rules.
[161] Sections 32 and 33 of the Competition Act 1998.
[162] Rule 12 of the CA98 Rules.
[163] Section 36 of the Competition Act.
[164] See section 36(8) of the Competition Act. Turnover is determined in accordance with the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004.

6.52 When deciding on the appropriate amount of a penalty the Panel will have regard to the CMA's adopted guidance, 'The OFT's guidance as to the appropriate amount of a penalty'.[165]

6.53 Before making the final decision on infringement and the appropriate penalty, the Panel must give the company an opportunity to comment in writing and orally[166] (if they wish to), within a time specified in the draft, on the draft penalty notice which sets out the calculation of the penalty amount.

6.54 Having taken account of any representations, final notice of the penalty will be given in writing and specify the period for payment.[167] The company must be informed of the facts on which the Panel bases the penalty and its reasons for requiring it.[168]

Appeals

Appeals to the court in sectoral cases

6.55 A regulated person may appeal against the making of a provisional or final order[169] on the grounds that it was not within the powers conferred on the Authority by, or the procedural requirements of, the Gas or Electricity Acts. They may make an application to the court[170] within 42 days from the date of the order being served on them.[171]

6.56 The court has the power to quash the order or any provision of it if it is satisfied that the order was not within those powers or that the interests of the regulated person have been substantially prejudiced by a failure to comply with those requirements.[172]

6.57 Where a regulated person is aggrieved by the imposition of a penalty, the amount or the date for payment and/or by the making of a consumer redress order, or any requirement imposed by the order, the regulated person may make

[165] OFT 423 at: https://www.gov.uk/government/publications/appropriate-ca98-penalty-calculation.
[166] Following similar procedures to those set out in paragraphs 5.35, 5.36, 5.38 to 5.40.
[167] Section 36 of the Competition Act. The date before which the payment is due must not be earlier than the end of the period within which an appeal against the notice may be brought under section 46.
[168] Rule 12 of the CA98 Rules.
[169] Except when they have agreed not to as part of a settlement agreement, see paragraph 5.4.
[170] In relation to England and Wales, the High Court and in relation to Scotland, the Court of Session, section 30(9) of the Gas Act and section 27(8) of the Electricity Act.
[171] Section 30(1) Gas Act and section 27(1) Electricity Act.
[172] Section 30(2) Gas Act and section 27(2) Electricity Act.

an application to the court.[173] The application must be made within 42 days of receipt of notice of the decision.[174]

6.58 The court may quash the penalty, substitute a penalty of a lesser amount or substitute the date or dates for payment, as appropriate, if satisfied that one or more of the grounds of appeal are met, namely:

- the imposition of the penalty was not within the Authority's power
- relevant procedural requirements were not complied with and the regulated person has been substantially prejudiced by the non-compliance
- it was unreasonable of the Authority to require the penalty imposed, or any portion of it, to be paid by the date or dates by which it was required to be paid.

6.59 In the case of a consumer redress order, the court may quash the order or any provision in it, or vary any such provision, as appropriate, if satisfied that one or more of the grounds of appeal are met, namely:

- the making of the order was not within the Authority's powers
- relevant procedural requirements were not complied with and the interests of the regulated person were substantially prejudiced by that non-compliance
- it was unreasonable of the Authority to require something to be done under the order.

6.60 Note that in the case of enforcement orders made or financial penalties imposed in respect of breaches of the Transmission Constraint Licence Condition, appeals are heard by the Competition Appeals Tribunal (see paragraph 6.64) and not the court.

Appeals to the Competition Appeal Tribunal

6.61 Competition Act decisions may be appealed to a specialist tribunal, the Competition Appeal Tribunal (the CAT), established under the Enterprise Act 2002. Appealable decisions include, among others, infringement decisions, no grounds for action decisions, directions and the imposition of financial

[173] Section 30E(1) and 30M of the Gas Act and section 27E(1)and 27M of the Electricity Act.
[174] Section 30E(2) and 30M(2) of the Gas Act and section 27E(2) and 27M(2) of the Electricity Act.

penalties.[175] Note that there is no appeal against the decision not to accept commitments.

6.62 Any party in respect of which the Authority has made a decision may appeal against that decision.[176] A third party who the CAT considers has sufficient interest may also appeal certain decisions to the CAT.[177]

6.63 If a party appeals an infringement decision that was made following a settlement agreement, the settlement discount set out in the decision will no longer apply[178] and the CAT will have full jurisdiction to review the appropriate amount of any penalty.

6.64 In sectoral cases, an electricity generator on whom an enforcement order and any penalty have been imposed in respect of breaches of the Transmission Constraint Licence Condition, can appeal to the CAT against the order and/or penalty.[179]

6.65 Any appeal to the CAT must be made so that it is received by the CAT within two months of the date of notification or publication of the decision (whichever is the earliest).[180]

6.66 The CAT's powers include the power to confirm or set aside the decision, to substitute its own decision for that of the Authority, to remit the matter to the Authority and to impose, revoke or vary the amount of penalty.[181]

Appeals against decisions made by the courts

6.67 Orders made under Part 8 of the Enterprise Act 2002, the Unfair Terms in Consumer Contracts Regulations 1999 and the Business Protection from Misleading Marketing Regulations 2008 are dealt with on appeal in the same way

[175] Except in the case of an appeal against the imposition, or the amount, of a penalty, the making of an appeal does not suspend the effect of the decision to which the appeal relates: section 46(4) of the Competition Act.
[176] Section 46 of the Competition Act 1998
[177] Section 47 of the Competition Act 1998
[178] In accordance with the settlement agreement made with us (see paragraph 5.44).
[179] See the separate guidance, 'Transmission Constraint Licence Condition Guidance' available at: https://www.ofgem.gov.uk/ofgem-publications/40377/tclc-guidance.pdf. Appeals are dealt with at paragraph 3.8.
[180] Rule 8 of the Competition Appeal Tribunal Rules 2003. The CAT's Rules and Guidance are available on its website at : http://www.catribunal.org.uk/240/Rules-and-Guidance.html.
[181] Paragraph 3 of Schedule 8 to the Competition Act.

as other civil appeals. An appeal lies to the next level of judge in the court hierarchy against the order made by the lower court.[182]

6.68 Notice of appeal must be filed at the appeal court within the time directed by the lower court, or (where the court makes no such direction) within 21 days of the date of the lower court's decision that is to be appealed.[183]

[182] The Access to Justice Act 1999 (Destination of Appeals) Order 2000 provides a summary of the destinations for different types of civil appeals.

[183] Rule 52.4(2) of the Civil Procedure Rules and see Part 52 of the Civil Procedure Rules generally for further information about appeals.

Section 7

Closing cases

7.1 A decision may be made very early on not to pursue a case where the issue raised does not satisfy the criteria for opening a case (see paragraphs 3.30 to 3.40).

7.2 If a case has been opened, it may be closed at any stage. Cases will be kept under review.

7.3 A case may be closed (subject to any compliance monitoring as described in paragraph 7.9 below) where:

- it is concluded that there is no relevant breach or infringement (eg after investigating the matter or following receipt of the response to the Statement of Case or Statement of Objections)
- the company under investigation has made commitments, or given assurances, undertakings, or has taken other action to ensure that behaviour is stopped and things are put right
- we have obtained a court order to secure compliance (eg an enforcement order under Part 8 of the Enterprise Act 2002 or injunction under the Business Protection from Misleading Marketing Regulations 2008)
- a case has been contested or settled and a decision made or approved by the decision maker and published
- we have reviewed it against our prioritisation criteria (see paragraphs 3.30 to 3.40) and concluded that the case should be closed on the grounds of administrative priorities[184] (see also the specific comments below in paragraphs 7.5 to 7.7 concerning Competition Act 1998 (the Competition Act) cases)

7.4 When closing the case on the grounds of administrative priorities, it is unlikely that this would be done solely on the grounds of a change in the annual strategic priorities.

[184] This means that we have weighed up the likely benefits of conducting the case against the resources that it requires, and the comparative benefits of using those resources in other ways, before deciding that the case should be closed.

7.5 Competition Act cases are complex and resource intensive. When we review a case to decide whether to continue, we may close it on the grounds of administrative priorities without reaching a decision as to whether or not there has been an infringement.[185] This may be, for example:

- because the evidence, or our analysis, suggests that the likelihood of consumer detriment from the conduct or agreement in question is less significant than anticipated at the outset; or
- the resources needed to progress the investigation in a timely fashion are greater than planned and cannot be justified in the light of our overall portfolio of work and resource demands.

7.6 In Competition Act cases, we may decide to consult with a complainant or other third parties on a proposed decision to close the case on any grounds. In considering whether to consult with such persons, we will normally have regard to the Competition and Markets Authority's guidance on, 'Involving third parties in Competition Act investigations'.[186]

7.7 Where we close a Competition Act case on the grounds of administrative priorities, this will mean that we are taking no decision on the merits of the case.

Publicity

7.8 We will deal with publishing case closures on our website as described in paragraph 4.12.

Compliance monitoring

7.9 Where we have taken enforcement action, or secured undertakings or other agreements, we may close the case straight away. Alternatively, we may decide to put the company under investigation into a "compliance phase". This means that we will monitor its behaviour to ensure that there are no further behaviours of concern, that it complies with any undertakings or commitments, and/or that

[185] Further information on the way in which we may deal with such decisions can be found in Chapter 10 of the Competition and Markets Authority's guidance, *'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1988 cases'*, at: https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases.

[186] See OFT 451 at: https://www.gov.uk/government/publications/involving-third-parties-in-competition-act-investigations.

it implements any agreements made with us (eg paying compensation to affected consumers or ceasing the infringing behaviour).

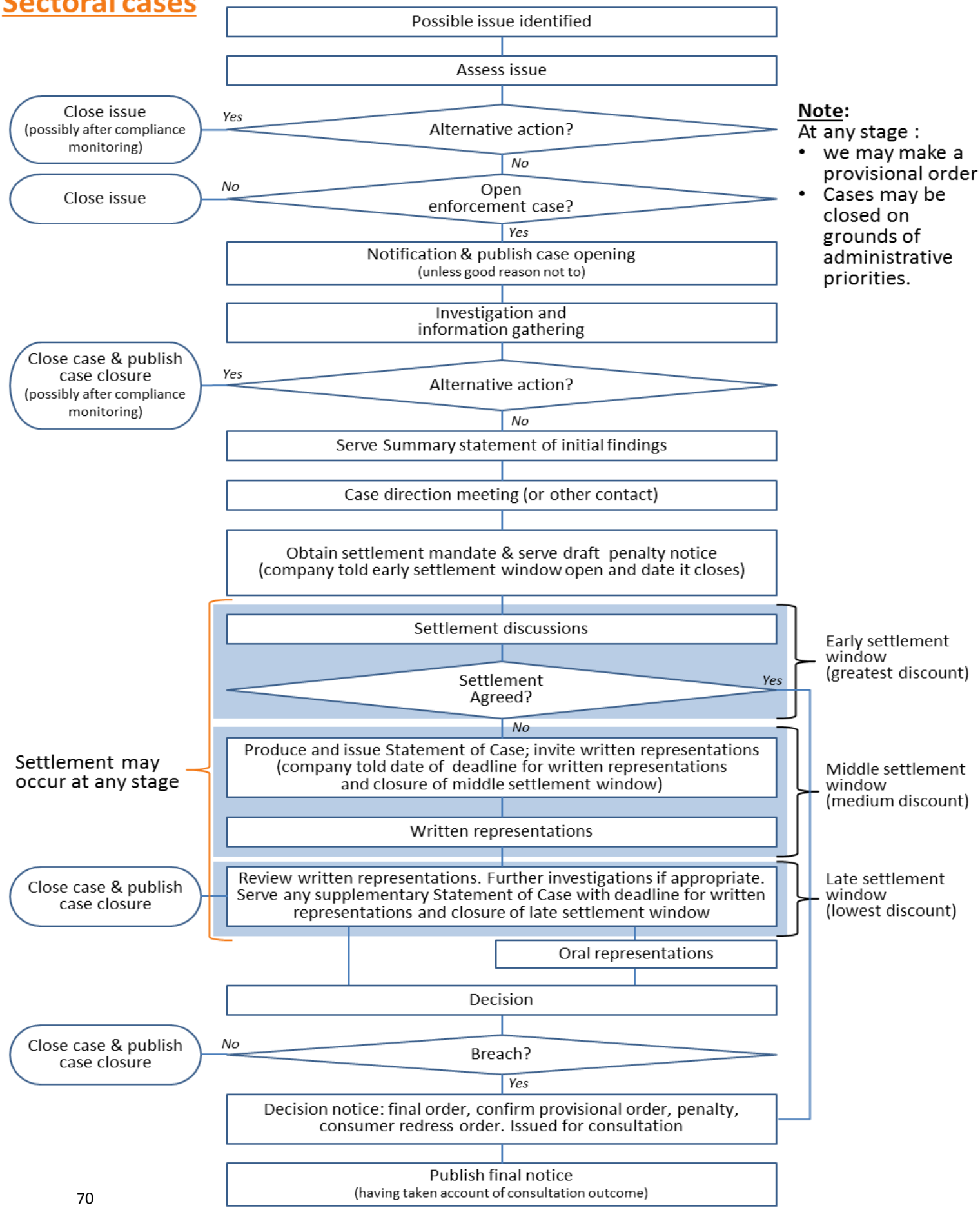
7.10 The length of the compliance phase will depend on the particular circumstances of the case and the monitoring required.

Feedback

7.11 After closing a case, our case teams routinely evaluate the investigation process to assess what went well and how things could be improved. We will usually share the "lessons learned" with our colleagues at Ofgem so that we can learn from everything we do. In some cases we may also request feedback from others involved in the case (eg companies under investigation, sources of information).

Appendix

Sectoral cases



Note:
At any stage :

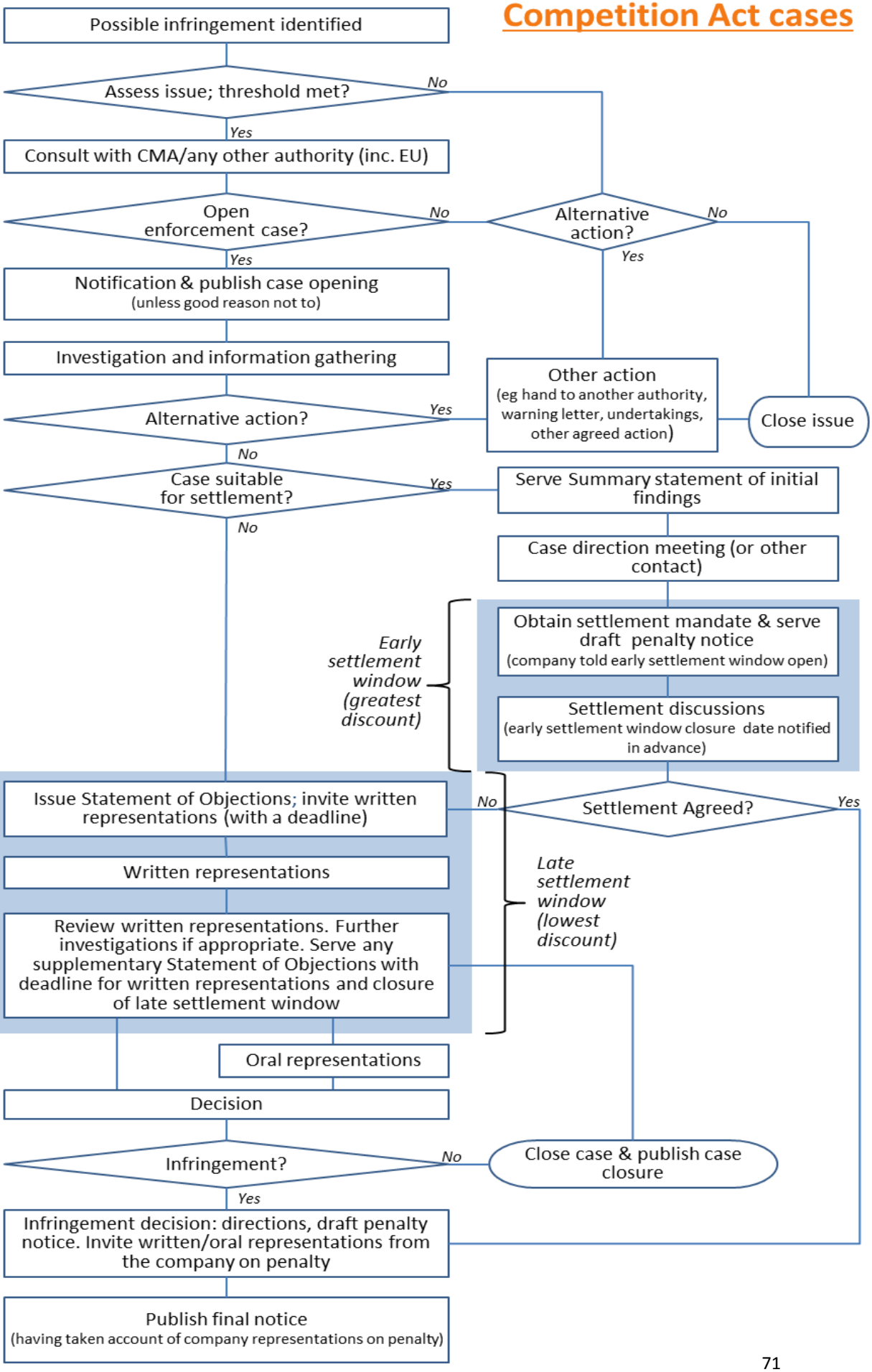
- we may make a provisional order
- Cases may be closed on grounds of administrative priorities.

Competition Act cases

Note:

At any stage:

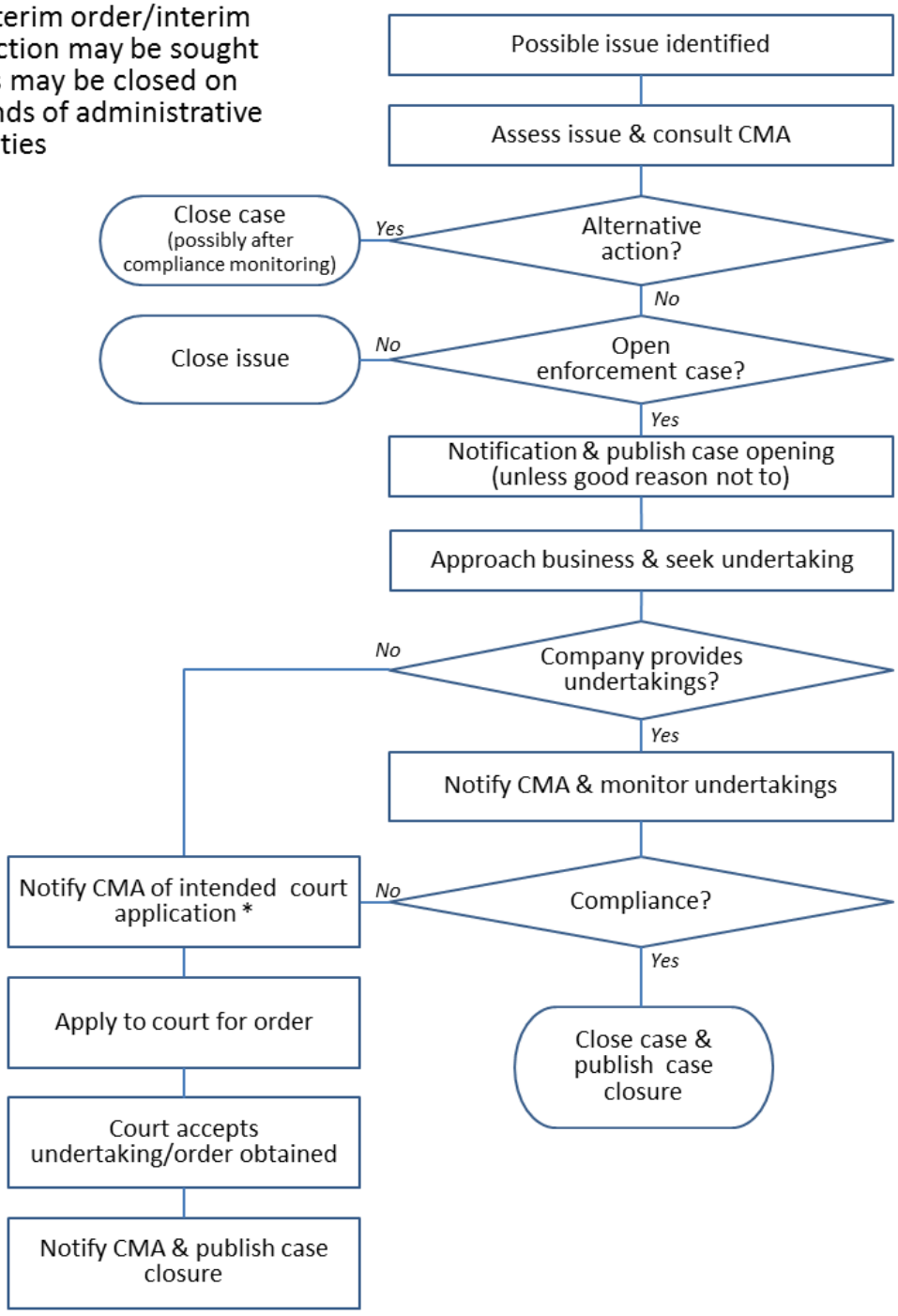
- we may make an interim measures direction
- we may be offered and accept commitments (after consultation)
- cases may be closed on grounds of administrative priorities
- the Authority may also issue a no grounds for action decision after opening



Cases under Part 8 of the Enterprise Act, UTCCRs and BPMMRs

Note:
At any time:

- an interim order/interim injunction may be sought
- Cases may be closed on grounds of administrative priorities



* In cases under Part 8 of the Enterprise Act we are required to give a company a minimum of 14 days to respond to an approach for consultation prior to seeking an order, except where we seek an interim order where a minimum of seven days is required, unless immediate court action is warranted and the CMA considers the application should be made without delay.