ofgem Making a positive difference for energy consumers

Enforcement Guidelines

Guidelines

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Contact: Bruno Sheldon, Senior Enforcement Manager

Team: Enforcement

Tel: 020 7901 7000

Email: enforcement@ofgem.gov.uk

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 describes how we will 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 actions we may take as an alternative to exercising our statutory enforcement powers.

The aim of these guidelines is to bring greater clarity, consistency and transparency to our enforcement policies and processes, and to highlight the processes we have in place to maximise the impact and efficiency of our work. This document is for anybody who is seeking more information on how we will use our enforcement powers. Consumers who wish to make a complaint about their gas or electricity supplier (or network operator) should contact their supplier (or network operator) in the first instance and then, if they are unhappy with the response, the Energy Ombudsman (see paragraph 1.5). Ofgem does not generally enter into individual correspondence with complainants.

Contents

Changes to these guidelines:

Change number	Date	Summary of change
1	14-09-2016	Document updated to reflect a number of statutory, technical and other changes including in relation to: - the composition of Settlement Committees; - our consumer powers in light of changes brought into effect by the Consumer Rights Act 2015; and - our powers under competition law.
2	10-10-2017	Document updated to reflect a number of changes including: - streamlining of the criteria to decide when to open an investigation and use our enforcement powers;

		- clarification of our expectations regarding companies self-reporting potential non-compliance with licences; - ancillary changes to reflect the fact that enforcing the Standards of Conduct is no longer a new practice and to reflect our updated practices in relation to competition law investigations.

Executive Summary

The Gas and Electricity Markets Authority (the Authority) regulates the gas and electricity markets in Great Britain.[1] The Office of Gas and Electricity Markets (Ofgem) carries out the Authority's day-to-day work and investigates matters on its behalf.

Ofgem may open an investigation into a potential breach of a relevant legal requirement. Investigations may result in the Authority deciding to close the case because there is insufficient evidence of a breach, or it may decide to take enforcement action. Enforcement action includes issuing directions or orders to bring an end to a breach or remedy the harm that was caused, imposing financial penalties and accepting commitments or undertakings relating to future conduct or arrangements. The relevant legal requirements that the Authority can enforce, which are covered by these guidelines, include:

- imposing financial penalties, making consumer redress orders and issuing provisional/final orders, where appropriate, for breaches of relevant conditions and requirements under the Gas Act 1986 and the Electricity Act 1989

- imposing directions and penalties for breaches of the prohibitions on anti-competitive agreements and abusing positions of dominance in the Competition Act 1998 and in articles 101 and 102 of the of the Treaty on the Functioning of the European Union

- applying to the court for an order to stop breaches of certain consumer legislation, including under the Enterprise Act 2002, the Consumer Rights Act 2015 and the Business Protection from Misleading Marketing Regulations 2008.

Our vision is to achieve a culture where businesses put energy consumers first and act in line with their obligations. Enforcement action is a core part of our role and is essential to the delivery of our mission to make a positive difference for consumers. It ensures we can put right harm that is caused and there are meaningful consequences for companies that fail to comply and, as such, companies are deterred from breaching legal requirements.

However, enforcement action is not the only tool available to us for achieving a culture where businesses put energy consumers first. Through our monitoring and engagement with energy companies, we can prevent harm occurring in the first place or put it right quickly and satisfactorily through alternative action. Alternative action may include non-statutory undertakings or assurances to ensure future compliance, independent audits of conduct and/or voluntary action to remedy any concerns, which could include payments to affected parties and charitable organisations.

These guidelines set out our general approach to enforcing the legislation set out above, which includes explaining our powers to investigate and enforce, the criteria

[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.

that we use to decide whether to open an investigation, the key investigative stages that we will usually follow and our decision making processes.

These guidelines cover the following:

- Section 1 explains what these guidelines cover and our objectives and regulatory principles in exercising our enforcement functions
- Section 2 describes the legislation and legal requirements covered by these guidelines
- Section 3 sets out the criteria for prioritising whether to investigate a potential breach of a legal requirement; it includes how we will take into account self-reporting
- Section 4 explains our general procedures for conducting investigations under the different types of legislation
- Section 5 covers our processes for settling or contesting cases
- Section 6 explains our decision-making bodies and our framework for delegating our decision-making powers
- Section 7 sets out our processes for closing cases including the publicity that may result, when follow-up compliance might be appropriate and how we evaluate cases and share lessons learned.

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.

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 and the Electricity Act 1989[2]
- alleged anti-competitive agreements and abuses of dominant positions in the gas and electricity sectors under chapters I and II of the Competition Act 1998 for matters affecting trade within the United Kingdom, and Articles 101 and 102 of the Treaty on the Functioning of the European Union for matters affecting trade between EU member states
- compliance with consumer protection provisions under Part 8 of the Enterprise Act 2002, including the Consumer Protection from Unfair Trading Regulations 2008
- potentially unfair terms in consumer contracts and potentially unfair consumer notices under the Consumer Rights Act 2015[3]
- compliance with misleading marketing provisions in the Business Protection from Misleading Marketing Regulations 2008.

1.3 We have published separate guidance on:

- the Authority's policy on imposing financial penalties and making consumer redress orders under the Gas Act and the Electricity Act ("penalty and redress policy statement[4]")
- the Authority's policy on imposing financial penalties and seeking restitution for affected parties under REMIT[5]
- the procedures that we will normally follow when investigating potential REMIT breaches

[2] This includes requirements treated as such under other legislation.
[3] The Unfair Terms in Consumer Contracts Regulations 1999 may also be relevant in certain circumstances. Please see paragraph 2.78 onwards for further details.
[4] https://www.ofgem.gov.uk/publications-and-updates/statement-policy-respect-financial-penalties-and-consumer-redress
[5] REMIT is the European Regulation (1227/2011) on wholesale energy market integrity and transparency. We have powers to enforce the prohibitions on a range of matters set out in REMIT, including energy market insider trading and market manipulation. These powers are set out in the Electricity and Gas (Market Integrity and Transparency)(Enforcement Etc.) Regulations 2013 (as amended).

- our prioritisation criteria and approach to dealing with applications for the approval of voluntary redress schemes for infringements of competition law.[6]

1.4 In certain cases conduct may amount to an offence which we have the power to prosecute (subject to any requirements for consent).[7] Our separate prosecution policy statement explains the process we will follow for criminal investigations[8]. We will launch any criminal investigations in accordance with statutory requirements and relevant codes of practice, notably the Criminal Procedure and Investigations Act 1996 and the Police and Criminal Evidence Act 1984 (PACE).

1.5 We do not generally intervene in individual disputes between consumers and energy companies. If consumers are worried about an issue concerning their energy supplier (or network operator), or have a complaint they wish to make, they should contact their supplier (or network operator) in the first instance. If they are not happy with the outcome they can contact the Energy Ombudsman. More information on how to make a complaint can be found on our website,[9] which also provides details about the Energy Ombudsman and the Citizens Advice consumer service.

Our objectives and regulatory principles

1.6 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 electricity.[10] The Authority must carry out its functions in the manner best calculated to further that objective, wherever appropriate by promoting effective competition.[11] 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.[12]

[6] https://www.ofgem.gov.uk/system/files/docs/2016/04/ofgem_guidance_on_voluntary_redress_schemes_for_infringements_of_competition_act_1998_open_letter_dated_14_april_2016.pdf.
[7] Conduct may amount to an offence under the Gas Act, Electricity Act or Competition Act. Examples include carrying on licensable activities without a licence or without the benefit of an exemption, failing to provide information required under a notice or making false statements. 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.
[8] https://www.ofgem.gov.uk/publications-and-updates/ofgems-criminal-prosecution-policy-statement.
[9] https://www.ofgem.gov.uk/consumers/business-gas-and-electricity-guide/complain-about-your-gas-or-electricity-bill-or-supplier
[10] Section 4AA of the Gas Act and section 3A of the Electricity Act.
[11] The Authority's principal objective does not apply when it is exercising functions under the Competition Act, consumer protection legislation or REMIT.
[12] These provisions relate only to our functions under Part 1 of the Gas Act and Part 1 of the Electricity Act. Section 4AA(1C) of the Gas Act and section 3A(1C) of the Electricity Act.

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

1.8 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.

1.9 We aim to achieve these objectives by:

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

1.10 We will have regard to better regulation principles of transparency, accountability, proportionality, consistency and targeting regulatory activities only at cases in which action is needed, and to other principles that we consider represent best regulatory practice.[13]

1.11 In relation to our enforcement activities this will include:

Transparency – We aim to be transparent in our enforcement work, having due regard to the need to maintain confidentiality in certain circumstances. We will aim to inform companies as soon as possible of our concerns and keep them appropriately informed through the key stages of our decision-making processes. Where appropriate, we will publish information when we open and close cases in line with these guidelines. In appropriate cases, we may also share information with other enforcement authorities to facilitate the exercise of our functions or those of other authorities involved.

Accountability – Our enforcement processes seek to ensure parties under investigation are treated fairly and appropriately; we are accountable for the decisions we take and make public. We also seek feedback following case closure and share lessons learnt in accordance with these guidelines (see paragraph 7.11).

Proportionality – We will prioritise our enforcement investigation and action in cases where the potential breach, if confirmed, is serious (our assessment

[13] These provisions relate only to our functions under Part 1 of the Gas Act and Part 1 of the Electricity Act. Section 4AA(5A) of the Gas Act and section 3A(5A) of the Electricity Act.

will include harm to consumers, competition and our ability to regulate) and/or where there is a need to address poor conduct in the energy market. We will not normally prioritise enforcement action for isolated issues affecting small numbers of consumers unless any harm they have suffered is significant. We will generally focus on systemic weaknesses, including where those weaknesses adversely affect particular groups of consumers such as those in vulnerable situations.

Consistency – We will aim to ensure consistency in our enforcement decision making. Our Enforcement Oversight Board (see paragraphs 6.4-6.6) makes our case opening and related decisions and helps to achieve this by providing strategic oversight of our enforcement work.

Targeting – We will target our resources where they are most needed to tackle the most serious harm or poor conduct while delivering maximum impact. We have a range of enforcement tools which enable us to target action appropriately in line with these guidelines. Where appropriate, we will also work with other enforcement authorities to achieve these aims.

1.12 We will also have regard to the timeliness of our decision-making. One of our objectives is to respond more quickly to events and speed up our decision-making to promote consumer protection. We aim to reach a view on the appropriate way to handle issues which come to our attention, including case opening decisions, in a timely manner.

Status of these guidelines

1.13 These guidelines apply to all current and future investigations. We amend the guidelines from time to time and will use the version published on Ofgem's website. 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 explain why.

1.14 These guidelines are not a substitute for any regulation or law and should not be taken as legal advice. Companies concerned about a complaint that has been made against them should consider seeking independent legal advice. 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 explains the legal basis for the main types of investigation that we conduct under the legislation covered by these guidelines.

2.2 It also describes our enforcement options under the different pieces of legislation. In appropriate cases, instead of or before using our enforcement powers, we may take alternative action to try to resolve issues that arise (see paragraphs 3.29-3.35).

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[14]
- the Competition Act 1998 (the Competition Act)
- the Enterprise Act 2002 (the Enterprise Act)
- the Consumer Rights Act 2015 (the Consumer Rights Act)
- the Business Protection from Misleading Marketing Regulations 2008 (the BPMMRs).

Gas Act and Electricity Act

Compliance with relevant conditions and requirements

2.4 Under the Gas Act and the Electricity Act, the Authority has powers to ensure that regulated persons comply with relevant conditions and requirements.[15]

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.[16] Breaches of obligations under 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.

[14] The Utilities Act established the Gas and Electricity Markets Authority and amended the Gas Act and Electricity Act. Its provisions are therefore covered under paragraphs 2.4–2.13 which relate to those Acts.
[15] '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 licence holders, distribution exemption holders and supply exemption holders.
[16] Examples include the Balancing and Settlement Code, the Connection and Use of System Code, the Uniform Network Code, and the System Operator – Transmission Owner Code.

2.6 Where we see opportunities to improve consumer protection as the markets we regulate evolve, we can amend or insert conditions into existing licences or new licences.

2.7 The Gas Act and the Electricity Act prohibit certain activities unless the person carrying on that activity is licensed, exempt from the requirement for a licence, or eligible (under the Gas Act only) for an exception to the prohibition on unlicensed activities.

2.8 Licensable activities include the transporting, shipping and supply of gas and the transmission, distribution, generation and supply of electricity. There are also interconnector licences for both gas and electricity, which concern the co-ordination and conveyance of gas and directing the flow of electricity via interconnectors. SMART meter communication licences for gas and electricity allow licensees to provide communication services to link smart meters in homes and small businesses with the systems of energy suppliers, network operators and energy service companies.

2.9 Licensees must comply with the conditions set out in their licence, including conditions in relation to becoming a party to, and complying with, industry codes and standards. Industry codes and standards establish rules that govern market operation and the terms for connection and access to energy networks.

2.10 Licence conditions can be prescriptive or principles-based and licences may contain both. Prescriptive conditions tend to be detailed and specific, identifying how licensees must achieve a certain outcome. Principles-based conditions have more general requirements, such as 'to treat customers fairly', which generally places the onus on licensees to determine how compliance should be achieved while also providing more space for innovation. Ofgem has committed over time to rely more on principles within the gas and electricity supply licences rather on prescriptive conditions.

2.11 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 Act and Electricity Act.[17] We also have powers to enforce obligations or requirements treated as relevant requirements under other legislation.[18]

2.12 In these guidelines, "sectoral cases" refers to cases where obligations or requirements are enforced as breaches of relevant conditions or requirements. This is distinct from competition cases, for example, which we enforce using our competition powers.

2.13 If we believe that a regulated person may be in breach of any of their obligations, we may decide to investigate. We take a proportionate approach

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

[18] For example, breaches under the rules and regulations implementing the Electricity Market Reform, such as under the Electricity Capacity Regulations 2014. Where appropriate, the Authority may also use other prescribed sanctions available in the relevant statutory instruments.

to enforcement and compliance and will consider alternatives to exercising our statutory enforcement powers, as described in paragraphs 3.29-3.37.

Provisional orders

2.14 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]

2.15 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. For example, provisional orders have been used to:

- prevent serious harm to customers of one energy company who were at risk of having their supplies cut off during cold weather[20]
- require an energy company not to disconnect customers and to provide the option of prepayment meters for customers in payment difficulties
- require an energy company to lodge sufficient credit, pay any outstanding debts, and send us a business plan, updated monthly, on the measures it has taken to comply with industry code payment and credit requirements.

2.16 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.

2.17 A provisional order will lapse after a maximum of three months if not subsequently confirmed.[21]

Final decisions

2.18 If the Authority is satisfied that a regulated person is contravening or is likely to contravene any relevant condition or requirement, it may impose a final order or confirm a provisional order to bring the breach to an end, after complying with certain procedural requirements.[22]

[19] Section 28(2) of the Gas Act and section 25(2) of the Electricity Act.
[20] 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 existing customer complaints.
[21] 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.
[22] Sections 28(1) and 29 of the Gas Act and sections 25(1) and 26 of the Electricity Act.

2.19 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,[23] the Authority may impose a financial penalty, after complying with certain procedural requirements.[24] It may also, or instead, make a consumer redress order where one or more consumers have suffered loss, damage or inconvenience as a result of a contravention of a relevant condition or requirement, after complying with certain procedural requirements.[25] Section 6 describes how decisions are made and issued. Further information about penalties and redress can be found in paragraphs 6.43-6.50.

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

2.21 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.[26]

2.22 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[27] to proceed under the Competition Act.[28]

2.23 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.[29] The Authority can enforce a final order, provisional order or consumer redress order by civil proceedings.[30] Any outstanding financial penalty (and interest) may be recovered by the Authority as a civil debt.[31]

2.24 An outline of the process that we will usually follow in sectoral cases is set out in a flowchart in the appendix.

[23] 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).
[24] 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.
[25] Section 30G and 30I of the Gas Act and section 27G and 27I of the Electricity Act.
[26] Section 28(5A) of the Gas Act and section 25(5A) of the Electricity Act.
[27] In relation to consumer redress orders the language 'most appropriate' is used. Section 30N(2) of the Gas Act and Section 27N(2) of the Electricity Act.
[28] 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 exercising its powers. In practice this is likely to be considered much earlier. See paragraph 2.24.
[29] See the list of revocation conditions at https://www.ofgem.gov.uk/licences-codes-and-standards/licences/revoking-licence.
[30] Sections 30(8) and 30L of the Gas Act and sections 27(7) and 27L of the Electricity Act.
[31] Section 30F of the Gas Act and section 27F of the Electricity Act.

Competition Act and Treaty on the Functioning of the European Union

Prohibited agreements or conduct

2.25 Under the Competition Act and the Treaty on the Functioning of the European Union (TFEU)[32], 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).

2.26 We have concurrent powers[33] with the Competition and Markets Authority (CMA) to enforce these prohibitions, in relation to commercial activities in the gas and electricity sectors. Specifically, those activities are the following:

- commercial activities connected with the generation, transmission or supply of electricity or the use of electricity interconnectors
- licensable activities, or other activities that are ancillary to those subject to licences, for the transportation, shipping or supply of gas or for gas interconnectors or smart meter communication services (including, in particular, the storage of gas, the provision and reading of meters and the provision of pre-payment facilities).[34]

2.27 The relationship between the CMA and Ofgem in relation to their concurrent competition powers is set out in the Memorandum of Understanding (MoU) between the two bodies.[35]

2.28 The relevant competition law provisions apply to agreements between, and conduct by, 'undertakings'. Where these guidelines deal with competition law

[32] We will review these guidelines in relation to powers under EU Treaties post BREXIT.
[33] This means that more than one competition authority has the jurisdiction to investigate and take enforcement action.
[34] Section 36A of the Gas Act and section 43 of the Electricity Act set out the Authority's precise jurisdiction under the Competition Act. These activities are broader than activities that require a licence under the Electricity Act or the Gas Act. We do not have powers to deal with criminal cartel offences under section 188 of the Enterprise Act.
[35] The latest version of the MoU was published on 24 February 2016: https://www.ofgem.gov.uk/publications-and-updates/memorandum-understanding-between-competition-and-markets-authority-and-gas-and-electricity-markets-authority-concurrent-competition-powers.

cases, the word 'company' should be understood to include all forms of undertaking (such as a sole trader, partnership, company or a group of companies).

2.29 An investigation may be conducted under the Competition Act where there are reasonable grounds for suspecting that the prohibitions in the Competition Act and/or TFEU have been infringed.[36]

2.30 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. This means that although we may initially identify a competition concern, or receive a complaint that raises the issue of concern, the investigation might ultimately be carried out by another authority. Transfers between regulators may also occur at any stage.[37]

2.31 The process in the Competition Act (Concurrency) Regulations 2014 (the Concurrency Regulations) and associated CMA guidance on the concurrent application of competition law to regulated industries[38] (the Concurrency Guidance) will be followed to decide who will investigate the case.

2.32 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)[39] 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[40] in a competition case raising Article 101/102 issues.[41] 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.

2.33 As noted above (at paragraph 2.22) 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.

2.34 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 (the CA98 Rules).

[36] The full test is set out in section 25 of the Competition Act.
[37] Regulation 7 of the Concurrency Regulations.
[38] https://www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-industries.
[39] 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.
[40] Sections 26 to 28A of the Competition Act.
[41] Article 11(3) of the Modernisation Regulation (EU Regulation 1/2003).

2.35 Further information on the concurrency arrangements and the application of competition law in the energy sector can be found in applicable CMA guidance, including the Concurrency Guidance.[42]

2.36 If appropriate, we may consider alternatives to exercising our statutory enforcement powers as described in paragraphs 3.29-3.35.

2.37 We also have concurrent powers with the CMA to make a market investigation reference.[43] 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.[44]

Commitments

2.38 We may accept binding commitments from a company that it will take appropriate action to address the competition concerns which we have identified.[45] In such cases, we will not take an infringement decision in relation to that company. We are required to have regard to the CMA's adopted guidance, 'Enforcement', when considering whether to accept commitments.[46]

2.39 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]

2.40 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 less likely to consider it appropriate to accept them at a very late stage in our investigation (for instance, after we have considered representations in response to the Statement of Objections). We may accept

[42] https://www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-industries.
[43] Under Part 4 of the Enterprise Act.
[44] For example, in 2014 we made a market investigation reference in respect of the supply and acquisition of energy in Great Britain: https://www.ofgem.gov.uk/publications-and-updates/decision-make-market-investigation-reference-respect-supply-and-acquisition-energy-great-britain
[45] Section 31A of the Competition Act.
[46] Chapter 4 of OFT407 https://www.gov.uk/government/publications/competition-law-application-and-enforcement. Further information is also in Chapter 8 and Chapter 10 of the CMA's guidance CMA8: 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 OFT407 at: https://www.gov.uk/government/publications/competition-law-application-and-enforcement.

commitments in respect of some competition concerns and continue our investigation in respect of others arising from the same agreement or conduct.

2.41 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).

2.42 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

2.43 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] 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] Paragraphs 7.4-7.6 describe other ways in which a Competition Act case may be closed.

2.44 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]). Section 6 describes how decisions are made and issued. Further information about penalties is set out in paragraphs 6.53-6.56.

2.45 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]

Interim measures directions

2.46 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.[56]

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[49] These are described in Chapter 4 of OFT407 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).
[54] Section 34 of the Competition Act.
[55] Section 37 of the Competition Act.
[56] Section 35 of the Competition Act and rule 13 of the CA98 Rules. Further information on interim measures is in Chapter 3 of the CMA's adopted guidance, 'Enforcement' (OFT407) at: https://www.gov.uk/government/publications/competition-law-application-and-enforcement.

2.47 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 will prevent, limit or remedy the significant damage that we have identified, and will beproportionate for the purpose of preventing, limiting or remedying that significant damage.

2.48 There is more information about the factors that we may take into account when deciding whether to impose interim measures in Chapter 8 of the CMA's guidance on investigation procedures in Competition Act 1998 cases.[57]

2.49 Equally, the Competition Appeal Tribunal (the CAT) may give such directions as it considers appropriate to prevent significant damage to a particular person or category of person, or protecting the public interest.[58]

2.50 An outline of the process that we will usually follow in Competition Act cases is set out in a flowchart in the Appendix.

Enterprise Act

2.51 We are a "designated enforcer" under Part 8 of the Enterprise Act.[59] This means that we are empowered to take action to enforce certain consumer protection legislation[60] such as the provisions on unfair terms in consumer contracts and unfair consumer notices of the Consumer Rights Act, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 and the Consumer Protection from Unfair Trading Regulations 2008.

2.52 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

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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.

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

[58] See paragraph 24(2) of the Competition Appeal Tribunal Rules 2015.

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

[60] 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 states legislation and other provisions implementing the European Directives listed in Schedule 13 to the Act).

Scotland) to prohibit a respondent (a company) from carrying on a particular course of conduct.[61]

2.53 Part 8 of the Enterprise Act 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.

2.54 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 found in the CMA's guidance on enforcement of consumer protection legislation.[62]

2.55 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.

2.56 As Ofgem is a concurrent designated enforcer of certain consumer protection legislation along with the CMA, the relationship between the CMA and Ofgem in relation to the exercise of these powers is set out in a Memorandum of Understanding.

2.57 The following general principles also underpin our enforcement of this legislation:

- 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 co-ordinated (so that the company is not subjected to unnecessary multiple approaches)
- publicity will be accurate, balanced and fair.

[61] 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. 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. In certain cases, conduct may amount to an offence which could be prosecuted by Trading Standards or the CMA.

[62] Consumer Protection: Enforcement Guidance dated 17 August 2016 (CMA58) available at: https://www.gov.uk/government/publications/consumer-protection-enforcement-guidance-cma58.

2.58 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.[63] A decision will be made by the CMA about who is best placed to take the investigation forward.[64]

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

Interim enforcement orders

2.60 We may seek an interim enforcement order from the court only if it is expedient that the infringing conduct is prohibited or prevented.[65] This is a temporary order made to continue until the court finally determines whether or not to make an enforcement order.

2.61 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.[66] A case is likely to be regarded as urgent when immediate action is vital to safeguard consumers' interests.

Undertakings

2.62 Instead of (or before) seeking an enforcement order we may secure undertakings under the Enterprise Act to address the relevant conduct. An undertaking will seek to ensure that a company does not continue, repeat or engage in the conduct that constitutes an infringement, or consent or connive with another company in the carrying out of the particular conduct.[67]

2.63 We may also include such further undertakings for the benefit of consumers as Ofgem considers just, reasonable and proportionate in the circumstances. The measures which may be included in such undertakings are often referred to as 'enhanced consumer measures'. They may include:

- measures offering compensation or other redress to consumers who have suffered loss as a result of the conduct
- measures offering consumers the option to terminate (but not vary) their contract
- where the consumers who have suffered loss as a result of the conduct cannot be identified (or cannot be identified without disproportionate

[63] This is done via the National Anti-Fraud Network website.
[64] See chapter 4 of the CMA's guidance on the use of its consumer powers https://www.gov.uk/government/publications/consumer-protection-guidance-on-the-cmas-approach-to-use-of-its-consumer-powers.
[65] Section 218 of the Enterprise Act.
[66] Section 214 of the Enterprise Act.
[67] 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).

cost), measures intended to be in the collective interests of consumers (eg a payment to an appropriate consumer charity)

- measures intended to prevent or reduce the risk of the infringing conduct re-occurring, including where this may improve compliance with consumer law more generally

- measures intended to enable consumers to choose more effectively between parties supplying or seeking to supply goods or services.

2.64 The terms of the undertaking will be agreed in discussion with the company. We may also require information or documents to be provided to determine if the enhanced consumer measures have been taken.

2.65 We will notify the CMA of any undertakings given.[68] We will usually publish undertakings on our website (after taking account of the appropriate confidentiality considerations under Part 9 of the Enterprise Act).

2.66 In appropriate cases, we may consider other alternatives such as those set out in paragraph 3.30.

Enforcement orders

2.67 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.

2.68 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

- damage being done to consumers.

2.69 If seeking an enforcement order, we must give notice to the CMA and a minimum of 14 days'[69] consultation with the business is required, unless the CMA thinks that the order should be made without delay.[70] 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.

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

[68] Section 219(6) of the Enterprise Act.
[69] An extended consultation period of 28 days will apply in certain circumstances where the company against whom the enforcement order would be made is a member of, or is represented by, a trade association or other business representative body that operates an approved consumer code of practice. Section 214(4) to (4B) of the Enterprise Act.
[70] 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.

2.71 If we bring proceedings against a company, it will be notified and 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).[71]

2.72 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.[72]

2.73 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.[73]

2.74 An enforcement order may also require the company to take enhanced consumer measures. A summary of the enhanced consumer measures can be found in paragraph 2.63 of these guidelines. Any undertaking given to the court may also include enhanced consumer measures. There is no power to impose a penalty.

2.75 We will notify the CMA of any undertakings given or court order made, which it may publish.[74]

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

2.77 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 in the appendix.

Unfair Terms in Consumer Contracts and Unfair Consumer Notices – Consumer Rights Act

2.78 We also have the power to enforce the provisions in the Consumer Rights Act relating to unfair terms in consumer contracts and unfair consumer notices directly, rather than under the provisions of Part 8 of the Enterprise Act.[75]

2.79 These provisions enable us to consider complaints about unfair terms in consumer contacts or unfair consumer notices[76], as well as to take action on our own initiative.

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[71] CPR Part 31.
[72] Section 217 of the Enterprise Act.
[73] Section 217(9) and (10) of the Enterprise Act.
[74] Section 215(9) of the Enterprise Act.
[75] Part 2 and Schedule 3 to the Consumer Rights Act.
[76] A consumer notice is defined broadly in the Consumer Rights Act as a notice to the extent

2.80 If we intend to consider a complaint about a potentially unfair contract term or consumer notice, we must notify the CMA of our intention to do so, and must then consider the complaint.[77]

2.81 We will generally consider potentially unfair contract terms in standard consumer contracts (between a consumer and a seller or supplier) or consumer notices under our powers in the Consumer Rights Act. We will usually use our powers under Part 8 of the Enterprise Act to enforce in relation to unfair terms provisions 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.

2.82 Under both the Consumer Rights Act and Part 8 of the Enterprise Act, we may seek undertakings from a party that it will comply with conditions agreed with us about the use of the relevant terms or notices. We are required to notify the CMA of the conditions on which any undertaking is accepted and the party which gave it. The CMA is required to publish details of any such undertaking. If the party fails to comply with those undertakings, we may apply to the court for an injunction.[78] Proceedings may be issued in the same courts as they are for cases under Part 8 of the Enterprise Act and our disclosure duties are the same.

2.83 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.[79] The injunction granted by the court may relate to the particular term or notice or to any term or notice of a similar kind or with a similar effect.[80] The court may grant an injunction on such conditions, and against such parties, as it thinks appropriate. There is no power to impose a penalty. We will notify the CMA of the outcome of any application and, if an injunction is granted, the conditions on which (and the parties against whom) it is made. The CMA is required to publish those details.[81] If we have agreed to consider a relevant complaint but decide not apply for an injunction, then we are required to give reasons for our decision to the party who made the complaint.[82] In doing so, we may have regard to any undertakings given by the company.

2.84 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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that it: a) relates to rights or obligations as between a trader and a consumer; or b) purports to exclude or restrict a trader's liability to a consumer. It does not matter whether the notice is expressed to apply to a consumer, as long as it is reasonable to assume it is intended to be seen or heard by a consumer. A notice includes an announcement, whether or not in writing, and any other communication or purported communication.

[77] Paragraph 2 of Schedule 3 to the Consumer Rights Act.
[78] Paragraph 3 of Schedule 3 to the Consumer Rights Act.
[79] Paragraph 4 of Schedule 3 to the Consumer Rights Act.
[80] Paragraph 5 of Schedule 3 to the Consumer Rights Act.
[81] Paragraph 7(1) of Schedule 3 to the Consumer Rights Act.
[82] Paragragh 2(3) of Schedule 3 to the Consumer Rights Act.

2.85 An outline of the process that we will usually follow in an unfair terms case is set out in a flowchart in the appendix.

2.86 The provisions set out above on unfair contract terms and consumer notices do not apply to:

- any contract entered into before 1st October 2015
- any consumer notice provided or communicated before 1st October 2015.

2.87 These matters are covered by the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs). The UTCCRs have now been revoked other than for those purposes.[83] We have power to enforce the UTCCRs on a similar basis to the process set out above, although certain procedural differences may apply.

Business Protection from Misleading Marketing Regulations 2008 (BPMMRs)

2.88 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).

2.89 We have concurrent powers with the CMA and other regulators to enforce the BPMMRs to protect business customers from misleading marketing.[84] Our powers to enforce the above regulations are set out in regulation 13. 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 may direct that another regulator proceeds.[85]

2.90 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. If this does not secure compliance we may:

- seek undertakings from brokers or other organisations to put a stop to misleading marketing activity[86]
- apply to the court for an injunction (or interim injunction) to secure compliance with the regulations.[87]

[83] The Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015.
[84] 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.
[85] Regulation 17 of the BPMMRs.
[86] Regulation 16 of the BPMMRs.
[87] Regulation 15 of the BPMMRs.

2.91 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 2.71.

2.92 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. The injunction may relate to particular advertising and any in similar terms or likely to convey a similar impression.[88] When granting the injunction, the court may require the person against whom the order is made to publish the injunction and a corrective statement.[89] 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.[90]

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

2.94 An outline of the process that we will usually follow in cases under the BPMMRs is set out in a flowchart in the appendix.

[88] Regulation 18 of the BPMMRs.
[89] Regulation 18 of the BPMMRs.
[90] 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 a potential breach and the sources of information that we most frequently use. It provides information about how we handle information (including confidential information).

3.2 It also explains how we prioritise cases and decide whether to open (or continue) a case. We provide an overview of how we assess whether there is a case to answer and, if there is, whether it would be consistent with our criteria to open an enforcement case.

3.3 Concerns may be resolved satisfactorily without opening an enforcement case; we have a range of alternative action tools that we will consider, as described in paragraph 3.30.

Sources of information

Self-reporting

3.4 A case may start because of self-reporting by a company[91] which has, for example, realised when carrying out internal checks that it may have breached a licence condition, code or relevant legislation.

3.5 We strongly encourage companies to promptly self-report potential breaches that may give rise to material harm to consumers, the market or to Ofgem's ability to regulate; our expectation is that they will do so. Companies should promptly open a dialogue with Ofgem[92] and provide as much detail as possible about the potential breach (or breaches), what caused it, the harm that may have resulted, including to customers, and the steps that have been or will be taken (including proposed timings) to remedy the situation. We recognise that the need to self-report promptly might mean companies have not necessarily established the full extent of problems but that should not prevent prompt and accurate self-reporting of the facts as they stand and taking steps, in a timely manner, to determine the full extent of problems and put things right.

3.6 For Competition Act cartel cases, companies should consider whether they may be eligible to receive total or partial immunity from fines and contact the CMA, in the first instance, if so.[93]

3.7 The fact that the breaches came to light as a result of prompt, accurate and comprehensive self-reporting, particularly when those breaches were unlikely

[91] 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.
[92] By writing to their usual contacts or 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.
[93] See https://www.gov.uk/guidance/cartels-confess-and-apply-for-leniency.

to come to light via other information sources, will, in most cases, count in a company's favour; it will either be taken into account in our decision to prioritise enforcement action or will be reflected in any penalty.

3.8 Prompt, accurate and comprehensive self-reporting, combined with swift action to put things right (ensuring no repeat breach), is more likely to result in Ofgem seeking to resolve the matter via alternative action for sectoral cases. However, for serious breaches or breaches that indicate repeated poor compliance, opening an enforcement case is likely to be the most appropriate course of action. Given that potential breaches of competition law are by their nature serious, alternative action is unlikely to be appropriate.

3.9 Companies should also be aware that prompt, accurate and comprehensive self-reporting is one of the factors that tend to decrease the amount of any financial penalty that the Authority may decide to impose[94] in circumstances when an investigation is carried out and a breach (or breaches) is found. When setting the amount of a penalty, the Authority recognises the value of companies promptly reporting to Ofgem and putting right any non-compliance that they have identified.

3.10 Conversely, factors that tend to increase the amount of any financial penalty in sectoral cases include withholding relevant evidence and/or submitting it in a manner that hinders the investigation and any attempt to conceal all or part of a contravention or failure.[95] Similarly, persistent and repeated unreasonable behaviour that delays enforcement action is an aggravating factor to be taken into account in setting penalties in competition law cases.

Whistleblowers

3.11 Whistleblowing is when a person raises a concern about a wrongdoing, risk or malpractice that they are aware of through their work (for instance, 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.

3.12 To facilitate such disclosures, government has issued whistleblowing guidance[96] applicable to people considering disclosing information, which:

[94] Details of the other factors that may affect the penalty level in cases under the Gas Act and Electricity Act are in the Authority's financial penalties and consumer redress policy statement.
[95] In relation to Competition Act investigations, persistent and repeated unreasonable behaviour that delays the Authority's enforcement action will be considered to be an aggravating factor in determining the level of any penalty imposed for breaching the relevant prohibitions contained in the Competition Act or the TFEU.
[96] 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. Ofgem is the Gas and Electricity Markets Authority for these purposes.

- 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 that should be followed in dealing with whistleblowers.

3.13 We have also produced our own whistleblowing guidance[97] document, which should be consulted before making a disclosure to us.

Own-initiative investigations

3.14 We have a general duty to monitor the gas and electricity markets for the purposes of considering whether any of our functions are exercisable.[98]

3.15 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 (in other words, our regular compliance monitoring may identify an issue that needs to be investigated). We use monitoring programmes to ensure compliance with a new regulation when it is introduced (for example to help industry understand new requirements) or where we are assessing compliance with an existing regulation/obligation across industry.

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

3.17 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 3.36-3.49) to decide whether to open a case. If we do not open a case we may, as an alternative, resolve any problems via alternative action (see paragraphs 3.29–3.35). We will generally inform companies when we become aware of a potential breach (or breaches) that warrants referral to the Enforcement team for further consideration.

Other sources of information

3.18 We collect information and data from a range of sources as part of our market monitoring activity. Along with information 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. In addition, we may receive:

- information from organisations such as the Citizens Advice consumer service and the Energy Ombudsman about complaints that have been made to them

[97] https://www.ofgem.gov.uk/ofgem-publications/83570/whistleblowingguidance.pdf.
[98] Section 34 of the Gas Act and section 47 of the Electricity Act.

- 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[99]

- information from the CMA or other regulators such as evidence suggesting potential breaches of competition law that may fall within our jurisdiction.

3.19 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.[100] Due to resource constraints we will not generally be able to enter into individual correspondence with complainants, although we will confirm receipt of a complaint in writing. In general, individual consumer complaints should be directed toward the supplier (or network operator) in the first instance and then, if they are not satisfied with the outcome, to the Energy Ombudsman.[101]

3.20 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 4.7-4.14) and we will notify complainants of this.

Handling information

3.21 Those who submit complaints (or otherwise provide us with information) should be aware that to take a case forward we may need to disclose the information provided, either to the company in question and/or to others connected to the subject matter of the complaint.

3.22 Where information is confidential or where complainants do not wish it to be disclosed, this should be made clear, including the reasons why, in writing.

3.23 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 annex 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.

3.24 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.

[99] Under section 11 of the Enterprise Act.
[100] Where the complaint concerns an alleged breach of the Competition Act, complainants should have regard to the CMA's guidance CMA8.
[101] https://www.ombudsman-services.org/energy.html.

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.[102]

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

Initial enquiry phase

3.26 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.

3.27 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.

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

Alternative action that we will consider

3.29 When deciding how best to deal with a concern, we may engage in alternative action to bring a company into compliance. Alternative action can be used in lieu of opening an investigation into a potential breach, as part of closing an investigation or during an investigation to address any ongoing concerns. As explained in paragraph 3.8 above, we do not normally consider alternative action to be appropriate when addressing potential breaches of competition law. It is also unlikely to be sufficient in sectoral cases when potential breaches are serious or when we have significant concerns about a company's conduct (see paragraphs 3.36–3.49 on our case opening criteria).

3.30 We may undertake one or more of the following alternative actions with the company in question:

- enter into dialogue or correspondence and discuss potentially harmful or unlawful conduct, including what they have done or plan to do to put things right

[102] We will comply with section 105 of the Utilities Act 2000 and Part 9 of the Enterprise Act 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 and section 48 of the Electricity Act, as appropriate, in relation to the publication of information and advice.

- agree a period of reporting, either to ensure that behaviour is not repeated or to show that they have taken certain action to address the issue
- request that they engage independent auditors or other appropriately skilled persons to conduct a review focused on a particular area of concern
- accept non-statutory undertakings or assurances to ensure future compliance with a particular obligation
- agree other voluntary action, such as the implemention of specified remedial or improvement actions and/or making voluntary payments to affected consumers, other appropriate parties or to charitable organisations.[103]

3.31 We would expect a company to engage fully and proactively in helping to ensure a successful resolution of the alternative action. Steps might include, for example, providing us with comprehensive plans (independently audited where necessary) to ensure future compliance, developing proposals for our consideration and input to fully compensate customers for any financial losses or other detriment caused, or ensuring other appropriate forms of redress.

3.32 When deciding whether an issue can properly be resolved without the need to investigate or use our statutory enforcement powers, we will have regard to our prioritisation criteria for opening an investigation (see paragraphs 3.36-3.49 below).

3.33 If we decide that alternative action is sufficient to deal with the conduct, we will need to be satisfied that the action will fully address our concerns. In considering alternative action we will have regard to whether:

- where issues have been self-reported, we are satisfied the full extent of the potential breach has been self-reported promptly, accurately and comprehensively by the company
- where issues have come to light via other means, we are satisfied that the full extent of the potential breach has been established
- we are confident that the company will act promptly to put things right, including taking account of its willingness and ability to address the matter as well as its previous record in complying with its legal obligations
- we consider that the company has provided robust assurances (including supporting evidence where necessary) that the potential breach will not recur
- the relevant concerns can be appropriately addressed by the alternative action being considered and be implemented effectively

[103] We have appointed an expert independent third party to manage the allocation of voluntary redress payments from licensees to charitable organisations.

- not pursuing an investigation and potential enforcement action is a proportionate and targeted response given the nature of the concern and meets our vision and Strategic Objectives for enforcement action (see paragraphs 1.7 and 1.8).

3.34 If we seek and obtain a non-statutory undertaking or other agreed action from a company, this may result in the case being closed, although the company may be the subject of a period of compliance monitoring after the case is closed (see paragraphs 7.7-7.10). 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 3.47).

3.35 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.

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

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

3.37 We will make decisions on a case-by-case basis, considering the specific facts of the matter, the legal context and our available resources.

Case opening decisions

3.38 In detemining whether an enforcement case is appropriate, we will consider how to meet our vision and Strategic Objectives for enforcement action (see paragraphs 1.7 and 1.8). When making our assessment we will consider in each case the following criteria:

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

2) Is it a priority matter for us, due to the apparent seriousness of the potential breach?

3) Is it a priority matter for us, due to the apparent conduct of the company in question?

3.39 We will consider whether we have the power to take action and are best placed pto act as set out below. The decision to open a new case can then be taken by applying either criteria (2) or (3) above (both need not apply). For example, we may open a case to address apparent poor conduct even when our assessment suggests that any resulting harm or likely harm is limited. Similarly, we may open a case when we judge the harm or likely harm to be serious even if the company in question has a good compliance history and has put things right.

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

3.40 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.[104] This means:

- in cases under the Gas Act and the Electricity Act, assessing if it appears likely that the behaviour in question could constitute a breach of any relevant condition or requirement
- in Competition Act and TFEU 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, 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 cases concerning unfair contract terms or consumer notices under the Consumer Rights Act, assessing whether it appears likely that there is a potentially unfair contract term or consumer notice
- 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.

3.41 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.[105] This may result in the case being referred to another regulator for investigation. Equally, sometimes other regulators will refer cases to us.

3.42 Where two or more concurrent regulators such as the CMA and Ofgem have the power to investigate a particular breach or infringement, the concurrency arrangements, which provide for co-ordination with other regulators, prevent a company from facing two separate investigations (and sanctions) by different regulators for the same behaviour.[106]

3.43 Action may be taken by us where another body is already investigating or taking action, where the power to act does not derive from concurrent powers (as distinct from the action envisaged in paragraph 3.42). For example, a code

[104] REMIT cases are covered in separate guidelines. However, when assessing the resource requirements of a potential case, consideration is given to other current and potential cases under all of our enforcement powers, including REMIT.
[105] See further at paragraph 3.43 onwards.
[106] The position is different in cases concerning European competition issues where the competition effects are felt in different territories. Parallel investigations may be carried out by two or more Member States' competition authorities for their respective territories.

owner or panel[107] may be dealing with a breach of a code where the same conduct may also amount to a breach of a licence condition.

3.44 Whether an additional investigation may be justified will depend on the circumstances of the case. 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.

3.45 Provided the issue warrants an investigation under our prioritisation criteria (see paragraphs 3.29–3.35), we are more likely to launch a separate investigation if, for example:

- the action being taken by the other body appears not to deal with our concerns fully 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.

Is it a priority matter for us due to the apparent seriousness of the potential breach?

3.46 This means assessing a range of factors including the degree to which the suspected breach has caused, is causing or is likely to cause harm to consumers (financial or non-financial), to competition or to our ability to regulate effectively. The latter is important for breaches that, if confirmed, would harm our ability to regulate or could lead to a loss of confidence in the regulator if companies do not face meaningful consequences. We will also take account of the extent to which the company may have benefitted (financially or otherwise) from the suspected breach and the need to deter future poor practice, both by the company in question and others across the market.

Is it a priority matter for us, due to the apparent conduct of the company in question?

3.47 This means assessing a range of factors to determine whether the company is willing and able to comply with its obligations or whether it is a company with recurring non-compliance. Our assessment will include whether the alleged breach appears to be intentional, reckless, a sign of negligence or constitutes a failure to comply with previous undertakings. For principles-based rules, it will include considering whether a company intent on complying might have acted in the way it did. We will consider the compliance record of the company[108] and any history of similar breaches, including any that in isolation may not have been considered serious enough at the time to justify opening a new

[107] 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.
[108] For supply licensees this could include an assessment of complaints registered with them, Citizen's Advice or the Energy Ombudsman

case. We will consider also whether the company self-reported promptly, accurately and comprehensively, is taking timely action (or has already taken action) to put matters right, and is willing and able to avoid repeat breaches. We are more likely to open an investigation if the breach is ongoing but may also take action if the company is no longer in breach.

Other case opening considerations

3.48 The criteria set out above are not exhaustive; we may consider other factors where relevant such as the resources we have available at the time. 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.

3.49 On occasion, particularly when addressing a concern across the market, we may not open a case and instead focus our resources on a relevant policy project (we also have powers under the Enterprise Act to conduct market studies and make market investigation references) which we consider may better address the identified non-compliant conduct and any resulting harm.

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 public cases that we open and close. It also outlines the investigation powers that we may use in a case.

4.2 Where there are differences to the procedure, for example in competition cases or cases where orders are sought from a court, these have been set out below. The section also deals with how to raise procedural issues.

Notification that we are opening a case

4.3 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.

4.4 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.

4.5 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 (for example, to say that it admits or denies breaches, or cannot say yet). It may wish to raise other matters, such as inviting Ofgem to visit a company site.

Ofgem's timescales for carrying out an investigation

4.6 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 and publicity

4.7 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.

4.8 In line with our commitment to transparency, we will publish on our website every case that we open[109] unless this would adversely affect the investigation (for example, where it may prejudice our ability to collect information), harm consumers' interests or is subject to confidentiality or other considerations.[110] We will consider on a case-by-case basis how best to publicise the opening of a case bearing in mind our Enforcement Vision and Strategic Objectives.[111] In some cases, we may also decide to make an announcement to the media. We will normally inform a company before we publish the opening of a case on our website or make an announcement to the media.

4.9 When we publish the opening of a case on our website we will make clear that this does not imply that we have made any finding(s) about non-compliance.

4.10 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.[112]

4.11 In 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 and the market affected). If publishing details of any company being investigated (or any other information set out in section 25A of the Competition Act) could adversely affect the investigation (as per paragraph 4.8) we may decide to exclude that information. In line with the CMA's approach, we will normally publicly announce the issue of the Statement of Objection.[113]

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. When a case has been made public on opening, then if we close it with no finding of breach or infringement (for example, due to lack of evidence, on the grounds of administrative priorities or because we are taking alternative action) we will also make this fact public.[114] We will normally inform a company before we publish the closing of a case on our website or make an announcement to the media.

4.13 In order to ensure the transparency of our work, to explain our expectations or to share lessons learned, details of cases resolved via alternative action will

[109] We will consider a case as open for publishing purposes once the Enforcement Oversight Board has decided to invest enforcement team resources investigating a case in accordance with our prioritisation criteria.
[110] Section 35 of the Gas Act and section 48 of the Electricity Act. We will comply with any duties under section 105 of the Utilities Act 2000 and Part 9 of the Enterprise Act in respect of confidential information.
[111] See paragraphs 1.11 and 1.12.
[112] When deciding on anonymity, we will have regard to the applicable legislation.
[113] In the case of market sensitive announcements, we will have regard to relevant guidance from the FCA.
[114] 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.

normally be made public. Where the issue was resolved quickly with limited intervention from Ofgem, some details may be included in reports that we publish from time-to-time on our compliance and enforcement activity.

4.14 Where alternative action involves more substantial activity or voluntary payments to put things right, we will normally publish information on the action taken. We will consult the company in advance of publishing any statements.

Contact with the case team

4.15 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. The name of the Senior Responsible Officer (SRO) in the case will also be provided to the company.

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

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

Interim orders

4.18 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 are described in Section 2.

4.19 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.

4.20 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.[115]

4.21 In cases under Part 8 of the Enterprise Act, consultation with the company before seeking an order is usually required.

[115] Section 35 of the Competition Act and Rule 13 of the CA98 Rules.

Information gathering

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

- the Gas Act and Electricity Act[116]
- the Competition Act[117]
- the Consumer Rights Act.[118]

4.23 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.

4.24 We will set the length of any deadline based on the complexity of the issues raised and the breadth, type and amount of information required. We will give what we consider, in the circumstances, to be a reasonable amount of time for responses.

4.25 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 (for instance, 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 and making any amendments we consider necessary, we will issue the actual information request.

4.26 Any problems understanding an information request or queries about the scope of it should be raised promptly 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.

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[116] Section 38 of the Gas Act and section 28 of the Electricity Act. 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.
[117] Sections 26 of the Competition Act.
[118] The investigatory powers of consumer law enforcement bodies have been consolidated so that they appear in a single piece of legislation: https://www.legislation.gov.uk/ukpga/2015/15/contents/enacted. Our powers to request information in consumer law cases can now therefore mainly be found in that Act. There is also guidance for business available: https://www.businesscompanion.info/sites/default/files/CRA-Goods-Guidance-for-Business-Sep-2015.pdf.

4.27 Delays in the provision of information can have an impact on overall timescales for the investigation. We expect stakeholders to respond within deadlines to the notices served upon them. Failure to cooperate fully with reasonable requests from the investigation team will be taken very seriously, in line with the appropriate policy on penalties/redress.

4.28 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.

4.29 In Competition Act cases, we may also ask questions of an individual connected with a company under investigation,[119] and enter, and in some instances search, business and domestic premises.[120]

4.30 In sectoral cases and those under the Enterprise Act and Consumer Rights Act, the Authority may apply to the court for an order requiring any default in complying with a notice to be made good (and costs).[121]

4.31 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.[122]

4.32 Failure to fully comply with notices to produce documents or information may amount to a criminal offence123 and will be taken seriously.

Meetings

4.33 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).

4.34 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

[119] Section 26A of the Competition Act.
[120] Sections 27, 28 or 28A of the Competition Act.
[121] Section 38(4) of the Gas Act, section 28(6) of the Electricity Act and Paragraph 16 of Part 3 of Schedule 5 to the Consumer Rights Act.
[122] Section 40A of the Competition Act and the CMA's guidance entitled "*Administrative penalties: Statement of Policy on the CMA's approach*" (CMA4), to which Ofgem is required to have regard when proceeding under section 40A.
[123] 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). If a person intentionally or recklessly destroys, falsifies or conceals a required document, or if a person 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).

particular people attend from the company, such as those with knowledge of particular matters or with the authority to speak for the company).

Other sources of information

4.35 We may seek information and evidence from third parties such as consumer bodies, industry competitors, whistleblowers or other witnesses, other stakeholders or from publicly available records.

4.36 Sometimes we instruct experts, for example to provide economic analysis or carry out a survey to help us assess detriment.

4.37 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.

Raising procedural issues

4.38 If a company wishes to raise any procedural issues these should be taken up with the SRO.

4.39 In competition cases we will comply with requirements under the Competition Act Rules for there to be a Procedural Officer to whom complaints about the investigation procedures can be made, if not adequately resolved by the SRO[124] in the case.

[124] 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 CMA8 at: https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases.

Section 5 Settling or contesting a case

5.1 This section describes our procedures for settling or contesting sectoral and Competition Act cases. Sectoral cases are covered in paragraphs 5.4-5.47.

5.2 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 5.48-5.76 explain how we deal with settling or contesting Competition Act cases.

5.3 This section and Section 6 do not apply to cases under the Enterprise Act 2002, the Consumer Rights Act 2015 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.

Sectoral cases

Settling a sectoral case

5.4 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.

5.5 The company will also be expected to agree not to challenge or appeal any finding of breach, penalty or consumer redress order that is agreed to as part of the settlement. We will not enter into partial settlements with companies.

5.6 This settlement process is distinct from the resolution of a case by, for example, the acceptance of undertakings or other agreed action.

5.7 Due to the statutory time restrictions in cases where a provisional order has been made, the process described in this section will not apply. In cases where no penalty or consumer redress order is proposed, the process described in this section will not apply. In such cases, the case team will write to the company concerned setting out the process that will be followed.

5.8 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 obligations to consult on proposed penalties and consumer redress orders.[125]

[125] Sections 30A and 30I of the Gas Act and sections 27A and 27I of the Electricity Act.

5.9 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.

5.10 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.

5.11 Companies should consider whether to obtain legal or other advice before settling a case. 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.

5.12 Although there may be exceptional cases[126] where settlement is not appropriate, generally we will consider settlement in all sectoral cases.

5.13 Companies may ask to enter into settlement discussions. Whilst we will engage positively with a company that indicates a willingness to enter into early settlement discussions, in many cases it may not be possible to start such discussions 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.

5.14 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

5.15 Early settlement results in cases being resolved more quickly, and saves resources for both the company and Ofgem. It may also result in consumers obtaining compensation earlier than would otherwise be the case. In recognition of the benefits of early settlement, we have a discount scheme.

5.16 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 signed by the company (the earlier the settlement, the greater the percentage discount).[127] The Authority has provided for three settlement windows, as follows:

[126] Certain cases may not be suitable for settlement (for example, where a point of legal interpretation is at issue such as the interpretation of a relevant provision on which we would wish the EDP's guidance).

[127] The discount does not apply to any monies to be recovered from the company. Any final penalty amount and/or consumer redress order is subject to consultation in accordance with statutory requirements (see paragraph 6.23).

Early settlement window

- greatest discount
- opens when the draft penalty notice and/or redress order and press notice are served on the company
- closes on expiry of the reasonable period (normally 28 days[128]) notified to the company when the above documents are served

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

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.[129]

5.17 The percentage discounts are set out in the Authority's penalties and redress policy statement.[130]

The settlement framework

5.18 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 Findings (the Summary Statement).

5.19 This document will cover the breaches that we consider have been committed and/or that may be ongoing, our thinking about the detriment and/or gain, and such other matters as may be appropriate.

[128] For example, where an early settlement window coincides with a holiday period we may allow a longer period for agreement
[129] The body that supports the Enforcement Decision Panel (EDP). The decision-making structure is described in section 6.
[130] This can be found at: https://www.ofgem.gov.uk/sites/default/files/docs/2014/11/financial_penalties_and_consumer_redress_policy_statement_6_november_2014__0.pdf

5.20 We will allow a reasonable period (normally 21 days) for written representations in response to the Summary Statement. We will also offer the company an opportunity to make oral representations on the Summary Statement at an optional case direction meeting (or other contact).

5.21 The purpose of these steps is not to negotiate but for us to understand the company's position on the Summary Statement so that we can take account of it in making recommendations to the Settlement Committee. Late submission of written representations may affect our ability to reach a settlement agreement during the early settlement window.

5.22 After this, we will obtain a settlement mandate from a Settlement Committee.[131] The company will then be provided with a draft penalty notice and/or consumer redress order, and/or a draft final order and press notice. If there is a proposed penalty and/or redress order 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.

5.23 If a company wishes to take advantage of the greatest settlement discount, it will have the duration of the window to sign a settlement. This agreement is subject to the processes set out in paragraphs 6.20-6.25 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.

5.24 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, telephone calls and/or emails.

5.25 Settlement discussions will take place on a "without prejudice" basis. This means that if discussions break down, neither party can rely on admissions or statements made during the settlement discussions in any subsequent contested case.[132]

5.26 The aim of discussions will be to agree the terms of a penalty notice and/or consumer redress order and get comments on press notices.[133] We may also agree other terms with the company as part of a settlement.[134]

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

[132] If for any reason a company that has entered into settlement discussions chooses to reveal to the Panel any of the detail of the settlement discussions, we reserve the right, similarly, to reveal information (including any admissions) that were made during those discussions.

[133] 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 be an exchange of press notices and an opportunity for the parties to comment on the content before they are published. The final decision as to what we publish will be made by us.

[134] For example, other terms of settlement may include the possibility of paying a sum of money in lieu of (or in addition to) a financial penalty, to appropriate charities, trusts or organisations for specific activities. We have published guidance which provides information on the current process and the set of principles involved in allocating voluntary redress payments in this respect, in the context of enforcement investigations conducted under the Gas Act and the Electricity Act. This guidance is available at https://www.ofgem.gov.uk/publications-and-updates/open-letter-guidance-allocation-voluntary-redress-payments for further information.

5.27 If a settlement agreement is not signed 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 is set out in paragraphs 5.30, 5.41 and 5.47).

5.28 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 6.20-6.25. If a settlement cannot be reached, the case will move to the contested route.

Contesting sectoral cases – the Statement of Case

5.29 If a case is not settled within the early settlement window we will draft and 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 will be invited. We will also disclose any relevant documents (see paragraphs 5.32-5.34).

5.30 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. 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).

5.31 If the case is to be contested, we will inform the Enforcement Decision Panel Secretariat so that a Panel can be selected to deal with the case.[135]

Disclosure

5.32 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 on which we rely that are reasonably requested by the company, subject to any legal restrictions on disclosure including questions of confidentiality and privilege.

5.33 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. Other arrangements may sometimes be required.

5.34 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 that will be made. Privileged documents may be listed by class and will not be disclosed.

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

Written representations

5.35 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 note that there are restrictions on introducing new material in any subsequent oral hearing (as described in paragraph 6.35).

5.36 The length of time that we give for a company to respond will depend on:

- the number and complexity of the issues raised by us in the Statement of Case and on
- the amount of any material in the Statement of Case that has not previously seen by the company.

5.37 We will usually allow 28 days for a company to respond to a Statement of Case. However, we may decide to extend the period for written representations if it appears reasonable to do so in a particular case.

5.38 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.

5.39 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 may shorten or extend the time subject to the complexity of the issues.

5.40 If there are difficulties in 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 such requests as described in paragraph 4.26.

5.41 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 by consideration of the written representations only, 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

5.42 A company may, if it wishes, make oral representations to the Panel. There is no obligation to do so. A decision not to request to make oral representations will not be held against a company. 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.

5.43 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.

5.44 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 for clarification are necessary is a matter for the discretion of the Panel.

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

5.46 The EDP Secretariat will notify the parties in writing of the date that the late settlement window closes. At least 28 days prior to the date fixed for the hearing, the Panel will issue directions in writing to the parties (via the EDP Secretariat) indicating how it intends to conduct the hearing.

5.47 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

5.48 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 exist because of requirements imposed by relevant legislation, including 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.

5.49 Due to the different legal framework for Competition Act 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. There should be no expectation that we will offer settlement in Competition Act cases. 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.

5.50 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[136] and confirm that it will pay a maximum penalty amount.[137] These are minimum requirements in order to settle. If a company meets them, a reduced penalty will be imposed in accordance with the CMA's adopted guidance as to the appropriate amount of a penalty.[138]

5.51 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 CAT,[139] and that we will remain free to use the admissions made by it and any documents, information or witness evidence provided by it.

5.52 Settlement is a voluntary process. In Competition Act cases, the company should satisfy itself that, having seen the key evidence on which the Authority is relying, it is prepared to admit to the infringement, including the nature, scope and duration of the infringement.

5.53 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.

5.54 When deciding how to deal with settling or contesting a Competition Act case, we will have regard to the CMA's guidance on investigation procedures in Competition Act 1998 cases (the CMA's Guidance).[140]

Early settlement discounts

5.55 We will apply the CMA's settlement discounts as described in the above guidance.[141] There are two settlement windows as follows:

Early settlement window

- greater discount up to a maximum
- opens when the parties are informed that the investigation has been opened
- closes just before the date for service of the Statement of Objections

[136] The streamlined procedure is intended to achieve efficiencies and resource saving. It would include, for example, streamlined access to file by access to key documents only, no written representations (except limited representations identifying manifest factual inaccuracies) or oral representations.
[137] This will be reduced by a settlement discount, provided that the company proposing to settle follows any continuing requirements of settlement.
[138] https://www.gov.uk/government/publications/appropriate-ca98-penalty-calculation.
[139] The CAT has full jurisdiction to review the appropriate level of penalty.
[140] https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases.
[141] Chapter 14 of the CMA's guidance CMA8 at: https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases.

Late settlement window

- lesser discount up to a maximum
- opens on service of the Statement of Objections
- closes on a date notified to the company by the EDP Secretariat.

5.56 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

5.57 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 Statement). The Summary Statement will be used as the basis of the company's admission.

5.58 We will also provide the company with access to key documents as part of the streamlined administrative process. There may be an optional case direction meeting (or other contact).

5.59 The SRO will generally oversee the settlement discussions. All decisions to follow the settlement procedure must be approved by the Settlement Committee.

5.60 The company will 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.

5.61 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. We will not extend the early settlement window for the purposes of reaching an agreement, apart from in very exceptional circumstances.

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

5.63 The company 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 (for example, by accepting an admission in relation to a lesser infringement in return for dropping a more serious infringement). [142] We may also agree other terms with the company as part of a settlement.

5.64 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.

5.65 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.[143] If a settlement is agreed, the infringement decision will be made and issued.

Contesting Competition Act cases – the Statement of Objections

5.66 Contested Competition Act cases follow similar procedures to those in sectoral cases whilst ensuring appropriate consistency with the CMA procedures for such matters including consistency with the CA98 Rules. 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 time usually allowed for responses to the Statement of Objections.

5.67 The case team will produce a Statement of Objections.[144] This is a notice to the company under investigation that the Authority proposes to make an infringement decision.

5.68 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.[145] 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.

5.69 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

[142] 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.
[143] Rule 9(5) of the CA98 Rules.
[144] 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.
[145] The procedure we must follow is set out in Rules 5 and 6 of the CA98 Rules.

disclosure is strictly necessary in order for them to exercise their rights of defence.

5.70 We may also offer third parties with a sufficient interest the opportunity to consider and make representations[146] 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.

5.71 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

5.72 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.[147] 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 documents.[148] We will adopt a similar procedure to handling confidential information as is described in paragraph 5.33.

Written representations

5.73 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 Statement of Objections. 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.

5.74 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.[149]

5.75 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.

[146] Non-confidential versions of these representations will be disclosed to the company or companies for comment.
[147] Rule 6(2) of the CA98 Rules.
[148] See also paragraphs 3.17-3.21 on the handling of confidential information.
[149] The decision making structure is set out in Section 6.

Oral representations

5.76 If oral representations are to be heard, the parties will be notified in writing of the date that the late settlement window closes and how the hearing is intended to be conducted.

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, Settlement Committees, the Enforcement Decision Panel 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.[150] Day-to-day decisions are made by the SRO (as discussed in paragraph 4.15).

The Enforcement Oversight Board (EOB)

6.4 The EOB provides strategic oversight and governance to our enforcement work and oversees the portfolio of cases, including monitoring their progress. Changes in the regulatory landscape and market environment mean that the priority of a case may change over time.

6.5 The EOB takes the decision[151] on whether to open (or not) an investigation into a potential breach, taking account of the prioritisation criteria (see paragraphs 3.36-3.49). The EOB also decides whether to accept alternative action that addresses harm via voluntary payments (other than those repaying consumers who have been directly impacted). It may also decide whether we should seek to exercise our Competition Act powers in a particular case.[152] It is usually consulted on whether interim orders should be made or commitments accepted.

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

The Settlement Committee

[150] Paragraph 9(1) and (3) of Schedule 1 to the Utilities Act 2000.
[151] Technically the senior civil servant who chairs the EOB takes the decision but does so after an EOB discussion in practice.
[152] Decisions about whether to seek a court order under the Enterprise Act and related decisions under general consumer law are generally reserved to the Authority.

6.7 A Settlement Committee may be constituted for any sectoral or Competition Act[153] case which is considered suitable for settling. Settlement Committees consider whether to authorise settlement agreements in respect of alleged contraventions and they reach decisions in accordance with Ofgem's powers under the applicable Acts. Our Settlement Committee Terms of Reference have been published on the Ofgem website[154].

6.8 In sectoral cases where the penalty amount is below £100,000[155] or the issues raised are unlikely to attract significant industry or media interest or are otherwise uncontentious, the case may be handled by a senior Ofgem employee, as described in paragraph 6.11.

6.9 A Settlement Committee generally consists of two members of the EDP and one Ofgem Partner or Senior Partner[156] and is constituted as and when required to deal with a case. The membership of the Committee in a particular case will be provided to the company in writing by the EDP Secretariat.

6.10 If settlement discussions 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 Ofgem employees

6.11 A Senior Partner may, in sectoral cases, decide:

(a) the settlement mandate and, if required, approve any final settlement decision

(b) to make a final order or confirm a provisional order

(c) to make a final order or confirm a provisional order with modifications

where the level of penalty recommended by the case team is below £100,000 or the issues raised are unlikely to attract significant industry or media interest or are otherwise uncontentious. The Senior Partner will take advice, where necessary, from other senior Ofgem officials.

6.12 The identity of the Senior Partner will be provided to the company in writing.

6.13 The process in relation to Competition Act cases is set out in paragraphs 5.48-5.65.

The Enforcement Decision Panel (EDP)

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

[153] See paragraphs 6.26-6.29.
[154] https://www.ofgem.gov.uk/system/files/docs/2017/07/committee_tors_approved_by_gema_july_2016.pdf.
[155] For these purposes the amount of any consumer redress payment is not taken into account.
[156] This includes Ofgem staff at equivalent or higher grades than Partner.

6.15 EDP members are employed specifically for EDP duties and 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 chair the decision making discussions, and who has the casting vote in the event of a deadlock.

6.16 In contested Competition Act cases where it must exercise its decision-making powers, 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.[157]

6.17 The EDP Terms of Reference have been published on the Ofgem website.[158]

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. 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

Settlement decisions in sectoral cases

6.20 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. When setting the mandate (or subsequently approving an agreement where necessary), the Settlement Committee will have regard to the Authority's penalties and redress policy statement.

6.21 Details of the procedural steps involved in settling a case are set out in paragraphs 5.4-5.28.

6.22 In sectoral cases, if after settlement discussions an agreement cannot be reached between the company and the case team within the settlement mandate (for example, because new material has come to light during the discussions), the case team may, in exceptional circumstances, go back to the Settlement Committee to seek a revised mandate.

[157] 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.

[158] https://www.ofgem.gov.uk/system/files/docs/2017/07/committee_tors_approved_by_gema_july_2016.pdf.

6.23 If an agreement is reached within the terms of the mandate given by the Settlement Committee, the decision and penalty notice and/or consumer redress order will be published in accordance with the statutory requirements,[159] for the purposes of consultation. Following the close of the consultation, any representations will be considered.

6.24 If, having received representations or objections, the Settlement Committee proposes to vary the level of a penalty or the amount of consumer redress ordered from that originally proposed, the consultation process must be repeated.

6.25 The company will then have the opportunity to make further representations. The company's agreement to waive its right to challenge or appeal against breach, penalty or a consumer redress order (see paragraph 5.5) will fall away if the proposed variation to the penalty and/or the consumer redress order is outside the scope of their original settlement agreement.

Settlement decisions in Competition Act cases

6.26 Details of the procedural steps involved in settling a Competition Act case are set out in paragraphs 5.48-5.65.

6.27 All decisions to follow the settlement procedure in Competition Act cases will be approved by the Settlement Committee. The Committee will have regard to the CMA's adopted guidance on the appropriate amount of a penalty[160] and applicable parts of the CMA's procedural guidance in Competition Act 1998 cases.[161]

6.28 If the Settlement Committee approves the SRO's decision to follow a settlement procedure, the procedure will continue as follows:

- **if the Statement of Objections has not been issued**,[162] the SRO will issue that document and the case will follow a streamlined administrative process (as set out in paragraph 5.50). If it is still appropriate to proceed with an infringement decision, the SRO will issue that decision together with a notice of penalty, if appropriate, and potentially, a notice of directions to bring the infringement to an end

- **if the Statement of Objections has already been issued,** the SRO will proceed to issue the infringement decision together with a notice of penalty, if appropriate, and potentially, a notice of directions to bring the infringement to an end

[159] Section 30A of the Gas Act and section 27A of the Electricity Act.
[160] OFT423 at: https://www.gov.uk/government/publications/appropriate-ca98-penalty-calculation.
[161] See Chapter 14 of the CMA's guidance at: https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases.
[162] We are still required to serve the Statement of Objections in settled Competition Act cases. See Rule 9(5) of the CA98 Rules.

- **once the settlement is agreed in terms that have been approved**, an infringement decision and notice of penalty will be published.[163]

Contested decisions

What decisions can the appointed Panel make?

6.29 EDP members have delegated powers to make decisions in contested cases concerning the Gas and Electricity Acts and the Competition Act.

6.30 The appointed Panel will decide in 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
- to make a final order or confirm a provisional order (see paragraph 6.11 on the potential delegation of these powers)
- 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.

6.31 The appointed Panel will decide in Competition Act cases whether

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

How will the appointed Panel make decisions?

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

6.33 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.

6.34 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 details of how the Panel intends to proceed (issued via the EDP Secretariat). In Competition Act cases we would usually expect these to be dealt with separately.

6.35 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

[163] Rule 12 of the CA98 Rules.

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.

6.36 Details of the procedural steps involved in contesting a sectoral case are set out in paragraphs 5.29-5.47. Details of the procedural steps involved in contesting a Competition Act case are set out in paragraphs 5.66-5.76.

6.37 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.

Outcome of the decision making process – sectoral cases

6.38 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).

6.39 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 make a final order[164] 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.

[164] The Panel decides whether or not to confirm a Provisional Order in accordance with statutory deadlines.

6.40 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.[165]

6.41 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.

6.42 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.[166]

Imposing a financial penalty or consumer redress order

6.43 The Panel may exercise the Authority's power to impose a financial penalty and/or make a consumer redress order. In deciding whether to do so, the Panel will have regard to the Authority's penalties and redress policy statement.

6.44 In setting the amount of any financial penalty and/or payment under a consumer redress order, the Panel will have regard to the Authority's penalties and redress policy statement. 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.[167]

6.45 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:[168]

- the payment of compensation to affected consumers (i.e. those consumers that have suffered loss or damage, or been caused inconvenience, as a result of the contravention)

[165] The procedural requirements are set out in section 29 of the Gas Act and section 26 of the Electricity Act. Representations may be made by anyone, including consumers.
[166] See section 29(7) of the Gas Act or section 26(5) of the Electricity Act.
[167] 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.
[168] 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.

- 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.

6.46 If proposing a penalty or a consumer redress order, a notice[169] 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[170]) and published in line with statutory requirements.[171] The notice will include the time (not less than 21 days) for representations or objections to the penalty amount or consumer redress order.

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

6.48 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.

6.49 Before varying any proposal, a further notice to this effect must be given[172] for consultation, and any further representations or objections must be considered.

6.50 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.[173]

Outcome of the decision making process – Competition Act cases

6.51 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.[174] 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.

[169] 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). 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).
[170] Section 30I(5) of the Gas Act and section 27I(5) of the Electricity Act.
[171] Sections 30A(7) and 30I(5) of the Gas Act and sections 27A(7) and 27I(5) of the Electricity Act.
[172] Section 30A(4) of the Gas Act and section 27A(4) of the Electricity Act.
[173] Sections 30A(5) and 30G(5) of the Gas Act and sections 27A(5) and 27G(5) of the Electricity Act.
[174] Rule 10 of the CA98 Rules.

6.52 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.[175] 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.[176]

Imposing a financial penalty

6.53 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.[177] The Panel may impose a financial penalty on the infringing party of up to 10 per cent of the company's applicable turnover.[178]

6.54 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'.[179]

6.55 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, within a time specified in the draft, on the draft penalty notice which sets out the calculation of the penalty amount.

6.56 Having taken account of any representations, final notice of the penalty will be given in writing and specify the period for payment.[180] The company must be informed of the facts on which the Panel bases the penalty and its reasons for requiring it.[181]

Authority strategic oversight

6.57 The Authority will not seek to influence the outcome of particular matters or change any decision of a Panel or Settlement Committee. The Authority will retain oversight through its annual review of the decisions taken by Panel members in settled and contested cases. It may, if appropriate, issue further guidance to the EDP to inform future decisions.

Appeals

Appeals to the court in sectoral cases

[175] Sections 32 and 33 of the Competition Act.
[176] Rule 12 of the CA98 Rules.
[177] Section 36 of the Competition Act.
[178] 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.
[179] https://www.gov.uk/government/publications/appropriate-ca98-penalty-calculation.
[180] 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.
[181] Rule 12 of the CA98 Rules.

6.58 A regulated person may appeal against the making of a provisional or final order[182] 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[183] within 42 days from the date of the order being served on them.[184]

6.59 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.[185]

6.60 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 an application to the court.[186] The application must be made within 42 days of receipt of notice of the decision.[187]

6.61 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.

6.62 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.

[182] Except when they have agreed not to as part of a settlement agreement.
[183] 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.
[184] Section 30(1) Gas Act and section 27(1) Electricity Act.
[185] Section 30(2) Gas Act and section 27(2) Electricity Act.
[186] Section 30E(1) and 30M of the Gas Act and section 27E(1)and 27M of the Electricity Act.
[187] Section 30E(2) and 30M(2) of the Gas Act and section 27E(2) and 27M(2) of the Electricity Act.

Appeals to the Competition Appeal Tribunal

6.63 Competition Act decisions[188] may be appealed to a specialist tribunal, the Competition Appeal Tribunal (the CAT), established under the Enterprise Act. Appealable decisions include, among others, infringement decisions, no grounds for action decisions, directions and the imposition of financial penalties.[189] Note that there is no appeal against the decision not to accept commitments.

6.64 Any party in respect of which the Authority has made a decision may appeal against that decision.[190] A third party who the CAT considers has sufficient interest may also appeal certain decisions to the CAT.[191]

6.65 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[192] and the CAT will have full jurisdiction to review the appropriate amount of any penalty.

6.66 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).[193]

6.67 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.[194]

Appeals against decisions made by the courts

6.68 Orders made under Part 8 of the Enterprise Act, the Consumer Rights Act 2015 and the Business Protection from Misleading Marketing Regulations 2008 are dealt with on appeal in the same way 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.[195]

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[188] Appeals relating to enforcement decisions in respect of breaches of the Transmission Constraint Licence Condition pre-dating 16 July 2017 may also be heard by the CAT. Further information can be found at: https://www.ofgem.gov.uk/publications-and-updates/final-decision-guidance-transmission-constraint-licence-condition.
[189] 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.
[190] Section 46 of the Competition Act.
[191] Section 47 of the Competition Act.
[192] In accordance with the settlement agreement made with us.
[193] Rule 9 of the Competition Appeal Tribunal Rules 2015. The CAT's Rules and Guidance are available on its website at: https://www.catribunal.org.uk/rules-and-guidance.
[194] Paragraph 3 of Schedule 8 to the Competition Act.
[195] The Access to Justice Act 1999 (Destination of Appeals) Order 2000 provides a summary of the destinations for different types of civil appeals.

6.69 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.[196]

[196] 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 3.36-3.49).

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

- it is concluded that there is no relevant breach or infringement (for example, 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 (including in the context of alternative action) to ensure that behaviour is stopped and relevant matters have been appropriately addressed and we do not consider further action to be appropriate
- we have obtained a court order to secure compliance (such as an enforcement order under Part 8 of the Enterprise Act 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 and concluded that the case should be closed on the grounds of administrative priorities[197] (see also the specific comments below about competition cases).

7.3 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.[198] For example, this may be 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.

[197] 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.
[198] Further information on the way in which we may deal with such decisions can be found in Chapter 10 of the CMA's guidance CMA8, *'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.

7.4 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 CMA's guidance on involving third parties in Competition Act investigations.[199]

7.5 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

7.6 We will usually make case closures public on our website (as set out in paragraph 4.8).

Compliance monitoring

7.7 Where we have taken enforcement action, or secured undertakings or other agreements that adequately resolve the issues, we will close the case.

7.8 In some cases we may decide to put the company under investigation into a 'compliance phase'. This means we will monitor its behaviour to ensure that:

- there are no further behaviours of concern
- it complies with any undertakings or commitments and/or that
- it implements any agreements made with us (for example by paying compensation to affected consumers or ceasing the infringing behaviour).

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

7.10 Similar compliance monitoring steps may be agreed with the company in question following alternative action.

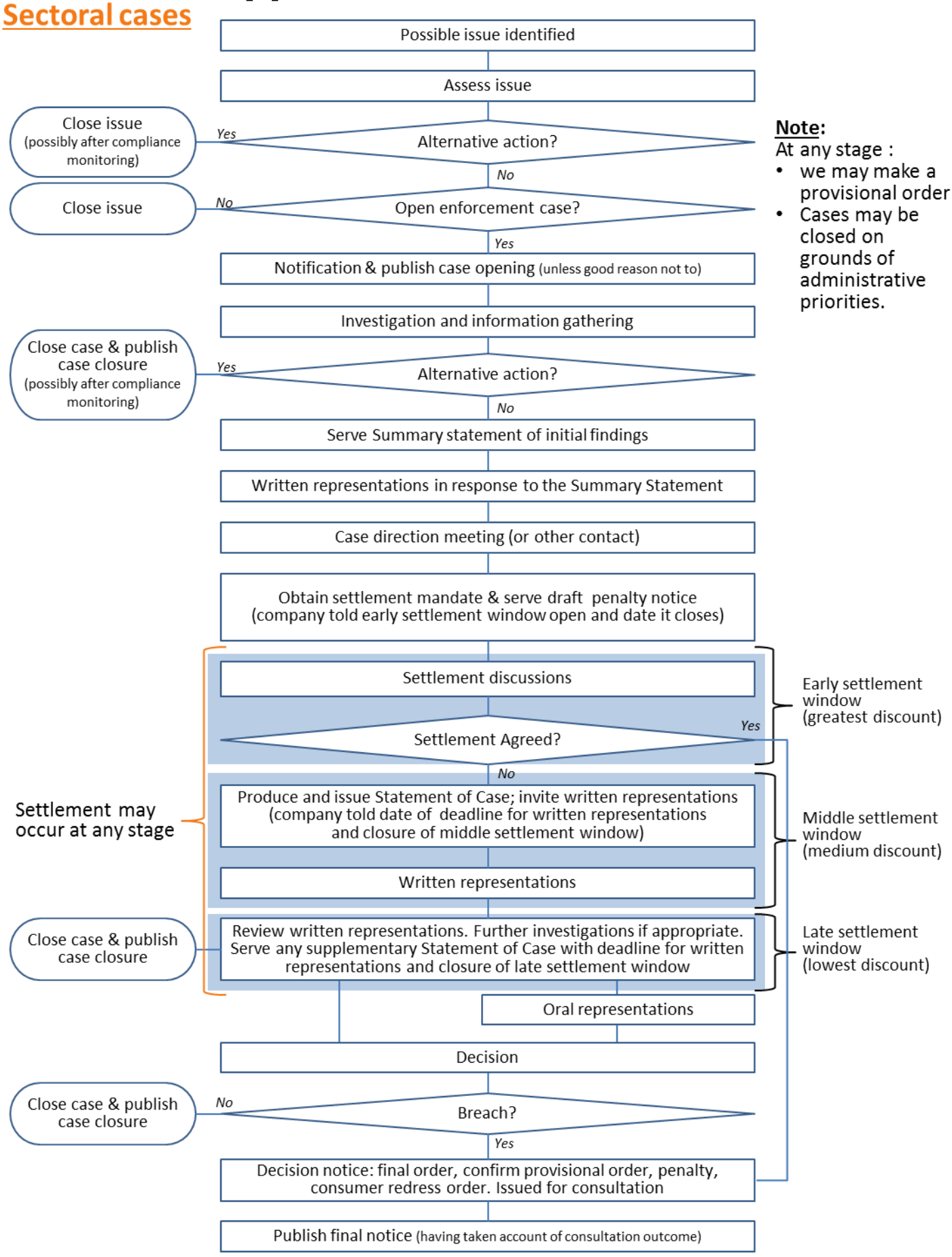
Feedback

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 most cases we will also request feedback from others involved in the case (for example, companies under investigation) and use it to inform our future enforcement work.

[199] https://www.gov.uk/government/publications/involving-third-parties-in-competition-act-investigations.

Appendix: Process Flowcharts

Sectoral cases

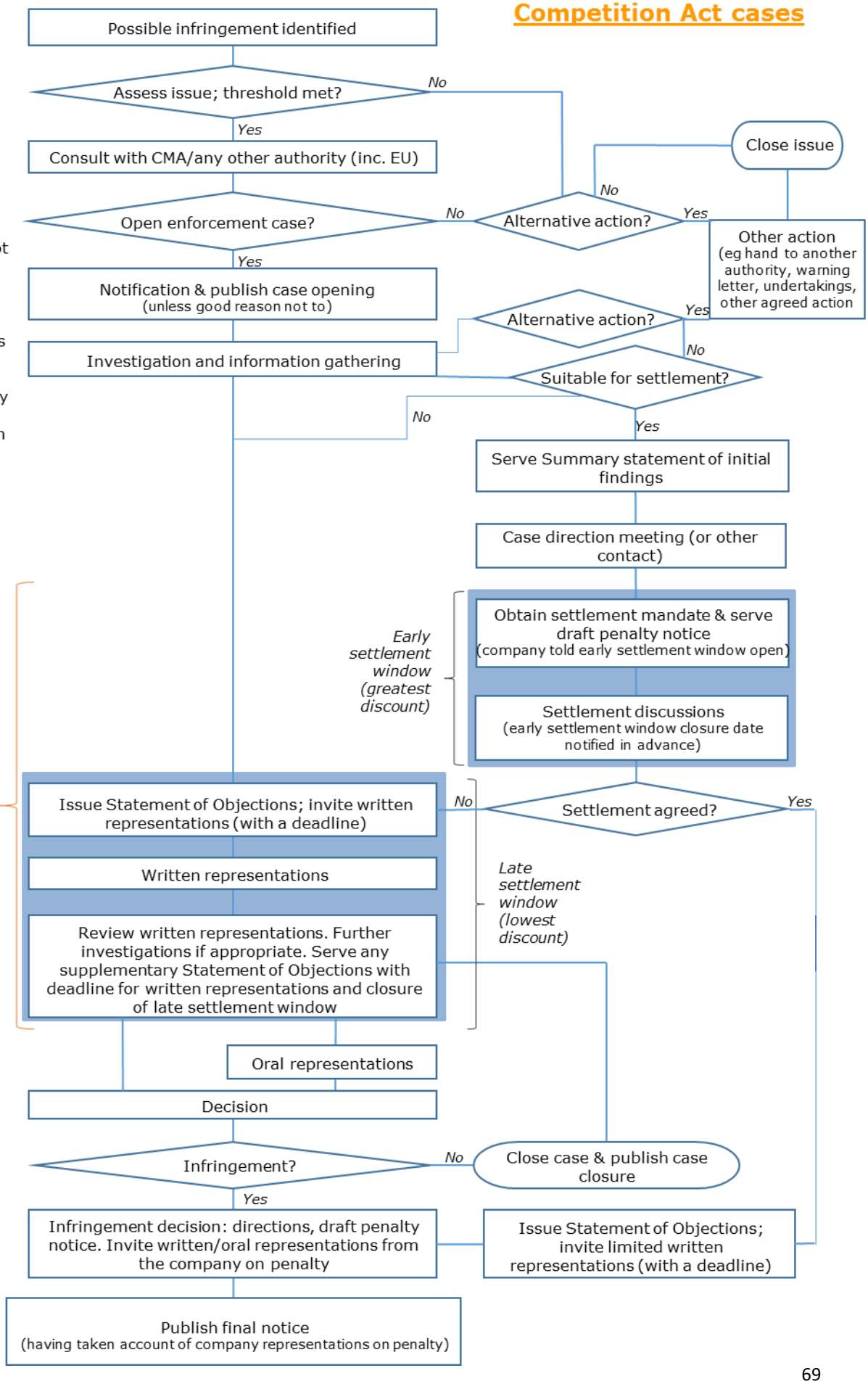


Note:
At any stage :

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

Competition Act cases

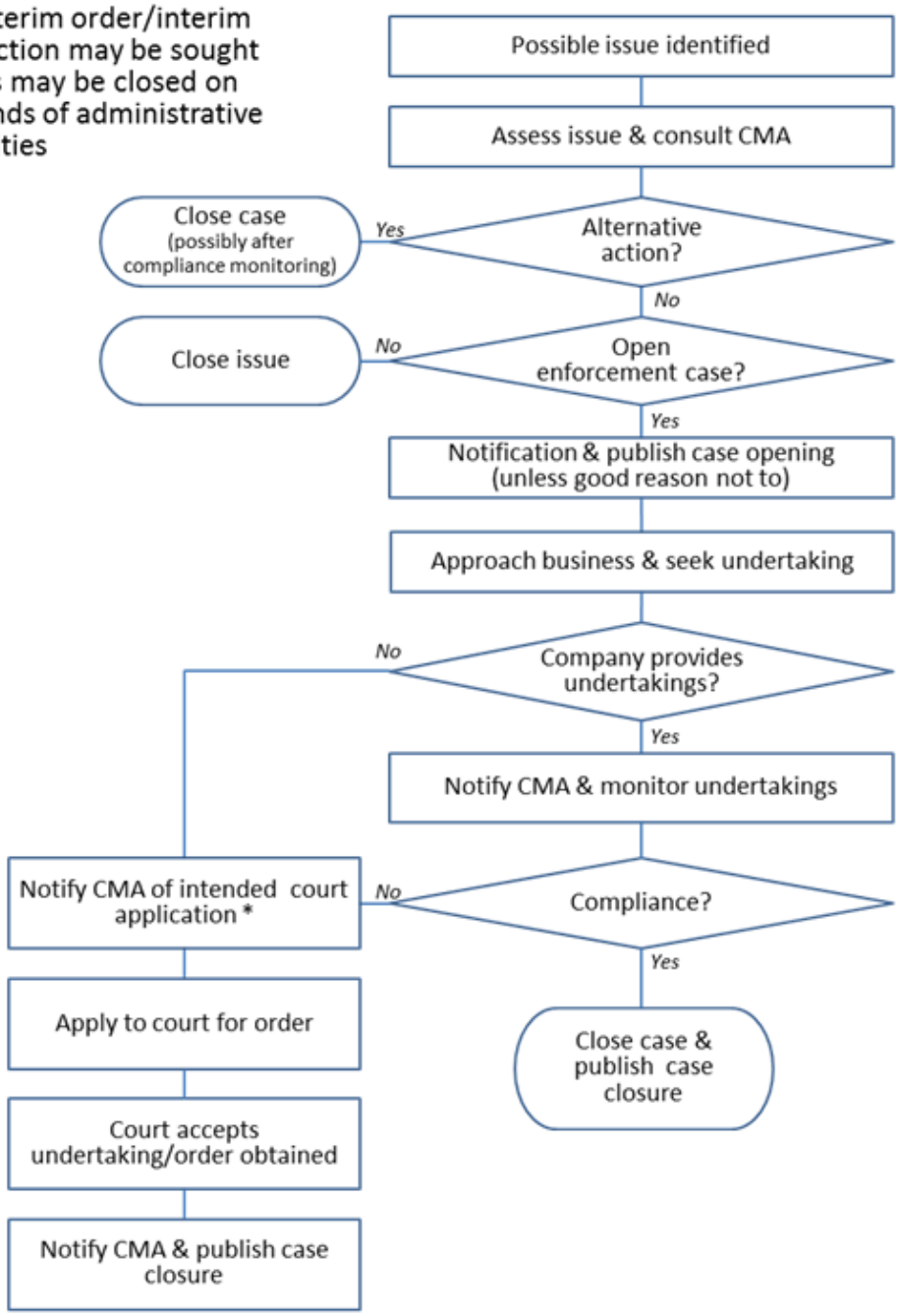
Note:
At any stage:
- we may make an interim measures direction
- We may be offered and accept commitments (after consultation)
- Cases may be closed on grounds of administrative priorities
- The Authority may also issue a no grounds for action decision after opening



Cases under Part 8 of the Enterprise Act, Consumer Rights 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, consultation requirements also apply.