Guidance

CO_2 Transport and Storage Enforcement Guidelines

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Ofgem is the economic regulator for companies providing CO_2 Transport and Storage (T&S) services and has duties relating to the wider Carbon Capture, Usage and Storage (CCUS) sector. It is important that we can act swiftly and decisively to put things right if businesses fail to meet their obligations, including where they demonstrate poor behaviours or conduct. By doing so, Ofgem can send strong deterrent messages to all the relevant businesses operating in the CCUS sector to help stamp out bad and sharp practice and provide a fair and positive environment for market participants.

This document covers:

- how we may use our enforcement powers and tools in situations relating to breaches or infringements;
- how our decision-making process works;
- how breaches will be addressed and deterred; and
- the actions we may take as an alternative to exercising our statutory enforcement powers.

The aim of these guidelines is to provide greater clarity, consistency and transparency to our enforcement policies and processes, and to describe the framework we have in place to maximise the impact and efficiency of our work. It is aimed at current and potential CO_2 Transport and Storage network development and operating Companies (T&SCos), users of those networks and anyone with an interest in the CCUS sector.

We have published further guidance on our activities in CCUS on our website.

Any enquiries related to the text of this publication should be sent to Ofgem at:

10 South Colonnade, Canary Wharf, London, E14 4PU.

This publication is available at www.ofgem.gov.uk. Any enquiries regarding the use and re-use of this information resource should be sent to: psi@nationalarchives.gsi.gov.uk

Contents

1. Introduction

What do these guidelines cover?

1.1 The Gas and Electricity Markets Authority (the Authority) regulates transport and storage networks for carbon dioxide in the United Kingdom. Ofgem is the Office of Gas and Electricity Markets. It carries out the day-to-day work of the Authority and investigates matters on the Authority's behalf.[1]

1.2 As the economic regulator of Carbon Dioxide (CO_2) Transport and Storage (T&S) networks, we have duties in relation to the CCUS market (see 1.6). We have a number of roles in identifying and responding to conduct in the CCUS market which may be unlawful, anti-competitive, or otherwise harm interests of users of the networks.

1.3 These guidelines are largely based on our existing Enforcement Guidelines[2] for the gas and electricity markets.

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

- compliance with relevant conditions and requirements as defined in the Energy Act 2023 (the Energy Act)
- alleged anti-competitive agreements and abuses of dominant positions relating to the carrying on of T&S activities under Chapters I and II of the Competition Act 1998 (the Competition Act)[3] for matters affecting trade within the United Kingdom;
- compliance with misleading marketing provisions in the Business Protection from Misleading Marketing Regulations 2008 (the BPMMRs).

[1] The terms "Ofgem", "the Authority," "we", "us" and "our" are used interchangeably in this document.
[2] The Enforcement Guidelines | Ofgem.
[3] Powers granted by Section 37 of the Energy Act.

Related Publications

1.5 We have published separately, and will continue to publish and revise guidance as appropriate on the Authority's statement of policy on imposing financial penalties on CO_2 T&S networks under the Energy Act ("Penalty Statement").

Our objectives and regulatory principles

1.6 Broadly, the Authority's principal objectives in relation to CCUS are to:

- protect the interests of current and future users of the T&S Network.
- protect the interests of any consumers whose interests the Authority considers may be impacted by the exercise of its functions.
- promote the efficient and economic development and operation of T&S Networks, having regard to the need for Licensees to be able to finance its licensable activities.

1.7 The Authority must carry out its functions in the manner that it considers is best calculated to further the principal objectives by:

- promoting effective competition between persons engaged in, or in commercial activities connected with, the licensable activities;
- promoting the resilience of T&S Networks; and
- protecting the public from dangers arising from the construction, operation and decommissioning of infrastructure used for the purposes of the licensable activities.

1.8 "Licensable activities" are as defined in the Energy Act, which includes a) operating a site for the disposal of carbon dioxide by way of geological storage and/or b) providing a service of transporting carbon dioxide by a licensable means of transportation.

1.9 In carrying out its functions the Authority must have regard to:

- the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles appearing to the Authority to represent the best regulatory practice.
- the need to contribute to the achievement of sustainable development of the sectors it is regulating.

1.10 At the same time, the Authority must have regard to:

- the need to assist the Secretary of State's compliance with its duties under sections 1 and 4(1)(b) of the Climate Change Act 2008 (carbon targets and budgets);
- the specific targets under the Climate Change (Scotland) Act 2009, the Climate Change Act (Northern Ireland) 2022 and the Environment (Wales) Act 2016 (as referenced in the Energy Act); and
- the strategic priorities set out in the CCUS strategy and policy statement (as defined in the Act).

1.11 In exercising its functions in relation to licensable activities, the Authority may have regard to the desirability of the efficient and effective operation of the energy system (or any part of it) in the United Kingdom or any part of the United Kingdom.[4]

1.12 Our vision for our enforcement work is to achieve a culture where market participants treat each other fairly, acting in line with their obligations to promote the efficient development of the sector.

1.13 Ofgem fits CCUS into its wider role and responsibilities but acknowledges that CCUS is a distinct market.[5] Ofgem's objective to achieve net-zero at the lowest cost, is a key factor in determining the objectives for the enforcement of CCUS licence holders. The enforcement priorities of Ofgem are intended to contribute to the viability and sustainability of a developing CCUS market whilst also ensuring that both network users and licence holders receive value in a fair and regulated manner.

1.14 Our strategic enforcement objectives are:

- Strategic Enforcement for Sector Viability: Enforce regulations to instil confidence in the private sector having regard to the financeability of companies in CCUS market.
- Enforcement of Fair Treatment: Enforce to ensure fair and equitable treatment of network users, particularly considering the smaller number of participants in the early days of the CCUS sector. Uphold enforcement practices that promote fairness and inclusivity in the evolving market landscape.

[4] As set out in Part 1 section 1(7) of the Energy Act.
[5] See Our role and responsibilities | Ofgem.

1.15 In addition to these two strategic objectives tailored to CCUS, enforcement will be considered within the wider context of all of Ofgem's enforcement activity and priorities.[6]

1.16 We aim to achieve these objectives by:

- identifying poor conduct or behaviour early and taking action in a timely manner;
- using a range of appropriate enforcement processes;
- being fair and transparent throughout the enforcement process and visible in the actions that we take; and
- learning from everything we do, including sharing lessons learned across Ofgem and from across the energy industry.

1.17 In these guidelines, "Sectoral cases" refers to cases in the CCUS sector 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.

1.18 We will, as appropriate, have regard to regulatory principles of transparency, accountability, proportionality, consistency and other principles that we consider represent best regulatory practice.[7] Further, we will only initiate regulatory activities in cases where action is needed.

1.19 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 businesses 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. For Sectoral cases we will publish provisional and final order milestones and may publish Alternative Action (see paragraphs 5.55 to 5.63) outcomes in line with these guidelines. In appropriate cases, we may also share information with other enforcement authorities or regulatory bodies 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 and that we are

[6] Paragraph 1.8 of the Enforcement Guidelines.
[7] Section 1(4)(a) of the Energy Act.

accountable for the decisions we take and make public. We may also seek feedback following case closure and share lessons learned, where relevant, in accordance with these guidelines (see paragraphs 8.13 to 72).

Proportionality: We will prioritise our enforcement investigations and actions in cases where the potential breach, if confirmed, is serious (our assessment will include harm to consumers/competition and our ability to regulate), and/or where there is a need to address contravening behaviours or conduct and send a deterrent signal to the market.

Consistency: We will aim to ensure consistency in our enforcement decision-making. Our Enforcement Oversight Board (EOB) advises the Director responsible for Enforcement on case opening and certain related decisions.[8] The EOB therefore helps the Director responsible for Enforcement to ensure consistency through strategic oversight of our enforcement work. As enforcement priorities change and the energy market evolves, the way we enforce may change.

Targeting: We will use our enforcement tools and resources where they are most needed to tackle the most serious harm or contravening conduct while delivering maximum impact. Where appropriate, we will also work with other enforcement authorities or regulatory bodies to achieve these aims.

Timely actions: We will also have regard to the timeliness of our enforcement work. We aim to reach a view on the appropriate way to handle issues which come to our attention and to make decisions as quickly as possible. One of our objectives is to respond more quickly to events and speed up our decision-making to promote consumer / market protection. The options for settlement decision-making (see paragraph 6.1) aim to support these objectives and provide greater flexibility during an enforcement investigation.

[8] The Director responsible for Enforcement is a senior civil servant who chairs the EOB.

Status of these guidelines

1.20 These guidelines were introduced on [date][9] and apply to all current and future investigations. However, if the circumstances of a particular case justify it, or our strategic enforcement objectives are better met by adopting a different approach, we may depart from the general approach to enforcement set out in these guidelines. Examples of where we may depart from the general approach include, but are not limited to, following the making of a final order or confirming of a provisional order (see section 7), or following failure to provide information to the Authority in the format requested in accordance with any relevant licence condition in the T&S Licence.

1.21 These guidelines are not a substitute for any regulation or law and should not be taken as legal advice. Businesses 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.

Your feedback

1.22 We believe that consultation is at the heart of good policy development. We are keen to receive your comments about this guidance. We'd also like to get your answers to these questions:

- Do you have any comments about the overall quality of this guidance?
- Do you have any comments about its tone and content?
- Was it easy to read and understand? Or could it have been better written?
- Any further comments?

1.23 You can contact us by writing to your usual contacts within Ofgem or to: Enforcement Team, Ofgem, 10 South Colonnade, Canary Wharf, London, E14 4PU, by emailing enforcement@ofgem.gov.uk or by telephoning via the main switchboard on 020 7901 7000.

Please send any general feedback comments to enforcement@ofgem.gov.uk

[9] To be updated when the Enforcement Guidelines are published following consultation.

2. Our Enforcement Powers

Section summary

This section explains the legal basis for the main types of enforcement action that we conduct under the legislation covered by these guidelines.

2.1 Ofgem's powers in relation to the matters covered by these guidelines are principally derived from the following legislation:

- The Energy Act 2023
- The Competition Act 1998.
- The Enterprise Act 2002.
- The Business Protection from Misleading Marketing Regulations 2008.

2.2 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 5.55 to 5.63).

2.3 Compared to our existing Enforcement Guidelines for the gas and electricity markets, we have removed from this guidance our powers under the Consumer Rights Act as the CCUS sector has no direct interaction with Consumers. For the same reason the section on the Enterprise Act (paragraphs 2.50 to 2.52) is considerably shorter.

The Energy Act 2023

2.4 The Authority's Sectoral enforcement powers to make a final order, confirm a provisional order, or impose a penalty, cannot be exercised if the Authority is satisfied it would be more appropriate to proceed under the Competition Act.[10]

2.5 Under the Energy Act, the Authority has powers to ensure that licence holders comply with relevant conditions and requirements.[11]

2.6 Relevant conditions are those contained in a CO_2 Transport and Storage licence held by a licence holder. These licences contain conditions which require the licence holder to comply with industry codes and agreements.[12] Breaches of obligations under these codes and agreements may amount to breaches of licence

[10] Schedule 3, paragraphs 1(7) and 4(2) of the Energy Act.
[11] Schedule 3 of the Energy Act.
[12] For example, the Carbon Capture and Storage (CCS) Network Code.

conditions. We can take enforcement action in respect of these breaches under the relevant legislation.

2.7 Where we see a need to address monopolistic or other undesirable behaviour as the markets we regulate evolve, we can amend or insert conditions into existing licences or new licences.

2.8 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 places the onus on licensees to determine how compliance should be achieved, while also providing more space for innovation.

2.9 The provisions that impose obligations on licence holders under Part 1 of the Energy Act are enforceable as relevant requirements.

Provisional orders

2.10 A provisional order may be issued to secure compliance where it appears that a licence holder is contravening or is likely to contravene any relevant condition or requirement and it is considered requisite to act before a final order can be made.[13]

2.11 This may include where a business is not taking steps to secure compliance, where behaviour needs to be stopped urgently, or where market participants are suffering continuing loss or harm.

2.12 A provisional order will cease to have effect at the end of the period specified in the provisional order (which will not exceed three months) unless it is confirmed.

2.13 Further information on the provisional order process is detailed in paragraphs 7.1 to 0.

Final orders and confirmation of provisional orders

2.14 If the Authority is satisfied that a licence holder is contravening or is likely to contravene any relevant condition or requirement, it may impose a final order where that order is requisite to bring the breach/es to an end, after following certain procedural requirements.[14] The Authority

[13] Schedule 3, paragraph 1(2) of the Energy Act.
[14] Schedule 3 paragraphs 1(1) and 2 of the Energy Act.

must give notice that it proposes to make a final order or confirm a provisional order as set out at Schedule 3 Section 32 of the Energy Act. We call this a consultation. Further information on the provisional order confirmation process is detailed at paragraph 7.11 and on the final order process at paragraphs 7.4 to 7.9.

2.15 The Authority need not make a final order or confirm a provisional order if the licence holder has agreed to take, and is taking, appropriate steps to comply, or where it considers that the breach is trivial.[15] The Authority has a three-month period (from the date it makes the final order or confirms the provisional order) to serve a notice of a financial penalty on the licence holder in relation to a breach or failure to which the final or provisional order relates.

2.16 Where the Authority makes, but does not confirm, a provisional order, it has a six-month period[16] (from the date on which it makes the provisional order) to serve a notice of a financial penalty in relation to a breach or failure to which the provisional order relates.

2.17 Failure to comply with a confirmed provisional order, or made final order, may lead to licence revocation.

Penalties

2.18 If the Authority is satisfied that a licence holder has contravened or is contravening a relevant condition or requirement the Authority may impose a financial penalty, after following certain procedural requirements.[17] A penalty may also be imposed following the making of a provisional or final order (see paragraph 0).

2.19 Section 3 details how decisions are made and issued. Further information about penalties can be found in paragraphs 6.56 to 6.61.

2.20 If the Authority concludes that the licence holder has not breached any relevant condition or requirement, the case may be closed.

2.21 The Authority may decide to revoke a licence under certain circumstances, including where a licence holder fails to comply with a final order, confirmed

[15] Paragraph (1)9 of Schedule 3 to the Energy Act.
[16] Paragraph 6 (2)(a) & (b) of Schedule 3 of the Energy Act.
[17] Paragraph 4 of Schedule 3 to the Energy Act. It may not impose a financial penalty for a contravention that is likely to occur.

provisional order or does not pay any financial penalty. The Authority can enforce a final order or a provisional order by civil proceedings. Any outstanding financial penalty (and interest) may be recovered by the Authority as a civil debt.

2.22 An outline of the process that we will usually follow in Sectoral cases is set out in flowchart number 1 in the appendix.

Competition Act 1998[18]

2.23 Before exercising its Sectoral enforcement powers to make a final order, confirm a provisional order or impose a penalty, the Authority must consider whether it would be more appropriate to exercise its powers under the Competition Act.[19]

Prohibited agreements or conduct

2.24 Under the Competition Act, the following are prohibited:

- agreements that may affect trade within 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;

- conduct that amounts to an abuse of a dominant position which may affect trade within the UK (the Chapter II prohibition of the Competition Act).

2.25 We have concurrent powers[20] with the Competition and Markets Authority (CMA)[21] to enforce these prohibitions, in relation to licensable transport and

[18] Powers granted via Chapter 2 Section 37 of the Energy Act.
[19] Schedule 3, paragraphs 4(2) & (3) of the Energy Act require the Authority to consider this before exercising its powers. In practice this is likely to be considered much earlier. See paragraph 2.23.

[20] This means that in the carbon dioxide transport and storage sector Ofgem has the power to investigate and take enforcement action under the Competition Act alongside the CMA.

[21] For more information on which regulated sectors are affected by the concurrency provisions and the scope of the concurrent powers see Concurrent application of competition law to regulated industries: CMA10 - GOV.UK (www.gov.uk).This document describes the operation of the concurrency regime including the procedures for making complaints and the way in which they are dealt with. See also The Competition Act 1998 (Concurrency) Regulations 2014 (legislation.gov.uk)

storage activities in the CCUS sector or other activities that are ancillary to licensable activities.[22]

2.26 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.[23]

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

2.28 An investigation may be conducted under the Competition Act where there are reasonable grounds for suspecting that the prohibitions in the Competition Act have been infringed.[24]

2.29 Before exercising investigatory powers, we are required to consult with the CMA and any other concurrent regulator where they may have concurrent jurisdiction to reach agreement as to 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.

2.30 The process in the Competition Act 1998 (Concurrency) Regulations 2014 (the Concurrency Regulations) and the associated Concurrency Guidance[25] sets out how the case allocation process works and will be followed to decide who will investigate the case.

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[22] Section 37 of the Energy Act set out the Authority's jurisdiction to exercise its competition powers under the Competition Act. We do not have powers to deal with criminal cartel offences under section 188 of the Enterprise Act.

[23] The latest version of the MoU was published on 24 February 2016: Memorandum of understanding between the Competition and Markets Authority and the Gas and Electricity Markets Authority – Concurrent Competition Powers | Ofgem.

[24] The full test is set out in section 25 of the Competition Act.

[25] Concurrent application of competition law to regulated industries: CMA10 - GOV.UK (www.gov.uk).

2.31 As noted above (at paragraph 2.23) the Authority must, 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.

2.32 When dealing with Competition Act cases we will follow the parts of the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (the CA98 Rules) applicable to Sectoral regulators.[26]

2.33 Further information on the concurrency arrangements can be found in applicable CMA guidance, including the Concurrency Guidance.

2.34 If appropriate, we may consider alternatives to exercising our statutory enforcement powers.

2.35 We also have concurrent powers with the CMA to carry out market studies under the Enterprise Act 2002 and make market investigation references in relation to commercial activities connected with relevant CO_2 transport and storage activities.[27] These can be used 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.[28]

2.36 We also have the power to apply to the court for a competition disqualification order,[29] to disqualify a person from acting as a company director following a breach of competition law by a company of which that person is or was a director (a Competition Disqualification Order).[30] The maximum period of disqualification is 15 years.

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[26] The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014, SI 2014/458.

[27] Section 36(2) of Energy Act.

[28] For example, in the energy sector, in 2014 we made a market investigation reference in respect of the supply and acquisition of energy in Great Britain: Decision to make a market investigation reference in respect of the supply and acquisition of energy in Great Britain | Ofgem.

[29] Section 9A(10) of the Company Directors Disqualification Act 1986; we would also have regard to CMA's Guidance on Competition Disqualification Orders (publishing.service.gov.uk)

[30] Under the Company Directors Disqualification Act 1986 as amended by the Enterprise Act 2002, we may apply to the court for an order disqualifying a director from, amongst other things, being involved in the management of a company. The court must award a

Investigation outcomes

2.37 If the Authority finds that a prohibition has been infringed, it will issue an infringement decision that may include written directions requiring the appropriate person to bring the infringement to an end.[31] If the Authority does not find sufficient evidence of an infringement, it may publish a reasoned no grounds for action decision and close the case.[32] Paragraphs 2.45 to 2.49 describe other ways in which a Competition Act case may be closed. Alternatively, we may accept binding commitments as to future conduct from the subject(s) of the investigation which address the competition concerns we have identified during the investigation.

2.38 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[33]). Section 6 describes how decisions are made and issued. Further information about penalties is set out in paragraphs 6.98 to 6.103.

2.39 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).[34] Any outstanding penalty sum may be recovered as a civil debt.[35]

Commitments

2.40 The Authority may accept binding commitments that a company will take appropriate action to address the competition concerns which we have identified.[36] In such cases, the Authority will not take an infringement decision in relation to that company. We are required to have regard to

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Competition Disqualification Order if it is satisfied that there has been a breach of competition law (involving a company of which the individual was a director), and the director's conduct in connection with that breach makes him or her unfit to be concerned in the management of a company.

[31] 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.

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

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

[34] Section 34 of the Competition Act.

[35] Section 37 of the Competition Act.

[36] Section 31A of the Competition Act.

the guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA 8 Guidance) when considering whether to accept commitments.[37]

2.41 In line with the above guidance, we are only likely to accept commitments once the competition concerns are readily identifiable,[38] 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 a serious abuse of a dominant position.[39]

2.42 It is for a company under investigation to offer commitments to the Authority. 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 commitments in respect of some competition concerns and continue our investigation in respect of others arising from the same agreement or conduct.

2.43 Where we propose to accept commitments, we will comply with the procedural requirements for notification and consultation and the proposed commitments will be published as part of the consultation document.[40] This is so that interested third parties and those likely to be affected by the commitments have an opportunity to make representations. Once commitments are accepted our final decision will be published on our website (after taking account of the appropriate confidentiality considerations under Part 9 of the Enterprise Act).

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[37] By virtue of section 31D (8) of the Competition Act, Ofgem must have regard to the CMA8 Guidance when exercising its discretion to accept commitments under section 31A, see also paragraphs 10.15 to 10.29 of the CMA8 Guidance.

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

[39] See paragraph 10.19 of the CMA 8 Guidance.

[40] Paragraphs 10.21-10.25 of the CMA 8 Guidance.

2.44 If a person fails, without a reasonable excuse, to adhere to commitments, the Authority can seek a court order for compliance (and costs).[41]

Interim measures directions

2.45 Where a case under the Competition Act has been opened but it is not completed, the Authority may impose interim measures as a matter of urgency to prevent significant damage to a particular person or category of persons, or to protect the public interest.[42]

2.46 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 the identified specific behaviour or conduct is causing, or is likely to cause, significant damage to a particular person or category of persons, or is or is likely to be contrary to the public interest;[43]
- the particular interim measures sought prevent, limit, or remedy the significant damage that we have identified, and will be proportionate for the purpose of preventing, limiting, or remedying that significant damage.

2.47 There is more information about the factors that we may consider and the process that we will follow when deciding whether to impose interim measures in Chapter 8 of the CMA 8 Guidance,[44] including a declaration of truth by the applicant (or person authorised to act on behalf of the applicant).

[41] Section 31E of the Competition Act.
[42] Section 35 of the Competition Act and rule 13 of the CA98 Rules. Further information on interim measures is in Chapter 8 of the CMA8 Guidance.
[43] Section 35 of the Competition Act.
[44] The CMA's investigation procedures in Competition Act 1998 cases: CMA8 - GOV.UK (www.gov.uk).

2.48 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.[45]

2.49 An outline of the process that we will usually follow in Competition Act cases is set out in flowchart number 4 in the Appendix.

Enterprise Act 2002[46]

2.50 The Authority is a "designated enforcer" under Part 8 of the Enterprise Act.[47] This means that it is empowered to take action to enforce certain consumer protection legislation[48] such as the Business Protection from Misleading Marketing Regulations 2008.

2.51 We have concurrent powers with the CMA under the Enterprise Act[49] to carry out market studies and make market investigation references (other than certain powers which rest only with the CMA) insofar as the functions relate to commercial activities connected with the transportation and storage of carbon dioxide. These functions can be used to determine whether the process of competition is working effectively in the market as a whole and to seek to remedy industry or market-wide competition problems.

2.52 Further information on matters the Authority may consider when investigating under Part 8 of the Enterprise Act can be found in the CMA's adopted guidance on enforcement of consumer protection legislation.[50]

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

[46] Powers granted via Chapter 2 Section 36 of the Energy Act.

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

[48] 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, Schedule 13 infringements which contravene an enactment listed at Schedule 13 of the Enterprise Act and which harms the collective interests of consumers).

[49] See Part 4 of Enterprise Act 2002.

[50] Consumer protection enforcement guidance: CMA58 - GOV.UK (www.gov.uk)

Business Protection from Misleading Marketing Regulations 2008 (BPMMRs)

2.53 Under the BPMMRs, the following are prohibited:

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

2.54 The Authority has concurrent powers with the CMA and other regulators to enforce the BPMMRs to protect business customers from misleading marketing.[51] The powers to enforce the BPMMRs 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.[52]

2.55 If the Authority considers that there may have been breaches of the BPMMRs, it 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;[53]
- apply to the court for an injunction/interdict (or interim injunction/interdict) to secure compliance with the BPMMRs.[54]

2.56 The Authority 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.

2.57 If the Authority brings proceedings against a business, they will be notified, have an opportunity to dispute the case and to make representations to the court. The Authority will comply with our duties of disclosure under the Civil Procedure Rules

[51] 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.

[52] Regulation 17 of the BPMMRs.

[53] Regulation 16 of the BPMMRs.

[54] Regulation 15 of the BPMMRs.

(CPR).[55] The Authority will also comply with any court order in Scotland requiring it to provide certain information or documentation to the company.[56]

2.58 The Authority can apply for an injunction or interdict (in Scotland) if there has been or is likely to be a relevant breach and we consider that 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 or interdict may relate to specific advertising and any advertising in similar terms or likely to convey a similar impression.[57] When granting the injunction or interdict, the court may require the person against whom the order is made to publish the injunction or interdict and a corrective statement.[58] 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.[59]

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

2.60 Orders made under the BPMMRs 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.[60]

2.61 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.[61]

2.62 An outline of the process that we will usually follow in cases under the BPMMRs is set out in flowchart number 5 in the appendix.

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[55] CPR Part 31.
[56] There is no general duty of disclosure in terms of the Sheriff Court – Civil Procedure Rules (Ordinary Cause Rules) or in terms of the Rules of the Court of Session. However, the company may seek information or documentation from the Authority through a specification of documents which the court will consider and may grant, or grant in part, depending on the circumstances.
[57] Regulation 18 of the BPMMRs.

[58] Regulation 18 of the BPMMRs.

[59] Regulations 19 and 20 of the BPMMRs.

[60] The Access to Justice Act 1999 (Destination of Appeals) Order 2000 provides a summary of the destinations for different types of civil appeals.
[61] Rules 52.4(2) of the Civil Procedure Rules and see Part 52 of the Civil Procedure Rules generally for further information about appeals.

3. Governance

Section summary

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.

3.1 Decisions on breaches or infringements, the use of its enforcement powers, and the imposition of penalties may be delegated by the Authority to certain employees (of the Authority), who have delegated decision-making powers. The Authority's decision-makers include the Director responsible for Enforcement or a nominated alternative employee of Ofgem at Director level, (in some cases assisted by the EOB)[62] the Settlement Committee and the Enforcement Decision Panel (EDP).

The decision-makers

The power to delegate

3.2 The Authority is authorised to delegate its decision-making powers to any member or employee of Ofgem, or any committee of Ofgem which consists entirely of members or employees of Ofgem.[63]

3.3 For Sectoral cases, day-to-day decisions are made by a designated case team under the supervision of the Senior Responsible Officer (SRO), who will be involved as and when necessary.

3.4 For competition cases, day-to-day decisions are made by a designated case team under the supervision of the SRO. The SRO is responsible, in particular, for authorising the opening of a formal investigation, handling escalated complaints on procedures that could not be resolved by the case team, as well as for the decision to issue the Statement of Objections, and whether to accept commitments.

[62] The EOB is made up of senior civil servants from around Ofgem chaired by the Director responsible for Enforcement. This Director is the final decision-maker.
[63] Paragraphs 9(1) and (3) of Schedule 1 to the Utilities Act 2000.

Senior Ofgem employees

3.5 The Authority has delegated decision-making authority in relation to certain matters to the Director (or their nominated alternate), including but not limited to the decision:

a) to issue the settlement mandate;
b) to approve and issue the proposed settlement penalty notice;
c) to approve any final settlement decision;
d) to make a provisional order;[64]
e) to confirm a provisional order;
f) to make a final order;
g) to revoke a final order or a confirmed provisional order;
h) to impose a penalty and its amount (where the imposition of the penalty follows the making of a provisional order, confirmation of a provisional order or the making of a final order).

3.6 In relation to decisions outlined at paragraph 3.5 (e)-(h), the Director (or their nominated alternate) shall determine whether any such matters would be appropriate for them to decide having consulted with such parties as they consider appropriate and having regard to such matters as may be relevant depending on the facts and circumstances of the case. If they consider it would not be appropriate for them to decide, they shall refer the matter to the EDP (see paragraphs 3.11 to 3.17).

3.7 The identity of the Director will be provided to the business in writing.

3.8 The process in relation to Competition Act cases is set out in paragraphs 6.62 to 6.106

The Enforcement Oversight Board (EOB)

3.9 The EOB advises the Director with responsibility for enforcement. It provides strategic oversight and governance across our enforcement work. The members of the EOB are usually senior civil servants from across Ofgem. It is chaired by the senior civil servant with responsibility for enforcement.

3.10 It may also decide to recommend that we should seek to exercise our Competition Act powers in a particular case. It is usually consulted on whether

[64] These matters usually involve discussion with the EOB, however, an Ofgem senior employee, including a Deputy Director, has the authority to make a provisional order should the need arise.

interim orders should be made, or commitments accepted. It is also usually consulted on decisions whether to seek a court order under the Enterprise Act.

The Enforcement Decision Panel (EDP)

3.11 The EDP consists of a pool of members who are employed specifically for EDP duties and are independent from Ofgem's case teams. One of the EDP members will be appointed as the EDP Chair.

3.12 EDP members have delegated powers to make decisions in accordance with their published Terms of Reference.[65]

3.13 The EDP Secretariat provides administrative and procedural support to the EDP members. This includes the management of correspondence, meetings, case papers and evidence. The EDP Secretariat is separate from Ofgem's case and legal teams. It liaises with the parties on behalf of the EDP.

3.14 The EDP or its individual members should not be contacted directly by any party or their representatives unless advised to do so by the EDP.

3.15 Each time we need to use the EDP for an enforcement decision, a decision-making panel ("the Panel") of usually three members will be appointed by the EDP Chair. 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. In certain cases the EDP chair may appoint a single EDP member or a panel of two members to take the decision.

3.16 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 EDP. The EDP decides on whether an infringement of the Competition Act has or has not occurred. If an infringement has occurred, the EDP also decides on what action is to be taken against the infringing party or parties (in the form of written directions) and whether a financial penalty should be imposed. In Competition Act cases, a Procedural Officer is also required to chair the oral hearing and report to the Panel on procedural fairness.[66]

3.17 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.

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[65] GEMA rules of procedure and committees | Ofgem.
[66] Rules 6(5) and (6) of CA98 Rules. Note that the Procedural Officer will not have been involved in the investigation and is not a decision-maker in the case.

Authority strategic oversight

3.18 The Authority will not seek to influence the outcome of particular matters or change any decision of the EDP, Settlement Committee or other relevant decision makers.

3.19 The Authority will retain oversight through its annual review of the decisions taken by EDP members. It may, if appropriate liaise with the EDP to inform future decisions.

4. Information gathering

Section summary

This section will describe the sources of information that are most frequently used and how this information is managed including confidential information) and assessed to decide whether to open or continue a case.

Sources of information

4.1 As part of our enforcement and compliance work, we gather information from various sources, some of which is provided to us and some of which is requested via informal and formal processes.

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

- The Energy Act[67]
- The Competition Act[68]

Self-reporting

4.3 The standard licence conditions require CO_2 Transport and Storage companies to provide information to Ofgem which it requires to perform its regulatory functions.

4.4 Whilst self-reporting is not a strict requirement of the licence conditions at present, we strongly encourage T&SCos and other relevant businesses (for example T&S network users) to promptly and accurately self-report potential breaches that may give rise to material loss, harm, or damage to market participants, the market, or to Ofgem's ability to regulate.

[67] Section 28 of the Energy Act. There are other powers to require information: for monitoring purposes under section 29 of the Energy Act and in the standard licence conditions.
[68] Ofgem has the power, under section 26 of the Competition Act, to issue written information requests requiring a person to produce specified documents or information which we consider relate to any matter relevant to the investigation. Ofgem also has powers under sections 26A to 28A of the Act to require an individual connected with the subject of the investigation to answer oral questions on any matter relevant to the investigation and enter, and in some instances to search, business and domestic premises (section 28 of the Competition Act in relation to business premises. Section 28A of the Competition Act in relation to domestic premises). We would expect to have regard to the CMA's guidance in this regard when exercising these powers.

4.5 A case may be opened following self-reporting by a business,[69] for example, the business has identified an issue when carrying out internal compliance checks, showing that it may have breached a licence condition, code, or relevant legislation.

4.6 If a potential breach is identified by a business, it should promptly open a dialogue with Ofgem, and provide as much detail as possible about the potential breach (or breaches), what caused it, the loss, harm, or damage that has or may have resulted, 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 businesses 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.

4.7 For Competition Act cartel cases, businesses should consider whether they may be eligible to receive total or partial immunity from fines. This is known as an application for "leniency". All initial applications for leniency should be made to the CMA in accordance with its published leniency process and procedure.[70]

4.8 The fact that the breaches came to light as a result of prompt, accurate and comprehensive self-reporting, particularly when those breaches were unlikely to come to light via other information sources, may be seen as a mitigating factor and will be considered in Ofgem's decision to prioritise enforcement action, or may be reflected in any penalty. This may also result in Ofgem seeking to resolve the matter via Alternative Action (see paragraphs 5.55 to 5.63).

4.9 However Alternative Action may not always be appropriate, for example for serious or repeat breaches in which opening an enforcement case or issuing an enforcement order 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.

[69] The Energy Act imposes obligations on 'licence holders'. 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.

[70] See Cartels: come forward and apply for leniency - GOV.UK (www.gov.uk) and Leniency and no-action applications in cartel cases: OFT1495 - GOV.UK (www.gov.uk) See as well, the CMA's information note on the Arrangements for the handling of leniency applications in the regulated sectors: Information note (publishing.service.gov.uk)

4.10 As indicated in paragraph 4.8, prompt, accurate and comprehensive self-reporting is one of the factors that may decrease the amount of any financial penalty that the Authority may decide to impose in circumstances when an investigation is carried out and a breach (or breaches) is found.[71] When setting the amount of a penalty, the Authority recognises the value of businesses promptly reporting to Ofgem and putting right any non-compliance that they have identified.

4.11 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. Similarly, persistent, and repeated unreasonable conduct or behaviours that delay enforcement action are an aggravating factor to be taken into account in setting penalties. In relation to Competition Act investigations, persistent and repeated unreasonable behaviour that delays the Authority's enforcement action will be considered an aggravating factor in determining the level of any penalty imposed for breaching the relevant prohibitions contained in the Competition Act.

Whistleblowers

4.12 Whistleblowing is when a person or business raises a concern about a wrongdoing, risk, or malpractice that they are aware of through their work (for instance, failure to follow safe procedures). 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 CCUS sector. Disclosures made to "blow the whistle" about concerns regarding potential breaches of relevant regulations or legislation may lead to enforcement and/or compliance action.

4.13 To facilitate such disclosures, government has issued whistleblowing guidance applicable to people considering disclosing information, which:[72]

- 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 whistle-blowers; and
- details the process that should be followed in dealing with whistle-blowers.

[71] Details of the other factors that may affect the penalty level in cases under the Energy Act are in the Authority's financial penalties policy statement.
[72] Whistleblowing for employees: What is a whistleblower - GOV.UK (www.gov.uk) 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.

4.14 We have also produced our own whistleblowing guidance document,[73] which should be consulted before making a disclosure to us.

Information gathered via Ofgem's internal monitoring functions

4.15 We have a general duty to monitor the CO_2 transport and storage sector for the purposes of considering whether any of our functions are exercisable and we may conduct on our own initiative investigations to address issues concerning T&SCos on a particular regulatory requirement or industry risk.[74] We may request information from T&SCo to enable us to fulfil this duty.

4.16 We may use monitoring programmes to ensure compliance with a new regulation or code modification when it is introduced, for example to help industry understand new requirements, or where we are assessing compliance with an existing regulation/obligation across the industry. Our regular compliance monitoring may also identify an issue that needs to be investigated.

4.17 We may adjust our monitoring requirements dependant on market conditions. This could mean increased or decreased reporting in relation to business operations, operational procedures, and financial reporting.

4.18 Some licence conditions and regulations require licence holders 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.

4.19 Where our monitoring work reveals information that suggests it may be appropriate for us to investigate a business or multiple businesses, we will use our prioritisation criteria (see paragraphs 5.4 to 5.24) to decide whether to open a case. If we do not open a case, we may, as an alternative, seek to resolve any poor behaviours or conduct through Alternative Action (see paragraphs 5.55 to 5.59).

4.20 We will generally inform businesses when we become aware of a potential breach (or breaches) that warrants referral to the enforcement team for further consideration.

[73] Guidance on Whistleblowing to Ofgem | Ofgem
[74] Sections 28 and 29 of the Energy Act.

Other sources of information

4.21 In addition to information and data received through self-reporting, whistleblowing and our market monitoring activity, we may also receive, or seek, information and evidence from third parties such as industry or industry bodies, individual complaints, or other witnesses, other stakeholders, or from publicly available records.

4.22 We may also receive information from the CMA, or other regulators, such as evidence suggesting potential breaches of competition law that may fall within our jurisdiction.

4.23 If we need any further information, we will contact a complainant and tell them what we require. If we do decide to pursue a case or enforcement order, the details will generally be published on our website (see paragraphs 5.31 to 5.36).

4.24 Sometimes, where necessary, we may instruct experts, for example to provide economic analysis.

Handling information

4.25 At Ofgem we take the handling of information and privacy very seriously. How we keep it secure is detailed in our Privacy Policy.[75]

4.26 If a person or business thinks that any information that they are giving us,[76] or that we have acquired, is commercially sensitive or contains details of an individual's private affairs, and/or 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.

4.27 We will make our own assessment of whether material should be treated as confidential. We may not agree that the information in question is confidential. This will depend on the circumstances and will be assessed on a case-by-case

[75] Ofgem privacy policy | Ofgem
[76] This includes responses to public consultations and complaints.

basis. Any request that information is treated as confidential will be considered in accordance with the appropriate legislation.[77]

4.28 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 2018, the UK General Data Protection Regulation, the Freedom of Information Act 2000 and the Environmental Information Regulations 2004) or to facilitate the exercise of our functions.

[77] 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 31(3) of the Energy Act and our privacy policy as appropriate, in relation to the publication of information and advice. We will also have regard to any relevant data protection requirements such as the Data Protection Act 2018 and the UK General Data Protection Regulation.

5. Enforcement Processes

Section summary

This section describes what enforcement processes are available to us, how we will usually use them in practice and how we would identify and decide whether to investigate a potential breach or infringement.

Initial enquiry phase

5.1 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 complaints bodies, to inform the decision.

5.2 We may also contact the business in question to seek clarification or information to help us assess whether there is sufficient evidence to pursue enforcement action. We can request this information via informal processes or via a formal request for information.[78] Prompt and appropriate responses may speed up the resolution of the issue and may, in some cases, avoid the need to take enforcement action.

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

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

5.4 This section includes non-exhaustive factors that we will normally consider in deciding whether to open (or continue) a case or issue an enforcement order.

5.5 We will make decisions on a case-by-case basis, taking account of the specific facts of the matter, the complexity of the issues, our priorities, the legal context, and our available resources.[79]

[78] Section 29 of the Energy Act. There are other powers to require information: for monitoring purposes under section 28 of the Energy Act.
[79] This is case dependant and the factors listed are those usually considered. Sometimes we may take other considerations into account.

Case opening decisions

5.6 In determining whether an enforcement case is appropriate, we will have regard to our vision and strategic objectives for enforcement of CO_2 T&S (see paragraphs 1.6 to 1.15).

5.7 When making our assessment we will consider in each case the following criteria:

1. Do we have the power to take enforcement 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 behaviours or conduct of the business in question?

5.8 We will consider whether we have the power to take enforcement action and are best placed to act, as set out below. The decision to open a new case or issue an enforcement order can then be taken by considering criteria (2) and/or (3) above (both need not apply). For example, we may open a case to address apparent poor behaviours or conduct even when our assessment suggests that any resulting loss or harm or likely loss or harm is limited. Similarly, we may open a case when we judge the loss or harm or likely loss or harm to be serious even if the business in question has a good compliance history and has put things right. For competition cases, deterrence is an important factor when deciding whether to open an investigation.

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

5.9 This means asking whether the alleged behaviour or conduct falls within the scope of the relevant provisions of the legislation, that gives us the power to take enforcement action, and whether the tests set out in the relevant legislation are met.

5.10 This means:

- for cases under the Energy Act, assessing if it appears likely that the behaviour or conduct in question could constitute a breach of any relevant condition or requirement;

- for cases under Section 25 of the Competition Act, considering whether there are reasonable grounds for suspecting that there has been an infringement of the applicable prohibitions;
- for cases under Part 8 of the Enterprise Act 2002, assessing whether it appears likely that the behaviour or conduct in question could constitute 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 under the BPMMRs, assessing whether it appears likely that there could have been any prohibited advertising which is misleading to traders.

5.11 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.[80] This may result in the case being referred to another regulator for investigation. Equally, sometimes other regulators will refer cases to us.

5.12 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.

5.13 Action may be taken by us where another body is already investigating or taking enforcement action, where the power to act does not derive from concurrent powers (as distinct from the action envisaged in paragraph 5.12).

5.14 Whether an additional investigation may be justified will depend on the circumstances of the case. We will take account of the impact of any action already taken, or to be taken by another body, before deciding whether to launch a case into any apparent breach of a licence condition also occasioned by the activity.

5.15 Provided the issue warrants an investigation under our prioritisation criteria, 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 the matters about which we have concerns;

[80] See further at paragraphs 2.28 to 2.32.

- a financial penalty may be merited (which the other body does not have the power to impose);
- separate action should be taken as a deterrent to the business or others.

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

5.16 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 or market participants (financial or nonfinancial), 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 businesses do not face meaningful consequences. We will also consider the risks involved in pursuing the case and the potential resources required.

5.17 We will also take account of the extent to which the business may have benefitted (financially or otherwise) from the suspected breach/es and the need to deter future poor behaviours or conduct, both by the business in question and others across the market.

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

5.18 This means assessing a range of factors to determine whether the business is willing and able to comply with its obligations, or whether it is a business with recurring poor behaviours or conduct.

5.19 Our assessment will include whether the alleged breach appears to be intentional, a sign of negligence, or constitutes a failure to comply with previous undertakings.

5.20 For principles-based rules, it will include considering whether a business intent on complying might have acted in the way potentially to be investigated. We will consider the compliance record of the business 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 case.

5.21 We will consider also whether the business self-reported promptly, accurately, and comprehensively, is taking timely action (or has already acted) 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 enforcement action if the business is no longer in breach.

Other considerations

5.22 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.

5.23 On occasion, particularly when addressing a concern across the CCUS sector, we may decide it is not appropriate to take enforcement action at that stage, but instead focus our resources on a relevant policy project to bring about change across the market to reduce the harm (we also have powers under the Enterprise Act to conduct market studies and make market investigation references).

5.24 In competition cases, if Ofgem decides not to open an investigation, in appropriate cases, it may send an advisory letter or a warning letter to the business or companies whose conduct is the subject of the complaint. This would inform it that Ofgem has been made aware of a possible breach of competition law and that although Ofgem is not currently minded to pursue an investigation, it may do so in the future, if it receives further evidence of a suspected infringement, or if Ofgem's prioritisation assessment changes.

Enforcement case process

5.25 This section provides a general summary of the procedures we will follow once we have decided to open an enforcement case. It also outlines the investigation powers that we may use, and how to raise procedural issues.

5.26 None of the processes in this section apply to the process involved in imposing enforcement orders – see section 7.

Notification that we are opening an enforcement case

5.27 If we decide to open an enforcement case, we will normally inform the business under investigation. We may not, for example, where we consider that alerting the business before issuing a formal request for information or conducting a dawn raid might prejudice the investigation.[81] In these instances, we will notify the business as soon as it is appropriate to do so.

[81] For competition cases, Ofgem has powers under the Competition Act to enter a business

5.28 When notifying a business of the case opening, we will provide an outline of the allegations and the scope of the investigation, usually by an online meeting followed up with a case initiation letter and any supporting correspondence, including a provisional timeline for the key steps of the investigation and when we expect to give updates on progress. The timeline may change as the case progresses and if so, we will notify the business as soon as possible. The scope of the case may widen if we become aware of other matters requiring investigation and we will notify the business of any relevant information or changes.

5.29 We may invite the business for an initial meeting to discuss the nature of the allegations, the timeline and how we intend to proceed. The business may comment on the allegations at this stage (for example, to say that it admits or denies breaches, or cannot say yet), or it may wish to raise other matters.

Ofgem's timescales for carrying out an investigation

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

Making cases public and publicity

5.31 We believe that making cases public is important to ensure transparency of our work. It also serves to inform consumers and wider industry about the work that we are doing, helps identify possible witnesses, and maximises the deterrent effect of enforcement action by encouraging industry compliance.

5.32 In line with our commitment to ensure transparency, we will publish every case that we open on our website, unless this would adversely affect the investigation (for example, where it may prejudice our ability to collect information), harm network users' interests, or is subject to confidentiality or other considerations.[82]

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premises (without a warrant, under Section 27 or with a warrant, under Sections 28 and 28A), and to enter and search a domestic premise (with a warrant, under Sections 28 and 28A). See also Competition Act, section 29. For the procedure for making an application to the High Court for a warrant see Civil Procedure Rules, Practice Direction – Application for a warrant under the Competition Act 1998 (May 2004) and the Alternative Procedure for Claims in Rule 8 CPR, as modified by the Practice Direction. For Sectoral cases, in terms of section 29 of the Energy Act, the Authority has the power to require the person on whom a notice requesting information is served to produce information at a time and place specified in the notice.

[82] Section 31(3) of the Energy 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.

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.[83] In some cases, we may also decide to make an announcement to the media, which is often in the form of a press release. We will normally inform a business before we publish the opening of a case on our website or make an announcement to the media.

5.33 When we publish the opening of a case on our website, we will make clear that this does not imply that we have yet made any finding(s) about the issues under investigation.

5.34 We will exclude information from publication only if we consider that failure to do so would harm interests of T&S network users or might seriously harm the interests of the business under investigation. We will consider these factors when deciding whether to offer anonymity to any business under investigation.

5.35 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 in the Authority's view prejudice the investigation, we may decide to exclude that information. We will usually include parties' names if a Statement of Objections is issued.[84]

5.36 We will publish findings of breach or infringement and penalties in settled and contested cases (subject to any confidentiality and other legal issues) and we will usually publish case closures on our website. 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 these details public.[85] As a courtesy, we will normally inform a business before we publish the closing of a case on our website or make an announcement to the media, however, we are not obliged to do so.

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[83] See Section 1.
[84] In these instances, we will have regard to CMA 8 Guidance (paragraph 5.7). In the case of market sensitive announcements, we will also have regard to relevant guidance from the CMA on handling sensitive information (CMA 8, paragraphs 11.10-11.12) and FCA's Best practice note - Identifying, controlling and disclosing inside information | FCA
[85] 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.

5.37 To ensure the transparency of our work, to make clear our expectations, and drive improved behaviour, details of cases resolved via Alternative Action (see paragraphs 5.55 to 5.63) will normally be made public. We will usually consult the business in advance of publishing any statements relating to Alternative Action.

Contact with the case team

5.38 When we open a case, we will provide the business under investigation, and any relevant third parties, with contact details of the person/s who will be the main point/s of contact at Ofgem during the investigation, including the SRO. Any specific queries should be addressed to the Ofgem contacts via the agreed method of contact.

5.39 We will comply with our duties in respect of confidential information (see section 4) when providing updates.

Requests for information and site visits

5.40 As mentioned in Section 4 we will use a range of powers to collect the information and evidence which we need to progress a case.

5.41 Requests for information are a key part of our evidence gathering process and it may be necessary to issue several requests for information during the course of an investigation. Each such request will set out the specific information required and how we want the information to be submitted, which may include specific templates to be completed. It will set out the deadline for submission,[86] as well as the offences and/or sanctions that may apply, if the recipient does not comply.[87]

[86] Section 26 of the Competition Act. For competition cases, having regard to CMA 8 Guidance on the types of documents and information the CMA may ask, our information requests may include internal business reports, copies of emails and other internal data as well as information that is not already written down, for example market share estimates based on knowledge or experience of the addressee of the information request. Under these powers we may also require past or present employees of the business providing the document to explain any document that is produced. If a document cannot be produced, the CMA can require the recipient to state, to the best of their knowledge, where the document can be found.

[87] Section 40A (1) of the Competition Act. We will have regard to the CMA 8 Guidance and to the CMA's guidance entitled CMA4 Administrative penalties: Statement of Policy on the CMA's approach (publishing.service.gov.uk) and we may impose administrative penalties on persons who fail, either intentionally or without reasonable excuse, to comply with requirements imposed on them under sections 26, 26A, 27, 28 or 28A of the Competition Act. These include failures to answer questions or to produce documents required by us or to comply with our powers to enter premises (either with or without a warrant). They also include failure to provide adequate or accurate information in response to a request.

5.42 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 response.

5.43 We may share drafts of the request with the business to give them 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 whether there is any practical issue with the deadline. After considering any comments and making any amendments we consider necessary, we will issue the finalised request for information.

5.44 Any problems understanding a request for information or queries about the scope of it should be raised promptly with the Ofgem contact/s. Representations about the deadline should be made to the contact in writing to the relevant email address, as soon as possible, and should clearly lay out the reasons for the request. Businesses should not wait until just before the deadline to request more time. We will aim to deal with all requests promptly and reasonably and on a case by case basis.

5.45 Delays in the provision of information can have an impact on overall timescales for the investigation or enforcement order. We expect stakeholders to respond within deadlines to the notices served upon them. Failure to cooperate fully with reasonable requests from the case team will be taken very seriously, in line with the appropriate statement of policy on penalties.[88]

5.46 Failure to fully comply with notices to produce relevant documents or information may amount to a criminal offence and will be taken seriously.[89]

5.47 The failure to respond appropriately to a request for information may also contravene a licensee's standard licence conditions, which may be enforced as a Sectoral contravention and result in the imposition of an additional penalty or enforcement order.

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[88] To be updated when the Statement of Policy is published following consultation.

[89] Where a person intentionally alters, supresses or destroys documents they have been required to produce, or knowingly or recklessly makes a false statement when providing information, they may be guilty of a criminal offence and liable on conviction to a fine (sections 29(4) and 33(1) of the Energy 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, 44 and 72 of the Competition Act).

Site visits

5.48 We may also gather information by conducting a site visit. A visit may be made, either at the request of the business 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/s. If appropriate, we will suggest that relevant members of the Ofgem case team attend a site visit to the business premises.

5.49 Prior to any visit, we will often provide correspondence which will detail what information we require and possible discussion points.

Competition cases

5.50 In Competition Act cases, we may also ask questions of an individual connected with a company under investigation,[90] and enter, and in some instances search, business, and domestic premises.[91]

5.51 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 sections 26, 26A, 27, 28 or 28A of the Competition Act.[92]

Meetings

5.52 Meetings with a business under investigation may be held as part of information or evidence-gathering or be used to provide updates on the progress of the case. If we think a meeting is needed, we will make the arrangements with the business and confirm who, from Ofgem, will attend. We may also request that particular people attend from the business, such as those with knowledge of specific matters or with the authority to speak for the business. The business and the case team may use this time to manage procedural or substantive issues, raise concerns, for example in advance of the settlement phase (case direction meeting), or to discuss settlement terms (see section 6).[93]

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[90] Section 26A of the Competition Act.
[91] Sections 27, 28 or 28A of the Competition Act.
[92] Section 40A of the Competition Act and CMA guidance (CMA 4), to which Ofgem is required to have regard when proceeding under section 40A. Failure to comply includes failures to answer questions asked by the Authority, failures to produce documents required by the Authority, or failures to provide adequate or accurate information in response to any requirement imposed on a person under sections 26, 26A, 27, 28 or 28A of the Competition Act.
[93] For competition cases we follow the CMA practice (see paragraphs 9.10 and 9.11 of the CMA 8 Guidance).

Raising procedural issues

5.53 For Sectoral cases, if a business wishes to raise any procedural issues, these should be raised with the main point of contact in the first instance, or the SRO should the business consider it appropriate.

5.54 In competition cases we will comply with requirements under the CA98 Rules. Procedural issues are first raised with the case team. If resolution at this stage fails, then a complaint should be made to the SRO.[94] If this form of resolution does not resolve the issue/s, a complaint should be raised (file an application) with the Procedural Officer.

Alternative Action

5.55 In certain circumstances, Alternative Action may be used to bring the business into compliance and remedy the consequences of any non-compliance. In deciding whether Alternative Action is appropriate we will have regard to our prioritisation criteria for opening an investigation, where appropriate (see paragraphs 5.4 to 5.24). Alternative Action can be used in lieu of opening an investigation into a potential breach, as part of closing a formal investigation, or during an investigation to address ongoing concerns.

5.56 We do not normally consider Alternative Action to be appropriate when addressing potential breaches of competition law.

5.57 Prior to deciding on enforcement action, we will enter into dialogue or correspondence with the responsible parties about the potentially harmful or unlawful conduct, and/or poor behaviours, including whether they have done anything, or plan to do to anything, to put things right.

5.58 We may pursue one or more of the following Alternative Actions with the business in question:

- agree a period and a specified format of reporting, either to ensure that behaviour is not repeated or to show that they have taken certain action/s to address the issue/s;
- request that they engage independent auditors or other appropriately skilled persons to conduct a review focused on a particular area of concern;

[94] 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 8 Guidance.

- accept non-statutory undertakings or assurances to ensure future compliance with a particular obligation; and
- agree other voluntary action, such as the implementation of specified remedial or improvement actions and/or making voluntary/redress payments to affected users or other appropriate parties.

5.59 We would expect a business to engage fully and proactively in securing a successful resolution of our concerns through Alternative Action.

Alternative Action outcome

5.60 In making the decision to resolve the case by Alternative Action, the authorised decisionmaker will follow the criteria listed in paragraphs 5.4 to 5.24.

5.61 If the decision-maker decides that Alternative Action is sufficient to deal with the poor behaviours or conduct, they will need to be satisfied that the action will fully address our concerns.

5.62 If we obtain satisfactory non-statutory undertakings/assurances or other agreed action from a business, this will usually result in the case being closed. In some cases, there may be a period of compliance monitoring after case closure (see paragraphs 8.7 to 8.12). Failure to comply with non-statutory undertakings/assurances or any other agreed action could lead to formal enforcement action, and we would likely take a more serious view of any breach found to have occurred in breach of undertakings or assurances given.

5.63 If we consider that a case is not suitable to be resolved without the use of our statutory enforcement powers, the case may still be settled by Alternative Action. Further details are provided in section 7.

6. Settling or contesting a case

Section summary

This section describes our procedures for settling or contesting Sectoral (covered in paragraphs 6.5 to 6.61) and Competition Act cases (covered in paragraphs 6.62 to 6.102).

6.1 When deciding how to deal with settling or contesting a Competition Act case, we will have regard to the CMA 8 Guidance.[95]

6.2 Many of the processes described for Sectoral cases 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.

6.3 This section and section 4 do not apply to cases under the Enterprise Act 2002, 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.

6.4 We reserve the right to depart from the procedures set out in this section. A business has no "right" to the processes set out in this section and we may decide to resolve enforcement action in a different manner, depending on the circumstances of a case or behaviour at issue. If our strategic enforcement objectives are better met by adopting a different approach, we may depart from the general approach to settlement and contest set out in these guidelines. Examples of where we may depart from the general approach include, but are not limited to, following the making of a final order or confirming of a provisional order (see section 7 below), or following failure to provide information to the Authority in the format requested in accordance with any relevant licence conditions in the T&SCo's licence.

[95] The CMA's investigation procedures in Competition Act 1998 cases: CMA8 - GOV.UK (www.gov.uk)

Sectoral cases

Settling Sectoral cases

6.5 To settle a case, a business under investigation must be prepared to admit to the breaches that have occurred. The settlement will lead to a formal finding of breach. The business must agree with this finding and to any penalty imposed.

6.6 The business will also be expected to agree to not challenge nor to appeal any finding of breach or penalty that is agreed to as part of the settlement. We will not enter into partial settlements with businesses.

6.7 Settlement is a voluntary process. There is no obligation on businesses 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 of breach will be made.

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

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

6.10 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 business 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.[96]

6.11 It is also important to note that settling does not reduce the seriousness of any breach. It may, 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.

6.12 Businesses should consider whether to obtain legal or other advice before settling a case. The fact that we have settled a case with a business does not prevent us

[96] Paragraph 4 of Schedule 3 Energy Act.

from taking future action if further breaches occur, or if actions agreed by the business to reach settlement are not carried out.

6.13 Businesses may ask to enter settlement discussions and whilst we will engage positively with a business 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 loss or harm caused. To speed up our investigations, we may ask the business to cooperate with us by providing information in the meantime.

6.14 We will expect businesses 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 network users to be put in place. The fact that a business has not completed such steps will not be a bar to settlement discussions taking place, so long as the business has shown a real commitment to resolve the outstanding issues. If actions are agreed and not carried out, enforcement action may be undertaken.

Summary Statement of Initial Findings

6.15 In most cases where an investigation has been opened, once we have concluded our assessment of the evidence, we will serve the business with a Summary Statement of Initial Findings (the Summary Statement).

6.16 The Summary Statement will set out the breaches that we consider have been committed and/or that may be ongoing, our conclusions about the detriment and/or gain, and other appropriate matters.

6.17 We will allow a reasonable period (normally 21 days for standard cases and 7 to 14 days for more straightforward cases) for written representations in response to the Summary Statement. We may also offer the business an opportunity to make oral representations on it to the case team at an optional case direction meeting, for example, if the nature of breaches is complex.

6.18 The purpose of these steps is not to negotiate but is for us to understand the business' position on the Summary Statement, so that we can take it into account when making a recommendation to the Settlement Committee. Late submission of written representations may affect our ability to reach a settlement agreement during the settlement window.

The settlement framework

6.19 Settlement results in cases being resolved more quickly and saves resources for both the business and Ofgem.

6.20 In recognition of the benefits of settlement, we may offer a discount in line with our statement of policy on penalties.[97]

Settlement window

6.21 **30 percent discount:**[98] This will usually be the only offer of discount available and settlement must be achieved within the settlement window to receive it. However, we may consider offering a discount outside of the settlement window in exceptional circumstances.

6.22 **The settlement window opens when the settlement mandate, draft penalty notice and press notice are provided to the business**.

6.23 **The settlement window closes on expiry of a reasonable period (usually 28 days) which will be notified to the business when the above documents are provided**. The settlement window may be reopened at the Authority's discretion in exceptional circumstances, however, if the settlement window is reopened there is no guarantee that a settlement discount will remain available.

Settlement decisions

6.24 There are two decision-making options for settling cases:

(a) The formation of and decision by a Settlement Committee;[99] or

(b) The Director responsible for Enforcement makes the settlement decisions for the case, or nominates an alternative employee of Ofgem at Director level to act on their behalf.

The Settlement Committee

6.25 The Settlement Committee may be established for a Sectoral or Competition Act[100] case which is considered suitable for settling via this route. Settlement

[97] To be updated when the Statement of Policy is published following consultation.

[98] To be updated when the Statement of Policy is published following consultation.

[99] This includes Ofgem staff at equivalent or higher grades than Director.

[100] See paragraphs 6.63 to 6.75.

Committees are one of the decision-makers who consider whether to authorise settlement agreements in respect of alleged contraventions and they reach decisions in accordance with the Authority's powers under the applicable Acts. Our Settlement Committee Terms of Reference have been published on the Ofgem website.[101]

6.26 The membership of the Committee in a particular case will be provided to the business in writing by the EDP secretariat or the Ofgem case team.

Settlement documents and discussions

6.27 Once EOB has advised, and the Director responsible for Enforcement has decided, on the appropriate decision-maker based on a case-by-case basis, the case team will obtain a settlement mandate from either a Settlement Committee,[102] or from the appointed Director. The business will then be provided with a draft settlement agreement, draft penalty notice and a draft press notice. The business will be notified at this point that the settlement window has opened, and the date when the settlement window will close.

6.28 Settlement discussions will be conducted through a method which is suitable for both parties.[103] 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, unless otherwise agreed.[104]

6.29 The aim of discussions will be to agree the terms of the settlement including the wording of any penalty notice and to provide an opportunity for the business to comment on the draft press notice.[105]

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[101] Committees of The Authority - Terms of Reference and Non-Executive membership | Ofgem.
[102] The bodies with delegated powers to issue a settlement mandate prior to settlement discussions are described in section 3.

[103] This may include letter, email, face to face discussion, telephone or video link or similar technology.

[104] If for any reason a company that has entered into settlement discussions chooses to reveal to the Panel dealing with the contested case 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 if we consider that it is appropriate to do so.
[105] 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. 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.

6.30 If a business wishes to take advantage of the settlement discount, it will have the duration of the settlement window, notified to it, to sign and agree a settlement agreement. This agreement is subject to the settlement processes set out in this section and there will be no extension to the deadline that we set, except in exceptional circumstances.

6.31 In Sectoral cases, if after settlement discussions an agreement cannot be reached between the business and the case team on 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 decision-maker to seek a revised mandate.

6.32 If a settlement is agreed within the terms of the mandate given by the settlement decision-maker, the business will have to sign a settlement agreement. The settlement decision will be made and the decision and penalty notice will be published in accordance with the statutory requirements[106] for the purposes of public consultation. Following the close of the consultation, any representations will be considered.

6.33 If, having received representations or objections, the settlement decision-maker proposes to vary the level of a penalty from that originally proposed, the consultation process must be repeated.

6.34 The business' agreement as part of the settlement to waive its right to challenge or appeal against the finding of breach, penalty (see paragraph 6.7) will fall away if the proposed variation to the penalty is outside the scope of their original settlement agreement.

6.35 If a settlement cannot be reached, the case will move to the contested route. The EDP members of the Settlement Committee cannot be part of the EDP contest panel if they have been on an earlier Settlement Committee that has considered the same case.

Contested Sectoral cases: The Statement of Case

6.36 If a case is not settled or the business does not want to settle the case, we will serve a Statement of Case ("the STOC"), which sets out our findings and the case alleged against the business. The STOC will be accompanied by an evidence

[106] The settlement decision will be made and the decision and penalty notice will be published in accordance with the statutory requirements with regard to penalties under Schedule 3 paragraph 4(6) & (8) of the Energy Act.

bundle of documents to support our findings and the other relevant content within the STOC. The STOC may be substantially different from the Summary Statement. New breaches may be added, and different reasons relied on. We may also request further information from the business before drafting the STOC. This does not apply if a provisional or final order has been issued.

6.37 We will usually write to the business to advise that the STOC is being drafted and to provide an updated timeline for the case.

6.38 When the STOC is ready we will serve it on the business and notify them of the deadline for any written representations.

6.39 The business' written representations will be invited on the STOC, and we may invite the business to attend a case direction meeting for discussions to take place. We will also disclose any relevant documents (see paragraphs 6.41 to 6.43).

6.40 If the case is to be contested, we will inform the EDP secretariat so that a Panel can be selected to deal with the case.[107]

Disclosure

6.41 Along with the STOC, we will disclose a list of all the documents that we intend to rely on. Many of them are likely to be documents that the business already provided to us during the investigation. However, we will produce copies of any other documents on which we rely that are reasonably requested by the business, subject to any legal restrictions on disclosure, including questions of confidentiality and privilege.[108]

6.42 In some cases, we may rely on information contained in confidential documents. In these cases, our disclosure list will note the reference number/name of 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, for example, a confidentiality ring.

[107] The decision-making structure is described in Section 3.
[108] Material may be redacted where appropriate.

6.43 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 STOC. Again, we will note the reference number/names of 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.

Written representations and related matters

6.44 Making written representations in response to the STOC is the business' opportunity to provide further information, including any challenge, in relation to the case made against it. The business should submit any evidence it has to support its representations. There is no obligation to submit a response, but businesses should note that there are restrictions on introducing new material in any subsequent oral hearing (see paragraph 6.52).

6.45 We will usually allow 28 days for a business to respond to a STOC, however, more or less time may be allowed depending on the case.

6.46 Once we have received any written representations and supporting evidence from the business, 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 further requests for information to the business or replying to the business' representations.

6.47 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 STOC. The business will be given an opportunity to respond in writing to the new document. We will usually allow a further 28 days for this but may shorten or extend the time if it appears reasonable to do so in a particular case.

6.48 If there are difficulties in meeting any deadline, a request for an extension should be made in writing by email to the Ofgem contact/s (or in urgent cases by a call). We will deal with such requests as described in paragraph 5.44.

6.49 If a business 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 business informing it of the relevant deadlines.

6.50 Once the written representations to the STOC have been received, it will be decided whether a supplementary STOC is required. Once all written representations (STOC/supplementary STOC) have been received the case will be

passed over to the Panel. All future deadlines and arrangements will be made via the EDP Secretariat and will no longer be the responsibility of the case team.

6.51 Having reviewed the written representations and considered whether the business has requested the opportunity to make oral representations, the EDP will determine whether it wants to hear oral representations from the parties. The EDP secretariat will tell the parties whether there will be a hearing, and it is for the licensee to decide if it wants to make any representations.

6.52 Where oral representations are made, neither Ofgem nor the company will be permitted to introduce new material in oral representations save in exceptional circumstances or where the Panel requests additional material. If a party wishes to introduce new material, notice must be given to any other party and the permission of the Panel should be sought before it is introduced. No evidence can be introduced after the hearing other than at the request of the Panel.

The EDP's decision: Sectoral cases

6.53 When making decisions, the EDP will consider all the relevant available information presented to it.

6.54 If the EDP is satisfied that a licence holder 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 has occurred (or is ongoing) and that the EDP decides to impose a financial penalty; and/or
- a breach has occurred, and the EDP does not intend to propose a financial penalty.

6.55 If the Panel concludes that the licence holder has not committed any breach, the business will be informed of the case closure and a statement will normally be published on our website (see paragraph 5.37).

Financial penalty in Sectoral cases

6.56 The EDP may exercise the Authority's power to impose a financial penalty. The Director responsible for Enforcement may also impose a financial penalty where this follows the making of a provisional order, confirmation of a provisional order or the making of a final order. In deciding whether to impose a penalty, the

relevant decision maker will have regard to the Authority's penalties statement. The amount in each case in respect of a contravention must not exceed 10 per cent of the licence holder's turnover.[109]

6.57 If proposing a penalty, a notice[110] setting out relevant details will be served on the licence holder and published in line with statutory requirements. The notice will include the time (not less than 21 days) for representations or objections to the penalty amount.

6.58 Following the close of the consultation period, the relevant decision maker 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.

6.59 Before varying any proposal, a further notice to this effect must be given[111] for consultation, and any further representations or objections with respect to the variation must be considered.

6.60 Notice of the final decision and the period for compliance (minimum 42 days for payment of a penalty), will be published and served on the licence holder.[112]

Appeals

6.61 Where a licence holder is aggrieved by the imposition of a penalty, the amount, or the date for payment, the licence holder may make an application to the court.[113] The application must be made within 42 days of service of the decision.[114]

Competition Act cases

6.62 For enforcement cases under the Competition Act, settlement is the process whereby a company under investigation admits liability in relation to the infringement, stops the infringing behaviour, agrees to a streamlined

[109] Schedule 3 paragraph 10(1) of the Energy Act. Turnover is determined in accordance with the regulations the Secretary of State may make under paragraph 10(2).

[110] Schedule 3 paragraph 4(4) & (8) of the Energy Act.

[111] Schedule 3 paragraph 4(5) of the Energy Act.

[112] Paragraph 4(6) of Schedule 3 to the Energy Act.

[113] Paragraph 8(1) of Schedule 3 to the Energy Act.

[114] Schedule 3 paragraph 8(2) of the Energy Act.

administrative process for the remainder of the investigation[115] and confirms that it will pay a penalty set at a maximum amount.[116] 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.[117]

6.63 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 and applicable parts of CMA 8 Guidance.[118]

6.64 Settlement is a voluntary process in Competition Act cases and 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. We will retain our discretion in determining which cases to settle.

6.65 There should be no expectation that we will offer or accept settlement in Competition Act cases. The assessment of whether a case is suitable for settlement will be made on a case by case basis. If a business would like to discuss the possibility of exploring settlement, it should contact the case team in the first instance. The SRO will be required to obtain a mandate from EOB to engage in settlement discussions. The SRO will generally oversee the settlement discussions. All decisions to follow the settlement procedure must be approved by the Settlement Committee.

6.66 We will consider factors such as whether the evidential standard for giving notice of a proposed infringement decision is met (we will only enter discussions where we consider that the standard is met) and the likely procedural efficiencies and resource savings that can be achieved, for example, taking into account the nature of the allegations and the number of parties that may be involved. Before service of the Statement of Objections, each company that enters into settlement

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[115] 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 or oral representations (except limited representations identifying manifest factual inaccuracies).

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

[117] Appropriate CA98 penalty calculation: CMA73 - GOV.UK (www.gov.uk)

[118] See Chapter 14 of the CMA 8 Guidance.

discussions will be provided with a Summary Statement of Facts (the Summary Statement).[119] The Summary Statement will be used as the basis of the company's admission.

6.67 We will also provide the company with access to key documents on which the Authority is relying as part of the streamlined administrative process. There may be an optional case direction meeting (online of face-to-face).

6.68 We will also provide an indication of the provisional level of penalty that the Authority would be minded to impose, including the settlement discount (the draft penalty calculation). The discount available for settlement pre-Statement of Objections will be up to 20% of the calculated maximum penalty. The company will be notified that the early settlement window has opened. At the same time, it will be told that the window will close by the issuing 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.

6.69 If a company wishes to take advantage of the settlement discount, it will have up until the settlement window closes to agree a settlement. We will not extend the settlement window for the purposes of reaching an agreement, apart from in very exceptional circumstances.

6.70 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 the facts of the alleged infringement as set in the Summary Statement, we will reassess, on a case by case basis, whether the case remains suitable for settlement.

6.71 The company will also be given the opportunity to make limited representations on the draft penalty calculation within a specified time frame, provided these are not inconsistent with its admission of liability. We will not enter 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

[119] The Summary Statement of Facts is a draft Statement of Objections, where issued for settlement purposes (see paragraph 14.14 of the CMA8 Guidance).

serious infringement).[120] We may also agree other terms with the company as part of a settlement.

6.72 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. The discount available for settlement post-Statement of Objections will be up to 10% of the total penalty.

6.73 If the company is willing to settle based on 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.[121] Once the settlement is agreed in terms that have been approved, an infringement decision and notice of penalty will be published.[122]

6.74 The percentage discounts and their calculation are set out in the CMA's guidance.[123] The amount of any settlement discount to be applied (up to a maximum) will depend on the procedural efficiencies and resource savings resulting from the settlement, and the extent to which the company follows the requirements of settlement.

Contesting Competition Act cases: issuing Ofgem's provisional findings: Statement of Objections

6.75 Competition Act cases follow similar procedures to those in Sectoral cases, whilst ensuring appropriate consistency with the CA98 Rules and procedures for such matters. The main differences, which are set out below, relate to documents served on the company, disclosure of information (which is called "access to file" in competition cases), and the time usually allowed for responses to the Statement of Objections.

[120] 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.

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

[122] Rule 12 of the CA98 Rules.

[123] Paragraphs 14.28-14.31 of the CMA8 Guidance.

6.76 If Ofgem reaches the provisional view that the conduct under investigation amounts to an infringement of competition law, we will issue a Statement of Objections[124] to the subject/s of the investigation.

6.77 The statement of objections represents Ofgem's provisional view, following the analysis of the evidence on the investigation file, which may change in light of subsequent representations made, or materials provided by, the subject of the investigation (or by complainants or other third parties where relevant), or any further evidence which comes to light. The Statement of Objections will also set out any action Ofgem proposes to take, such as imposing financial penalties and/or issuing directions to stop the infringement if Ofgem believes it is ongoing, and the reasons for the proposed actions. It allows the subject of the investigation to know the full case against it, and if it chooses to do so, to formally respond in writing and orally.[125] At this stage, Ofgem may also invite addressees of a Statement of Objections to contact Ofgem if they would like to enter discussions on the possible settlement of the case.

6.78 If the case involves more than one party, each party will receive a copy of the Statement of Objections.

6.79 We may also offer third parties with a sufficient interest/or affected by the infringement the opportunity to consider and make representations on a non-confidential version of the Statement of Objections.[126] 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.

6.80 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.

[124] 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 Objectives 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.

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

[126] Non-confidential versions of these representations will be disclosed to the business or businesses for comment.

Access to file

6.81 At the same time as we serve the Statement of Objections, we will give the company a reasonable opportunity to inspect copies of disclosable documents on the case file as required by the legislation.[127] If Ofgem is unable to give access to file at the same time as we issue the Statement of Objections, the time for submission of written representations will be reasonably extended until access to file has been granted.

6.82 We will usually consider the most appropriate process for allowing parties to have access to the case file in each case, while ensuring that parties are able to exercise their rights of defence. We will usually expect to follow a streamlined approach to access to file and provide each party with copies of the documents that are directly referred to in the Statement of Objections and any Draft Penalty Statement sent to that party, and a schedule containing a detailed list of all the documents on our file. These will usually be given in electronic form by secure email or using a file transfer site.

6.83 We may withhold any document to the extent that it contains confidential information, or which is an internal document.[128] We may also exclude routine administrative documents from the case file and list these as a schedule which will be placed on the file.

6.84 In many instances we may have to remove any confidential information before disclosing documents.[129]

6.85 We may consider whether it is appropriate to disclose such documents to a limited group of persons using practices such as a confidentiality ring or a data room to facilitate further disclosure of documents on the Authority's file.[130]

[127] Rule 5(2) and Rule 6(1) of the CA98 Rules.

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

[129] Rule 6(1) of the CA98 Rules, see also Rule 1(1) for the definition of "confidential information".

[130] In setting up a confidentiality ring or data room, we will have regard to the CMA 8 Guidance and to the CMA Guidance on transparency and disclosure (CMA6).

Written representations

6.86 We will usually allow up to 12 weeks for a company to respond in writing to the Statement of Objections. Where the Authority receives new evidence at this stage which supports the objection(s) contained in the Statement of Objections or the draft penalty calculation set out in any Draft Penalty Statement, we will provide the subject/s of the investigation with any new documents on the file.[131] We would also provide the subject/s of the investigation and any interested third parties, with the opportunity to respond in writing to the new document. We will usually allow a further 28 calendar days for this, and we may shorten or extend the time, subject to the complexity of the issues, as appropriate.

6.87 If, in response to the Statement of Objections, there is either a material change in the nature of the infringement as described there, or there is evidence of a different suspected infringement, we may issue a Supplementary Statement of Objections.

6.88 If the case is to be contested, we will inform the EDP Secretariat so that a Panel can be selected from the EDP to decide on the case from this point onwards.[132]

6.89 If a company has not requested the opportunity to make oral representations to the Panel, the EDP Secretariat or the case team will issue a notice to the company informing it of the date that the late settlement window closes.

Oral representations

6.90 The Authority will offer the subject/s of the investigation the opportunity to attend a single oral hearing before the EDP, to make oral representations and to discuss the matters set out in the Statement of Objections. If oral representations are to be heard, the parties will be notified in writing of the date for the oral hearing and how the hearing is intended to be conducted which can be face to face or via video link or similar technology.

6.91 The hearing will be attended by the EDP, the addressees of the Statement of Objections and members of the case team, including the SRO. Other personnel from Ofgem may attend as appropriate, for example, legal advisers, economic

[131] The Authority may in this case issue a Letter of Facts having regard to paragraph 12.27 of the CMA8 Guidance.

[132] The decision-making structure is set out in section 6.

advisers and/or technical experts, depending on the circumstances of the case. The oral hearing will be chaired by the Procedural Officer.[133]

6.92 The oral hearing will be held after the deadline for the submission of the written representations on the Statement of Objections and any Draft Penalty Statement.

6.93 The subject/s of the investigation can invite their legal or other professional advisers to the oral hearing to assist in presenting its oral representations at the hearing.[134] Complainants and third parties will generally not be permitted to attend the oral hearing.[135]

6.94 A transcript of the oral hearing will be taken, and the subject/s of the investigation will be asked to confirm the accuracy of the transcript and, if necessary, to identify any confidential information.

Outcome of the Panel's decision: Competition Act cases

6.95 If the Panel finds an infringement of the Competition Act, it will make an infringement decision.[136] Notice of the decision will be given to each person who the Authority considers is or was a party to the agreement and/or is or was engaged in anticompetitive conduct.[137] A final opportunity will be given to the addressee(s) of the decision to make confidentiality representations on the decision text. The non-confidential version of the decision and any summary will be published on our website.

6.96 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.[138] 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 the reasons for it.[139]

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[133] Rule 6(5) of the CA98 Rules.

[134] Subject to any reasonable limits that the Authority may set in terms of the number of persons that may attend on behalf of the subject/s of the investigation.

[135] The Authority might consider multi-party oral hearings on specific issues in appropriate cases, such as where there are differing views on a key issue like market definition, or differing interpretations offered in respect of a key piece of evidence.

[136] Section 31 of the Competition Act.

[137] Rule 10 of the CA98 Rules.

[138] Sections 32 and 33 of the Competition Act.

[139] Rule 12 of the CA98 Rules.

Imposing a financial penalty

6.97 Where the Authority (through the EDP's delegated decision-making) intends to make an infringement decision, the Authority may also decide to impose a financial penalty, if satisfied that the infringement was committed intentionally or negligently.[140] In that case, the Authority will issue a draft penalty notice to each party on which it proposes to impose a penalty at the same time as the Statement of Objections. The Authority may impose a financial penalty on the infringing party of up to 10 per cent of the turnover of the undertaking.[141]

6.98 The Draft Penalty Statement will set out the level of the penalty the Authority is minded to impose and the key aspects relevant to the calculation of the penalty based on the information available to the Authority at the time.[142] It will also include a brief explanation of the Authority's reasoning for its provisional findings on each aspect of the penalty calculation.

6.99 When deciding on the appropriate amount of a penalty the Authority will have regard to the CMA's guidance as to the Appropriate Amount of a Penalty.[143]

6.100 Before making the final decision on infringement and the appropriate penalty, the Authority must give the company an opportunity to comment in writing and orally, within a time specified in the draft, on the Draft Penalty Statement which sets out the calculation of the penalty amount.

6.101 The Authority will not publish the Draft Penalty Statement or the amount of any proposed penalty and will not comment publicly about issuing a Draft Penalty Statement.

6.102 Having taken account of any written and oral representations, final notice of the penalty will be given in writing and specify the period for

[140] See section 36 of the Competition Act.

[141] 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.

[142] Including, for example, the starting point percentage, the relevant turnover figure to be used, the duration of the infringement, any uplift for specific deterrence, any aggravating/mitigating factors (and the proposed increase/decrease in the penalty for these), and any adjustment proposed for proportionality.

[143] The CMA's guidance as to the appropriate amount of a penalty (CMA 73): Appropriate CA98 penalty calculation: CMA73 - GOV.UK (www.gov.uk)

payment.[144] The company must be informed of the facts on which the Authority bases the penalty and its reasons for requiring it.[145]

Appeals to the Competition Appeal Tribunal

6.103 Competition Act decisions 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.[146] Note that there is no appeal against the decision not to accept commitments.

6.104 Any party in respect of which the Authority has made a decision may appeal against, or in respect of that decision.[147] A third party may also make an appeal to the CAT if it has sufficient interest in the Authority's decision (with respect to which the appeal is made).[148]

6.105 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[149] and the CAT will have full jurisdiction to review the appropriate amount of any penalty.

6.106 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).[150]

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[144] 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.

[145] Rule 12 of the CA98 Rules.

[146] 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.

[147] Section 46 of the Competition Act.

[148] Section 47 of the Competition Act.

[149] In accordance with the settlement agreement made with us.

[150] Rule 9 of the Competition Appeal Tribunal Rules 2015. The CAT's Rules and Guidance are available on its website at: Rules and Guidance | Competition Appeal Tribunal (catribunal.org.uk)

6.107 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.[151]

[151] Paragraph 3 of Schedule 8 to the Competition Act.

7. Enforcement Orders

Provisional and Final Orders

7.1 The Authority has the power to make provisional or final orders or confirm a provisional order to bring licence holders into compliance with relevant conditions or requirements. This section sets out the process we would usually use in deciding whether to make these orders and in making them.

Final orders

7.2 The Authority may make a final order if the Authority is satisfied that a licence holder is contravening or is likely to contravene any relevant condition or requirement and where that order is requisite to bring the breach/es to an end, after following certain procedural requirements.[152]

Provisional orders

7.3 The Authority may make a provisional order, if it appears to the Authority a licence holder is contravening or is likely to contravene any relevant condition or requirement and where that order is requisite to bring the breach/es to an end. A provisional order may be considered necessary to require a licence holder to take action to improve poor behaviours or conduct and therefore bring it into compliance with its obligations to prevent existing or future loss or harm that might arise before a final order can be made.

Making a final order

7.4 The Authority will decide whether to issue a Notice of Proposal to make a final order and will publish that Notice of Proposal for consultation. Once published, the consultation must be live for not less than 21 days – however this timescale may change in the future.[153] During this period, representations can be made by the company concerned, industry and the public. Once the Notice of Proposal consultation period has ended, the Authority will make the decision as to whether the final order should be made.

7.5 The Authority may modify (i.e. make changes to) a final order by consulting as set out at paragraph 2.14 or with the consent of the licence holder that the order

[152] Schedule 3 paragraph 1 (1) of the Energy Act.

[153] Schedule 3, paragraph 2(1)(c) of the Energy Act.

relates to.[154] Where the Authority decides that it may wish to modify a final order after receiving representations or objections to its notice, it may therefore then need to give notice about those modifications. The licence holder and any third party can make representations or objections with respect to the proposed modifications.

7.6 If the Authority does not make a final order, a notice of decision not to make the order will be published, explaining the reasons.

7.7 Following the making of a final order, a Notice of Reasons[155] document, which explains the Authority's reasons for imposing a final order will be published as soon as practicable.[156]

7.8 Once the final order has been made, there is an opportunity for the business to appeal the decision to make the order. The appeal window is open for 42 days[157]. When the appeal window closes, the business may be issued with a notice notifying it of its failure to comply with a final order.

7.9 If the business has not rectified the issues within three months of the notice of the failure to comply with a final order, the Authority may issue a final 30-day notice detailing that the outcome may be licence revocation. The Authority may revoke a business' licence following the end of the 30-day notice period. The decision-maker for both the notice notifying the business of its failure to comply with an order and the 30-day notice is a senior Ofgem employee.

Making a provisional order

7.10 The recommendation to make a provisional order will be submitted to the appropriate decision-maker who will decide on next steps.

If the recommendation is approved, the provisional order will be served on the business and published on the Ofgem website, accompanied by a Notice of Reasons, which explains the Authority's reasons for imposing a provisional order. The Notice of Reasons does not have to be published on

[154] Schedule 3, paragraph 2(3) of the Energy Act.

[155] Schedule 3, paragraph 2(1) of the Energy Act.

[156] Part 1 Section 31 of the Energy Act.

[157] Paragraph 3(1) of Schedule 3 to the Energy Act.

the same day as a provisional order is made, but it should be published as soon as practicable thereafter.[158]

7.11 A provisional order will cease to have effect after three months unless it is confirmed before that three-month period elapses.[159] The process for confirming a provisional order and the subsequent actions are the same as those set out in paragraphs 7.4 to 7.6. The Authority may decide to revoke a provisional order before it elapses.

7.12 A provisional order can be confirmed (with or without modifications to it) before it ceases to have effect if the Authority is satisfied that the licence holder is contravening or likely to contravene a relevant condition or requirement and where a provisional order is requisite to bring the licence holder into compliance with its obligations. If a provisional order is confirmed it does not cease to have effect after three months but instead continues to have effect until revoked.

7.13 The Authority can revoke a provisional order at any time, and it will cease to have effect from the date on which it is revoked.

Revocation of a final order or confirmed provisional order

7.14 The Authority may revoke a final order, or a confirmed provisional order,[160] where there is evidence to show that the business is no longer in breach of its obligations or likely to be in breach of these or that the order is no longer requisite to secure compliance.

7.15 If there are grounds to revoke the order, the case team will make a recommendation to the relevant decision maker, who will decide whether to publish a Notice of Proposal to revoke the final order or confirmed provisional order. This consultation will be published and provides a period of no less than 28 days for representations or objections to be made.

7.16 Once the Notice of Proposal consultation period ends, representations will be considered by the case team and the relevant decision maker. If the decision

[158] Section 31(2) of the Energy Act.

[159] Schedule 3, paragraph 1(5) of the Energy 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.

[160] Schedule 3, paragraph 2(6) of the Energy Act.

maker decides that the order is to be revoked, they will authorise a revocation notice.

7.17 The business will be notified of the outcome and the details will be published on the Ofgem website.

Court proceedings

7.18 If necessary, we may apply to the courts to enforce compliance with an enforcement order. This can be done at any stage of the process.

Appeals

7.19 A licence holder may appeal in relation to a final or provisional order[161] on the grounds that the making or confirmation of the order was not within the powers conferred on the Authority, or the procedural requirements of the Energy Act have not been complied with. It has a period of 42 days from the date on which a copy of the order was served on it to make that application.[162]

Final orders and provisional orders: penalties

Where the Authority makes a final order or confirms a provisional order, in terms of the Energy Act, it has a period of 3 months to serve a Notice of Proposal to impose a penalty in relation to the contravention or failure to which the order relates.[163] Where it makes, but does not confirm, a provisional order it has a period of 6 months to serve the Notice of Proposal. Given these statutory deadlines, this is an example of a circumstance where the Authority may depart from the general approach to enforcement set out in these guidelines in terms of paragraph 1.20 above. This means that the Authority may not follow the processes detailed in these guidelines other than those required under statute. Therefore, for example, the Authority may not issue a Summary Statement, and/or STOC and may not be able to provide any opportunity for settlement. In these circumstances, if the Authority considers it appropriate to do so, it may also depart from these guidelines in relation to any related breach, even where the order does not relate directly to that breach.

[161] Except when they have agreed not to as part of a settlement agreement.

[162] Schedule 3, paragraph 3 of the Energy Act.

[163] Schedule 3, paragraph 6(2) of the Energy Act.

8. Closing cases

8.1 Open cases will be kept under review and may be closed at any stage. A case may be closed, for example, where:

a) 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); or

b) 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 poor behaviours or conduct have ceased, and relevant matters have been appropriately addressed, and we do not consider further action to be appropriate; or

c) we have obtained a court order to secure compliance (such as an enforcement order under Part 8 of the Enterprise Act or an injunction under the Business Protection from Misleading Marketing Regulations 2008); or

d) a case has been settled or contested and a decision made or approved by the decision-maker and the information published externally; or

e) we have reviewed it against our prioritisation criteria and concluded that the case should be closed on the grounds of administrative priorities (see also the specific comments below about competition cases).

8.2 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 there has been an infringement.[164] For example, this may be because:

(a) the evidence or our analysis suggests that the likelihood of detriment to market participants from the conduct or agreement in question is less significant than anticipated at the outset; or

(b) 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.

[164] Further information on the way in which we may deal with such decisions can be found in Chapter 10 of the CMA 8 Guidance.

8.3 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.

8.4 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

8.5 We will usually make our enforcement action outcomes public on our website (as set out in paragraph 5.37), however there may be occasions where this is not appropriate. We may also decide to make a statement to the media (usually a press release) or issue an update to the subscribed followers of the Ofgem website.

8.6 Once our enforcement outcomes are made public, we may have follow-up discussions with the media, where appropriate.

Compliance monitoring

Compliance monitoring following enforcement action

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

8.8 In some cases, we may decide to put the business under investigation into a "compliance phase".

8.9 This means its behaviour will be monitored to ensure that:

(a) there are no further concerning behaviours;

(b) it complies with any undertakings or commitments; and/or

(c) it implements any agreements made with us

8.10 The length of the compliance phase will depend on the circumstances of the case, and the specific monitoring required.

8.11 Similar compliance monitoring steps may be agreed with the business in question following Alternative Action.

8.12 It will be decided at the time of the case closing, which is the most appropriate case team to manage the agreed compliance actions. It will be either the Enforcement team or the Compliance team.

Lessons learned

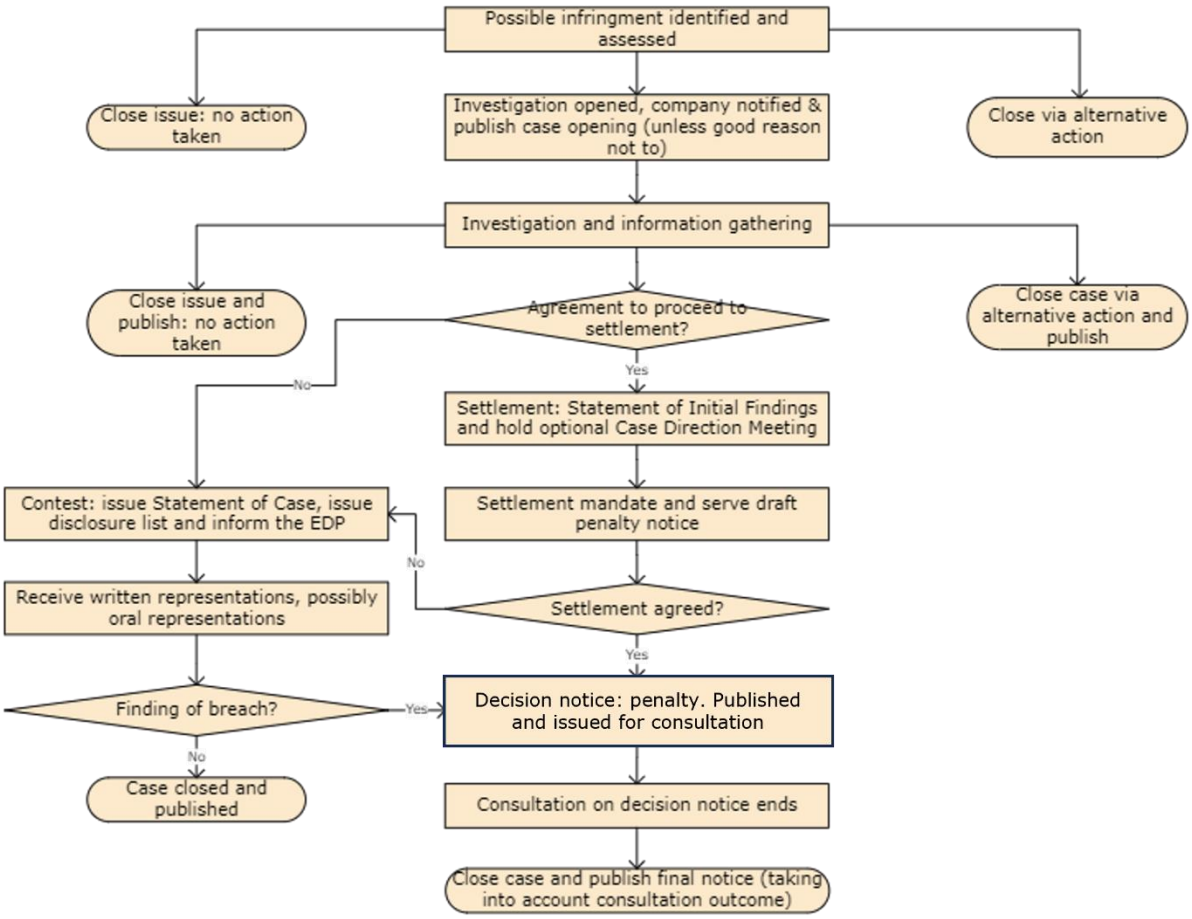
8.13 After closing a case we will routinely carry out an evaluation to assess what went well and what could be improved in future.

8.14 We will usually share the "lessons learned" with our colleagues throughout Ofgem, and sometimes externally, so that we can build on the learning.

8.15 In some cases, we may also request feedback from others involved in the case (for example, businesses under investigation, other Sectoral regulators or third parties) and use it to inform our future enforcement work.

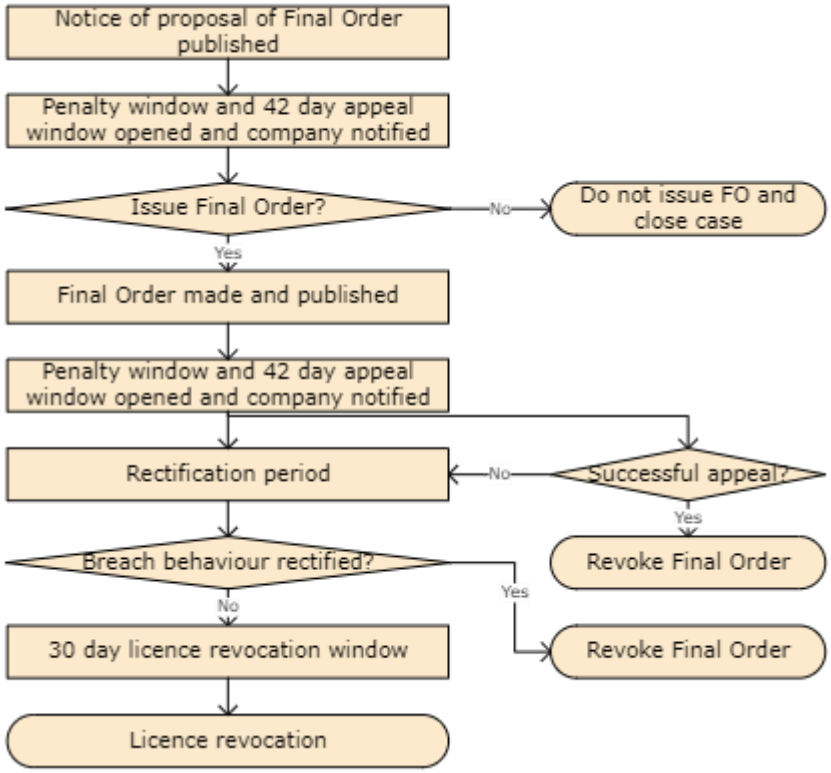
Appendices: Process Flow Charts

Flowchart 1: Sectoral Case Process

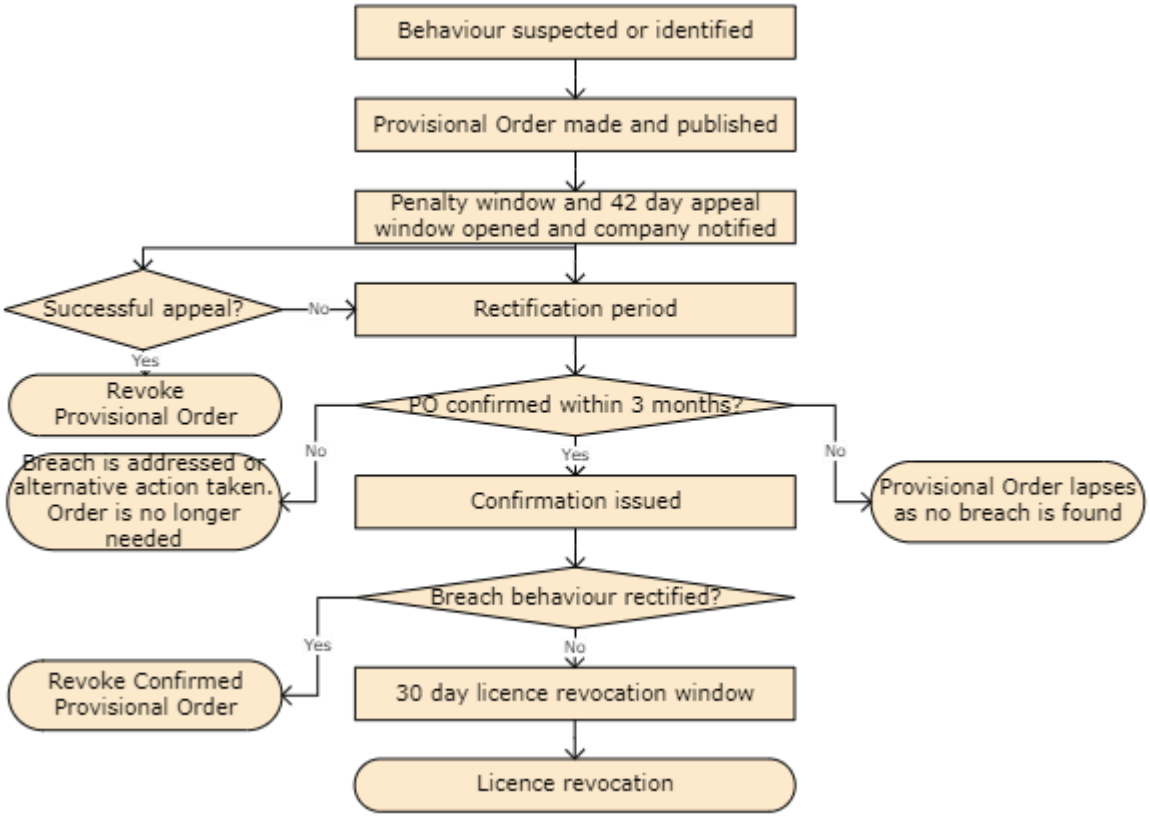


Note: at any stage we may issue a final or provisional order, or close the case on administrative priority grounds.

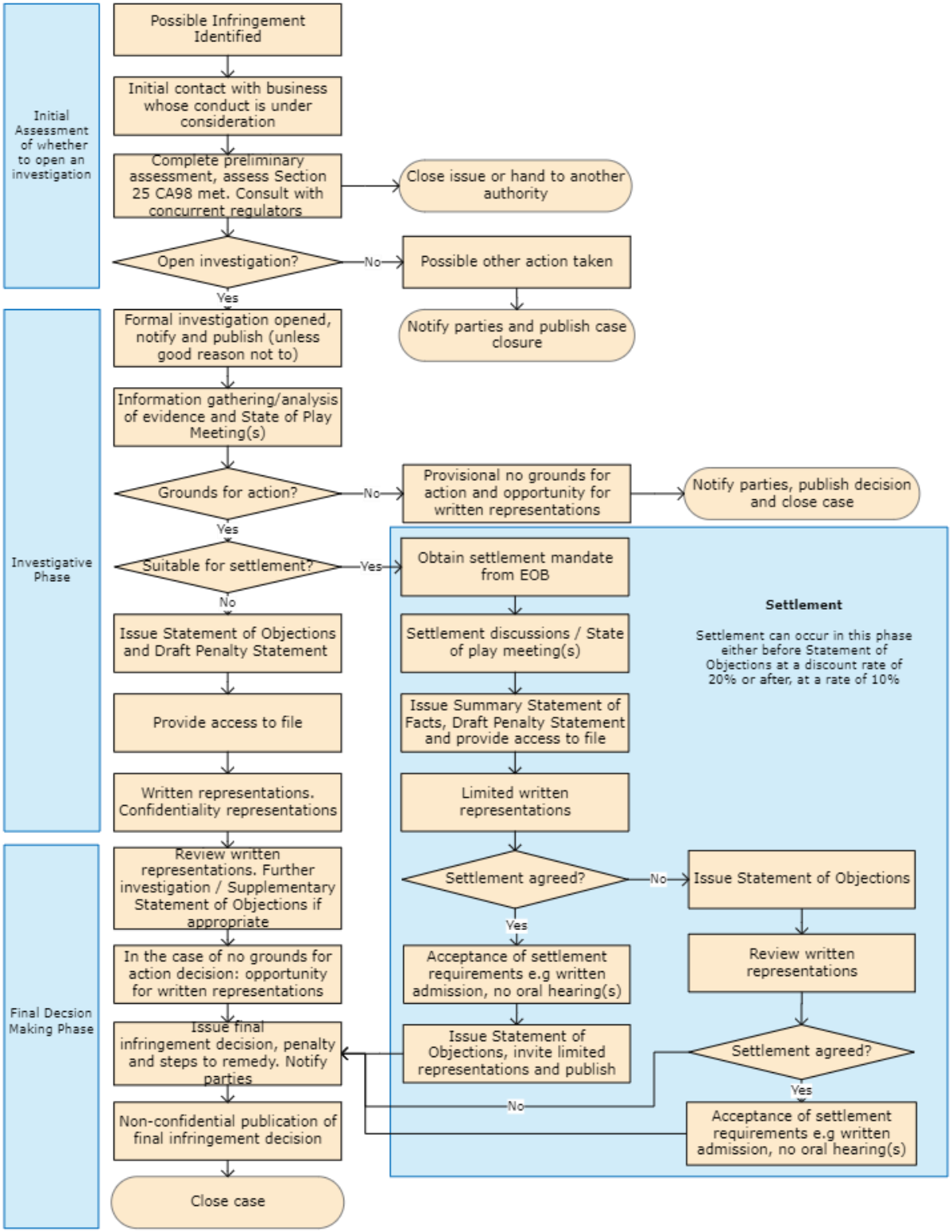
Flowchart 2: Final Order Process



Flowchart 3: Provisional Order Process

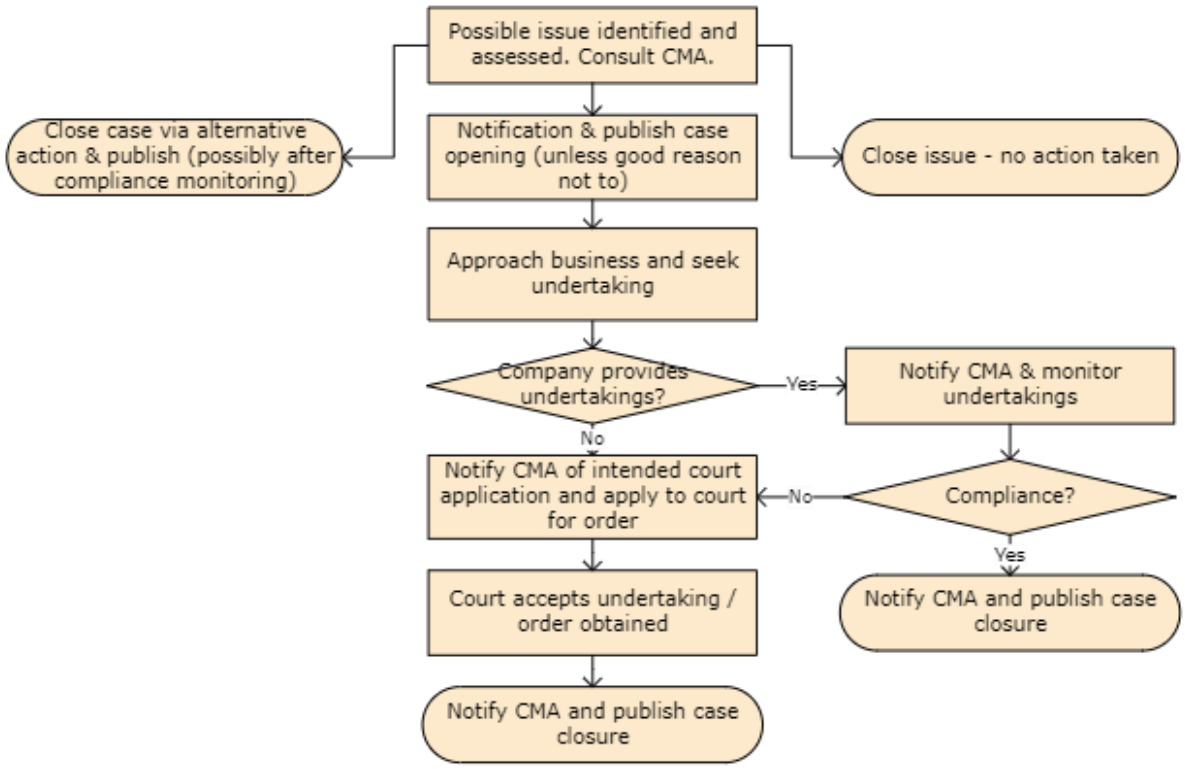


Flowchart 4: Competition Act Cases



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 administrative priority grounds.

Flowchart 5: Cases under Part 8 of the Enterprise Act, and BPMMRs



Note: At any time:

- an interim order/interim injunction or interdict (in Scotland) may be sought
- cases may be closed on administrative priority grounds; and
- in cases under Part 8 of the Enterprise Act, consultation requirements also apply if court application intended.