

# Draft Enforcement Guidelines on Complaints and Investigations (for consultation)

## Consultation

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### Overview:

Effective enforcement is important to protect consumers' interests and promote well functioning markets. This document is a draft for consultation. It explains Ofgem's proposed approach to enforcing sectoral, competition and consumer legislation. The consultation question relating to this draft can be found in the accompanying [open letter](#) or Appendix 1 to this document.

The guidelines bring together, in one document, Ofgem's processes and policies for enforcement. They set out the information that Ofgem requires in order to assess complaints and the criteria that Ofgem will use to determine whether to launch an investigation. The guidelines also explain the key stages of the investigation process and set out some key performance indicators that Ofgem will work to meet for acknowledging complaints and progressing investigations.

The aim of these guidelines is to give greater clarity and transparency to Ofgem's enforcement policies and practices, consistent with better regulation principles and the role that enforcement plays in meeting our wider duties.

## Context

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The focus of these guidelines is on Ofgem taking enforcement action in respect of alleged breaches of the requirements of the relevant legislation. They do not focus on individual consumer complaints in respect of their gas or electricity supply or supplier. Chapter Two does, however, provide some advice to consumers who have such complaints.

These Guidelines were published on 28 September 2007. Since then some of our procedures have evolved as our practical experience of using our powers has increased. There are also a number of wider developments taking place that are likely to have implications for the way in which we carry out our enforcement work, for example, proposed changes to the consumer and competition landscapes. Also, enforcement is receiving increasing emphasis within Ofgem's work. In our March 2011 Retail Market Review, we made public our intention to take a tougher stance on enforcement, for the benefit of consumers and with the aim of increasing competition amongst suppliers. In addition to the emphasis on our enforcement role, we have significantly increased the amount of enforcement work we do. This is therefore a timely opportunity to review our approach to enforcement.

The review process will be completed in two parts. This document represents the first part, in which we are consulting on proposed updates to the Enforcement Guidelines that include expanded or new coverage on areas such as early resolution, consumer protection and provisional orders. Please see the accompanying [Open Letter](#) or Appendix 1 to this document for the consultation question. The second part is a wholesale review of our approach to enforcement. It will take a fundamental look at procedures and policy, with a view to maximising the impact and efficiency of enforcement work. The [Call for Evidence](#) which opens this part of the review is given in our [Open Letter](#).

## Associated documents

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- Open letter – “Consultation - Ofgem’s Enforcement Guidelines on Complaints and Investigations” (December 2011):  
<http://www.ofgem.gov.uk/About%20us/enforcement/Documents1/Open%20letter.pdf>
- “Enforcement Guidelines on Complaints and Investigations” (September 2007):  
<http://www.ofgem.gov.uk/About%20us/enforcement/Documents1/Enforcement%20Guidelines%20post%20consultation.pdf>
- “Statement of policy with respect to financial penalties” (October 2003):  
<http://www.ofgem.gov.uk/About%20us/Documents1/Utilities%20Act%20-%20Statement%20of%20policy%20with%20respect%20to%20financial%20penalties.pdf>

- "The Retail Market Review – Findings and initial proposals" (March 2011):  
[http://www.ofgem.gov.uk/Markets/RetMkts/rmr/Documents1/RMR\\_FINAL.pdf](http://www.ofgem.gov.uk/Markets/RetMkts/rmr/Documents1/RMR_FINAL.pdf)
- "The Retail Market Review: Non-domestic Proposals":  
[http://www.ofgem.gov.uk/Markets/RetMkts/rmr/Documents1/RMR\\_non-domestic%20proposals\\_consultation.pdf](http://www.ofgem.gov.uk/Markets/RetMkts/rmr/Documents1/RMR_non-domestic%20proposals_consultation.pdf)
- The Retail Market Review: Domestic Proposals":  
<http://www.ofgem.gov.uk/Markets/RetMkts/rmr/Documents1/RMR%20Domestic%20Consultation%20December%202011.pdf>
- "Enforcement of consumer protection legislation – Guidance on Part 8 of the Enterprise Act" (OFT 512):  
[http://www.oft.gov.uk/sharedoft/business\\_leaflets/enterprise\\_act/oft512.pdf](http://www.oft.gov.uk/sharedoft/business_leaflets/enterprise_act/oft512.pdf)
- "Application in the energy sector – Understanding competition law" (OFT 428):  
[http://www.oft.gov.uk/sharedoft/business\\_leaflets/ca98\\_guidelines/oft428.pdf](http://www.oft.gov.uk/sharedoft/business_leaflets/ca98_guidelines/oft428.pdf)
- "Market investigation references – Guidance about the making of references under Part 4 of the Enterprise Act" (OFT 511):  
[http://www.oft.gov.uk/sharedoft/business\\_leaflets/enterprise\\_act/oft511.pdf](http://www.oft.gov.uk/sharedoft/business_leaflets/enterprise_act/oft511.pdf)
- "Super-complaints, guidance for designated consumer bodies" (OFT 514):  
[http://www.oft.gov.uk/sharedoft/business\\_leaflets/enterprise\\_act/oft514.pdf](http://www.oft.gov.uk/sharedoft/business_leaflets/enterprise_act/oft514.pdf)

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## Executive Summary

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The Gas and Electricity Markets Authority (the Authority) has powers under the Gas Act 1986 and the Electricity Act 1989 to take enforcement action including imposing financial penalties for breaches of requirements imposed under or pursuant to those Acts. Under the Competition Act 1998, the Authority has concurrent powers with the Office of Fair Trading to bring an end to anti-competitive behaviour as well as impose financial penalties. Under Part 8 of the Enterprise Act, the Authority may apply to the court for an order to stop breaches of certain consumer legislation.

The Authority governs the Office of Gas and Electricity Markets (Ofgem), which carries out the day to day work of the Authority. We will mainly refer to Ofgem throughout this document. The purpose of these guidelines is to set out Ofgem's approach to enforcing the above-mentioned legislation.

Effective enforcement is essential to ensure that the gas and electricity markets work well for consumers and that energy companies operate on a level playing field. Ofgem may conduct investigations into companies that it considers may be in breach of this legislation. Investigations can be undertaken on Ofgem's own initiative or on the receipt of complaints or on referrals from other regulatory bodies.

These guidelines are intended to enable Ofgem to act proportionately in investigating matters and to enhance the transparency of the investigation processes.

The guidelines explain the following:

- The information complainants should provide when alleging breaches of the requirements of the relevant legislation<sup>1</sup>. Complaints should be specific, well reasoned, clear and supported by all relevant evidence.
- The criteria Ofgem will apply in deciding whether to open an investigation. These include whether Ofgem has power to act, the seriousness of the alleged breach, whether or not its effects are continuing, the deterrent effect of enforcement action and whether appropriate action is already being taken by another body.
- The key stages of the investigation process that Ofgem will ordinarily follow.

In 90 per cent of cases, within 4 weeks of receiving a complaint Ofgem will acknowledge receipt and either inform the complainant whether Ofgem intends to investigate the matter or otherwise request further information to decide whether to investigate. Ofgem will also progress investigations in a timely manner.

Within 9 months of launching an investigation, Ofgem intends to do one of the following:

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<sup>1</sup> This will generally entail an allegation of a breach of a licence condition and/or statutory duty, an abuse of a dominant position or the existence of an anti-competitive agreement.

- issue a detailed statement of the case against the party being investigated (in the form of a Statement of Objections (notice of a decision) for investigations under the Competition Act 1998 or a Statement of Case for investigations under the Gas Act 1986 and Electricity Act 1989); or
- close the case for reasons of finding no breach or infringement or for reasons of administrative priorities; or
- update the parties being investigated of the expected timescale for one of the above.

Ofgem will aim to achieve the above in shorter timescales where possible, taking into account the need to follow the appropriate processes and procedures. It considers that a 9 month target achieves a suitable balance between speed and the need for due process.

A different type of procedure applies to investigations under Part 8 of the Enterprise Act, outlined in paragraphs 4.55-4.65.

### **Enforcement and industry code compliance**

Where the same contravention is a breach of a code and a licence condition, Ofgem will take account of sanctions already being imposed or proposed by code owners when considering whether to investigate or take enforcement action. This may lead Ofgem to decide not to exercise its discretionary investigative powers. However, in appropriate cases, including serious cases of consumer harm, it may nonetheless investigate and may ultimately take some form of enforcement action, including the imposition of a financial penalty.

# 1. Legislation under which Ofgem may take enforcement action

## Chapter Summary

As a sector regulator, Ofgem has certain enforcement powers under legislation governing the gas and electricity markets in Great Britain.<sup>2</sup> The principal legislation comprises the Gas Act 1986, the Electricity Act 1989 and the Utilities Act 2000. As a competition authority, Ofgem also has concurrent powers with the Office of Fair Trading ("OFT") under the Competition Act 1998 as well as powers under the Enterprise Act 2002 in relation to those areas within its jurisdiction. In order to help complainants understand what action Ofgem might be able to take in a particular case, a brief overview of key aspects of this legislation is provided below.

1.1. Under the Gas and Electricity Acts,<sup>3</sup> the Authority has powers to ensure that persons<sup>4</sup> licensed by the Authority to operate in the gas and electricity markets in Great Britain comply with licence conditions and relevant requirements of the Acts<sup>5</sup>.

1.2. Where it appears to the Authority that a licensee may be contravening, or may have contravened, any licence condition or relevant requirement of the Acts, including any failure to achieve any prescribed standard of performance, Ofgem may decide to investigate and the Authority may serve a notice on any person<sup>6</sup>, requiring that person to produce any documents specified in that notice, or requiring that person (if he is carrying on a business) to furnish to the Authority such information as may be specified, subject to certain conditions.<sup>7</sup>

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<sup>2</sup> The Authority's powers do not extend to the UK. The Northern Ireland Authority for Energy Regulation is responsible for the regulation of the gas and electricity industries in Northern Ireland.

<sup>3</sup> Sections 28 to 30F of the Gas Act 1986 and sections 25 to 28 of the Electricity Act 1989 provide for enforcement powers in respect of breaches of licence conditions and breaches of relevant requirements.

<sup>4</sup> Under the Gas Act 1986 those licensed to operate in the market are set out in section 5. It includes a person who "(a) other than by means of a gas interconnector conveys gas through pipes to any premises, or to a pipe-line system operated by a gas transporter; (aa) participates in the operation of a gas interconnector; (b) supplies to any premises gas which has been conveyed to those premises through pipes; or (c) arranges with a gas transporter for gas to be introduced into, conveyed by means of or taken out of a pipe-line system operated by that transporter. Under the Electricity Act 1989 those licensed to operate in the market are set in section 4. It includes a person who, (a) generates electricity for the purpose of giving a supply to any premises or enabling a supply to be so given; (b) participates in the transmission of electricity for that purpose; (bb) distributes electricity for that purpose; (c) supplies electricity to any premises, or; (d) participates in the operation of an electricity interconnector.

<sup>5</sup> Relevant conditions and requirements are set out in the Gas Act 1986, Electricity Act 1989, the Utilities Act 2000, the Energy Act 2004, the Consumers, Estate Agents and Redress Act 2007 and the Energy Act 2010. These conditions and requirements also include changes introduced by the Electricity and Gas (Internal Markets) Regulations 2011.

<sup>6</sup> "Any person" can be a company or an individual – including an employee or member of the public. It is not limited to licensees or their staff.

<sup>7</sup> Section 38 of the Gas Act 1986 and section 28 of the Electricity Act 1989

1.3. Where the Authority is satisfied that a licence holder is contravening or is likely to contravene any licence condition or relevant requirement of the Acts, the Authority shall by final order<sup>8</sup> (or in certain circumstances by provisional order<sup>9</sup>) make such provision as is requisite for the purpose of securing compliance with that condition or requirement. A provisional order may be used to prevent loss or damage which might otherwise arise before a final order can be made.<sup>10</sup> As such, the making of a provisional order is not a reserved matter for the Authority and may not require the same degree of investigation as a final order but it will cease to have effect after a maximum of 3 months<sup>11</sup> if it is not subsequently confirmed.

1.4. However, the Authority shall not make an order where it is satisfied that its general duties under the Acts preclude the making of an order, or that the most appropriate way of proceeding is under the Competition Act 1998.<sup>12</sup> In addition, the Authority is not required to make an order where the licensee has agreed to take and is taking, all such steps as appear to the Authority to be appropriate for the purpose of securing or facilitating compliance with the condition or requirement, or where it considers that the breach is of a trivial nature.<sup>13</sup>

1.5. A licence holder may question the validity of a final or provisional order on the grounds that it was not within the powers conferred on the Authority by, or the procedural requirements of, the Gas or Electricity Acts. It may make an application to the court within 42 days from the date of the order being served on it.<sup>14</sup> The court has the power to quash the order or any provision of it if it is satisfied that the order was not within those powers or the interests of the licence holder have been substantially prejudiced by a failure to comply with those requirements.<sup>15</sup>

1.6. Where the Authority is satisfied that a licensee has contravened, or is contravening, any relevant condition or requirement, it may impose on the licensee a financial penalty of such amount as is reasonable in the circumstances of the case (not exceeding 10% of the licensee's applicable turnover in its business year preceding the date of the Authority's notice under s.27A(3) Electricity Act 1989 and s.30A(3) Gas Act 1986). The Authority shall not impose a penalty on a licensee where it is satisfied that the most appropriate way of proceeding is under the Competition Act 1998.<sup>16</sup>

1.7. Where a licence holder is aggrieved by the imposition of a penalty, the amount of the penalty, or the date by which the penalty is required to be paid, the licence holder may make an application to the court.<sup>17</sup> This application must be made

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<sup>8</sup> Section 28(1) of the Gas Act 1986 and section 25(1) of the Electricity Act 1989

<sup>9</sup> Section 28(2) of the Gas Act 1986 and section 25(2) of the Electricity Act 1989

<sup>10</sup> Section 28(3) of the Gas Act 1986 and section 25(3) of the Electricity Act 1989

<sup>11</sup> Section 28(8) of the Gas Act 1986 and section 25(8) of the Electricity Act 1989

<sup>12</sup> Section 28(5) of the Gas Act 1986 and section 25(5) of the Electricity Act 1989

<sup>13</sup> Section 28(5A) of the Gas Act 1986 and section 25(5A) of the Electricity Act 1989

<sup>14</sup> Section 30 (1), Gas Act 1986 and section 27(1), Electricity Act 1989

<sup>15</sup> Section 30 (2), Gas Act 1986 and section 27(2), Electricity Act 1989

<sup>16</sup> Section 30(A)(2) of the Gas Act 1986, section 27(A)(2) of the Electricity Act 1989 and the Electricity and Gas (Determination of Turnover for Penalties) Order 2002

<sup>17</sup> Section 30E, Gas Act 1986 and section 27E, Electricity Act 1989

within 42 days of receipt of notice of the decision.<sup>18</sup> The court may quash the penalty, substitute a penalty of a lesser amount or substitute the date or dates for payment imposed by the Authority.

### **Anti-competitive behaviour**

1.8. As a concurrent regulator with the OFT, and a National Competition Authority, Ofgem has powers under the Competition Act 1998 to apply and enforce the Chapter I and Chapter II prohibitions of the Competition Act and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), in relation to those areas within its jurisdiction.<sup>19</sup>

1.9. The Chapter I prohibition and Article 101 of TFEU prohibit agreements between undertakings, decisions by associations of undertakings and concerted practices (hereafter collectively referred to as agreements) which have as their object or effect the prevention, restriction or distortion of competition. The Chapter I prohibition applies to agreements implemented or intended to be implemented in the UK (or a part thereof), which may affect trade in the UK, while Article 101 applies to agreements which may affect trade between EU member states.

1.10. The Chapter II prohibition and Article 102 of TFEU prohibit conduct by one or more undertakings which amounts to the abuse of a dominant position if it may affect trade in a market. The Chapter II prohibition applies if the dominant position is held within the UK and the conduct in question may affect trade within the UK (or a part thereof), while Article 102 applies to conduct within the common market in so far as it may affect trade between Member States.

1.11. Where Ofgem has reasonable grounds to suspect that the Chapter I or Chapter II prohibitions and Articles 101 or 102 have been infringed it has the powers of investigation including the following:

- to require the production of documents and/or provision of information;<sup>20</sup>
- to enter business premises without a warrant and require the production of a specified class of document (with or without prior notice);<sup>21</sup>
- to enter and search business and domestic premises with a warrant (without prior notice).<sup>22</sup>

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<sup>18</sup> Section 30E(2), Gas Act 1986 and section 27E(2), Electricity Act 1989

<sup>19</sup> The jurisdiction of the Authority with regards to the application of Article 101, Article 102, Chapter I or Chapter II prohibitions is set out in section 36A of the Gas Act 1986 and section 43 of the Electricity Act 1989 and relates to “the carrying on of activities mentioned in section 5(1) of the Gas Act 1986” and to “commercial activities connected with the generation, transmission or supply of electricity {or the use of electricity interconnectors...}”

<sup>20</sup> Section 26, Competition Act 1998

<sup>21</sup> Section 27, Competition Act 1998

<sup>22</sup> Section 28, Competition Act 1998

1.12. Prior to concluding an investigation, Ofgem has the power to issue interim measures directions as a matter of urgency for the purpose of preventing serious, irreparable damage to a particular person or category of person, or protecting the public interest<sup>23</sup> and to accept commitments to take action or refrain from taking such action as it considers appropriate.<sup>24</sup> After concluding that there has been an infringement, Ofgem has the power to issue directions<sup>25</sup> to bring an infringement to an end and to impose financial penalties<sup>26</sup> for any infringements committed intentionally or negligently (up to 10% of an undertaking's worldwide turnover).

1.13. The competition law guideline "Application in the energy sector"<sup>27</sup> provides advice and information about the factors which Ofgem will take into account when considering whether, and if so how, to exercise its powers under the Competition Act.

1.14. Competition Act decisions may be appealed to a specialist tribunal, the Competition Appeal Tribunal (the CAT), established under the Enterprise Act 2002. Appealable decisions include, among others, infringement decisions, non-infringement decisions, directions and the imposition of financial penalties.<sup>28</sup> Any party in respect of which the Authority has made a decision may appeal against that decision.<sup>29</sup> A third party who the CAT considers has sufficient interest may also appeal to the CAT.<sup>30</sup> 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 or revoke or vary the amount of penalty.<sup>31</sup>

## **Market monitoring and investigations**

1.15. As part of its on-going work, Ofgem has a general duty to keep the gas and electricity markets under review.<sup>32</sup> This may result in Ofgem proposing legislative changes to Government or proposing licence modifications.

1.16. Ofgem also has concurrent powers with the OFT to make a market investigation reference. Under Part 4 of the Enterprise Act 2002,<sup>33</sup> Ofgem may make a market investigation reference to the Competition Commission (CC) in relation to the gas and electricity markets, where it has reasonable grounds for suspecting that

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<sup>23</sup> Section 35, Competition Act 1998

<sup>24</sup> Section 31A, Competition Act 1998

<sup>25</sup> Section 32 and 33, Competition Act 1998

<sup>26</sup> Section 36, Competition Act 1998

<sup>27</sup> See OFT competition law guidelines, "Application in the energy sector", [http://www.oft.gov.uk/shared\\_oft/business\\_leaflets/ca98\\_guidelines/oft428.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft428.pdf)

<sup>28</sup> 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) Competition Act 1998

<sup>29</sup> Section 46, Competition Act 1998

<sup>30</sup> Section 47, Competition Act 1998

<sup>31</sup> Schedule 8 paragraph 3 of the Competition Act 1998

<sup>32</sup> Section 34 of the Gas Act 1986 and section 47 of the Electricity Act 1989

<sup>33</sup> See OFT guidance on Market Investigation References,

[http://www.oft.gov.uk/shared\\_oft/business\\_leaflets/enterprise\\_act/oft511.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft511.pdf)

any feature, or combination of features, of a market prevents, restricts, or distorts competition in connection with the supply or acquisition of any goods or services.

1.17. Following a reference, it will be for the CC to decide whether competition is indeed prevented, restricted or distorted, and (if so) what, if any, action should be taken to remedy, mitigate or prevent the adverse effect on competition or any detrimental effect on consumers arising from the adverse effect.

1.18. The purpose of market monitoring and investigations is to determine whether the process of competition is working effectively in markets as a whole. They provide a framework for identifying, analysing and, where appropriate, remedying industry-wide or market-wide competition problems. The OFT's guidelines on market investigation references<sup>34</sup> provide further information on the handling of market investigations and their relationship with competition law.

1.19. Any person aggrieved by a decision by the Authority or the CC in connection with a reference or potential reference may apply to the CAT for a review of that decision. The CAT shall apply the same principles as would be applied by a court on application for judicial review. The CAT may dismiss the application or quash the whole or part of the decision and if quashed, refer the matter back to the original decision-maker with a direction to reconsider and make a new decision.

### **Super-complaints**

1.20. Under section 11 of the Enterprise Act 2002, a designated consumer body<sup>35</sup> can make a super-complaint when it thinks that a feature, or combination of features, of a market is, or appears to be, significantly harming the interests of consumers.

1.21. As with the Competition Act and other parts of the Enterprise Act, section 11 is applied concurrently by the OFT and other regulators, including Ofgem.

1.22. Where a super-complaint falls to Ofgem, it will consider the evidence submitted and undertake whatever work is necessary to establish the extent, if any, of the alleged problems. Ofgem must then publish a response within 90 days from the day after which the super-complaint was received stating what action, if any, it

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<sup>34</sup> OFT guidance on Market Investigation References, [http://www.oft.gov.uk/shared\\_oft/business\\_leaflets/enterprise\\_act/oft511.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft511.pdf)

<sup>35</sup> Only those bodies that are designated by the Secretary of State can bring a super complaint. Such bodies include The Campaign for Real Ale Limited, The Consumer Council for Water, The Consumers' Association (trading as "Which?"), The General Consumer Council for Northern Ireland, The National Association of Citizens Advice Bureaux, The National Consumer Council (trading as "Consumer Focus") and The Scottish Association of Citizens Advice Bureaux (trading as Citizens Advice Scotland (CAS). See the Enterprise Act 2002 (Bodies Designated to make Super complaints) Order 2004 as amended.

proposes to take in response to the complaint and giving the reasons behind its decision.<sup>36</sup>

1.23. In some cases, it may be possible to resolve the concerns and propose remedies within the 90-day period but, in more complex cases, further work may be called for. Further information on the process can be found in the OFT's guidance on super-complaints.<sup>37</sup>

### **Enforcement Orders under the Enterprise Act**

1.24. Under Part 8 of the Enterprise Act, the OFT has a leading role in terms of promoting good consumer practice and enforcing certain consumer legislation. Ofgem is a designated enforcer and in certain circumstances has the power to seek to obtain an Enforcement Order (from the High Court or County Court) in relation to a breach of specific pieces of consumer protection legislation, where such a breach harms the collective interests of consumers. The effect of an Enforcement Order is similar to a prohibiting order/injunction and prohibits the respondent from carrying on a particular course of conduct.

1.25. Prior to launching an investigation Ofgem would notify the OFT, which is the central co-ordinator. It would expect to agree which enforcer is best placed to take forward the investigation and if necessary obtain an enforcement order. Ofgem would liaise closely with the OFT at the relevant steps of the process.<sup>38</sup>

1.26. The Act sets out a broad range of relevant consumer protection legislation under the headings "Community infringements"<sup>39</sup> and "domestic infringements".<sup>40</sup> Where an enforcer has the power to make an application for an Enforcement Order, it may instead accept undertakings in respect of a domestic infringement if the infringing conduct has occurred or is occurring, whilst such an undertaking may be obtained for a Community infringement also if the conduct is likely to occur.<sup>41</sup> This means that the power regarding community infringements is also prospective.

1.27. The legislation under which Ofgem can act as enforcer includes:

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<sup>36</sup> For example, in July 2005, Ofgem responded to a super-complaint from energywatch (now part of Consumer Focus). The super-complaint was sent on 6 April 2005 and, it highlighted energywatch's concerns in respect of gas and electricity supplier's billing processes and practices.

<sup>37</sup> Super-complaints, Guidance for designated consumer bodies,

[http://www.oft.gov.uk/shared\\_oft/business\\_leaflets/enterprise\\_act/oft514.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft514.pdf)

<sup>38</sup> Further information on Part 8 and on the OFT's role is set out in OFT's guidance document,

[http://oft.gov.uk/shared\\_oft/business\\_leaflets/enterprise\\_act/oft512.pdf](http://oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft512.pdf)

<sup>39</sup> "Community infringements" are acts or omissions that breach the UK's and other European Economic Area (EEA) states legislation and other provisions implementing the European Directives listed in Schedule 13 to the Act.

<sup>40</sup> "Domestic infringements" relate to breaches of a wide range of UK laws listed in a Statutory Instrument made under Part 8

<sup>41</sup> See section 219, Enterprise Act 2002

### Community infringements<sup>42</sup>

- The Consumer Protection from Unfair Trading Regulations 2008 ("CPRs")<sup>43</sup>, which prohibit the use of misleading, aggressive or otherwise unfair commercial practices by businesses in interactions with domestic consumers.
- The Control of Misleading Advertisements Regulations 1998 (as amended), which are aimed at protecting the interests of consumers and traders from misleading or unacceptable comparative advertising;<sup>44</sup>
- The Consumer Protection (Cancellation of Contracts Concluded Away From Business Premises) Regulations 1987, which provide consumers with a seven-day cooling off period when they agree to buy goods or services worth more than £35 from a trader during an unsolicited visit to their home;
- The Unfair Terms in Consumer Contracts Regulations 1999, which protect consumers against unfair standard terms in contracts they make with traders;
- The Consumer Protection (Distance Selling) Regulations 2000, which are aimed at businesses that sell goods or services to consumers by: the internet; digital television; mail order, including catalogue shopping; phone or fax;<sup>45</sup>
- Sale of Goods Act 1979, and Supply of Goods and Services Act 1982, which cover consumers' statutory rights in respect of goods and services.

### Domestic infringements<sup>46</sup>

- Trade Descriptions Act 1968 (which covers false descriptions applied to goods and services);
- Consumer Protection Act 1987 Part III (which covers misleading price indications).

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<sup>42</sup> Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003, SI 2003/ 1374

<sup>43</sup> [The Consumer Protection from Unfair Trading Regulations 2008 SI 2008/1277](#).

<sup>44</sup> See OFT fact sheet on Misleading Advertisements, [http://www.oft.gov.uk/shared\\_oft/business\\_leaflets/general/oft022.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/general/oft022.pdf)

<sup>45</sup> For further information see the DTI/OFT "A guide for businesses on distance selling", [http://www.oft.gov.uk/shared\\_oft/business\\_leaflets/general/oft698.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/general/oft698.pdf)

<sup>46</sup> Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2003, SI 2003/1593

## 2. Making a complaint – information required

### **Chapter Summary**

Consumers who have complaints against their energy supplier or network provider should in the first instance take the matter up with the company. If they are not satisfied they can refer the matter to the Energy Ombudsman.

Ofgem does not have a direct role in dealing with individual disputes between consumers and companies. However, it has a general duty to keep the gas and electricity markets under review, and to ensure that those licensed to operate within these markets comply with relevant legislation and licence obligations. As such, it considers complaints about conduct and practices that are (or appear to be) in breach of relevant legislation or other requirements. In order to be able to properly assess the merits of a complaint and decide whether it warrants investigation under any of the legislation outlined above, a minimum level of information is generally required. This section of these guidelines sets out the information that should be included in a complaint to enable Ofgem to carry out such an assessment.

### **Individual complaints from customers about energy companies**

2.1. Ofgem does not have a direct role in dealing with individual disputes between customers and energy companies<sup>47</sup>. Consumers who have complaints against an energy supplier or network provider should contact the company in the first instance to resolve the matter.

2.2. Energy suppliers and network operators are subject to strict complaints handling standards<sup>48</sup> and are required to have procedures for dealing with complaints from domestic and micro business customers. Further information and advice about making a complaint to an energy company can be obtained from the Government funded advice service Consumer Direct: [www.direct.gov.uk](http://www.direct.gov.uk) or 08454 040506.

2.3. If the complaint is not resolved to the customer's satisfaction and either eight weeks have passed since the complaint was made or reaches a point of deadlock where the energy company confirms in writing that it is unable to do anything more to resolve the complaint (whichever is sooner), the matter can be referred to the Energy Ombudsman.

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<sup>47</sup> Ofgem has powers to determine certain disputes such as connection charges. Further information can be found on Ofgem's connections page:

<http://www.ofgem.gov.uk/Consumers/ncamm/Pages/ncamm.aspx#unhappy>

<sup>48</sup> The Gas and Electricity (Consumer Complaints Handling Standards) Regulations 2008 (SI 2008/1898).

2.4. The Energy Ombudsman was appointed in October 2008 to resolve disputes between domestic or micro business customers and energy companies. It is free for customers and independent of the energy companies. The Ombudsman has a range of remedies at its disposal including requiring the company to take practical action, including (but not limited to) making an apology, and has the power to award customers up to £5000 in compensation. Information about the role of the Energy Ombudsman can be found at: <http://www.ombudsman-services.org/energy.html>

### **Allegations of a breach of the relevant legislation**

2.5. Ofgem seeks to ensure that companies operating within the gas and electricity markets comply with their obligations. It therefore assesses complaints about business practices which would appear to be contrary to the requirement of relevant legislation, licence conditions or is otherwise unfair, in order to decide whether to open an investigation.

2.6. The type and level of information required will depend on the nature of a particular complaint and the resources available to the complainant. However, the more relevant information that is provided at the outset, the more likely it is that Ofgem will be able to deal with the complaint with speed and efficiency. If all the information needed in order to make a proper assessment of the complaint is not provided, Ofgem may need to seek further information, thus delaying our decision on whether to open an investigation.

2.7. Complaints to Ofgem should be ***specific, well reasoned, clear and supported by all available relevant evidence.***

2.8. All complaints should generally include the following information:

- a clear explanation of the allegation – including a summary of events and dates relating to the alleged breach, details of any interaction with the subject of the complaint and any action taken by either the subject of the complaint or the complainant.<sup>49</sup> This should be accompanied by all available relevant evidence to support the alleged breach and the events which gave rise to it. For example, copies of any letters, emails, faxes, notes of meetings (including board minutes), notes of telephone calls, or any other documents or information, which support the allegation;
- a clear explanation of the harm that the complainant has been caused or may be caused, as a result of the behaviour or incident complained of. Again, this should be supported by all available relevant evidence. For example, documents showing increased costs or higher prices as a result of the conduct in question;
- an indication of the legal obligation that the complainant considers may have

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<sup>49</sup> This could include, for example, whether the complainant has raised the matter with the company and whether the company has sought to address the matter.

been breached;

- details of the company being complained about including the nature of their business and the complainant's relationship with them;
- details of the complainant's own business or interests, including contact details, or those of a representative with whom Ofgem can speak in relation to the complaint.

2.9. Where the complaint concerns an alleged breach of the Competition Act 1998, complainants should have regard to the OFT's Competition Guidelines, Involving Third Parties in Competition Act Investigations, (incorporating guidance on the submission of complaints).<sup>50</sup> Ofgem will not necessarily treat a complaint as incomplete if it does not contain all the information mentioned in that guidance as obligatory.

2.10. There may also be cases where there is information that is relevant that is not outlined above or mentioned in the OFT guidance. Complainants should seek to provide as much relevant evidence and information as possible.

### **Alleging a breach of the relevant legislation**

2.11. Ofgem recognises that some complainants, such as smaller companies or individuals, may find it difficult to provide all relevant information and it will work with complainants to help where necessary. This could take time and may impact on Ofgem's ability to progress the complaint within the usual timescales.

2.12. If you wish to make a complaint alleging a breach of relevant legislation or are unsure whether your complaint should be raised with the energy company or with Ofgem you can contact its Consumer Affairs Team for advice: [consumeraffairs@ofgem.gov.uk](mailto:consumeraffairs@ofgem.gov.uk); or 0207 901 7200.

### **What will Ofgem do when it receives an allegation about a breach of the relevant legislation?**

2.13. It will acknowledge receipt of all complaints it receives.

2.14. In 90 per cent of cases, within 4 weeks of receiving a complaint Ofgem will acknowledge receipt and either inform the complainant whether Ofgem intends to investigate the matter or otherwise request further information to decide whether to investigate. Ofgem will also progress investigations in a timely manner.

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<sup>50</sup> [http://www.oft.gov.uk/shared\\_oft/business\\_leaflets/ca98\\_guidelines/oft451.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft451.pdf)

## **Confidentiality**

2.15. Complainants should also be aware that it may be necessary for Ofgem to disclose information provided to the company complained about or to other parties connected to the subject matter of the complaint. Where information is confidential or the complainant does not wish it to be disclosed, this should be made clear.

2.16. Even where information is marked as confidential or the complainant does not wish it to be disclosed, there may still be circumstances in which its disclosure is required. Information provided, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA) and the Data Protection Act 1998). If you consider that information you provide should be treated in confidence, please provide the reasons for this when submitting your response. Your request will be considered in accordance with the FOIA and the FOIA code of practice.

2.17. Ofgem will consult with the complainant, prior to making a decision on disclosure, should such a situation arise.

## **Competition Pro Bono Scheme**

2.18. The Competition Pro Bono Scheme offers two hours of free legal advice to individuals and businesses who believe that their rights under competition law have been infringed. You can visit the Competition Pro Bono Scheme website at: <http://www.probonogroup.org.uk/competition/>.

2.19. Please note: by providing this link, Ofgem is not endorsing the member advisers or the advice provided by the Pro Bono Scheme.

## 3. Criteria for opening an investigation

### Chapter Summary

Investigations involve time and resources, not only for Ofgem and companies subject to the investigation but for other interested parties as well. Therefore, it is important to ensure that resources are efficiently allocated. This Chapter includes a non-exhaustive list of the factors that Ofgem will generally take into account in deciding whether to proceed with an investigation.

3.1. Ofgem can proceed with an investigation following the receipt of a complaint, a referral from another regulator, or on the basis of its own initiative. In deciding whether to proceed with an investigation it will consider the specific facts of the matter, the legal context and available resources. It is also mindful of the principles of Better Regulation. These principles require that regulation and its use is proportionate, accountable, consistent, targeted and timely.

3.2. Ofgem will consider the facts and circumstances of the particular case but some factors will make an investigation more likely, for example, where there is evidence of serious harm to consumers or where enforcement action might be important to deter similar breaches. Conversely, where the evidence of a potential breach is weak, any breach is likely to be trivial and there is no or minimal harm to consumers, an investigation would be less likely.

3.3. The criteria fall under two broad categories:

- a. whether Ofgem has the power to take action and is best placed to act;
- b. whether it is a priority matter for Ofgem, due to its apparent seriousness and impact or potential impact on consumers.

3.4. The first category includes consideration of:

- i. whether the matter relates to an area in which Ofgem has the power to take enforcement action. For example, whether the case falls within the scope of the relevant provisions of the Gas Act 1986, Electricity Act 1989, Competition Act 1998 or Enterprise Act 2002; and
- ii. whether the tests set out in the relevant legislation can be fulfilled.
  - For the Gas and Electricity Acts, this means assessing if it appears likely, on the face of it, that the behaviour in question could constitute a breach of any requirement of the relevant legislation and/or licence condition.
  - For the Competition Act, this means considering whether there are reasonable grounds for suspecting that there has been an infringement of

the applicable prohibitions.

- For Part 8 of the Enterprise Act, this means assessing whether Ofgem thinks that there has been a breach of any of the consumer protection legislation which Ofgem has the power to enforce and if so, whether that breach harms or has the potential to harm the collective interests of consumers.

3.5. The second category assesses whether it is a priority matter for Ofgem. This means looking at a range of factors which include:

- i. How serious is the alleged breach? This will depend on a number of factors, such as:
  - What is the harm, or potential harm, to consumers or to competition resulting from the alleged breach?
  - Is the alleged breach on-going? Is the company responsible for the potential breach taking action to address the situation? The extent to which this may impact on the decision to investigate will depend on other factors such as the harm to consumers.
  - Does it involve a repeat offence, for example have there been previous enforcement decisions in relation to similar breaches? Does it involve a repeat offender?
  - Is it a widespread problem?
- ii. What is the strength of the available evidence?
- iii. What will be the effect, including the deterrent effect, of enforcement action? Would action be likely to discourage similar behaviour in the future, either by the company that may have committed a breach or by others?
- iv. What resources are required to investigate the matter and what resources are available? Ofgem has finite resources and the most serious potential breaches will be prioritised.
- v. Has action already been taken, or is to be taken by another body, to remedy the situation. In some cases, such as when considering action under the Competition Act 1998 or Enterprise Act 2002, the concurrency arrangements mean that Ofgem does not or cannot investigate if another regulator wishes to take or is already taking action, for example, in order to ensure that a company is not financially penalised for the same breach twice.<sup>51</sup> Ofgem's approach to investigating an alleged breach of licence or requirements under the Gas Act 1986 and the Electricity Act 1989 where a code owner or panel is already addressing the matter is set out below at paragraphs 3.7-3.10.

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<sup>51</sup> See for example, OFT competition law guidance, Concurrent Application to Regulated Industries, [http://www.oft.gov.uk/shared\\_oft/business\\_leaflets/ca98\\_guidelines/oft405.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft405.pdf)

3.6. It should be noted that this is not an exhaustive list. The applicable criteria may depend on the nature of the enforcement action that is envisaged. There may be cases in which other considerations are applicable. Likewise, it may be that not all of the above criteria are applicable in every case.

### **Enforcement and industry code compliance**

3.7. Some licences contain conditions which require the licensee to accede to and to comply with industry codes and agreements.<sup>52</sup> Pursuant to these requirements, breaches of obligations under those industry codes and agreements can also constitute licence breaches and, therefore, are breaches in respect of which Ofgem can take enforcement action under the relevant legislation.

3.8. The code owners and panels<sup>53</sup> have certain powers to bring an end to a breach of the relevant code and to impose sanctions. When considering the merits of launching an investigation and the possibility that enforcement action may be required in respect of any breach that is ultimately found, Ofgem will consider all of the facts. In doing so, it will assess the impact of any timely and suitable action that is being taken under a relevant industry code or agreement.

3.9. Where the Authority is satisfied that a company is no longer contravening or likely to contravene a relevant condition, it cannot impose an enforcement order to secure compliance. Therefore, appropriate action in such circumstances by the code owners or panels may lead Ofgem not to exercise its discretionary investigative powers as it could not take such enforcement action.

3.10. However, the sanctions which can be applied pursuant to industry codes and agreements for a breach of their terms do not include financial penalties. Such penalties can be imposed by the Authority where it finds a company to be in contravention of a term of its licence. As explained in its statement of policy with respect to financial penalties, a penalty is more likely to be imposed where the contravention has damaged the interests of consumers or other market participants or where to do so would be likely to deter future breaches. In such cases, Ofgem may use its investigative powers and may impose a financial penalty against a company even where a breach is no longer anticipated or continuing and/or code compliance mechanisms have been or are being pursued. Again, in considering such action, it will take into account the general criteria outlined above, as well as the impact of any sanction applied, or expected to be applied, by the relevant code administrative body.

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<sup>52</sup> For example, the Balancing and Settlement Code, the Connection and Use of System Code, the Uniform Network Code, or the System Operator – Transmission Owner Code.

<sup>53</sup> Code owners are network operators required by licence to provide codes or agreements. Panels are comprised of consumer and industry representatives and are responsible for administering the code.

## 4. The investigation and decision making process

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### **Chapter Summary**

The purpose of this section is to provide an overview of the key stages of Ofgem's investigation and decision making process.

4.1. When Ofgem has received or is assessing a complaint, it may contact the company that is the subject of the complaint to ask them to clarify details of the complaint or allegation or to provide information in order that Ofgem might consider whether there is a case to answer.

4.2. Prompt responses at this stage may mean that the complaint can be dealt with swiftly and it might also avoid the need to use formal powers.

### **Notification of an investigation**

4.3. Should Ofgem decide to proceed to a formal investigation, it will inform the complainant and provide details of the Ofgem contact.

4.4. It will also write to the company being investigated providing as full details as possible of the allegations and of the focus of the investigation. A provisional timeline for the key steps of the investigation will be included but this may alter as the investigation progresses. The Ofgem contact (usually from the Enforcement and Competition Policy team), whose details will be provided, can be contacted for further details or updates on the progress of the investigation.

4.5. Ofgem will generally publish brief details of the fact and nature of the investigation on the Ofgem website.<sup>54</sup>

### **Information gathering**

4.6. Ofgem has formal powers under various legislation (see section 1) to require the provision of information by any person. It may need to issue several information

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<sup>54</sup> Except in cases where this may adversely affect the investigation. For example, where it may prejudice Ofgem's ability to collect information or where to do so may be adverse to the interest of consumers.

requests in the course of an investigation. However, it will avoid requesting the same information more than once without good reason.<sup>55</sup>

4.7. Ofgem will also seek to be as clear as possible in these information requests. However, if companies that receive information requests have further questions or wish to clarify their understanding, the Ofgem contact can help. Ofgem will inform the recipient in writing of how such information should be submitted.

4.8. Ofgem will take any failure to comply with an information request within the prescribed timescales very seriously. Under the Gas Act 1986 and the Electricity Act 1989 a person who without reasonable excuse fails to provide information required of him may be guilty of an offence and liable on summary conviction to a fine not exceeding level five on the standard scale.<sup>56</sup> Under the Competition Act, a person is guilty of an offence if he fails to comply with a request for information.<sup>57</sup> The penalty on summary conviction is a fine not exceeding the statutory maximum or an unlimited fine on conviction on indictment. Where the recipient of an information request has good reason to believe that they will be unable to supply the requested information within the specified time, they should contact Ofgem in writing at the earliest possible opportunity. Ofgem may grant an extension to the specified time and will consider whether it would be reasonable to do so on a case by case basis.

### **Progressing the investigation**

4.9. Ofgem will keep both the company being investigated and the complainant updated on the progress of the investigation on a quarterly basis. Additional updates can be provided by the Ofgem contact on request.

4.10. Within 9 months of launching an investigation, Ofgem intends to do one of the following:

- issue a detailed statement of the case against the company being investigated (in the form of a Statement of Objections (notice of a decision) for investigations under the Competition Act 1998 or a statement of case for investigations under the Gas Act 1986 and Electricity Act 1989); or
- close the case explaining its reasons for no finding of breach or infringement, or close the case for reasons of administrative priorities; or
- update the company being investigated of the expected timescale for one of

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<sup>55</sup> For example, where a company fails to provide in full the information requested then we may request the same information again.

<sup>56</sup> See section 38(2) of the Gas Act 1986 and section 28(4) of the Electricity Act. The standard scale is the scale established under section 37 of the Criminal Justice Act 1982 for England and Wales and by section 225 of the Criminal Procedure (Scotland) Act 1995, both Acts as amended (level 5 is £5,000).

<sup>57</sup> See section 42(1) of the Competition Act 1998. Under Section 26 of the Competition Act 1998 Ofgem may require any person to produce to it a specified document, or provide it with specified information, which it considers relates to any matter relevant to the investigation.

the above.

4.11. Ofgem will aim to achieve the above in shorter timescales where possible, taking into account the need to follow the appropriate processes and procedures. It considers that a 9 month target achieves a suitable balance between speed and the need for due process.

4.12. A different type of procedure applies to investigations under Part 8 of the Enterprise Act, outlined in paragraphs 4.55-4.65.

## **Feedback**

4.13. At the end of a formal investigation Ofgem may request feedback on the process from the complainant and the company investigated.

## **Gas and Electricity Acts**

### **Investigation**

4.14. When a formal investigation is commenced, this will normally be recorded on Ofgem's website. Investigations under the Gas and Electricity Acts will focus on particular licensees rather than on the whole company or group.

4.15. A decision may be taken at any stage of the investigation not to pursue the case further on grounds of administrative priority, either because the breach is trivial or because it appears that the company has taken or is taking appropriate steps to secure compliance.

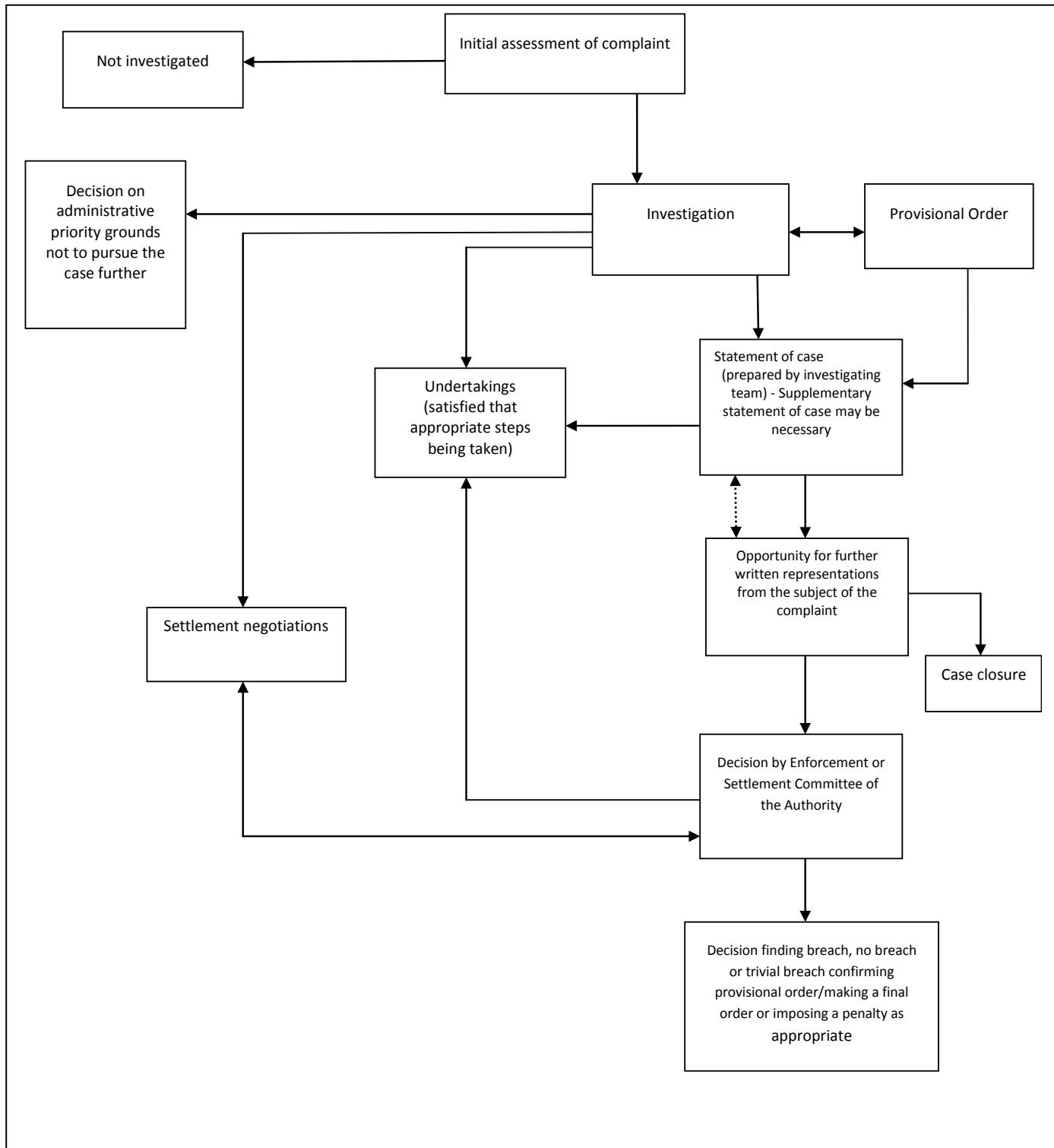
4.16. Where it is found that there has been or is a continuing breach but it appears that appropriate steps have been or are being taken to secure compliance, the Authority is not required to make a final order or confirm a Provisional Order. Instead, the Authority may serve notice on the licensee that it is satisfied that appropriate steps are being taken<sup>58</sup> and if such a decision is made, will publish that notice. However, the Authority may decide to continue the investigation in respect of past breaches and to impose a financial penalty.

4.17. An indication of the possible outcomes and the likely stages are described below and outlined in the following flowchart:

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<sup>58</sup> Section 28(5A)(a) & Section 6 Gas Act 1986 and Section 25(5A)(a) & Section 6 Electricity Act 1989.

### Gas and Electricity Acts – investigation process



## **Provisional Order**

4.18. The Authority has the power to make a Provisional Order requiring a company to either stop doing something or to require it to do something<sup>59</sup>. A Provisional Order may be made at any stage before a final decision has been made on any concerns about ongoing or future breaches. Such an Order is similar to an injunction issued by the Court before a final hearing.

4.19. The factors which may lead to the making of a Provisional Order generally include where appropriate steps are not being taken to secure compliance, where behaviour needs to be stopped as soon as possible or where there is detriment being suffered by consumers that needs to be stopped.

4.20. Where appropriate, Ofgem may permit written representations prior to issuing a provisional order. However, there may be circumstances (such as where an ongoing or likely contravention requires immediate intervention to prevent detriment to consumers or competition) in which it may be necessary or appropriate for the Authority to make a provisional order without formal representations from the party concerned.

4.21. A provisional order will cease to have effect after a maximum of 3 months unless it is subsequently confirmed. A Provisional Order may be confirmed with or without changes. The circumstances when a Provisional Order may be confirmed include if the company is continuing to commit breaches or where Ofgem suspect future breaches are likely.

## **Undertakings**

4.22. Where it considers it appropriate, Ofgem may discuss with the company the possibility of accepting undertakings to comply with a particular licence condition (or other agreed action, such as licence modifications), as an alternative to formal enforcement action. These can be raised at any point. Failure to comply with such undertakings or agreed action may lead to further action and/or a more serious view being taken of any subsequent breach.

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<sup>59</sup> See sections 28(3) Gas Act 1986 and 25(3) Electricity Act 1989

## The Decision Maker

4.23. Decisions on breaches or infringements, the use of its enforcement powers under relevant legislation<sup>60</sup> and the imposition of penalties<sup>61</sup> are matters reserved for the Authority. Where not taken by the full Authority, decisions are generally taken by a Committee of the Authority, known as an Enforcement Committee. These Committees comprise a majority of non-executive members and are chaired by a non-executive member. The company under investigation will be told about the membership of the Enforcement Committee which will hear its case once the committee is established.

4.24. The Enforcement Committee forms an independent view on the recommendation of Ofgem staff who have carried out the investigation.

4.25. Decision-making on breaches may also be delegated to senior Ofgem officials. Any delegation of decision-making will be made in accordance with the Authority's rules of procedure.<sup>62</sup> Again, the decision maker will be independent of the investigation team. Where delegation of decision-making has been sought, Ofgem will confirm this in writing with the party subject to the investigation. It will also explain any relevant terms of the delegation that has been granted.

## Settlement Procedure

4.26. The Settlement Procedure enables Ofgem to work with the company subject to the investigation to bring the case to an early resolution by agreement. Settlement results in a lower penalty than would likely be imposed by an Enforcement Committee, and may take place at any stage of an investigation. However, Ofgem is less likely to engage in settlement in the final stages of the investigation, when the focus is on presenting its conclusions to the Enforcement Committee. The sooner settlement is reached the more significant any reduction in penalty is likely to be.

4.27. Ofgem is open to requests from companies to enter into settlement negotiations. However, it will decide whether it is appropriate for the case to proceed through the settlement procedure. It is important to remember that it may not be desirable to reach an early resolution in all cases, and that Ofgem may decide that a case is not suitable for settlement. Cases that may be suitable for settlement will be considered against a range of factors.

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<sup>60</sup> This includes the imposition or confirmation of enforcement orders under the Gas and Electricity Acts, infringement decisions under the Competition Act and the exercise of enforcement powers under Part 8 of the Enterprise Act. See paragraphs 14, 15, 20 & 29 of the Schedule to the Rules of Procedure of the Gas and Electricity Markets Authority, <http://www.ofgem.gov.uk/About%20us/Documents1/Ofgem%20Rules%20of%20Procedure.pdf>

<sup>61</sup> See paragraphs 19 and 26 of the Schedule to the Rules of Procedure of the Gas and Electricity Markets Authority, <http://www.ofgem.gov.uk/About%20us/Documents1/Ofgem%20Rules%20of%20Procedure.pdf>

<sup>62</sup> For further information on the circumstances under which decision making may be delegated, see the Rules of Procedure of the Gas and Electricity Markets Authority, <http://www.ofgem.gov.uk/About%20us/Documents1/Ofgem%20Rules%20of%20Procedure.pdf>

4.28. Before starting discussions, Ofgem will need to be satisfied that it has sufficient information to enable it to assess the nature and extent of the breaches, the likely detriment caused, and the level of penalty that might be appropriate.

4.29. Settlement discussions will usually be held by the Enforcement and Competition Policy team responsible for the investigation. They will have a good understanding of the issues involved and will be able to direct the discussions accordingly.

4.30. The aim of settlement is to reach agreement on the nature and extent of breaches, an appropriate level of penalty and proposals for reparation. Ofgem may agree other terms with the company as part of settlement. Where agreement is reached on the breaches, it will seek to agree the amount of the financial penalty or reparation to be recommended to the Settlement Committee. Ofgem will have regard to its Statement of Policy with respect to financial penalties<sup>63</sup> when agreeing the level of penalty.

4.31. Settlement discussions will be conducted on a "without prejudice" basis. This means that if negotiations break down, neither party can rely on admissions or statements made during the settlement discussions in any subsequent Enforcement Committee hearing.

4.32. Where agreement is reached with a company, the investigating team will make a recommendation for early resolution to a Settlement Committee. In all cases, such a recommendation will mean that the case is considered on the papers by a Settlement Committee of the Authority. The Settlement Committee comprises one executive and one non-executive member of the Authority. The Settlement Committee will consider the terms proposed to bring the case to an early resolution. The Committee may accept or reject the terms, or require changes as a condition of agreement.

4.33. Members of the Settlement Committee in a particular case may not later sit as members of the Enforcement Committee for the same case (see paragraphs 4.23-4.25). This means that if settlement discussions break down, the case will be considered afresh by Authority members who have had no involvement in early resolution discussions and will not know the content of the settlement discussions.

### **Statement of case**

4.34. Where the investigating case team considers that there is or has been a breach, it will prepare a statement of case explaining its initial findings. The purpose of this is to set out the relevant facts and the case against the licence holder and to seek the licence holder's views. The company will have an opportunity to respond in

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<sup>63</sup> <http://www.ofgem.gov.uk/About%20us/Documents1/Utilities%20Act%20-20Statement%20of%20policy%20with%20respect%20to%20financial%20penalties.pdf>

writing. The period of time permitted will depend upon the facts and complexity of the case. However, Ofgem generally expects to allow 21 days.

4.35. Prior to or at the point of issuing a statement of case, Ofgem will set out the process it intends to follow. It will also update the licence holder, if changes to the process are subsequently deemed appropriate.

4.36. Following the written representations, the case team may decide there is insufficient evidence of a breach and may close the case. Alternatively it may remain persuaded of a breach but consider that it is necessary to amend its initial findings and prepare a supplementary statement of case. In these circumstances it will provide the licence holder with a further opportunity to make representations.

### **Oral Representations**

4.37. Following the final written representations on the statement of case(s), all companies will have an opportunity to make oral representations to the decision-maker at a hearing. The company will be asked to indicate in its written response to the statement of case, whether it wishes to exercise this option. There is no obligation to make oral representations and a company might decide (in the interests of expediency or to save costs) that it does not wish to do so. If it does wish to make representations, hearing with the decision-maker will be arranged. Ofgem would normally expect representatives to include senior members of the company's management team.

4.38. Save in exceptional circumstances, the company should not introduce any new material at the oral hearing which was not submitted in its written response to Ofgem's statement of case. The agreement of the Enforcement Committee will be required before such material is introduced.

4.39. The form and duration of such a hearing will be determined by the decision-maker taking account of all circumstances of the case.

4.40. Where a company has exercised its option to make oral representations on the statement of case only those members of the Authority who were present at the oral hearing will be involved in the Authority's final decision on whether to impose the proposed financial penalty.

### **Decision-making**

4.41. Following any oral representations (or if oral representations are not made, following consideration of the written representations) the decision-maker will consider whether the company being investigated has contravened, is contravening or is likely to contravene, a licence condition or relevant requirement. The decision-maker may find that no such contravention has occurred. The company will be informed of the case closure and a statement will be published on Ofgem's website. Alternatively, the decision-maker may find that there is or has been or is likely to be

a contravention of a licence condition or relevant requirement. In this case, Ofgem will publish a notice on its website setting out the basis for that decision and the proposed action, which may be one or more of the following:

- a. finding a breach is ongoing, or likely to occur and that the Authority proposes to confirm a provisional order or make a final order;
- b. finding a breach has occurred (or is ongoing) and that the Authority intends to impose a financial penalty;
- c. finding a breach has occurred, but the Authority does not intend to impose a financial penalty.

*a) Making a Final Order or confirming a Provisional Order*

4.42. Where the Authority is satisfied that the contravention is ongoing or is likely to occur, it shall confirm any relevant provisional order or make a final order to bring the breach to an end. The Authority is not required to make an order if it is satisfied that the company has agreed to take the necessary steps to secure compliance or that the breach is trivial. Where the Authority proposes to make or confirm an order it will issue a Notice. The Notice will set out:

- that the Authority proposes to make or confirm an order;
- the relevant condition or requirement with which it seeks compliance and the acts or omissions which, in its opinion, constitute contraventions of it, and any other facts justifying the making or confirmation of the order; and
- the time (not less than 21 days) for representations or objections to be made.

4.43. Following the close of the consultation the Authority will consider all the representations that are made and decide whether to confirm or make the order.

*b) Imposing a Financial Penalty*

4.44. The decision-maker may impose a financial penalty where a contravention is ongoing or has occurred. It may not impose a financial penalty for a contravention that is likely to occur.<sup>64</sup> It will issue a notice, which will: state the amount of the intended penalty; set out the relevant conditions, relevant requirements or standards of performance in question; and explain which acts or omissions, in the opinion of the Authority, constitute the contravention or failure.

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<sup>64</sup> The procedure relating to the imposition of a financial penalty is set out in section 30A of the Gas Act 1986 and section 27A of the Electricity Act 1989

4.45. A minimum of 21 days must be allowed for the making of written representations and objections.<sup>65</sup> The precise timeframe will depend on the circumstances of the case.

4.46. Following the close of the consultation period the Authority will consider all the representations and objections that have been made and will decide whether or not to impose, vary or withdraw the proposed financial penalty.

### **Appeals**

4.47. Where a company is aggrieved by the imposition of a penalty, the amount of the penalty, or the date by which the penalty is required to be paid, the company may make an application to the court (see paragraph 1.7 above).

### **Competition Act<sup>66</sup>**

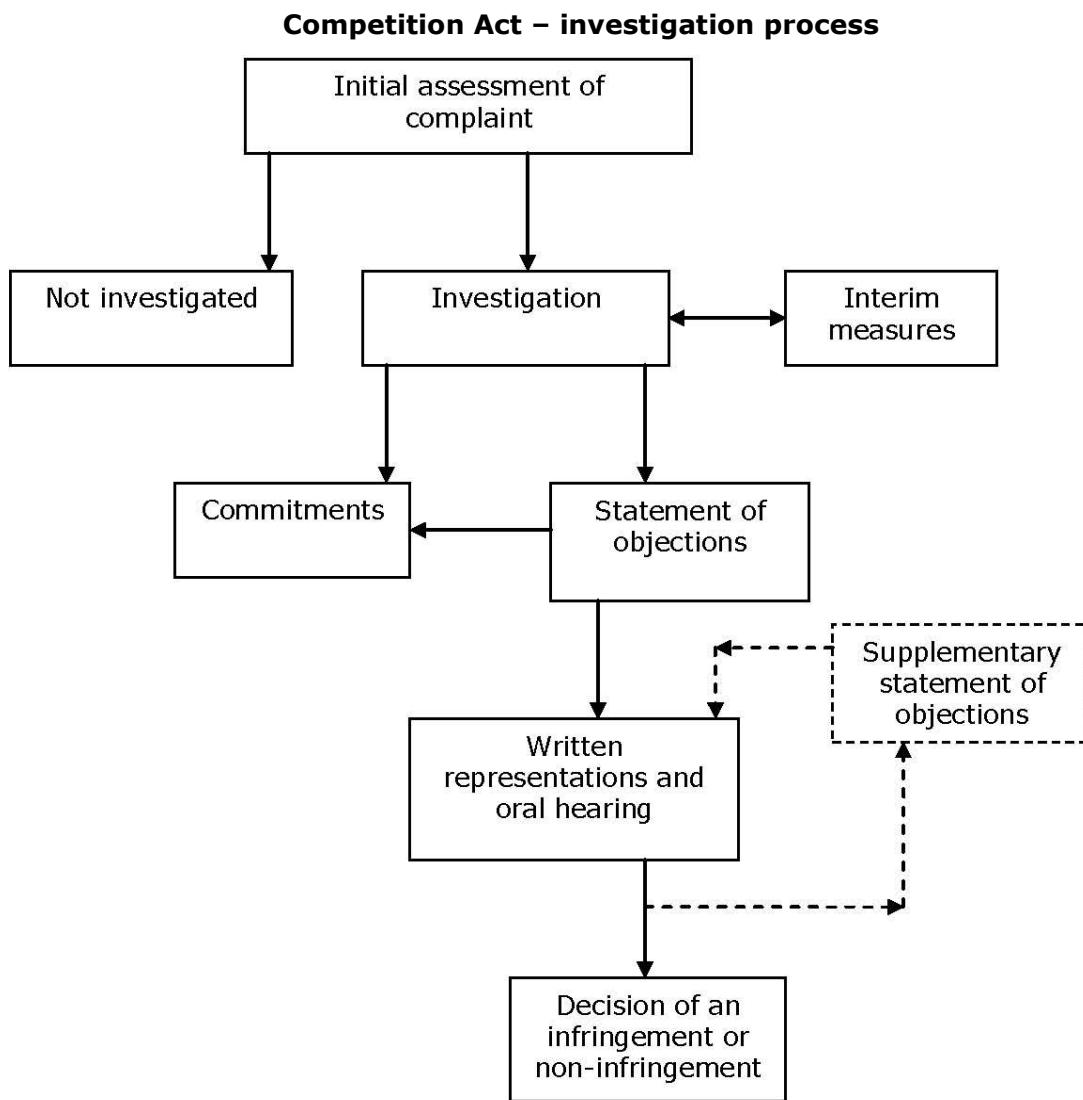
4.48. The main stages of the process under the Competition Act and possible outcomes are described below and outlined in the following flow chart. For a more detailed guide to the Competition Act and its application, see the OFT's competition law guideline, "Application to the energy sector".<sup>67</sup>

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<sup>65</sup> See section 27A(4)(b) of the Electricity Act 1989 and section 30A(3)(d) of the Gas Act 1986. The timescales within which the Authority must impose a financial penalty are laid out in section 30C of the Gas Act and section 27C of the Electricity Act.

<sup>66</sup> In accordance with Regulation 1/2003, the same procedures will apply if we are applying Articles 101 or 102 of TFEU

<sup>67</sup> OFT competition law guideline, "Application to the energy sector",  
[http://www.oft.gov.uk/shared\\_oft/business\\_leaflets/ca98\\_guidelines/oft428.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft428.pdf)



## Investigation

4.49. If Ofgem is satisfied that there are reasonable grounds for suspecting that the prohibitions of the Competition Act have been infringed,<sup>68</sup> then it may launch a formal investigation and consideration will be given to the use of the investigative powers under the Competition Act to obtain information.

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<sup>68</sup> Section 25, Competition Act 1998

## **Interim measures**

4.50. In certain urgent circumstances (e.g. where there is a real danger of serious permanent harm to a particular business), Ofgem may require a company to comply with a temporary order (e.g. to stop certain conduct) while it completes its investigation. Further information on interim measures can be found in Chapter 3 of the OFT's competition law guidance, "Enforcement".<sup>69</sup>

## **Commitments**

4.51. Ofgem may accept binding commitments from undertakings suspected of infringing the Competition Act. Ofgem is required to have regard to the OFT's guidance when considering whether to accept commitments.<sup>70</sup> Ofgem is only likely to accept commitments in cases where the competition concerns are readily identifiable, where the concerns are fully addressed by the commitments offered and the commitments are capable of being implemented effectively.<sup>71</sup> Ofgem may accept commitments in respect of some of its competition concerns and continue its investigation in respect of other concerns arising from the same agreement or conduct.

## **Statement of Objections and representations**

4.52. Where Ofgem proposes to make an infringement decision, it will set out its case in a "Statement of Objections",<sup>72</sup> which will be issued to the relevant companies and they will have the opportunity to make written representations and oral representations<sup>73</sup> in response. It may be necessary to issue a supplementary statement of objections in some cases.

## **Decision**

4.53. Following any representations and the oral hearing, the decision-maker will consider the evidence, including the written and oral representations, and make a final decision either to uphold an infringement of the Competition Act 1998 or to find that no such infringement has occurred. The company will be informed of the decision and a statement will be published on Ofgem's website. If an infringement decision is made, the decision-maker will also decide whether to impose directions

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<sup>69</sup> [http://www.oft.gov.uk/shared\\_oft/business\\_leaflets/ca98\\_guidelines/oft407.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft407.pdf)

<sup>70</sup> OFT Competition law guidance, Enforcement,

[http://www.oft.gov.uk/shared\\_oft/business\\_leaflets/ca98\\_guidelines/oft407.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft407.pdf)

<sup>71</sup> Ofgem will not, other than in exceptional circumstances, accept commitments in cases involving cartels which include price-fixing, bid-rigging, output restrictions or quotas, sharing or dividing markets or cases involving the serious abuse of a dominant position.

<sup>72</sup> See rule 4, The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, Statutory Instrument 2004 No. 2751

<sup>73</sup> In conformity with the practice of other Competition Authorities, the oral representations will be chaired by a senior Ofgem official, who has not been involved in the investigation.

and/or a financial penalty, and if so, decide the content of the directions and level of the penalty and inform the party or parties concerned.<sup>74</sup>

## Appeals

4.54. Competition Act decisions may be appealed to a specialist tribunal, the Competition Appeal Tribunal (the CAT), established under the Enterprise Act 2002. Appealable decisions include, among others, infringement decisions, non-infringement decisions, directions and the imposition of financial penalties (see paragraph 1.14 above).

## Consumer legislation<sup>75</sup>

4.55. Part 8 of the Enterprise Act establishes a consistent enforcement regime within the UK to improve the protection of consumers. Enforcers, including Ofgem have powers to accept binding undertakings and to obtain court orders against companies infringing the wide range of consumer protection legislation, set out in paragraphs 1.24 to 1.27. In particular, Ofgem may take Part 8 enforcement action against misleading, aggressive or otherwise unfair commercial practices under the Consumer Protection from Unfair Trading Regulations 2008.

4.56. Part 8 only applies to an infringement which harms or has the potential to harm the collective interests of consumers; it is not a means of pursuing individual redress.

4.57. Generally, the Enterprise Act regime will involve a series of contacts with the company (by letter, telephone, and / or face to face) in attempts to secure compliance before undertakings or an Enforcement Order is considered (unless the matter is considered urgent and a more speedy approach is required).

4.58. The Enterprise Act also makes certain periods of consultation between Ofgem and the company mandatory:

- Where Ofgem wishes to seek an Enforcement Order a minimum of 14 days must be allowed for consultation with the business,
- If Ofgem wishes to apply for an interim order a minimum of 7 days must be allowed for consultation with the business.<sup>76</sup>

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<sup>74</sup> See the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, Statutory Instrument 2004 No. 2751, <http://www.opsi.gov.uk/si/si2004/20042751.htm> and sections 32, 33 and 36 of the Competition Act 1998.

<sup>75</sup> See the OFT's guideline, Enforcement of Consumer Protection Legislation, Guidance on Part 8 of the Enterprise Act, [http://www.oft.gov.uk/shared\\_oft/business\\_leaflets/enterprise\\_act/oft512.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft512.pdf)

<sup>76</sup> Section 214 of the Competition Act 1998.

4.59. In some situations it may be necessary to formally request information. For example, details of the company's own records regarding customer complaints might assist in the assessment of "harm to the collective interests of consumers". This power is available under s.225 of the Enterprise Act and a notice can be served on any person.

4.60. If compliance cannot be secured at an initial stage, it may be necessary for Ofgem to seek undertakings instead of applying for a court order.

4.61. Ofgem may accept undertakings from a company that has engaged, or is engaging, in behaviour that infringes or that is likely to infringe, the various consumer protection legislation it enforces. Ofgem does not have powers to require the company to provide individual redress to consumers through undertakings nor can it impose a financial penalty. An undertaking may require the company:

- to stop or not to repeat the behaviour, or
- not to behave in a particular way in the course of its business, or
- not to consent to or connive with another body corporate in the carrying out of a particular behaviour.

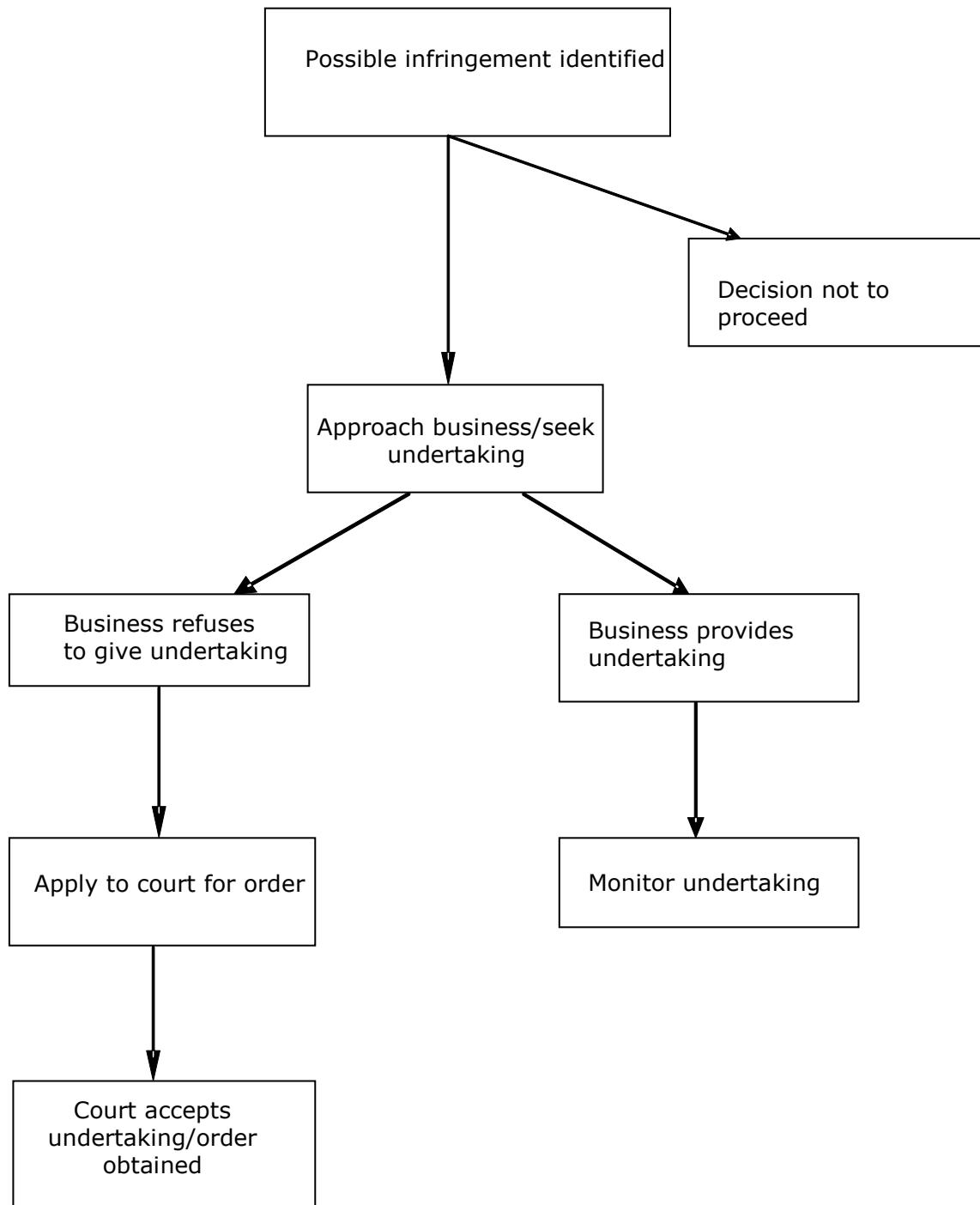
4.62. Ofgem will usually publicise undertakings (after taking account of the appropriate confidentiality considerations under Part 9 of the Act) on its website.

4.63. If the company does not comply with an undertaking, Ofgem would consider whether to seek an order from the Court. It is obliged to consult the OFT before applying for a Court order. Ofgem would draw the Court's attention to the breach of the undertakings and the court would have regard to this when determining whether to make an Enforcement Order.

4.64. Where proceedings are brought against a company, the company will be informed about the proceedings and will have an opportunity to dispute the Authority's case and to make representations to the court. The court may accept an undertaking from the company instead of making an Enforcement Order/injunction. As part of the undertakings given to the court, the business may be required to publish, in a manner the court considers appropriate, the terms of the undertaking and a corrective statement. A subsequent breach of an undertaking given to the court could result in contempt of court proceedings.

4.65. An outline of the procedure Ofgem will follow when taking action under Part 8 is provided in the flowchart below:

**Part 8 of the Enterprise Act 2002 – investigation process**



# Appendices

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## Appendix 1 - Consultation Response and Questions

1.1. Ofgem would like to hear the views of interested parties in relation to any of the issues set out in this document.

1.2. We would especially welcome responses to the specific question below.

1.3. Responses should be received by Anna Stacey and should be sent to:

- Anna Stacey
- Enforcement and Competition Policy
- 9 Millbank - SW1P 3GE - London
- 020 7901 7000
- enforcementguidelines@ofgem.gov.uk

1.4. Unless marked confidential, all responses will be published by placing them in Ofgem's library and on its website [www.ofgem.gov.uk](http://www.ofgem.gov.uk). Respondents may request that their response is kept confidential. Ofgem shall respect this request, subject to any obligations to disclose information, for example, under the Freedom of Information Act 2000 or the Environmental Information Regulations 2004.

1.5. Respondents who wish to have their responses remain confidential should clearly mark the document/s to that effect and include the reasons for confidentiality. It would be helpful if responses could be submitted both electronically and in writing. Respondents are asked to put any confidential material in the appendices to their responses.

1.6. Next steps: Having considered the responses to this consultation, Ofgem intends to publish a revised version of the enforcement guidelines. Any questions on this document should, in the first instance, be directed to:

- Anna Stacey
- Enforcement and Competition Policy
- 9 Millbank - SW1P 3GE - London
- 020 7901 7000
- enforcementguidelines@ofgem.gov.uk

### **Consultation Question**

Do you have any comments on these guidelines and in relation to the changes proposed to them? Please give reasons for your answer, giving examples where possible.

## Appendix 2 – Glossary

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### C

#### Competition Act 1998

The Act prohibits anti-competitive agreements and the abuse of a dominant position. Under the Act, Ofgem has the power to investigate alleged breaches of the Act and can take enforcement action, such as ordering that offending agreements or conduct be stopped and imposing financial penalties.

#### Competition Appeal Tribunal (CAT)

The CAT is a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy. Under United Kingdom law, the function of the CAT is to hear and decide appeals and other applications or claims involving competition or economic regulatory issues.

#### Competition Commission (CC)

The CC is an independent public body which conducts in-depth inquiries into mergers, markets and the regulation of the major regulated industries.

### E

#### Energy Supply Ombudsman (ESO)

The ESO provides a free and independent service. If a consumer has a problem sorting out a complaint with an energy supplier, it may be able to help. The Ombudsman is the person who decides what action should be taken when a consumer and an energy supplier can't agree.

#### Enterprise Act 2002

The Act made a number of important reforms, designed to crack down on abuses that harm customers and fair-trading businesses alike and thus encourage productivity and enterprise. Included in the Act are provisions relating to market investigation references, super complaints and the enforcement of consumer legislation.

### O

#### Office of Fair Trading (OFT)

The OFT is the UK's consumer and competition authority. Its mission is to make markets work well for consumers.

## Appendix 3 - Feedback Questionnaire

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1.1. Ofgem considers that consultation is at the heart of good policy development. We are keen to consider any comments or complaints about the manner in which this consultation has been conducted. In any case we would be keen to get your answers to the following questions:

- 1.** Do you have any comments about the overall process, which was adopted for this consultation?
- 2.** Do you have any comments about the overall tone and content of the report?
- 3.** Was the report easy to read and understand, could it have been better written?
- 4.** To what extent did the report's conclusions provide a balanced view?
- 5.** To what extent did the report make reasoned recommendations for improvement?
- 6.** Please add any further comments?

1.2. Please send your comments to:

**Andrew MacFaul**  
Consultation Co-ordinator  
Ofgem  
9 Millbank  
London  
SW1P 3GE  
[andrew.macfaul@ofgem.gov.uk](mailto:andrew.macfaul@ofgem.gov.uk)