



Joanna Whittington
Partner
Ofgem
9 Millbank
London
SW1P 3GE

Inveralmond House
200 Dunkeld Road
Perth
PH1 3AQ

29 August 2013
lesley.gray@sse.com
01738 516854

Dear Joanna,

Consultation on our proposed REMIT penalties statement and procedural guidelines

Thank you for the opportunity to respond to Ofgem's consultation published on 6 June. SSE finds Ofgem's proposals to be broadly agreeable, subject to the issues that are highlighted in this response.

We note that Ofgem is currently conducting a review of its approach to enforcement generally and that a further consultation will be published in due course. We also note that the findings from the Enforcement Review will apply to Ofgem's REMIT enforcement unless there is a good reason for them not to. SSE welcomes consistency in Ofgem's regulatory decision making, however would suggest that any changes to Ofgem's approach that are identified and implemented through the Enforcement Review are also separately communicated to those stakeholders with an interest in REMIT, as the audiences following the Enforcement Review and REMIT may not necessarily be the same.

Key Issues

Before addressing Ofgem's specific questions, SSE would like to flag what it sees as being the key considerations for the development of the REMIT enforcement approach:

Consistency

As noted above, SSE welcomes consistency in regulatory decision making. This helps safeguard legal certainty for regulated parties. Ofgem seeks to ensure consistency by aligning its approach with its own current approach to enforcement. While SSE does not disagree with

this, particularly in light of the fact that Ofgem is currently reviewing how to improve the impartiality of its enforcement decision making as part of the Enforcement Review, e.g. through the introduction of a permanent Enforcement Panel, SSE is concerned to ensure that Ofgem's approach to REMIT enforcement is also consistent with that of the FCA and other NRAs. There are three aspects to this. First, Ofgem's interpretation of REMIT should be consistent with that of other NRAs and with ACER. A regulated party should not be facing conflicting standards for compliance under REMIT. Second, that regulated parties have certainty that they will receive consistent treatment by Ofgem in relation to an identified breach, particularly in cases where other parties have also committed similar breaches. Last, Ofgem's approach to enforcing REMIT, while being consistent with its own general approach to regulatory enforcement, should also align with that of the FCA and other NRAs insofar as is practicable.

In relation to the last of these aspects, an example of where Ofgem's proposed approach does not align with that of the FCA can be seen in relation to publication of investigations. In paragraph 5.6 of the proposed Guidelines, Ofgem makes clear that it will publish investigations into REMIT compliance. In contrast, section 6 of the FCA's Enforcement Guide sets out that the FCA will not make public the fact that it is or is not investigating a particular matter, except in the exceptional circumstances listed in the Guide (e.g. in relation to a takeover bid). SSE considers that this approach should also be adopted by Ofgem. This approach is a fairer approach for the regulated party, particularly in the case where action is being taken against an individual. This kind of publicity will have an adverse impact on the party concerned, which is an unfair outcome where it is found that no breach has occurred. Furthermore, SSE considers that Ofgem may not be best placed to judge what effect such an announcement may have on the relevant market – and that damage could be caused to market participants or to market confidence, which may not have been foreseeable at the time of publicising an investigation.

Whilst SSE agrees in principle that Ofgem should model its approach on its guidance for licence and competition breaches, we think there is still room to explore how consistency can be achieved with other regulatory approaches. SSE therefore welcomes Ofgem's comment that it will be considering the FCA's approach to imposing a penalty as part of the ongoing enforcement review.

Concurrency Rules/Double Jeopardy

Ofgem refers, in a number of places, to its relationship with the FCA and other NRAs and the fact that it will cooperate/provide assistance to these other enforcement bodies. However, unlike in the case of Competition law breaches, there does not appear to be any formal

concurrency arrangements in place to govern how this relationship will work in practice. It is important to ensure that regulated parties do not face duplicate action from different enforcement bodies and that the body that is best placed to act in relation to a particular case of an alleged breach of REMIT leads the enforcement response.

SSE recognises that there are provisions in place to prevent duplicate actions (for example, a relevant factor for deciding whether an issue is a priority matter includes “*whether action has already been taken, or is to be taken by another body*”), however there needs to be a more formalised arrangement to prevent the same issue being considered by two different enforcement bodies. This is important from the perspective of legal certainty and fairness.

Response to the Consultation Questions

Q1: Do stakeholders agree that modelling its approach to REMIT enforcement on Ofgem’s existing enforcement approach is desirable?

Subject to the comments relating to consistency above, SSE agrees that this approach to desirable.

Q2: Are the regulatory objectives that the Authority proposes to promote in the exercise of its REMIT powers appropriate? Should any other objectives be included?

SSE agrees with the objectives set out. A further objective we would suggest is as follows:

“to ensure that market participants and final consumers of energy can expect a consistent approach to the regulation of REMIT as market participants and final consumers of energy would receive in other EU countries.”

Q3: Are the factors that we propose to consider in deciding whether to launch REMIT investigations appropriate? Should any other factors be included?

SSE agrees that the factors set out are appropriate.

Q4: Does the proposed process for REMIT investigations strike an appropriate balance between fairness to those being investigated and ensuring the effectiveness of the Authority’s investigations (bearing in mind particularly the requirements of DECC’s regulations in relation to warning and decision notices)?

SSE feels that the following areas could be improved:

Publicity - As discussed in our introductory comments above, SSE considers that Ofgem should align its approach to publicity with that of the FCA. The current proposal to publicise the investigation may have unfair impacts on the regulated party, particularly if they are an individual. Further, it may not be immediately obvious to Ofgem of the effect that publication may have on the market.

In relation to any published notices, and particularly press releases, SSE believes that the drafting of these should be the responsibility of the office of the Enforcement Committee, rather than the investigative team. This is necessary to safeguard the impartiality of messaging to the general public through the media. The same team should be responsible for drafting all publicity notices, regardless of whether these relate to a settled or a contested case. What should not be allowed, in any enforcement context, is a position whereby a regulated party can effectively “buy” sympathetic press coverage through settlement. In all cases, regardless of how the matter reached an outcome, parties should have equal comfort that they will receive fair, proportionate treatment from the Authority where the case is being publicised.

Statement of Case- Under the current process, Ofgem is given 9 months (or more) to investigate and prepare a Statement of Case, whereas the regulated party concerned is generally allowed 21 days to respond to the Statement of Case. In this time, the regulated party will require to: fully review the Statement of Case; obtain legal advice regarding the alleged breaches; consider the evidence produced by Ofgem; undertake internal investigations; and draft a formal response. 21 days is not nearly enough time, particularly when considering that during the oral Enforcement Hearing, a party is not generally entitled to introduce any further material (see para. 5.35) and that there is no formal process for adjustment of the written case except in the scenario where a Supplementary Statement of Case has been issued. A party must be given a fair opportunity to prepare a defence. We would suggest that a minimum period of 8 weeks (56 days) is a more appropriate standard period of time, with more complex cases granted an extension, on a case by case basis, where it can be demonstrated by the regulated party that 8 weeks is insufficient.

Oral Representations – It should be made explicit that the regulated party has the right to be legally represented at any oral hearing.

Injunctions/Temporary prohibition of professional activity - Before seeking an injunction from the Court, Ofgem should first provide the regulated party with an opportunity to take steps to voluntarily address the alleged behaviour. Engaging with the party concerned will

enable less onerous options to be explored. If the circumstances do not allow time for formal engagement with the party concerned, then this should be done informally in parallel with the court action to explore whether a voluntary solution could be agreed.

Restitution Orders- It is mentioned in the Penalties Guidance that the penalty imposed will take account of the harm suffered by consumers or other market participants *after taking account of any restitution paid* (para. 4.2). This is the correct approach and a necessary safeguard as it ensures that the regulated party is not required to pay twice for the same harm caused. However, the same safeguard is not included in relation to Restitution Orders. A Restitution Order may be made by the Authority after a penalty has been imposed, however there is no requirement to have regard to the penalty imposed when making the Restitution Order. It should be explicit that Ofgem when making a Restitution Order will take account of the financial penalty – specifically the element of the penalty that has been imposed in relation to the harm that the proposed Restitution Order is intended to address.

Settlement – The settlement procedure is a new concept introduced into the latest (2012) version of Ofgem’s general Enforcement Guidelines. SSE considers that, as a general point, there is a need for Ofgem to ensure that a consistent approach is taken when considering settlement proposals, and to ensure that a party is not unfairly disadvantaged in cases where settlement has not been possible. There needs to be clear visibility regarding how Ofgem and the Settlement Committee will conduct itself during the settlement. Ensuring that, generally, the settlement procedure is made fair and transparent should be considered as part of Ofgem’s wider enforcement review.

Q5: Are the criteria that the Authority proposes to consider in deciding whether to impose a financial penalty appropriate? Should any other criteria be included?

SSE agrees that the criteria set out are appropriate.

Q6: Are the factors that the Authority proposes to consider in determining the amount of a financial penalty appropriate? Should any other factors be included?

SSE agrees that the factors set out are appropriate.

Q7: Does the statement provide sufficient clarity about the factors that the Authority will take into account in relation to imposing financial penalties on individuals?



SSE considers that these factors should be made clearer considering the serious impact that a penalty on an individual would have relative to a company. SSE refers to the FCA guidance in this area (DEPP 6.5C) which is more detailed than Ofgem's guidance. A similar level of detail may be appropriate here. For example, it would be preferable there was more detailed guidance regarding what would be a "reasonable" standard of behaviour.

I hope the foregoing has been helpful. Please feel free to contact me if you have any questions.

Yours sincerely

A handwritten signature in black ink that reads "Lesley Gray".

Lesley Gray
Regulation Manager