

## Ofgem's Enforcement Guidelines

### Decision

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### Overview:

We have reviewed our approach to enforcement. This document represents the outcome of the review in respect of the Enforcement Guidelines. We would like to thank stakeholders for their responses to our consultation, which closed on 23 May 2014.

In this document, we summarise and address the key points made by stakeholders during the consultation. We also outline the final changes to the Enforcement Guidelines that we have decided to make taking into account these comments.



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## Executive Summary

In March 2014, we concluded an in-depth Enforcement Review aimed at maximising the efficiency and impact of our enforcement work. On 28 March, we consulted on proposed revisions to our Enforcement Guidelines.<sup>1</sup>

We have now considered the consultation responses and in this document we set out our position on the key points raised by stakeholders. In summary, we have

- clarified how we will decide whether and what alternatives to enforcement action may be appropriate
- amended and reordered some of the criteria by which we decide whether a matter is a priority for opening an enforcement case (stakeholders should note that the reordering is intended to provide a more logical grouping of closely related criteria and does not indicate a ranking of overall importance)
- clarified that we will usually have dialogue with a supplier before proceeding with enforcement action on Standards of Conduct issues
- made clear that a case is 'open' for the purposes of publicising it once the Enforcement Oversight Board has decided to invest resources in it
- clarified that companies will have an opportunity to engage with the case team on the facts of the case before a Settlement Committee is involved
- decided to proceed with the new decision-making framework including being clear that in sectoral cases the early settlement window will normally be 28 days and that partial settlement or settlement without admission of liability will not be available
- clarified the process for consulting on proposed decisions after a settlement agreement has been signed
- clarified the existing position on the delegation of certain enforcement decisions to senior Ofgem employees
- clarified that a decision by a company not to request to make oral representations in a contested case will not be held against it
- confirmed that any procedural concerns regarding sectoral cases should be raised with the Senior Responsible Officer and
- made some changes to the description of the settlement process for Competition Act 1998 cases to align it more closely with the Competition and Markets Authority's procedures.

In some places, we have made minor amendments to the text of the final Guidelines for clarification purposes or stylistic reasons.

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<sup>1</sup> <https://www.ofgem.gov.uk/ofgem-publications/86887/draftenforcementguidelines28march2014.pdf>.

We have taken full account of the responses in preparing the final version of the Guidelines. We believe that the Guidelines provide a clear and robust framework to support effective enforcement action across the range of our activities.

As part of our consultation on the Guidelines we published proposals on how we would in the future account for our enforcement activities. We proposed to provide companies with provisional and updated case timelines, to produce a balanced scorecard of our cases and to hold regular conferences so that useful dialogue with stakeholders could continue beyond the end of the Enforcement Review. In the light of responses we intend to implement these proposals.

On 31 March 2014, we consulted on our approach to imposing financial penalties and making redress orders under our sectoral powers.<sup>2</sup> We expect to publish our decisions on that consultation in the autumn.

## Introduction

In March 2014 we invited stakeholders' views on proposed revisions to the Guidelines. The table below lists the organisations that responded.

1	National Grid
2	Ecotricity
3	Energy UK
4	SSE
5	UK Power Networks
6	British Gas
7	EDF Energy
8	E.On
9	Npower
10	Northern Gas Networks
11	Scottish Power
12	Citizens' Advice Service

The Guidelines set out our approach to enforcing sectoral, competition and consumer protection legislation and describe the key stages of the investigation process that we will usually follow.

All paragraphs cited in this document refer to the final version of the Guidelines unless otherwise stated.

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<sup>2</sup> <https://www.ofgem.gov.uk/ofgem-publications/86949/penaltiesandredresspolicystatement31march2014.pdf>.

## Section 1 Opening cases and alternative actions

### Summary

We proposed changes to the process by which we decide whether to open or continue a case. We also set out the range of actions we will consider as an alternative to using our statutory enforcement powers. This section summarises the responses to these proposals and sets out the final decisions we have taken.

Stakeholders generally supported our prioritisation criteria for opening and continuing cases but wanted clarity about the weighting and precise meaning of the different criteria. Some stressed the need to gather sufficient evidence of breach before opening a case. Some suggested amendments including additional criteria.

Respondents agreed that the list of potential alternative actions was appropriate. Some said that Ofgem should communicate with the company when considering taking enforcement action. Some sought clarification on:

- whether agreeing to alternative action would require an admission of breach
- whether settling without having to accept a breach was included as an alternative action
- the decision-making process for deciding which enforcement tool to use.

We have made some amendments to the Guidelines to take account of these comments but have decided not to add any additional prioritisation criteria.

### Prioritisation criteria

- 1.1 Respondents broadly supported the prioritisation criteria for deciding whether to open a case and agreed that the changes brought greater transparency. Some asked whether the criteria would be weighted and argued that the extent of any harm to consumers was the most important criterion.
- 1.2 Some respondents said the strength of the evidence should be a key consideration given the risk of unnecessary reputational damage to the companies and the market. Others, however, accepted that it was more efficient for us to undertake the majority of our evidence gathering after opening a case. In this context, stakeholders emphasised that we should open discussions with companies before taking enforcement action. Several respondents suggested amendments to the criteria.
- 1.3 A number of stakeholders sought confirmation that we would be consulting on the annual priorities and one asked whether any changes in the annual priorities would impact on an existing long running investigation.
- 1.4 *We believe that the prioritisation criteria should not be weighted in any particular way. To do so would remove the flexibility we need to apply them to the many different sorts of cases that we handle.*

- 1.5 *We have however decided to reorder the criteria. The reordering is intended to provide a more logical grouping of closely related criteria and does not indicate a ranking of overall importance. We have made it clear that we will look at the range of factors to decide whether an issue is a priority, in the light of our Enforcement Vision and Strategic Objectives.*
- 1.6 *When we are considering opening a case, such evidence as we have is being assessed to decide whether further investigation is merited. The fact that there is not strong evidence is not necessarily a bar to opening a case since we may be able to obtain other evidence during an investigation. We would expect the more detailed assessment of the strength of the evidence to come later after the investigation has been carried out.*
- 1.7 *We acknowledge that stakeholders may be keen for more preparatory work to take place before a case is opened and made public. Investigations are of course resource-intensive for the regulator and the company concerned. In addition, it is inevitable that some cases will not ultimately result in a finding of wrongdoing. On the other hand, if we were constrained not to open cases unless we had strong evidence, there would be a risk that we would fail to open cases where closer examination using our powers would reveal breaches causing consumer or other harm. It is therefore important to strike the right balance between having enough information or evidence to justify opening a case and preserving our resources for cases that are opened. We consider that the existing proposals achieve this balance and have therefore decided not to amend the guidelines.*
- 1.8 *As we have previously stated<sup>3</sup>, it would be inappropriate to consult with regulated companies about which of their obligations should be targeted by our annual priorities. We do of course consult all stakeholders on our Corporate Strategy and the annual priorities are set in the light of that document. The annual priorities are also (and will continue to be) aligned with our principal objective and Enforcement Vision.*
- 1.9 *Potential new cases will be assessed against the prioritisation criteria, which include the annual priorities in existence at the relevant time. Whilst open cases will be kept under review, it is unlikely that a long running case would be closed solely on the grounds of a change in the annual priorities.*
- 1.10 Respondents suggested additional criteria providing for
- consistency of approach towards companies committing the same or similar breach in order to ensure fair competition in the market
  - a level playing field for all licensees irrespective of size
  - circumstances outside the reasonable control of the licensee which constrained the ability to take remedial action
  - a higher hurdle for enforcement action where the company has already been sanctioned financially (for example, via price control obligations).

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<sup>3</sup> See paragraph 2.43 of our earlier decision document published on 19 November 2013.

- 1.11 *We do not believe it is necessary to restate within the prioritisation criteria our commitment on consistency since this is already set out in paragraph 1.10. Similar but separate cases are rarely identical in all respects and on that basis do not merit identical treatment. Requests that all apparently similar breaches by industry players should be treated identically do not take account of multiple factors eg. the different reasons behind the breach, the compliance history of the parties concerned, their actions once the breach became apparent, or how the size of a licensee may affect the amount of harm or potential harm caused. These factors affect our decision about the appropriate way forward, and it may not be an efficient use of our resources to investigate every party suspected of a particular breach. Other factors may also lead to a change in approach over time, such as a change in the annual priorities or the need to manage our overall portfolio of cases at any time.*
- 1.12 *As stakeholders are aware, a number of licence conditions operate on a strict liability basis. It would be inappropriate to introduce a criterion for case opening that incorporates a reasonableness test 'by the back door'. The matters raised by the stakeholder may be relevant to whether the behaviour falls under criterion 5 (was it intentional or reckless).*
- 1.13 *Where a company has already been sanctioned financially, this is likely to be taken into account through a number of our existing criteria – for example, the likely impact of enforcement action in discouraging similar behaviour in future. Thus, we do not consider that a separate additional criterion is needed.*
- 1.14 *We have, however, amended the criteria and explanatory material as follows:*
- *criterion 2 makes clear that the gain to be taken into account is more than just a proxy for harm to consumers, that gain may be non-financial. This other benefit might include, for example, unfair competitive advantage.*
  - *criterion 8 now refers to issues brought to the attention of the Citizens Advice consumer service and Extra Help Unit*
  - *criterion 9 is now clearly intended to cover problems that are widespread and not just across the company*
  - *in the explanatory note to criterion 13 we have clarified that the reference to the most serious breaches is intended to cover the most serious individual breaches and also those that are most serious by cumulative effect or in the round.*
- 1.15 *We consider that the amended criteria provide a framework with appropriate transparency and clarity, which is sufficiently flexible for us to take account of the wide variety of potential cases, and changes in circumstances over time.*
- 1.16 *We have also inserted an additional footnote to the criteria. It explains that although REMIT cases are not covered by the criteria, when assessing the resource requirements of a potential case, consideration is given to other current and potential cases under all of our enforcement powers, including*

*REMIT. The assessment takes account of the different thresholds for opening different types of cases and the corresponding difference in the amount of evidence likely to have been gathered at the time we consider whether to open a case.*

1.17 Many stakeholders emphasised the need to open discussions proactively with companies before opening a case or taking other action. One respondent also stated that the evidence presented to the Enforcement Oversight Board on whether to open a case should be made available to the company concerned.

1.18 *We expect that in most cases there will be contact with the company concerned to seek clarification or information so that the merits of the allegation can be properly weighed up. If we decide to open a case, when communicating this to the company (as described in paragraphs 4.3 to 4.5) we will usually provide an outline of the allegations and the scope of the investigation. We believe this is the appropriate way to provide transparency at this stage of the process.*

1.19 Stakeholders also said that Ofgem should set out:

- when considering whether we may take action in a case, the test we had to meet, our decision and our reasons
- in cases where we have a concurrent power to act, how the decision would be made as to which regulator would act
- the extent to which a company could face action by different bodies for the same, or aspects of the same conduct
- whether, if resources were not available to open a case, we would take alternative actions so that an issue was addressed (particularly if a breach impacted on competition in a market)
- that harm or potential harm should be quantified accurately and consistently using lessons learned from previous cases as a benchmark
- that as the list of prioritisation criteria is not exhaustive, we would communicate other factors if they became relevant (explaining why) and committing to publish them in future guidance.

1.20 *The tests to decide whether we have the power to take action are already adequately set out in paragraph 3.35. If we decide to open a case, we will normally have contact with the company under investigation as described in paragraphs 4.3 to 4.5. This will be expected to cover the matters that have led to us opening the case.*

1.21 *The company will have an opportunity, either at an initial meeting or by telephone, to raise any particular queries that it may have. This does not seem to us to require any further elaboration in the Guidelines.*

1.22 *We have not provided a standard test on how decisions in concurrency cases will be made because there are differences of approach depending on the*



*nature of the case. Such cases will be dealt with in accordance with all relevant Competition and Markets Authority (CMA) guidance and/or regulations. We have set this out in section 2 of the Guidelines. We take competition issues very seriously and we will work closely with the CMA to ensure that appropriate cases are taken forward. In some cases, this may be done by a concurrent regulator and not by us.*

- 1.23 *We have inserted additional references in section 2 to the CMA's guidance on how it uses its consumer powers. This material is best set out in one place rather than being reproduced in our Guidelines, which would otherwise need updating if the other documents changed. Ofgem and the CMA have agreed a Memorandum of Understanding on Concurrency which is available on the Ofgem and CMA websites.<sup>4</sup>*
- 1.24 *Paragraph 3.43 covers the situation where two or more concurrent regulators (such as the CMA and Ofgem) have the power to investigate a particular breach or infringement. The concurrency arrangements would prevent a company from facing two separate investigations (and sanctions) by two different regulators for the same behaviour.<sup>5</sup>*
- 1.25 *Paragraph 3.44 of the draft Guidelines describes the action we may take where another body is already investigating or taking action and where our power to act does not derive from concurrent powers. (This is distinct from the action envisaged in paragraph 3.43.) For example:*
- a code owner or panel may be dealing with a breach of a code yet the same conduct may also amount to a breach of a licence condition*
  - the HSE may be taking action against a company for health and safety offences and the same conduct may also amount to a breach of a licence condition*
  - the Information Commissioner's Office may be investigating a company for breach of data protection rules which, in respect of cold calls, may also amount to misselling.*
- 1.26 *It is possible we will conclude, having regard to the circumstances of the case, that that an additional investigation is justified. We had already set out in the Guidelines the sorts of reasons that might make an additional investigation more likely. For greater clarity we have amended the section dealing with action by another body in the Guidelines.*
- 1.27 *The reference to "our ability to regulate effectively" is intended to cover, for example breaches of requirements to provide reports on company activity (or other documents that we use to monitor conduct of a company), or cases where a company has provided misleading information to us thereby affecting*

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<sup>4</sup> <https://www.ofgem.gov.uk/ofgem-publications/89666/mougemaandthecmaconcurrentcompetitionpowersaugust2014.pdf>.

<sup>5</sup> The position is different in cases concerning European competition issues, where the competition effects are felt in different territories. Parallel investigations may be carried out by two or more Member States' competition authorities for their respective territories. We have inserted a footnote to paragraph 3.43 of the Enforcement Guidelines to make this clearer.

*our ability to regulate effectively. We would expect to take this into account, as with other harm factors, when deciding whether to open a case.*

- 1.28 *All regulators have to prioritise their case load and inevitably some issues will not be taken forward. Depending on the circumstances of a particular case, it may be possible that issues can be resolved in other ways. Any issues not taken forward or dealt with in this way will be added to our intelligence database and be kept under review along with other material that we gather from a number of sources. If there is a growing weight of evidence at a later stage, the matter may be revisited.*
- 1.29 *Efforts will be made to ensure that our assessment of the harm or potential harm is reasonably accurate. It should be noted, however, that this section of the guidelines relates to the decision of whether or not to open a case. The purpose at this stage, therefore, is simply to gain a reasonable understanding of the harm or potential harm to consumers or to our ability to regulate effectively, so as to enable us to prioritise the appropriate cases. These Guidelines are not intended to influence any subsequent decisions after a breach has been admitted or found as to the appropriate amount of a financial penalty or the requirements of a consumer redress order.<sup>6</sup>*
- 1.30 *In the future, if other prioritisation criteria become relevant in multiple cases, we may incorporate them into the Guidelines as appropriate.*

### Alternative actions

- 1.31 We provided information in the draft guidelines about a range of actions we will consider as an alternative to using our statutory enforcement powers. Stakeholders broadly supported our approach to the range of alternative actions available, describing it as both appropriate and welcome.
- 1.32 A key query related to whether the use of alternative actions would require the company to make an admission of breach. One respondent sought confirmation that the list of alternative actions was not exhaustive and wanted to see an option which allowed companies to settle without having to accept that a breach had occurred, wondering if this could be included as an alternative action under paragraph 3.25.
- 1.33 Another stakeholder thought there should be cases where we were willing to agree that no financial penalty would be imposed in order to resolve a case sooner. The stakeholder was unclear whether this was envisaged as an alternative action after a case has been opened.
- 1.34 *The list of alternative actions provides examples of the sorts of actions that may be used and is not exhaustive. An admission of breach will not be required in every case where alternative actions are used. This will depend on the circumstances. In some cases, a company may be expected to admit in their press notice that they breached a licence condition. However, any*

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<sup>6</sup> The factors that influence these decisions are set out in the Authority's policy statement on financial penalties and consumer redress.

*alternative action will not lead to a finding on breach (unlike cases which are being settled).<sup>7</sup>*

- 1.35 *We will have regard to the prioritisation criteria when deciding whether an issue can properly be resolved without using our statutory enforcement powers.*
- 1.36 *In order to settle a case (where we consider that settlement is appropriate) a company under investigation must be prepared to admit to breaches. Settlement will lead to a finding of breach. If a company does not admit to breaches, settlement (as described in Section 5 of the Enforcement Guidelines) is not appropriate or available.*
- 1.37 *We have decided not to amend the Guidelines in response to the points raised above because we believe that they already adequately cover these issues.*
- 1.38 One respondent sought additional clarity on the decision-making process we will adopt in deciding which enforcement tool is appropriate.
- 1.39 *In order to assist stakeholders in understanding how a decision will be made about using alternative action, and if so which action(s), we have expanded the explanation in paragraph 3.28.*
- 1.40 *We will have regard to our Enforcement Vision and Strategic Objectives when deciding whether alternative action is sufficient to deal with the conduct. When considering what alternative action is appropriate we will have regard to*
- whether the relevant concerns can be appropriately addressed by the alternative action being considered*
  - what alternative action best achieves this and*
  - whether the alternative action being considered can be implemented effectively.*
- 1.41 Some respondents focused on the need for dialogue with the company when considering taking enforcement action. For example, one stakeholder felt that timely and meaningful dialogue with the company was key. Another said that we should proactively open discussions with the licensee, preferably face-to-face, to talk openly about the nature and scale of the issue as well as options, next steps and timescales. Another felt that this interaction could also include site visits. There was also support for a two-stage approach to enforcement. It was suggested that proactive meetings and dialogue before deciding to take enforcement action could be exceptionally helpful in Standards of Conduct cases to ensure a common understanding of potentially subjective issues.
- 1.42 It was suggested that suppliers would be more likely to enter into open dialogue over potential or actual licence breaches if they felt Ofgem would take a proportionate response to enforcement and first look at other alternatives - particularly for first offences, or where the licensee is taking (or has taken) active steps to resolve the issue.

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<sup>7</sup> A finding of breach can only be made by the Authority or by those to whom the Authority's powers have been delegated.

- 1.43 *We do not agree that we should have a "two-stage" approach to enforcement (ie. where a company must be given the opportunity to put right any breach before we can take action). This would mean that companies would not need to take responsibility for their own compliance. They could just wait to be caught and then put right any failings without facing any consequences. We clarified that we will consider alternatives to the use of our statutory enforcement powers (see paragraph 3.25). In most cases we do expect to enter into an early dialogue with the company concerned.<sup>8</sup> Not every case will be appropriate for resolution through alternative action. As companies are aware, the burden remains on the company throughout to take ownership of compliance and take responsibility for its own culture, system and actions.*
- 1.44 *We agree that it is particularly important to promote open dialogue with companies in respect of potential breaches of the Standards of Conduct. We have amended paragraph 2.5(g) to make it clear that we will usually speak to suppliers, as well as asking them to supply any relevant contemporaneous documents, before taking enforcement action in respect of Standards of Conduct issues.*
- 1.45 *We have not otherwise amended the Guidelines in response to the points raised above because we believe they already adequately cover these points.*
- 1.46 One respondent advocated a watching brief on a company even if it had taken steps to address an issue of concern and the alleged breach had stopped.
- 1.47 *In appropriate cases, we may keep an eye on certain companies, for example agreeing a period of reporting by them to ensure that behaviour is not repeated or for them to show that they have taken certain action to address an issue (see paragraph 3.25).*

## Self-reporting

- 1.48 We received comments from stakeholders about our approach to self-reporting. One respondent sought clarification that once contacted by a company, the enforcement team would consult the appropriate department in Ofgem (on a topic specific basis) before deciding whether further investigation was appropriate. Another did not believe that self-reporting should automatically trigger formal enforcement and publication.
- 1.49 A third respondent said that:
- the Guidelines should say that self-reporting "will normally" count in the company's favour and uncertainty about this would create little incentive to self-report and would lack transparency
  - self-reporting should mitigate the extent of any enforcement action in the majority of cases and tend to reduce the likelihood that a penalty would be imposed (as well as reduce the amount of any penalty)

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<sup>8</sup> We may not, for example, where we consider that alerting the company before making an information request or conducting a dawn raid might prejudice the investigation.

- we should set out the circumstances in which self-reporting would not be considered a mitigating factor and when it would not mitigate the extent of any enforcement action.
- 1.50 *Where a matter reported to the enforcement team relates to the policy area of another Ofgem division, the enforcement team will work together with the relevant division when dealing with the issue that has been raised. We consider that this will happen as a matter of course and does not require any amendment to the Guidelines.*
- 1.51 *In response to the other issues raised by stakeholders we have made some amendments to paragraph 3.5 and 3.6 to make it clearer that self-reporting may mitigate the decision as to whether action is taken and if so what action – see also our consultation on penalties and consumer redress.*
- 1.52 *It is not appropriate to state that "self-reporting **will normally** count in a company's favour" when considering what action to take because the action taken (if any) will vary depending on the particular circumstances of any breach. In cases where there has been self-reporting, this fact is likely to be reflected in the decision on penalty and the wording of the penalty notice. We have added further wording to clarify the Authority's recognition of the value of self-reporting. We cannot provide examples of the circumstances that might lead to no or minimal mitigation from self-reporting as the specific circumstances of cases vary so widely.*

### Other comments

- 1.53 We also proposed changes to the way in which we handle complaints (paragraphs 3.14 and 3.15). We received one comment from a stakeholder suggesting that in line with our transparency objectives, we should undertake to keep complainants informed of the progress of their complaint in the stages before the case is opened.
- 1.54 *Having considered this comment, we have decided not to make any amendments to the Guidelines. They already say that we will notify a complainant if the case is taken forward and the opening of the case will usually be published. We do not consider that it would be appropriate for us to undertake to inform a complainant about pre-enquiry matters which may be confidential to the party under investigation.*

### Conclusion

- 1.55 For the reasons set out above, the Authority has decided to adopt the new prioritisation criteria with the addition of some further detail and having re-ordered the list. We have decided not to add any further prioritisation criteria.
- 1.56 The Authority has also decided to go ahead with the proposed approach to alternative actions having provided stakeholders with more information about how we will decide whether to use alternative action, and if so, what action(s).

## Section 2 Announcing cases and other publicity

### Summary

Some stakeholders agreed in principle with our proposals or said they welcomed the increased transparency in the enforcement process. Others queried our proposals for making cases public.

In this section we outline our approach to publishing information on new investigations and in cases where we choose to take alternative action.

We have decided that we may use anonymised information about cases in which alternative action was taken instead of opening a case, to tell stakeholders about compliance issues and our views on them.

### Announcing cases

- 2.1 Our letter of 28 March 2014 accompanying the Enforcement Guidelines consultation referred to our proposal to announce every case we open (except those under REMIT) unless this would adversely affect the investigation or where there were confidentiality or other considerations.
- 2.2 Whilst the proposals received some support from stakeholders, including comments welcoming increased transparency in the enforcement process, some respondents queried various aspects of the proposals.
- 2.3 A few licensees felt we could achieve our aims without the company name being published. One supplier pointed to the reputational and brand damage that would be caused by such publishing, as well as the impact on wider consumer mistrust. Two industry players requested that we should state clearly when publishing the opening of a case that this does not imply any finding of breach.
- 2.4 *We continue to believe that making cases public is important to ensure that our work is transparent and effective. We do not consider that we could achieve all the aims set out in paragraph 4.7 of the Guidelines if cases were published anonymously (in particular, witnesses would be less likely to come forward). We have therefore decided to go ahead with the existing proposals.*
- 2.5 *In light of the concerns expressed about reputational damage in cases which may not lead to findings of breach, the Guidelines now state, at paragraph 4.9, that when we publish the opening of a case on our website we will make clear that this does not imply that we have made any findings about non-compliance.*
- 2.6 One stakeholder sought clarification about what constitutes a case being open for publishing purposes.

- 2.7 *We will consider a case as "open" for publishing purposes once the Enforcement Oversight Board has taken a decision to invest enforcement team resources in investigating a case (see paragraph 6.4) in accordance with the prioritisation criteria set out in paragraph 3.31 to 3.42. With less serious issues, alternative actions may be discussed and agreed upon so as to resolve the issue at an early stage instead of opening a case. These alternative actions will not usually be published.*<sup>9</sup>
- 2.8 One supplier queried what we meant by "making cases public". Another sought more detail around the manner of publication of cases suggesting that we should have a standard approach set out in the guidelines, stating that over the years the approach had varied from a statement on the Ofgem website to a high profile media announcement. They felt that the latter may prejudice investigations and damage consumer confidence in the licensee and the market as a whole, especially if the outcome did not match the expectation. Unless the issue under investigation had a particularly harmful impact on consumers, it was suggested that the approach should be to publish a website statement accompanied by a routine and low key factual press notice, and that there should be a general assumption against further media activity on opening.
- 2.9 Another supplier said that if the decision whether to publish or publicise will be made on a case-by-case basis, the decision-making criteria should be made available. That supplier wanted to know how long cases would be published for, suggesting that it should be time limited.
- 2.10 *The cases that we handle vary enormously. For this reason we do not consider that a standard approach to publishing cases is the most appropriate and effective way to achieve our aims. We will consider on a case-by-case basis how best to deal with publishing a case opening bearing in mind our Enforcement Vision and Strategic Objectives. In some cases we may also decide to make an announcement to the media. We have added these details to the Guidelines.*
- 2.11 *If a statement is published on our website about us opening a case, that case will remain in the list of open cases until it is closed.*

### Other case publicity

- 2.12 One stakeholder asked if we intended to consult with suppliers on statements and press releases. Another stakeholder commented that the ability to comment on content or timing of press releases should not be dependent on whether the case is settled or not.
- 2.13 *We will normally inform a company before we publish the opening of a case on our website. As part of any settlement discussions, a company will be given the opportunity to comment on a draft press notice (and in return we would expect to comment on the company's). We see this consultation as part of the process of cooperating to reach a mutually acceptable agreement*

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<sup>9</sup> Although anonymised information about such cases may be used to inform other stakeholders of potential compliance issues.

*though the final decision as to what we publish will be made by us. In contested cases, however, we will simply inform the company before publishing the closure of a case on our website. We have made some changes to the Guidelines to deal with this.*

- 2.14 A few suppliers were unclear about whether alternative action would be published if a case was not opened. Some felt that the open letter conflicted with the Guidelines on this topic. One supplier expressed the view that it was not proportionate to publish less serious issues being addressed by alternative action. Another said they would not expect us to publish a letter to a supplier asking for an initial discussion on a potential compliance issue.
- 2.15 *The proposals in the Guidelines retain a distinction between alternative action taken without a case being opened (likely to be less serious - not usually published) and any alternative action taken after a case has been opened (published).*
- 2.16 *We do not see any conflict between this approach and that which was described in the open letter: "When combined with our proposals for alternative action, this means that we will be making public types of cases that currently are not always made public even when they have been concluded. (That is to say, the most serious of those cases that we seek to resolve on a voluntary basis without making a finding of breach.)" In other words, we may now also make public the more serious cases (those in which we open a case) that we resolve voluntarily.*
- 2.17 One respondent suggested that details of issues not investigated for reasons of priority or where alternative actions have been taken (pre-case opening) could be made available to relevant licensees on an anonymous basis to enable them to investigate their own approach and take any necessary corrective action.
- 2.18 *We recognise that some of this information may assist licensees to self-regulate. We have decided that we may from time to time use anonymised information about cases where alternative action was taken instead of opening a case, and any other material that we consider helpful to stakeholders, to provide stakeholders with information about compliance issues and our views on them.*
- 2.19 *Whilst information about cases that we have not taken forward (for whatever reason) may also be informative, we are concerned that we should not send out a message to the industry that certain types of cases are not taken seriously or will not be taken forward. For this reason, on balance, we have decided that we will not usually include information about cases not taken forward. We may on occasions make reference to these on an aggregated or anonymised basis.*
- 2.20 Finally, two stakeholders also raised issues over publishing the closing of cases. One stakeholder said that all cases made public on opening should be made public on closing, particularly if no finding of breach was made, and that the reasons why should be published. The second said that if an investigation resulted in no findings of breach, we should do more than just publish the



case closure on our website (having consulted the company). This was because a website statement would not recompense the company for the potential detriment to its business caused by the case opening.

- 2.21 *We have already made a commitment (in paragraph 4.12) to publish a case closing if the case was made public on opening and no finding of breach or infringement is made – for example, if no evidence of a breach was found, or if continuing the case was not merited on grounds of administrative priorities. Such a notice or statement would cover the reasons, such as the fact that no evidence of breach was found. Having considered that matter carefully, we do not agree that we should be required to publicise more widely than the website in such cases. We consider that an announcement on our website, and inclusion in the Ofgem daily email alert, to be sufficient to make interested parties aware.*

## Conclusion

- 2.22 The Authority has decided to go ahead with the proposals to make cases public. When publishing the opening of a case on our website we will be clear this does not imply that we have made findings about non-compliance.
- 2.23 We have added further detail about the circumstances in which we will discuss or inform a company prior to publishing or making a press release about the opening or closing of a case. We have also
- made clear that issues resolved by alternative action where no case has been opened will not usually be published<sup>10</sup> and
  - decided that we may use anonymised information about matters where alternative action was taken instead of opening a case to provide transparency about compliance issues and our views on them. This will not usually include issues we have decided not to investigate.

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<sup>10</sup> Although anonymised information about such cases may be used to inform other stakeholders of potential compliance issues.

## Section 3 Settlement procedures

### Summary

This section clarifies stakeholder queries on company engagement with Ofgem and how we assess whether cases are suitable for settlement.

We have made amendments to the final Guidelines to reflect a number of the issues raised in the consultation responses, in particular to address stakeholder concerns that they should have the opportunity to engage with us on the breaches, detriment and gain. We have also made an additional commitment that the reasonable period for the first settlement window will be normally 28 days. We have decided not to offer the option of partial settlement or settlement without admission of liability for the reasons set out below.

- 3.1 We proposed a new process for settling cases and a system of early, middle and late settlement windows with fixed percentage discounts for settlement. During the consultation, stakeholders were asked whether they agreed with the proposed settlement process and settlement windows. Stakeholders were divided in their responses. Some supported the changes we had proposed while others raised a variety of concerns, which we address below.

### Settlement without admission of liability or partial settlement

- 3.2 Several respondents raised the question of settlement without admission of liability. It was said that a company might want to agree actions and move on even though there was genuine disagreement about whether a breach had taken place (for example because of differing views about the legal interpretation of a licence condition or about the strength of the evidence).
- 3.3 It was suggested that the proposals were inconsistent with competition cases where companies could make binding commitments. Another respondent said that parties should be able to settle on a "without prejudice" basis without admitting guilt in order to avoid expending significant time, resource and cost. Such an approach could still include an agreement not to appeal any penalty or consumer redress order, it was suggested.
- 3.4 One respondent sought clarification of whether a disagreement on breaches but wanting to take agreed action to move on would be covered by the section on alternative actions agreed after opening a case. We were asked by another to tie the process more closely to the procedure for closing a case as it was not clear how the approaches would interact.

- 3.5 *We have decided not to amend the Guidelines to include the option of settlement without admission of liability. This is because settlement in the regulatory context is not the same as settlement in a commercial dispute. Under the discount scheme that we have proposed, companies that admit their wrongdoing are treated more leniently. The biggest discounts are reserved for those who make admissions swiftly which result in the greatest savings to the public purse.*
- 3.6 *Settlement under the process that we have proposed is a regulatory decision by us, the terms of which are accepted by the company under investigation. If a company agrees to settle, the settlement process will lead to a finding of breach by (or on behalf of) the Authority. For this to happen, a company must admit the breaches. The settlement mandate, and any penalty and/or consumer redress order that are imposed, are based upon these admissions being made.*
- 3.7 *It is possible that the sorts of scenarios raised by stakeholders could, in appropriate cases, be resolved by alternative action which may not require an admission of breach. However, settlement cannot take place without admissions of breach.*
- 3.8 Some stakeholders said partial settlement would mean cases could conclude earlier and any redress to consumers could be delivered quicker.
- 3.9 *The purpose of the discount scheme is to encourage early settlement of cases so as to lead to greater procedural efficiencies and resource savings. If, as a result of settling a case, contested case preparations can be avoided, real savings in terms of time and resources can be made by us. It is these savings that are reflected in the discounts that we are proposing.*
- 3.10 *We do not consider that a system of partial settlements, which would still require us to go through a contest on some issues, would realise the resource savings that we are seeking to achieve to justify the discounts being offered.*

### Settlement windows and timescales

- 3.11 Several respondents commented on the settlement windows and timescales. We also received comments from stakeholders in the course of a round table discussion at Ofgem on 6 June 2014 on our proposed penalties and redress policy.
- 3.12 Some attendees indicated that they had not appreciated that the new process was a significant change from the old system where negotiations as to breaches and penalty took place. Some put forward the view that the proposed process would not give them enough opportunity to engage with us on the breaches, detriment and gain, and that as a result companies would not be prepared to settle. One stakeholder said that the current system worked well, that there was no need to change it and that a mandate set by the Settlement Committee in advance of the start of negotiations, based on Ofgem's view of the consumer detriment, might not be acceptable to a company.

- 3.13 A number of stakeholders said they did not think that the “reasonable period” for the first settlement window would allow for appropriate discussion to take place to enable agreement to be reached.
- 3.14 One stakeholder doubted that the period would be long enough to reach a shared acceptance of the scope, nature and severity of the breaches. 56 days would be significantly better than 28 suggested another, saying that licensees would have to review the implications, hold internal discussions, complete settlement negotiations and have the outcome ratified by their Board in this period. Another respondent, as a small supplier with limited resources, felt it would need 60 days to marshal interested parties and provide them with the necessary data to reach agreement. Another stakeholder asked us to formally commit to a “reasonable period of no less than 28 days” for the first settlement window.
- 3.15 One stakeholder supported the windows and sliding scales but expressed concern about the timing of the first settlement window. They were concerned that an initial statement of the case findings would not be produced during the first window. This would make it difficult in practice for parties to sensibly commit to settlement without an initial statement.
- 3.16 For the benefits of early settlement to be realised, another respondent said that companies must be in a position to be able to make an informed settlement decision. It was therefore critically important that the information and timescales, including the reasonable period, were clear and transparent. Another stakeholder said that a company should always be afforded the opportunity of meeting with us to discuss their views.
- 3.17 *We have considered all of the stakeholder responses to the proposed settlement process. We believe that there remains scope to improve on the current system to achieve greater efficiency and impact. Negotiations without knowing what will be acceptable to the decision-maker, in our view, lack necessary focus. Settlement discussions have, in some cases, been drawn out over many months, which is not necessarily an efficient use of resources.*
- 3.18 *The new proposals are designed to deliver procedural efficiencies and savings of time and resource. Companies will be rewarded with a large discount on the penalty if they resolve matters swiftly. The biggest settlement discount is reserved for those cases which can be resolved swiftly in this way within the set reasonable period.*
- 3.19 *If there are genuine disputes about the number of breaches or the adequacy of the evidence in respect of them that cannot be agreed within the first settlement window, companies are at liberty to seek to settle the matter at a later date and receive a lesser discount, or indeed contest the matter and the issues will be resolved by the Enforcement Decision Panel.*
- 3.20 *We believe that the proposed changes will improve the system, give companies greater certainty and transparency of the process, and help us to achieve our aims in respect of efficiency and impact. For these reasons, we have decided to go ahead with the proposed changes.*

- 3.21 *In the light of the comments that we have received, we have decided that the Guidelines should be clearer and more detailed about the process we expect to follow before we approach the Settlement Committee for a settlement mandate. This added detail should also reassure stakeholders that they will have a reasonable opportunity to make representations about the facts of our case before we seek a mandate.*
- 3.22 *To this end, the following detail has been added to the Guidelines in respect of sectoral cases:*
- *the Summary Statement of Initial Findings (the Summary Statement) will cover the breaches that we consider have been committed and/or that may be ongoing, our thinking about the detriment and/or gain, and such other matters as may be appropriate*
  - *companies will be given the opportunity to provide written and oral representations on the Summary Statement within a reasonable period. The period for making written representations will normally be 21 days.*
- 3.23 *The purpose of these steps is not for negotiations to take place but for us to understand the company's position on the Summary Statement so that we can take account of it in making recommendations to the Settlement Committee. This could include, for example, an explanation that there has been a misunderstanding on the facts, or that there are fewer breaches than suggested because of evidence we have not previously seen. To clarify the position we now refer to settlement discussions rather than negotiations. After the above steps, we will seek a mandate from the Settlement Committee and matters will proceed as described in paragraph 5.22 and thereafter.*
- 3.24 *If we do not receive the company's written representations within the reasonable period allowed and the company does not take advantage of the opportunity to meet the case team, we will make our recommendations to the Settlement Committee based on the information and evidence that we have.*
- 3.25 *Having considered the representations from stakeholders about timescales in respect of the first settlement window, we are committing that the "reasonable period" for the first settlement window will be "normally 28 days".*
- 3.26 *We have decided against extending this period because we think that most cases which are suitable for the largest discount can be resolved within this time period. The new process does not envisage extensive negotiation on the breaches within this window. We have amended paragraph 5.26, to make it clear that the aim of discussions is to reach agreement on the proposed terms of the penalty notice and/or consumer redress order and get comments on the press notices. The company will also be expected to sign the settlement agreement within the allotted period.*

## Other comments

- 3.27 One respondent wanted to know when it would be appropriate to start raising the possibility of settlement discussions. They felt that it would be helpful to know how soon we would inform them of our concerns and the implications for enforcement actions.
- 3.28 *We will generally share our emerging thinking with the company as the investigation progresses, so that companies will be given sight of the nature of the case as it develops. Companies may indicate an interest in entering into settlement discussions as early as they wish. As described in the Guidelines, if we are not ready to hold discussions at that stage because we do not have sufficient information, this will be communicated to the company. We will then contact them when we have the information that we need.*
- 3.29 Another stakeholder sought further guidance on how we will assess whether a case is suitable for settlement. The stakeholder expressed confusion at the reference to a point of law as it said the Authority has no jurisdiction to determine points of law.
- 3.30 *Settlement will be considered in most, if not all, sectoral cases. We will only refuse to consider settlement in such cases if some exceptional reason exists. This might happen, for example, if the legal interpretation of a relevant provision is at issue. In that event we may wish a contested case to be heard so that some guidance on the EDP's approach to that issue can be derived from the case. We do not know what other exceptional circumstances might arise in future cases.*
- 3.31 One stakeholder said that a company should be required to agree that a breach had occurred as part of the settlement discussions and not in advance. If not, it was felt that this could discourage companies from settling.
- 3.32 *There is no requirement for a company admit to breaches before settlement discussions have commenced.*
- 3.33 If settlement discussions fail, one stakeholder suggested that all those involved in the settlement process and discussions and review of settlement documents should not be involved in any way from then on in the investigation or decision-making bodies.
- 3.34 *We have already recognised the importance of maintaining a clear separation between those who may sit on a Settlement Committee in respect of a case and those who sit on the Panel of final decision makers if the case is ultimately contested. However, it would be unnecessary and impractical to preclude everyone with involvement in the settlement process from any further part in the case. This would, for example, require all investigators and the Senior Responsible Officer (and all of those who know most about the case) to stand down.*

- 3.35 *When settlement discussions are "without prejudice", neither party can rely on admissions or statements made during the settlement discussions if the case becomes contested. We consider that this is the appropriate way to deal with any concerns that companies may have that material coming to light in settlement discussions will be used against them in a contested case. If for any reason a company who has entered into settlement discussions chooses to reveal to the Panel any of the detail of the settlement discussions, we reserve the right similarly to reveal information (including any admissions) that were made during those discussions. We have added this detail into the footnote to paragraph 5.25 .*
- 3.36 Another respondent asked for clarification about whether the reference to our statutory obligation to consult on proposed penalties means consultation on an agreed settlement in every case.
- 3.37 *In short, yes. This is required in sectoral cases by statute (sections 30A and 30I of the Gas Act 1986 and sections 27A and 27I of the Electricity Act 1989). To make this clearer we have added a footnote to the end of paragraph 5.8 which cross-refers to the statute.*
- 3.38 *We have also clarified at paragraph 6.25 what happens in settled cases if the penalty and/or consumer redress order is varied following consultation on the proposed penalty notice. The revised wording sets out the procedure which is necessary to conform to the requirements of primary legislation.*
- 3.39 A number of stakeholders made comments and suggestions which covered our policies and procedures in respect of penalties and consumer redress.
- 3.40 *We are taking these comments into account as part of the development of the Authority's penalties and redress policy statement.*

## Conclusion

- 3.41 We have made amendments to the final Guidelines to reflect a number of the issues raised in the consultation responses, in particular to address stakeholder concerns that they should have the opportunity to engage with us on the breaches, detriment and gain.
- 3.42 We have made an additional commitment that the reasonable period for the first settlement window will be normally 28 days. We have decided not to offer the option of partial settlement or settlement without admission of liability.
- 3.43 The final Guidelines also include some drafting amendments in respect of settlements in Competition Act 1998 cases, to be more closely aligned with the CMA's settlement procedures, and for greater clarity about the process.

## Section 4 Decision-making process

### Summary

Our proposals for implementing the new decision-making framework were generally supported by stakeholders.

The Authority has decided that we should implement the proposals.

### EDP implementation

- 4.1 We have created the EDP to act as decision-makers in our enforcement cases. The Guidelines set out details of how the EDP and Panels appointed from its membership will operate.
- 4.2 Stakeholders were mostly supportive of how we propose to implement the new decision-making framework. One respondent felt it would provide greater impartiality and independence in decision making and agreed that the introduction of the EDP and Secretariat was a positive step. A second felt that the new decision-making framework would enhance the current enforcement process and create a further level of independence between the case team and the outcome of the case.
- 4.3 The second respondent was anxious to ensure a level playing field in terms of access to the decision makers. They sought confirmation that the restrictions on a licensee contacting the Panel would apply equally to the Ofgem case team, and that the licensee would be given the same written material and representations regarding the investigation as provided to the Panel by the case team. It was suggested that this should be explicitly covered in the Guidelines.
- 4.4 *We are providing access to information on which our case relies via our disclosure policy. We consider that this is the appropriate way to deliver transparency.*
- 4.5 One supplier queried the process by which members of the EDP would be recruited, saying that they would welcome the opportunity to comment on the skills and experience of potential members. The same supplier was also keen to know how the EDP Chair would operate the selection process for Panel members for any particular case to ensure that those with the most appropriate skills and experience are chosen.
- 4.6 Although supportive of the fact that the EDP would make decisions separately from the investigation team, it was important, suggested the supplier, that the enforcement and policy teams did not become dislocated or disconnected. This could be achieved, it was suggested, by the EDP Terms of Reference driving the correct consumer-outcome based decisions from the EDP in line with the new vision, objectives and the annual priorities, and through the Authority's annual



review of EDP decisions and the issuing of further guidance (where appropriate).

- 4.7 Other stakeholders also looked forward to reviewing the EDP's Terms of Reference. One stakeholder said that we should consult on them and that they should set out the basis upon which the Panel will make decisions, as this detail is not contained in the guidelines.
- 4.8 *The members of the EDP have been appointed and their profiles are on the Ofgem website. They all went through an open recruitment process.*
- 4.9 *The EDP Chair will select the Panel members to hear a contested case taking into account member availability, skills and experience, and any actual or perceived conflicts of interest. Each Panel will have a Panel Chair appointed by the EDP Chair. Each Panel will, in its make-up, comply with any requirements of any relevant legislation. In Competition Act cases the EDP Chair will appoint at least one legally qualified member to the Panel.*
- 4.10 *Guidance as to how the Panel will make its decisions is contained in the Guidelines and in the Authority's penalties and redress policy statement. The EDP Terms of Reference have been published on the website along with this document. Should it become necessary to provide any further guidance for the EDP, the decision about whether it should be the subject of a consultation will be taken at the appropriate time.*
- 4.11 One respondent sought clarification about what other matters the Panel would take into account in addition to those listed in section 6.
- 4.12 *Section 6 lists the material that the Panel will routinely consider. It is not exhaustive as there may be other relevant forms of evidence or information that arise in future cases.*
- 4.13 Two respondents said that the framework was a step in the right direction but did not go far enough. The first stakeholder complained that it would not allow challenges to our adherence to the guidelines. The second, similarly, complained that there was no independent scrutiny available if the case team failed to follow the guidelines or acted unfairly in the settlement process. It was suggested that because members of the EDP were still employees of the Authority, Ofgem remained investigator, judge and jury in the enforcement process, against the principles of natural justice. It was suggested that this could be solved by the conduct of the investigation and the decision in relation to any investigation not falling to Ofgem. These problems were said to be compounded by the lack of a merits-based appeal. One of the respondents also queried the lack of any "pre-trial" review like in civil proceedings.
- 4.14 *The complaints appear to fall under two heads; the suggestion that Ofgem is effectively investigator, judge and jury; and the complaint that there is no independent scrutiny available (whether at a "pre-trial" review or otherwise) for the way in which the case team handles the process.*
- 4.15 *The new framework establishes the EDP and supporting Secretariat with visible impartiality and separation of decision making functions from the case team.*

*We have already consulted on the framework for the EDP and Secretariat as decision makers, the outcome of which was published on 19 November 2013 (the 19 November Consultation Decision), and we do not propose to make any changes to this structure. We consider that the visible impartiality and separation meets the concerns raised by the stakeholder and that independent regulatory decisions can and will be made by the EDP.*

- 4.16 *As to the availability of independent scrutiny of the process or a "pre-trial" review, we would expect any procedural issues to be taken up with the Senior Responsible Officer (SRO) for resolution. We have already considered and rejected<sup>11</sup> the possibility of the appointed Panel or Panel Chair dealing with any "pre-trial" procedural issues. The Panel's role is to take decisions on cases and not to oversee the end-to-end process (an executive function).*
- 4.17 *We have added a new paragraph 4.37 to the Guidelines to confirm that procedural issues should be raised with the SRO. The position with respect to competition cases is now addressed in paragraph 4.38.*
- 4.18 Some stakeholders had comments about the possibility of the Authority issuing further guidance to the EDP members to inform future determinations. One respondent felt that any such guidance should be published to help underpin the EDP's independence and maintain transparency of the process. Two stakeholders suggested that we should consult on any such guidance. One said that the independence of the Panel would otherwise be jeopardised.
- 4.19 *Should it become necessary to provide any further guidance for the EDP, the decision about whether it should be the subject of a consultation will be taken at the appropriate time and, if applicable, in accordance with the requirements of the relevant legislation. For example, it may take the form of revisions to these Guidelines or to the Authority's Statement of Policy on penalties and consumer redress.*
- 4.20 There was a specific request from one supplier to make clear that in contested cases, failure by a company to request an oral hearing would not prejudice the outcome (for example the company being perceived as unconvinced of the merits of its own case).
- 4.21 *We understand that there are many reasons why a company may choose not to make oral representations in a case. Paragraph 5.42 sets out two possible reasons and also states that there is no obligation to make oral representations. We have also clarified in that paragraph that a decision not to request to make oral representations will not be held against a company.*
- 4.22 One supplier repeated earlier suggestions that use of the EDP should be widened so that it dealt with settlement discussions too. Its members, with their greater independence, could then determine the sanctions to be applied for all enforcement cases, which would provide greater consistency in the setting of sanctions. It was suggested that this would build on the benefit that the EDP could provide a clear separation between those involved in the three separate phases of investigation, sanction setting and handling contested cases.

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<sup>11</sup> See the Consultation Decision dated 19 November 2013.

4.23 *We continue to believe, for the reasons stated in the Consultation Decision document we published in November 2013, that it is important to maintain a clear separation between the Panel which hears contested cases and that which hears settlement cases. The inclusion of an EDP member on the Settlement Committee, who may have had experience of unrelated contested cases, will promote consistent setting of sanctions across all cases. For these reasons, we have not made any changes to the decision-making framework in this respect.*

### Delegation to senior Ofgem employees

4.24 There were two responses on the topic of delegation where the proposed penalty is below £100,000 or the issues raised are unlikely to attract significant industry or media interest or are otherwise uncontentious. One stakeholder was concerned that a senior partner acting alone could make settlement decisions on a political basis. This stakeholder also suggested that the threshold should be lowered. The second stakeholder, conversely, felt that decisions in cases under this threshold should be taken wherever possible by a Senior Partner with advice from the EOB, and that there were clear savings to be made in terms of resources and timescale in doing so.

4.25 *If a case is delegated to a senior Ofgem employee, a decision will be made by the senior employee with the benefit of advice from other senior Ofgem officials if necessary. We have amended the guidelines to reflect the existing delegation which allows sectoral cases to be dealt with by a senior Ofgem employee where the level of penalty is below £100,000, or where the issues raised are unlikely to attract significant industry or media interest, or are otherwise uncontentious.*

4.26 *Senior Ofgem employees cannot make 'political decisions'. They are legally required to apply the same tests as a Settlement Committee. A company will have the opportunity to contest the matter and make oral representations before a Panel if it is unhappy with the settlement terms on offer.*

4.27 *We are not proposing to change the £100,000 threshold.*

### The role of the Enforcement Oversight Board

4.28 One supplier saw an important role for the EOB to ensure consistency of decisions across all licensees and areas of Ofgem's work. It was suggested that to help with this the EOB would need a clear mechanism to discuss and compare enforcement decisions in line with the new vision, objectives and annual strategic priorities.

4.29 *The EOB's role does not include ensuring the consistency of decisions across the whole of Ofgem.*

### Conclusion

4.30 The Authority has decided to go ahead with our implementation proposals with a few amendments to the Enforcement Guidelines.

## Section 5 Accounting for our enforcement activities

### Summary

Stakeholders generally welcomed our proposals to account for our enforcement activities.

We have decided to go ahead with all of our proposals. We will not be consulting further on how we intend to formulate and present the metrics for the balanced scorecard but we will take account of all of the helpful comments that we have received in this consultation. We will be providing provisional timelines in all cases (new and existing) once the amended Enforcement Guidelines are published.

### Accounting for our enforcement activities

#### 5.1 We proposed that we would

- share a provisional timeline for the key steps of the investigation with the company under investigation and update the timeline as the case develops
- publish figures annually in a balanced scorecard setting out metrics of the cases that we have opened and closed
- hold regular enforcement conferences with stakeholders.

5.2 As part of this consultation, stakeholders were asked whether these proposals were an effective way to allow them visibility of our timetables and performance. One stakeholder welcomed the proposals saying that they built on the constructive approach and engagement with stakeholders during the review of our enforcement work. Respondents welcomed the move to make our enforcement work more transparent. The proposed timelines and balanced scorecard were described as a welcome step towards making visible not only the process, but the decisions, evidence and rationale for investigations.

5.3 One supplier said they were keen to attend future enforcement conferences. They had found the previous event to be very useful in discussing Ofgem's proposed approach. It had given stakeholders the chance to share views and experiences of enforcement. There was a request for further clarity on the form and content of future events. One stakeholder welcomed the opportunity it would give to discuss annual priorities and said that a common understanding would help licensees to focus compliance resource on key areas of concern within the overall objective of complying with all obligations. Another supplier considered that regular discussions with the industry, supported by appropriate metrics, would provide continued focus on our strategic priorities and enable lessons to be learned from recent enforcement activities.

- 5.4 The same supplier was interested in how the metrics of the balanced scorecard would be defined. The supplier urged us to consult on our detailed proposals. Effective enforcement, it said, should be about ensuring the optimum outcomes for competition and for consumers in every case. The supplier cautioned against measuring performance of enforcement against targets for the number of cases opened, the value of penalties obtained and time taken to manage these, as this would create artificial objectives which would obscure the true benefits of a robust enforcement regime. It was argued that the best results would be where no cases were opened as a result of compliance work and the clarity of licensees' regulatory obligations. Another supplier warned us against publication inadvertently resulting in a number chasing game.
- 5.5 One stakeholder suggested that the metrics should take account of cases resolved through alternative action (ie without breach or use of statutory powers) and cases closed where it is concluded that there is no breach. One respondent felt that publishing figures (in a scorecard) should also be helpful in increasing customer confidence in our enforcement activities.
- 5.6 The provisional timeline was thought to be helpful, useful and to facilitate effective case management. Two stakeholders queried whether the timeline would cover just the investigation process or the full process from start to closing the case. Another expressed the view that the timelines needed to be sufficiently flexible to enable the case to be conducted effectively and to allow the company sufficient opportunity to adequately respond and present its case.
- 5.7 *We are pleased that stakeholders found the previous enforcement conference useful and that stakeholders wish to take part in future events. We see these events as an important opportunity to engage with industry players and to discuss our annual priorities and the lessons that can be learned on both sides from our enforcement investigations. In light of the responses we have decided to go ahead with our plans to hold further enforcement conferences.*
- 5.8 *In view of the generally positive responses to the idea of a balanced scorecard, we have decided to go ahead with our proposals to publish this information. We are grateful for the constructive comments that we have received on this topic. We will take these into account when we formulate the metrics and the way in which we present the information.*
- 5.9 *One of the comments cautioned us against measuring our performance against the time taken to manage the cases (along with other factors). We agree that this metric needs to be considered in the round, alongside other factors. However, we consider that the time taken to deal with cases is a proper matter of concern if cases are not dealt with efficiently and take much longer than they need to, therefore tying up resources unnecessarily and delaying fair outcomes for consumers. It is not our intention to consult again on the details having already had the benefit of these comments.*
- 5.10 *We intend that the provisional timelines will cover only the key steps of the investigation. We expect that there will be flexibility in the system with updates to the timeline being provided at various stages.*

- 5.11 *We have not made any amendments to the Guidelines as the enforcement conferences and balanced scorecard are not covered there. We believe that the matters raised in respect of the provisional timelines is already adequately dealt with in the existing paragraph 4.4.*

## Conclusion

- 5.12 In the light of the generally supportive responses from stakeholders, we have decided to go ahead with all of the above proposals. Work is under way to formulate the metrics and the way to best present the information on the balanced scorecard, taking account of the helpful stakeholder comments.
- 5.13 We will begin to provide provisional timelines for investigation stages in all cases (new and existing) from the date of publishing the amended Enforcement Guidelines.

## Section 6 Further comments

### Summary

The responses contained a number of additional observations, comments and further recommendations beyond the scope of the specific questions that we posed.

We have answered these issues in this document. We have also added some further details to the Guidelines to deal with stakeholder comments, in particular in respect of information request deadlines.

### Regulatory Principles

- 6.1 One respondent welcomed our commitment to have regard to better regulation principles but asked for more specific information on how we intended to have regard to them in our enforcement approach. Another respondent asked how we would seek to determine what the principles of best regulatory practice were, for example, to what extent would we look to the non-statutory procedures adopted by other regulators. They also asked how we would ensure that we observe standards at least as high as those of our peer regulators.
- 6.2 *We are required to have regard to the principles of best regulatory practice and this is embedded throughout our work. The Simplification Plan for 2014-15 sets out our current commitments <https://www.ofgem.gov.uk/publications-and-updates/simplification-plan-2014-15>.*
- 6.3 *The legislation gives us flexibility to have regard to any principles that appear to us to represent best regulatory practice. We identify, develop and implement good practice through a number of routes, including*
  - *looking at developments in other sectors and internationally*
  - *engaging with other UK economic regulators continuously through the UK Regulators Network (UKRN) <http://www.ukrn.org.uk/>*
  - *participating in joint projects with other regulators.*
- 6.4 *For the Enforcement Review we have looked at statutory and non-statutory procedures used by other regulators.*
- 6.5 *Our Transparency Policy Statement <https://www.ofgem.gov.uk/about-us/transparency> sets out our commitment to procedural openness. Through the Enforcement Review we have provided greater transparency in our case-handling procedures, decision-making processes and guidance on our approach to penalties and redress. We will continue to engage with other regulators and Government more widely to ensure that we maintain our processes in line with Better Regulation principles.*

## Strategic Objectives

- 6.6 We received some comments from one respondent on what they considered to be the negative drafting of the strategic objectives. The same respondent also expressed concern that proportionality was not included in the methods of achieving the objectives.
- 6.7 *We have already consulted on our strategic objectives, the outcome of which was published on 19 November 2013. We do not propose to make any further changes to our strategic objectives.*
- 6.8 *We consider that proportionality is adequately dealt with as part of our commitment to have regard to better regulation principles, which specifically include proportionality.*

## Departing from the general approach

- 6.9 Two stakeholders raised concerns about when we might depart from the Guidelines or the general approach. One felt that the Guidelines should be applied consistently in all cases. The other thought that we should set out the circumstances where we might not follow either the normal procedures or the flowchart processes in the annex to the Guidelines.
- 6.10 A further respondent felt that it was reasonable to expect us to abide by our Guidelines only departing in exceptional circumstances. Another stakeholder expressed the view that the Guidelines should provide certainty around what licensees can expect from Ofgem, rather than for example saying that we will “usually” write to the company about drafting the statement of case (paragraph 5.24) or “normally” publish a case disclosure (paragraph 6.35).
- 6.11 *We have sought to describe our general approach to enforcement cases to assist stakeholders in understanding how we expect to do things in most (if not all) cases. However, situations may arise in cases that require a different approach, or in a particular case, some reason may exist for not following the normal procedure.*
- 6.12 *The Guidelines are drafted to allow the necessary flexibility to respond appropriately to all situations. We have not specified in the Guidelines when we might depart from the guidelines or our general approach as we do not yet know what situations may arise. We do not expect this to happen often. If we depart from the Guidelines or the usual processes that we have described, we will only do so with good reason and we will explain why.*

## The investigation process

- 6.13 One stakeholder raised several matters relating to information requests. They
- asked that concurrent information requests should only be issued in exceptional circumstances
  - asked us to take account of a company’s internal resources in setting deadlines for responses and not just assume that large companies have



limitless resources to respond to questions requiring specialist knowledge or the provision of technical data

- requested guidance on what might constitute a good reason for an extension and
- said that the statement that failure to cooperate with information requests may be an aggravating factor in setting the amount of a penalty, appeared to be not entirely consistent with the CMA's guidance as to the appropriate amount of a penalty in CA98 cases (only aggravating if breach is persistent and repeated).

6.14 *We will act in a reasonable and proportionate way when issuing information requests. We will have regard to appropriate parts of our Transparency Policy Statement.<sup>12</sup>*

6.15 *Sometimes issues will arise so that concurrent requests are necessary or appropriate. We consider that it is important that all companies set aside or make available adequate resources to handle an investigation efficiently. Whilst we recognise that all companies, and especially smaller ones, have finite resources, allegations of breaches of licence conditions, under the Competition Act 1998 or consumer legislation are very important and we expect companies, especially larger ones, to make these resources available when required. We will give what we consider to be a reasonable amount of time for responses. We have amended paragraph 4.23 to clarify this.*

6.16 *This will already take account of the company's resources to respond to our requests viewed in the light of the above comment. If a company is concerned about the deadline given (because of concurrent requests or any other reason) they should contact us in the manner described in the Guidelines. We do not consider that this requires any amendment to the Guidelines.*

6.17 *We have made clear in paragraph 4.23 that we will take into account the type of information that we are requesting when setting the deadline. For example, technical data may be more difficult or time-consuming to put together for a response.*

6.18 *We believe that what constitutes a "good reason" for an extension is a matter of common sense and does not need further clarification in the Guidelines. When deciding whether to grant an extension, we may ask ourselves whether the reason given is really preventing the company from complying or because the company has not properly applied itself to complying with the deadline.*

6.19 *The CMA guidance relates to Competition Act cases while the Authority's policy statement relates to investigations under the Gas Act and Electricity Act. There is therefore no legal requirement to adopt the same approach in all respects. We consider that it is appropriate to set out in the Guidelines the potential consequences of failing to comply with information requests. We have therefore decided to keep the reference to it in this section but have clarified that the matter will be considered in light of the appropriate policy on penalties/redress.*

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<sup>12</sup> See paragraphs 4.6 to 4.13 and in particular paragraph 4.10 of <https://www.ofgem.gov.uk/ofgem-publications/86772/transparencyofofgemdata-astatementofourpolicy.pdf>.

- 6.20 The same stakeholder queried the breadth of disclosure as described in the Guidelines. They suggested that the starting point should be full disclosure to the licensee to ensure an open and transparent approach to enforcement.
- 6.21 *Paragraphs 5.32 to 5.34 set out our approach to disclosing the material that we will rely on, and also documents that might undermine our case in accordance with our legal duties of disclosure. We do not consider that it is either necessary or appropriate for us to make full disclosure in all cases, or indeed for that to be the starting point for any disclosure exercise. The disclosure of irrelevant material assists neither side. It creates unnecessary work and reduces efficiency. Such an approach also fails to take account of issues that may arise, for example concerning confidentiality and privilege. For these reasons we have decided not to make the suggested changes to the Guidelines.*
- 6.22 The stakeholder also suggested that 28 days to make written representations in response to the Statement of Case may be too short in some circumstances. They asked for some guidance as to the sort of factors we will use to determine the appropriate period (for example complexity, novelty, seriousness and urgency).
- 6.23 *The Guidelines already provide examples of the sorts of factors that are likely to affect the appropriate period. These include the number and complexity of the issues raised and the extent of new disclosure. We will consider any relevant factors, ie those that appear likely to us to affect the time it will take to respond in a particular case. We do not particularly consider that novelty, seriousness or urgency will impact on the ability to respond. We do not consider that any amendment is required to the guidance that already appears in the Guidelines.*

### Competition cases

- 6.24 The same stakeholder also raised issues about competition law cases. They queried whether Section 3 accurately reflected the approach we are required to take in competition cases and felt that it would be helpful if Section 4 made a greater distinction between competition and sectoral cases because of the different procedural rules, for example in respect of whistleblowers.
- 6.25 The stakeholder also suggested that we should follow the same procedures as are adopted by the CMA in respect of whistleblowing to ensure consistency of approach, and that we should consider the impact of publication on the interests of the whistleblower in deciding whether to offer anonymity.
- 6.26 *We believe that our approach to investigating and dealing with Competition Act cases is, taking account of adjustments relating to the EDP, consistent with the approach taken by the CMA and what the rules and regulations require of us.*
- 6.27 *The stakeholder's reference to whistleblowing procedures appears to refer to the CMA's leniency procedure for whistleblowers who report on cartel activity. We expect to consult with the CMA on the topic before reaching a final decision on our approach.*

6.28 *Section 4 and other sections in the document have been drafted without separating out the competition aspects because many of the general procedures are the same. Where there are differences, these have been clearly identified, as noted in a small amendment to paragraph 4.2.*

## Flowcharts

6.29 One stakeholder said that the flowcharts should contain information on the indicative timetables for the processes (those spread across the guidelines) to allow stakeholders visibility of our timetables.

6.30 *The purpose of the flowcharts is to outline the process that will be followed in most cases. The length of time that different steps of the process will take will vary from case to case. This is why, instead of setting general time limits, we intend to give an individual provisional timeline in every case. In these circumstances, we do not consider it helpful to add indicative timetables.*

## Compliance

6.31 We received comments from two stakeholders about compliance issues. The first stakeholder

- urged us to work in partnership with the industry on compliance
- acknowledged that we could not be expected to undertake assurance activities but said that it was our responsibility to provide clarity of legal drafting in addition to underlying policy content
- said the industry required clarity and certainty to be fully confident that they were complying with their obligations
- suggested that working together would produce positive outcomes for consumers and avoid the need for enforcement.

6.32 The other respondent said that without an overall owner of the compliance function there was a risk that work in this area would be less effective.

6.33 These comments relate to a separate piece of work on compliance (see our open letter to industry on regulatory compliance, which was published in March 2014<sup>13</sup>).

6.34 *We agree that the compliance monitoring described in paragraph 7.9 of the Guidelines should not be considered a part of the enforcement process but rather something that may occur after a case has been closed. We have made this clear in the Guidelines.*

## Conclusion

6.35 In this section we have amongst other things clarified

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<sup>13</sup> <https://www.ofgem.gov.uk/publications-and-updates/open-letter-regulatory-compliance>.

- how we have regard to better regulation principles in our work
- confirmed the position in relation to the Strategic Objectives
- made clear that, where we depart from the enforcement processes that we would usually expect to follow, we will explain why.

6.36 We have also added some details to the Guidelines in response to comments and have made minor changes for clarification or stylistic reasons.