



Megan Pickard
Ofgem
10 South Colonnade
Canary Wharf
London
E14 4PU

Emailed to – EGPPconsultation@ofgem.gov.uk

2nd August 2021

Dear Megan,

Consultation on changes to Ofgem's Enforcement Guidelines and Sectoral Penalty Statement

Drax Group plc (Drax) owns two retail businesses, Haven Power and Opus Energy, which together supply renewable electricity and gas to over 350,000 business premises. Drax also owns and operates a portfolio of flexible, low carbon and renewable electricity generation assets – providing enough power for the equivalent of more than 8.3 million homes across the UK. This is a joint response on behalf of Haven Power and Opus Energy.

Ofgem's review of the Enforcement Guidelines and Sectoral Penalty Statement is timely given how much the market and regulatory framework has evolved in recent years. We share Ofgem's desire for an enforcement regime that is effective at penalising manifest non-compliance and deterring future non-compliance, and that operates in a streamlined and efficient manner. We therefore agree with many of the proposed changes to the enforcement regime. However, we are concerned that some of the proposals, while well intended, will remove some of the existing rigour and robustness of the current regime and be counterproductive to the overall goal.

In finalising the framework, we urge Ofgem to ensure that the rigour, robustness and oversight in the current regime is not diminished. We also urge Ofgem to retain (or increase where possible) the transparency around enforcement cases, as this compliments the deterrent effect and enables market participants to learn from others' experiences and actions.

Most importantly, we ask Ofgem to reconsider its proposal to make an Ofgem Director the sole decision-maker in settlement cases. We believe the current Settlement Committee approach provides the necessary independent oversight, rigour and credibility in decision making. It is implausible to consider the same level of independence and challenge could be applied by a single person who works in such close proximity to the case team.

Our responses to the specific consultation questions are appended. We would be happy to discuss any part of our response with you further if it would be helpful.

Yours sincerely,

Matt Young

Group Head of Regulation

Appendix 1 – Responses to Consultation Questions

Question 1. What is your view on the proposal to remove the middle and late settlement windows, and associated settlement discounts?

We don't hold strong views on the proposal to remove the middle and late settlement windows. However, the fact they haven't been used to date isn't a compelling reason to remove them. In fact, removing them as an option could inadvertently reduce the number of cases which do get settled, particularly as the single settlement window would close prior to a full statement of case being provided. A more pragmatic approach could instead be to reduce the available settlement windows from three down to two, i.e. an early settlement window and a later settlement window (once the statement of case has been provided).

Question 2. What are your views on the option of allowing the Director responsible for Enforcement to be a decision maker in settlement cases?

We're extremely concerned by the proposal to grant a Director sole decision-making power. The current use of a Settlement Committee allows different perspectives to be considered, and opinions and decisions to be questioned and challenged, resulting in a robust and rigorous process. Most importantly the current Committee approach allows for independent oversight affording the process and resulting decisions credibility. We're greatly concerned that this will not be the case when one person is making decisions in isolation.

Moreover, combining this proposal with the proposed removal of the middle and late settlement windows, along with reducing the need for a quantitative assessment of detriment, greatly risks creating a hurried settlement process that fails to consider all the evidence available.

Notwithstanding the above, Ofgem's reasoning for using a sole Director is to speed up the settlement process, but no evidence is presented that suggests the settlement committee are causing the process to be unduly slow, and thereby causing unnecessary or detrimental delay.

Additionally, if Ofgem is to proceed with this proposal, we urge it to set out what factors determine whether a case is "complex", and therefore requires a settlement committee to form.

Question 3. In your view, are there any other steps you think we could take to speed up the settlement process, without undermining the evidence-based nature of our decision making?

We have no further views.

Question 4. Do you have any comments on the updated guidance on Provisional and Final Orders in section 7 of the guidelines?

We have no specific comments on the updated guidance regarding Orders, but would highlight that the more information provided to licensed parties about enforcement cases, the better. Enforcement cases and Orders offer valuable insights and lessons for all licensed parties to understand the root causes of breaches and Ofgem's justification for decisions taken. We fully support removing repetition but otherwise ask Ofgem to maintain, or even increase, the amount of information provided to industry.

Question 5. Is there any other information on Provisional or Final Orders you would find helpful to be in the guidelines?

We have no further views.

Question 6. Do you have any comments on any areas of the revised guidelines?

We have identified some changes within the drafting of the guidelines that we have concerns with:

Senior Ofgem Employees | Current guidelines paragraph 6.11 | Proposed guidelines paragraph 3.6

As explained above, we do not support the proposal to grant decision-making authority to a sole Ofgem Director. As such, we believe the Settlement Committee arrangements should remain in place and the guidance reflect that accordingly.

Proposed guidelines paragraph 6.5

We recognise it is difficult to design a process to suit all enforcement cases, and in some exceptional circumstances it may be more appropriate and/or expedient for Ofgem to deviate from the published guidelines and procedures. However, the proposed change to this paragraph in the Enforcement Guidelines gives Ofgem *carte blanche* to do as it pleases. We ask that Ofgem narrow the scope of this paragraph, highlighting that it is by exception only, and committing to publish clear justification for a departure in any individual case from the standard process.

Question 7. What are your views on the changes to the Sectoral Penalty Statement?

We were concerned by the proposal to significantly reduce the number of prescriptive factors listed in the Sectoral Penalty Statement, particularly under Section 5. However, we were reassured during Ofgem's workshop on 20th July 2021, that the intent is primarily to remove duplication and this will not detract from the amount of detail or transparency that will be provided in the various publications on enforcement cases. Licensed entities greatly benefit from such transparency as it helps to clarify Ofgem's reasoning behind enforcement decisions, and we wouldn't want that transparency to be reduced.

Additionally, we note that Ofgem refers to both consumers and "*other energy market participants*" (e.g. Paragraph 2.12) when discussing the detriment in enforcement cases, but we can't locate a definition for this term. We urge Ofgem to define this term as entities they directly regulate (i.e. licensees). Ofgem only has a duty of care to energy consumers and entities they regulate, not to other parties. Impacts on non-licensed entities should be dealt with through the appropriate legal channels.