



E.ON Response – Enforcement Guidelines

Executive summary

E.ON is supportive of Ofgem’s approach in revising the Enforcement Guidelines given the changes that the industry has seen since the Guidelines were created and will ensure that they are fit for purpose. However E.ON welcomes this opportunity to comment on the proposed changes to the Guidelines as we believe further amendments are necessary to ensure there is transparency and clarity in the guidance to support the decision making by the Director and Committee. We have outlined this in more detail in our answers below.

General points

Paragraph 1.2 of the consultation document sets out Ofgem’s strategic enforcement objectives, but in addition to delivering credible deterrence we believe that there should also be a focus on proportionality in terms of enforcement outcomes. Essentially, we would prefer to see some reference to fostering trust and promoting energy businesses to self-declare and put right anything suppliers have got wrong, without the fear of disproportionate enforcement decisions.

Similarly, we would also prefer to see in paragraph 1.9 some mention of the proportionality principle in addition to the taking of ‘appropriate’ action.

Paragraph 1.23 of the consultation states that *“Any proposed changes that are adopted in the Enforcement Guidelines will come into effect on the date on which we publish the final version of the document and will apply to all current and future investigations. The Authority will have regard to the updated version of the Penalty Statement in respect of any contravention which occurred on or after the date on which the updated Penalty Statement is published”*. Notwithstanding that this reflects the status quo, the Enforcement Guidelines have retrospective effect (in terms of investigations already in flight) but the Penalty Statement does not. We believe that the updated versions of both the Enforcement Guidelines and the Penalty Statement should only apply to contraventions that occurred after they were updated, so that neither have retrospective effect. Without this change being made, we believe it could lead to anomalies. For example, where an investigation is ongoing at the time of the updated Enforcement Guidelines go into effect, it is not clear whether that case would then be subjected to the reduced settlement windows.

In addition to the above general points, we have provided comments on each of Ofgem’s questions below.

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

We do not completely agree with the proposal to remove the middle and late settlement windows. The rationale behind the adoption of three settlement windows was, in part, to allow suppliers to settle at a later date (albeit with a lesser discount) where there were considered to be *“genuine disputes about the number of breaches or the adequacy of the evidence in respect of them”*. Although Ofgem has noted in the current consultation document that no party has chosen to exercise the settlement option in the second or third settlement windows, we do not believe that this in itself provides evidence that there will never be a case where more than one settlement window would



have assisted suppliers in weighing up all the factors and arriving at a considered decision on whether to settle.

With the increased move to principles-based regulation, it is possible that situations may arise where licensed parties may have genuine disputes about the alleged breaches or the evidence in respect of them. It is in those cases, including where there is genuine challenge around fact and interpretation where parties may potentially find the availability of more than one settlement window useful.

It is noted that, within the consultation, Ofgem refers to the possibility of offering discounts outside of the settlement window in exceptional circumstances and/or reopening settlement windows. However, this would be at Ofgem's discretion and it is not clear what circumstances may lead to the exercise of such a discretion. At the very least, we encourage Ofgem to provide clarification on the types of circumstances in which they may exercise such a discretion and provide some examples of what constitutes an exceptional circumstance.

We agree that the current arrangement of there being three settlement windows available is in need of some rationalisation, but we believe it would be more proportionate to move to a position of having two settlement windows rather than the proposed single settlement window.

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

In principle, and subject to the comments below, we agree with the introduction of the option of allowing the Director responsible for Enforcement to be a decision maker in settlement cases.

Settlement decisions arrived at through the Enforcement Decision Panel (EDP) gives some semblance of independence, balance and consistency, and so credibility is key. If the relevant Ofgem Director can project similar attributes in deciding on settlement cases, then it may be beneficial to the expedient handling of enforcement cases.

However, there is a distinct lack of detail within the consultation documentation about the circumstances in which a Director would be permitted to be decision-maker in settlement cases instead of the Settlement Committee, and how such a determination would be made. Paragraph 3.7 of the consultation document states that the "*option to use a Settlement Committee will remain*", but it is not clear how that option may be exercised and by whom.

Furthermore, if it is being suggested Ofgem may unilaterally decide to appoint a Director to be the sole decision-maker on the settlement procedure, then we believe that there should be scope for licensed parties to challenge that decision, should they wish to, and request that a Settlement Committee be appointed to reach a settlement.

We strongly believe that Ofgem should clarify these matters in the updated Enforcement Guidelines document, particularly with reference to the circumstances in which the use of a Settlement Committee would, or could, be utilised.

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?

E.ON does not agree with Ofgem's stance on alternative action; we believe that there should not be an active move away from cases going down the alternative action route and that it should remain as



an option for resolving investigations and consumer detriment. We believe that further clarity should be provided in the drafting on the alternative action route procedure itself and when it can be applied.

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

We generally find the updated guidance on Provisional and Final Orders in sections of the guidelines useful as a reference tool. However, whilst the updated guidance does assist in terms of clarity and transparency, we believe Ofgem could take action sooner than it has taken previously on licenced parties, in order to ensure compliance, especially where this may mitigate the negative impacts arising from supplier failures and disorderly market exits.

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

We believe that the drafting on Provisional and Final Orders provides Ofgem with great latitude in its consideration of what is requisite. Use of some latitude here does seem reasonable because sometimes urgent action is required to prevent harm or further harm, which may be only suspected or prospective rather than proven. The most obvious case is suppliers who continue (sometimes wrongfully) to trade (for example, taking on customers, accumulating or withholding customer account balances etc.) with impending insolvency. However, we believe Ofgem is increasing its use of Orders to secure compliance, but in many cases we would encourage it could do so at an earlier stage so as to reduce harm. Therefore we would like to see guidance on this included to provide for Ofgem to set its position on acting earlier and more decisively.

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

We believe the proposed changes make the guidelines too wide and we would prefer to see further guidance in place in relation to the discretion Ofgem has in making and enforcing its decisions. For example, our aforementioned answers highlight our concerns with the discretion around settlement windows and discounts and when a Director may be appointed to decide the settlement as opposed to the Settlement Committee. Ofgem should include stringent guidance here to support decision makers in making decisions and thus ensuring that the decisions made provides a level of consistency overall; it will also ensure that extraneous factors play no part and that the decision making process is clear and transparent.

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

As mentioned above on the Enforcement Guidelines, we believe the Penalty Statement is also drafted too widely with the addition of discretions for Ofgem. For example, use of the words “may” rather than “will”, “not limited to”, etc. We would prefer to see more stringent drafting in place to ensure more consistent and transparent application of the Sectoral Penalty Statement.

Furthermore, we would like to see more stringent drafting included on how Ofgem will calculate the penalty amounts in the event of any consumer detriment as well as in the event there has been no detriment, outlining the proportionality of the calculations. There should also be further clarification included on the process in place that suppliers are able to follow in order to challenge or appeal any decision outcome enforced on them.