

Megan Pickard
Enforcement Manager

Ofgem
10 South Colonnade
Canary Wharf
London
E14 4PU

SSE plc
Inveralmond House
200 Dunkeld Road
Perth
PH1 3AQ

GroupRegulation@sse.com

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Sent by e-mail

Dear Megan

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

On behalf of SSE we detail below our response to Ofgem's consultation on changes to Ofgem's Enforcement Guidelines and Sectoral Penalty Statement.

Ofgem's first priority must be to ensure that non-compliant behaviour is addressed. However, non-compliant behaviour could perhaps partly be avoided by Ofgem providing assistance to parties to understand Ofgem's expectations and the obligations and standards of compliance that are required. As well as helping to avoid non-compliance, such an approach would allow remedial steps to be taken much sooner, which is in the best interests of consumers. Where required, enforcement action should be proportionate and targeted where needed. This supports a harm-based approach, where enforcement activity is focused on areas where consumer harm is likely to be greatest. Such an approach is consistent with the Authority's statutory duties.

From SSE's own experience of the enforcement process, Ofgem's approach to enforcement in the past has been formalistic and conducted at "arm's length". The process has been lengthy and cumbersome as a result, with Ofgem's clear focus being on preparing a case for prosecution rather than working with the licensee to agree remedial steps and achieve outcomes for consumers at an early stage. The move towards using more alternative action and provisional orders shows a shift away from this, however as above, we believe that supporting licensees and providing assistance prior to enforcement is even more beneficial.

In the previous review in [2013](#), SSE supported the introduction of greater impartiality and independence in decision-making through the introduction of an Enforcement Decision Panel (EDP) and Secretariat, which was seen as a positive step. We have concerns that the proposals being made in this consultation backtrack on that to a degree.

We would like to make it very clear that we agree that REMIT and sectoral enforcement should be treated separately, and it is essential that the guidance should be dealt with separately. Our views presented in this letter are only applicable to this consultation, and we look forward to responding to the REMIT Enforcement Guidelines consultation in due course.

With regard to the update to the guidance document, we would raise the following points:

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

We note that the middle and late settlement windows have not been used, and support Ofgem in principle in its pursuit to reduce the resource and time required to resolve investigations. However, we have concerns that “a reasonable period (usually 28 days)” may not allow enough time for complex settlement discussions and internal governance required to reach a decision that facilitates settlement. It is important that the flexibility lost from losing further settlement periods does not hinder these processes, as it may limit willingness to settle. We suggest that as part of the ongoing dialogue between Ofgem and the company there should be defined and clear opportunities for the licensee to resolve an issue to support it being closed or permit alternative action to be taken. We note the option remains for Ofgem to reopen the settlement period, however there is no information provided as to how this works in practice. It is important that Ofgem’s decision-making processes around no action/alternative action are clear at all points in the process, including likely timescales.

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

As noted above, impartiality and independence in decision making is critical in Decision Panels, which we would extend to the Settlement Committee (SC). We recognise that not using a SC this may result in swifter resolution. Accordingly, it must be clear from the outset who the responsible Director is and that they are able to be a decision maker in settlement cases.

Ofgem notes that “The EDP was established in 2014 to take decisions in contested and settlement enforcement cases and to provide separation between the case team and the decision maker.” Although this is acknowledged in the consultation, we remain concerned that in cases where a delegated Ofgem Director makes settlement decisions in place of the EDP, this separation could be infringed upon. We recognise that the option for using a SC will remain and it is vital that both parties are empowered to request this option i.e. that a third party review the outcome of the case. This should be made explicit in the new guidelines as at the moment it is not clear whether this is done by request or at Ofgem’s discretion.

While supportive in principle it is important that if this change is made it is clearly set out in the guidelines, otherwise it could lead to lengthier and more costly processes as parties would be more likely to contest cases where they believe there was an imbalance of independence.

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?

The majority of licensees will not have gone through enforcement, or the process of the need for settlement, so may not be able to fully understand or cooperate with the process due to lack of experience. Where appropriate, it may be worth sharing scenarios or approximate timescales with licensees, particularly of the pre-settlement stage, so that licensees are best equipped to come into settlement discussions in a constructive manner.

Other than the above, supporting and working with licensees to ensure that enforcement is not required in the first place will reduce breaches and therefore the need for enforcement. This includes ensuring that expectations of regulated parties are clear and learnings shared where there have been infringements leading to settlement or enforcement actions.

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

With the increased use of Final and Provisional Orders (FO&PO), we support the provision of increased guidance on the use of them and have no comments on what has been provided.

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

No further information is requested at this time on FO&PO.

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

- The previous guidance noted in 1.13 that “If the circumstances of a particular case justify it, we may depart from the general approach to enforcement set out in these guidelines. If we do, we will explain why.” This is now referenced three times at separate points (1.12, 6.5, 7.19), and there is a concern that this suggests that Ofgem is opening up to pursue this “departure”. This gives market participants uncertainty on the way that enforcement will take place and undermines the integrity of the guidelines.
- We note that Ofgem has inserted new wording into paragraph 6.79 of the Guidelines, relating to Competition Act investigations. The new paragraph allows Ofgem to issue a non-confidential version of the Statement of Objections to affected parties, or parties with sufficient interest. We strongly object to this new wording. Our position is that Ofgem’s Statement of Objections should be considered commercially sensitive to the addressee(s) and is likely to be market sensitive. No amount of redacting could remove the risks associated with issuing a document of this nature to a third party. Ofgem has not flagged this new provision in its consultation document and so we are unclear as to its rationale for including this new provision. We do not agree that this new paragraph is appropriate or necessary. If Ofgem intends to introduce a new provision of this nature then it should properly consult on this point, rather than including it as an unexplained consequential amendment.

In support of the above, we would note that CMA’s Guidance (CMA8) allows for the issuing of a Statement of Objections to a third party only in a very specific and limited context. The CMA notes (in para. 11.3) that (in cartel/ anti-competitive agreement cases), it may choose not to issue a Statement of Objections to one of the parties to the Agreement. In that specific case, CMA may notify that person that a Statement of Objections has been issued and can provide a non-confidential copy of it where is deemed necessary for them to review it to protect their rights of defence

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

With regard to the Sectoral Penalty Statement we would raise the following points:

- Throughout the document, including in 2.2 on the section on gain and detriment, Ofgem now references “detriment caused to consumers **or other market participants**”. It is unclear and unreferenced in the consultation document that this move away from enforcement being solely about consumers is happening. Previously it was included in measuring the impact of a

contravention, however this seems to have been extended to all parts of the document. Clarity should be provided on this change.

- With further regard to the change in calculation of Supplier Gain and Consumer Detriment, Ofgem proposes to only calculate detriment to consumers where it is proportionate, reasonable and practicable to do so to save time and resource. There are concerns that unless this is transparently calculated and is instead considered more generally as part of the assessment of seriousness, that parties will have no method of recourse if they believe the assessment is not proportionate. This may result in less satisfactory outcomes for industry and consumers, increasing the time and resource required when industry appeals figures which do not appear to have been transparently determined.
- As in our response to the Enforcement Review in 2013, the move further to a principle-based approach is not appropriate for a dissuasive enforcement regime. Instead a compliance-based enforcement model would be more suitable when dealing with principles. Confidence that consistent and proportionate approaches taken in every case may be undermined.
- 5.10 states “the regulated person’s awareness of the contravention and the extent to which the regulated person and its senior management had taken steps to secure compliance”. We feel this is a weakening in the wording from the previous guidelines. Enforcement should be reserved for those who cannot or will not demonstrate a positive compliance culture, while Ofgem should be more prepared to agree undertakings or alternative action with those who demonstrate that positive culture. This would provide a clear business case for investment in compliance measures.
- Further to the above, the removal of 5.16 and 5.17 which detailed factors increasing and decreasing the penal element of the enforcement, is not a positive step, as this provided guidance to licensees on areas which demonstrate best practice within their companies. One of our critical points is that ensuring breaches do not happen in the first place should be Ofgem’s priority over enforcement.
- One change being made is the removal of self-reporting as a mitigating factor. Ofgem introduced amended wording as part of the statutory consultation of the Supplier Licensing Review to indicate that self-reporting was expected in relation to matters that Ofgem might reasonably expect notice, “particularly actions or omissions that give rise to a likelihood of detriment to Domestic Customers.” Ofgem confirmed that it was for “suppliers to determine when it is appropriate to keep us informed of relevant developments and changing circumstances”.

The emphasis given to the disclosure of issues affecting Domestic Consumers might lead suppliers to conclude that the failure to self-report an issue that gave rise to a likelihood of detriment to Domestic Customers would be treated more severely than one that did not and therefore the removal of self-reporting as a mitigating factor would appear to contradict Ofgem’s policy intention during the SLR that suppliers should determine when it is appropriate to notify Ofgem of issues.

This may lead to suppliers opting against self-reporting marginal / minor issues to Ofgem. This would appear to be counterintuitive and we would, therefore, encourage Ofgem to consider whether self-reporting should remain a mitigating factor in cases where a supplier could

demonstrate that they did not consider that Ofgem would reasonably expect notice of an issue under SLC 5A. Finally, when documents such as this are being updated, small changes which may seem innocuous at first, may have unintended consequences down the line, so it is really important that stakeholders are made aware of any and all changes made. A tracked changes document would benefit here, so that we can help Ofgem to ensure the consulted-on documents are fair, reasonable, and meet their objective.

We look further to engaging further with Ofgem in relation to this topic, please contact us at GroupRegulation@sse.com.

Yours sincerely,

Kieran Alderton

Group Regulation Analyst