

Charles Hargeaves
Deputy Director, Enforcement
Ofgem
10 South Colonnade
Canary Wharf
London
E14 4PU

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Dear Charles,

Changes to Ofgem's Enforcement Guidelines and Sectoral Penalty Statement

Thank you for the opportunity to review and comment on your draft guidance. This response is on behalf of ScottishPower. We have set out answers to the consultation questions in Annex 1. We would highlight the following two points:

Changes to decision making in settlement cases

The proposed change to allow the Director responsible for Enforcement to be the sole decision maker in settlement cases could, in our view, result in the speed of decision making being emphasised at the expense of the quality and rigour of decision making. We are also concerned that the Director responsible for Enforcement may not be sufficiently independent from the SRO and case investigation team. We would suggest that Ofgem sets a threshold above which cases are always dealt with by a settlement committee, and that licensees are given the ability to request that cases falling below this threshold are nevertheless dealt with by a settlement committee.

Changes to Ofgem's sectoral penalty statement

We are extremely concerned about the proposed changes to Ofgem's sectoral penalty statement which appear to significantly weaken the requirements for calculating financial penalties for licensees found to be in breach of their licence. In particular, we note that consumer detriment will now only be quantified as part of the penalty calculation where "it is proportionate, reasonable and practicable to do so"¹. We believe these changes introduce risk that a material financial penalty could be imposed in situations where there is no demonstrable material consumer detriment or licensee gain. It seems that the rationale for these changes is to streamline and speed up Ofgem's settlement process which in our view is insufficient justification.

Please do not hesitate to contact me or my colleague Haren Thillainathan (hthillainathan@scottishpower.com) if you have any questions arising from our response.

¹ Consultation Document, paragraph 6.5.

Yours sincerely,

A handwritten signature in blue ink that reads "Richard Sweet". The signature is written in a cursive, flowing style.

Richard Sweet
Head of Regulatory Policy

**CHANGES TO OFGEM'S ENFORCEMENT GUIDELINES AND SECTORAL PENALTY
STATEMENT – SCOTTISHPOWER RESPONSE**

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

We do not oppose the proposal to remove the middle and late settlement windows, and associated settlement discounts.

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

Our understanding of the proposed change to Ofgem's Enforcement Guidelines is that the Director will primarily be making the decisions in settlement cases, with the ability to delegate this decision making power to another Director, and that the settlement committee will be in place to provide 'specialist' support in cases "*considered suitable for settling via this route*"². It appears that this proposed change is designed to promote the speed and ease of decision making³, but this is potentially at the expense of rigour and properly considering available evidence, and in turn the quality and accuracy of decisions and the confidence that licensees and consumers can have in the enforcement process. If Ofgem proceeds with this change (which in our view it should not, at least not without making changes), then it should provide further guidance on, or examples of, the cases that it envisages being "suitable for settling" by settlement committee.

The draft Enforcement Guidelines suggest that the Enforcement Oversight Board ("EOB") shall advise, and the Director responsible for Enforcement shall decide, on "*the appropriate decision maker based on a case-by-case basis*"⁴. This was confirmed by Ofgem in response to a question raised at the workshop on 20 July 2021. (We note that the EOB is chaired by the Director responsible for Enforcement, who is the "*final decision maker*".⁵) In this context, if licensees are not able to request that decisions are made by the Settlement Committee rather than just the Director responsible for Enforcement, the Director responsible for Enforcement will have sole discretion as to whether he/she is the settlement decision maker. This raises concerns about the independence of the process, and the confidence that parties who are subject to the process can have in it. To address some of the above concerns, we would suggest Ofgem's guidelines are clarified with regards to:

- types of cases where it would be appropriate for the Director responsible for Enforcement to take settlement decisions alone and circumstances where such decisions should be taken by the Settlement Committee, ideally with illustrative examples;
- The ability and processes by which licensees can request to the EOB that their settlement case is decided on by the Settlement Committee; and

² Draft Enforcement Guidelines, paragraph 6.24.

³ Consultation Document, paragraphs 3.5 and 3.10.

⁴ Draft Enforcement Guidelines, paragraph 6.26.

⁵ Draft Enforcement Guidelines, paragraph 1.11, footnote 20; and paragraph 3.1, footnote 100.

- the process for the EOB to decide whether the case should be decided by the Settlement Committee or Director responsible for Enforcement alone.

One of the benefits of settlement decisions being taken by the Settlement Committee is that it is independent from the designated case team, which is supervised by the Senior Responsible Officer ("SRO"). This is acknowledged by Ofgem within the draft Enforcement Guidelines.⁶ Ofgem claims that the Director responsible for Enforcement will be sufficiently separate from the case team, as he/she *"is not involved in the day to day running, or oversight, of our investigations and all decisions are evidence-based"*.⁷ However, it is not clear from Ofgem's Guidelines that the necessary safeguards are in place to ensure sufficient separation between the Director responsible for Enforcement, the SRO and investigation case team. We would welcome further clarification in the Guidelines on the definition and scope of these three parties, their interactions and functional separation. Indeed, we would suggest these amendments are the minimum necessary if the Director responsible for Enforcement will take settlement decisions alone.

In support of its proposal, Ofgem states that licensees have been willing to engage with the Alternative Action process where an Ofgem Director is the decision maker, and this process has delivered good outcomes. However, the Alternative Action process, and other informal compliance processes, do not result in a formal finding of breach in contrast to the formal settlement process. It cannot be assumed, therefore, that parties will have the same willingness to engage with a settlement process that results in a formal finding of breach where an Ofgem Director is the sole decision maker. We do not believe Ofgem has, so far, provided sufficient evidence to support the assumption that this change will reduce the duration of settlement cases nor that the use of a Settlement Committee prolongs them.

In order to assuage some of our concerns, we would propose that Ofgem sets a threshold based on the value of a case or the possible penalty to be imposed on the business, below which the Director responsible for Enforcement is the decision maker, and above which the Settlement Committee is the decision maker. Licensees subject to enforcement should have the ability to request that a case falling below the threshold should nevertheless be dealt with by the Settlement Committee. This would allow smaller enforcement cases to be dealt with more quickly and with less resource (which would appear to be Ofgem's rationale for suggesting the Director's involvement), while cases of higher value and significance would still be dealt with by the independent Settlement Committee.

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 suggestions in this regard. Indeed, in our view the proposed changes put too much of an emphasis on speed and potentially detract from the rigour and quality of the decision making process. Please see our comments in response to Question 6 for more detail in this regard.

⁶ Paragraph 3.11.

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

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

We have answered Questions 4 and 5 together.

The Guidelines state that the decision to make a Provisional Order is to be made by the "appropriate decision maker who will decide on next steps".⁸ It is not clear who the "appropriate decision maker" is. This should be clarified in the guidance. If Ofgem intends this to be the Director responsible for Enforcement, we ask that Ofgem explains the rationale for this.

Provisional Orders are interim measures that can be made to bring about compliance in cases where Ofgem suspects a licensee *"is contravening or is likely to contravene any relevant condition or requirement and where that order is requisite to bring the breach/es to an end"*.⁹ They should, therefore, only be put in place where they address the particular breach at hand or the particular issue that has arisen, and the measures to be implemented by the licensee should be designed to prevent the breach from occurring again. We have concerns that this has not always been the case, and that Provisional Orders are sometimes designed so as to impose sanctions on a licensee. Sanctions, if appropriate, should only be imposed as part of a Final Order and this should be reflected in the guidance.

We are also concerned that Provisional Orders and Final Orders are not being used consistently across large, intermediate and small energy companies, resulting in some parts of the industry being disproportionately affected by enforcement. The Guidelines should make it clear that they should be applied consistently across different categories of licensees.

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

Emphasis on speed and ease of decision making

Ofgem's proposed changes to the Guidelines focus on improving the speed and ease of decision making and easing the pull on resources from enforcement decision making. This is clear from the very first sentence of the Overview, and the introduction of the word "swiftly". It is also clear from Question 3 of this Consultation. However, we are concerned that this is done with no regard to the negative impacts that this will have on the rigour of the enforcement and decision making process, the consideration of evidence, and the quality and accuracy of decisions. For example, at page 6 of the revised Guidelines, Ofgem proposes replacing the aim to *"put it [loss or harm] right **quickly and satisfactorily**"* with the aim to *"put it right **swiftly**"* (emphasis added). The removal of the word "satisfactorily" here is, in our view, rather telling, and Ofgem should explain why it has been omitted.

It is currently open to a business to decide if it wants to make oral representations to the EDP during the enforcement process. However, under Ofgem's proposals, while the licensee may still request to make oral representations, the decision whether to hold oral hearings is ultimately to be made by the EDP Secretariat.¹⁰ The Guidance should set out the qualifications of the Secretariat to make this decision, the criteria to be used, the process for deciding it, and whether a disputed decision will be subject to reconsideration within Ofgem (and if so, by whom). If licensees are unable to make oral representations to the EDP, this will have a

⁸ Draft Enforcement Guidelines, paragraph 7.10.

⁹ Draft Enforcement Guidelines, paragraph 7.3.

¹⁰ Draft Enforcement Guidelines, paragraph 6.50.

detrimental impact on the quality of decision making, and the confidence that licensees and consumers will have in the rigour and fairness of the process. There appears to be little justification for licensees who will potentially be subject to enforcement, not to be able to put forward their case to the decision maker in this way. Should the EDP Secretariat refuse a business' request to make oral representations, then the EDP will potentially be making its decision without having all of the relevant information. We also do not understand the rationale for this proposed change. In particular Ofgem has not provided any evidence that EDP is unduly burdened by holding oral hearings, and so there would appear to be no justification for making this change if it is being made in order to improve the speed and ease of decision making (and would in our view, have a detrimental effect on the quality of decision making).

In the event that an oral hearing is held, Ofgem has proposed removing from the Enforcement Guidelines the detail regarding how hearings will be conducted.¹¹ This would result in less clarity for licensees about the process that will be followed during the hearing.

We note that, in relation to investigations, Ofgem proposes to delete the statements in the Guidelines that "*Companies under investigation can expect regular updates, often by telephone and email*"¹², and that it will "*aim to avoid requesting information more than once without good reason*"¹³. Ofgem has not given any justification for these changes. If they are designed, as may be the case, to improve the speed and ease of decision making and to reduce the burden on Ofgem, then we do not see how the benefit of these changes in this regard outweighs the benefit to licensees under investigation in being updated regularly on the progress of their investigation, and the unnecessary and arguably unfair burden placed on licensees under investigation should they be required to respond to multiple requests for the same information.

Also, in relation to information requests, Ofgem is proposing to delete the following regarding extensions of time for businesses to respond: "*We may allow further time if there are good reasons for needing an extension*"¹⁴. The Guidelines still allow businesses to request an extension of time, but the removal of the reference to "*good reasons*" gives Ofgem greater scope for refusing such requests. This is another example of Ofgem's changes focusing on improving the speed of the decision making process, but failing to consider the negative impacts this will have on the quality of decision making. It will also lead to increased unfairness, as parties under investigation may not be given sufficient time to collate relevant information and provide it to the decision maker.

In addition, rather than Ofgem being able to allow businesses more than 28 days to respond to a statement of case, the revised Guidelines state that the 28-day period "*may be more or less time depending on the case*"¹⁵. This change appears to place more importance on increasing the speed of proceedings by potentially reducing the period of time a business has to respond, at the expense of the quality and rigour of the decision making process, by allowing a business a longer period of time to respond where to do so may assist the resolution of the matter.

We also refer to our comments in response to Question 2 in this regard.

Procedural fairness, clarity and transparency

¹¹ Existing Enforcement Guidelines, paragraphs 5.45 – 5.47.

¹² Draft Enforcement Guidelines, paragraph 5.29.

¹³ Draft Enforcement Guidelines, paragraph 5.42.

¹⁴ Draft Enforcement Guidelines, paragraph 5.45.

¹⁵ Draft Enforcement Guidelines, paragraph 6.44 (emphasis added).

Ofgem confirmed during the 20 July workshop that one of the key objectives of its proposed changes is to promote transparency and clarity in its enforcement process. However, we are concerned that a number of proposed changes to the Guidelines would result in businesses and consumers having less transparency of the process to be followed during any enforcement investigation or action. For example, in paragraph 5.1 of the proposed Guidelines, Ofgem states that, *"This section describes what enforcement processes are available to us, how we will **usually** use them in practice and how we would identify and decide whether to investigate a potential breach or infringement"*. In paragraph 6.5, Ofgem reserves the right to depart from the settlement procedures set out in the Guidelines and state that businesses have *"no 'right' to the processes set out in this section"*. Ofgem also proposes removing the following requirement from earlier in the Guidelines: *"If we do [depart from the general approach to enforcement set out in these guidelines], we will explain why"*.¹⁶ If businesses do not know for certain what processes will be followed and what criteria will be applied during enforcement, they will have less confidence in the process. The same applies for consumers. It is also unfair for parties subject to an enforcement process not to know what the process is. There are therefore concerns around lack of due process. Ofgem should set out more detail in the Guidelines on the circumstances in which it envisages having to depart from its enforcement processes, and set out the criteria against which it will assess the need to do so. Ofgem should also be required to explain fully any such departure.

There are also issues with procedural fairness and due process in relation to Ofgem's proposed changes to the statement of case ("STOC") procedure. The Guidelines state that the STOC *"will be accompanied by an evidence bundle of documents to support our findings and the other relevant content within the STOC. **The STOC may be substantially different from the Summary Statement. New breaches may be added, and different reasons relied on.** We may also request further information from the business before drafting the STOC. This does not apply is [sic] a provisional or final order has been issued"*.¹⁷ The licensee under investigation should have fair notice of why they are being investigated and what particular actions are being investigated. If Ofgem is able to effectively change the case that is being brought against the licensee, then there is a clear risk that the party will not have this fair notice. We note the contrast with the licensee's inability to introduce new material at oral hearings that it has not previously included in its written representations.¹⁸ We also note the parallel with court proceedings, and the restrictions that there are on parties being able to introduce new evidence or causes of action once proceedings have been started.

We note that 'access to file' rights under competition law procedures would be curtailed under Ofgem's proposals.¹⁹ Ofgem should explain the rationale for this, and why the 'access to file' rights applicable to competition law cases are not extended to Sectoral cases.

The Guidelines are silent on how disputes over, for example, disclosure and procedural matters are resolved, and in particular whether the EDP has a role in this. Ofgem should include this detail in the Guidelines. Our preference would be for the EDP to be the decision maker in such disputes, given its independence, and the fact that it is unclear how the SRO would be able to resolve such disputes and substantive issues of law fairly.

Other comments

It would appear that the changes to the Guidelines lessen the involvement of the EOB. As we comment above, the EOB does not make all decisions regarding case opening, and instead

¹⁶ Draft Enforcement Guidelines, paragraph 1.12.

¹⁷ Draft Enforcement Guidelines, paragraph 6.35 (emphasis added).

¹⁸ Draft Enforcement Guidelines, paragraph 6.43.

¹⁹ Draft Enforcement Guidelines, paragraph 6.82.

advises the Director responsible for Enforcement. The Guidelines also state that it is no longer a requirement for the EOB to be consulted in relation to interim orders, on whether commitments should be accepted, and on whether to seek a court order under the Enterprise Act, and it is now only "usually" to be consulted.²⁰ Ofgem should explain the rationale for this further concentration of decision making power with the Director in the Guidelines.

Our recent experience suggests that there may be benefits in keeping Alternative Action as an option in Ofgem's enforcement "toolkit". Ofgem states in the consultation papers that it expects Alternative Action to be used less often going forward, and instead more cases will proceed to settlement²¹. A move towards the increased use of more formal enforcement processes (whether that be settlement or contested cases) may lead to some cases being more complicated and protracted than would otherwise have been the case. This would not only serve to defeat Ofgem's aim to increase the speed and ease of decision making, but also increase the time it would take to get redress to consumers and send a deterrent to the rest of the industry. We also do not agree with Ofgem's opinion that Alternative Action results in a lesser deterrent to industry than other enforcement processes²². Ofgem has the option to publish Alternative Action outcomes²³, and doing so would have a reputational impact on the business that was subject to the process. In addition, the redress payments and other measures that may be imposed as part of Alternative Action²⁴ will contribute to the deterrent factor.

We note that Ofgem has removed from the Guidelines the commitment to "*over time rely more on principles within the gas and electricity supply licences rather than on prescriptive conditions*"²⁵, however it has not offered an explanation for this deletion and it would be helpful for Ofgem to do so.

Paragraph 7.18 of the Guidelines provides that Ofgem "*has a period of 42 days from the date on which the **provisional order** was served on it to make that application*" (emphasis added), and the footnote refers to section 30 of the Gas Act and section 26 of the Electricity Act. The appeal right in fact applies to both provisional and final orders, and the reference to section 26 of the Electricity Act should be to section 27.

It would be helpful for Ofgem to confirm whether the enforcement measures the Guidelines make reference to in respect of individuals are comprehensive, or whether there are other enforcement measures that it would consider taking.

We note that the Enforcement Guidelines and the Consultation Document state that the revised Enforcement Guidelines will not only apply to future investigations, but also current investigations as well.²⁶ In our view, it is unfair for parties under investigation if the process and approach to enforcement changes during the currency of an investigation. This could mean, for example, an ongoing investigation going through settlement having a different decision maker (i.e. the Director responsible for Enforcement rather than a Settlement Committee). This approach would also be inconsistent with the approach being taken to the revised Penalty Statement, which will only apply to breaches on or after the date on which it is published.²⁷

²⁰ Draft Enforcement Guidelines, paragraphs 3.9 – 3.10.

²¹ Consultation Document, paragraph 3.5.

²² Ibid.

²³ Draft Enforcement Guidelines, paragraph 1.11.

²⁴ Draft Enforcement Guidelines, paragraph 5.60.

²⁵ Draft Enforcement Guidelines, paragraph 2.8.

²⁶ Draft Enforcement Guidelines, paragraph 1.12; Consultation Document, paragraph 1.23.

²⁷ Consultation Document, paragraph 1.23; Draft Penalty Statement, paragraph 9.1.

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

Calculation of licensee gain and consumer detriment

Ofgem is proposing a significant change to its approach to sanctions for licensees, namely only calculating the detriment to consumers as a result of the relevant breach(es) where it is proportionate, reasonable and practicable to do so. This is, as with many of Ofgem's proposed changes, justified on the basis that it is complex and time-consuming to do so.²⁸ However, in our view, this is the very reason that consumer detriment should not be assessed without reviewing the available evidence. We believe it is critical that Ofgem explains how it will ensure that its assessment of consumer detriment will be justified and proportionate, when it is not specifically calculated and is instead considered more generally as part of its assessment of seriousness (Step 2 of the calculation of the financial penalty or consumer redress). If Ofgem adopts its proposed approach there is a significant risk Ofgem will have the ability to set an arbitrarily material financial penalty not supported by any demonstrable consumer detriment or licensee gain. Ofgem should also explain how it intends to assess and weigh proportionality and practicality when considering whether or not to actually calculate consumer detriment.

We are also concerned that this approach may impact licensees' ability to make representations on Ofgem's calculations of the financial penalty. In practice at present, parties are typically given the opportunity to make representations on Ofgem's assessment of consumer detriment and licensee gain. If Ofgem decides that it is not proportionate, reasonable and practicable to calculate consumer detriment (or indeed licensee gain), parties should be able to make representations on these factors and how they should be considered by Ofgem as part of its assessment of seriousness. Ofgem should also be required to justify its decision whether or not to calculate consumer detriment and/or licensee gain, and its assessment of these factors as part of its assessment of seriousness. Otherwise, the process would not be sufficiently transparent and robust.

While we concede that Ofgem's proposed change of approach in this instance will result in less time and resource being spent on calculating licensee gain and consumer detriment, we note that Ofgem (as with other changes) does not appear to have considered whether it will result in more satisfactory outcomes for industry and, more importantly, consumers. There is a risk that dispensing with a specific calculation of licensee gain and, in particular, consumer detriment, will result in consumer detriment being included in Ofgem's assessment of seriousness in circumstances where a precise calculation would have resulted in little or no consumer detriment actually being assessed. This is particularly the case if licensees are not given the opportunity to make representations on consumer detriment as part of Ofgem's assessment of seriousness.

Changes as a result of Supplier Licensing Review

We also note the changes proposed as a result of new requirements on suppliers introduced through the Supplier Licensing Review. This includes some conduct that previously would have been an aggravating factor in respect of a breach now being a breach in its own right, and similarly failure to do something that would have been a mitigating factor had the business done it may now be a breach. The Guidelines give insufficient guidance on what potential mitigating and aggravating factors Ofgem may consider in its decision making following these changes.

²⁸ Consultation Document, paragraph 6.5.

Other Comments

Ofgem is proposing to remove the following from paragraph 8.3 of the Penalty Statement: "*The Authority will not normally require regulated persons to pay compensation for stress or anxiety caused to one or more consumers as a result of a contravention*". However, Ofgem has not provided any explanation or justification for this change.

Ofgem is proposing to remove the list of factors that they would take into account at various stages of the penalty assessment process, as part of a move towards principles-based regulation. Its reasoning is that this addresses overlap, and helps to "clarify and future-proof the Penalty Statement".²⁹ However, in our view, removing this level of detail from the Statement has a negative impact on the transparency and clarity of Ofgem's decision-making. Ofgem did say during the workshop held on 20 July 2021 that, for example, aggravating and mitigating factors would be set out in correspondence with the business subject to the enforcement process. This does not, however, deal with our concern that parties will not know the standard against which they will be judged, until they reach the stage at which they are judged.

General feedback on consultation

In our view, the consultation could have been improved in two respects. First (as we have pointed out at various points in our responses above), Ofgem has not properly explained the reasoning for many of its proposed changes to the Guidelines and Sectoral Policy Statement and has in some cases given no justification for the changes. Second, Ofgem's failure to provide 'tracked changes' versions of proposed Guidelines and Penalty Statement puts respondents to unnecessary effort in comparing the documents – or risks changes going unnoticed.

ScottishPower
July 2021

²⁹ Consultation Document, paragraph 6.5(b).