

## Enforcement Guidelines on Complaints and Investigations



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**Target audience:** Consumers, consumer groups and energy companies, including potential complainants and those subject to investigations.

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### Overview:

Effective enforcement is important to protect consumers' interests and promote well functioning markets. This document explains Ofgem's approach to enforcing sectoral, competition and consumer legislation.

The guidelines bring together for the first time, in one document, Ofgem's processes and policies for enforcement. They set out the information that Ofgem requires in order to assess complaints and the criteria that Ofgem will use to determine whether to launch an investigation. The guidelines also explain the key stages of the investigation process and set out some new key performance indicators that Ofgem will work to meet for acknowledging complaints and progressing investigations.

The aim of these guidelines is to give greater clarity and transparency to Ofgem's enforcement policies and practices, consistent with better regulation principles and the role that enforcement plays in meeting our wider duties.

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## Context

Ofgem has recently conducted a review of its complaint handling and investigation procedures when using its powers under the relevant legislation<sup>1</sup>. The purpose of this review was to ensure that our procedures remain appropriate and enable us to respond to complaints efficiently, to progress investigations in a timely manner and tackle non-compliance proportionately and effectively.

We issued draft guidelines for public consultation on 26 June 2007, which ended on 3 September 2007. The guidelines were subsequently revised. A summary of the responses is set out in appendix 1. The Authority's 2007/2008 Corporate Strategy announced that Ofgem would publish a statement of its enforcement practices in 2007.

These guidelines supercede the earlier documents, "Financial Penalties – the Process" and "Making markets work for consumers: Ofgem's approach to securing compliance with supply licence obligations and consumer protection legislation". Pursuant to section 27B of the Electricity Act and section 30B of the Gas Act 1986 the Authority produced a "Statement of policy with respect to financial penalties" in October 2003. This statement of policy is not superceded by these guidelines.

The guidelines also address some of the concerns in respect of Ofgem's enforcement policy raised by industry during the Industry Codes Compliance Review (ICCR). There is a specific section (see paragraphs 3.7 to 3.9) on Ofgem's approach to situations whereby a breach of obligations under the industry codes and agreements also constitutes a breach of the relevant legislation.

The focus of these guidelines is on Ofgem taking enforcement action in respect of alleged breaches of the requirements of the relevant legislation.

These guidelines do not deal specifically with Ofgem's role in dealing with complaints under article 23 of Directive 2003/54/EC concerning common rules for the internal market in electricity or under article 25 of Directive 2003/55/EC concerning common rules for the internal market in gas.

Consumers who have complaints against their supplier or network provider should, in the first instance, contact these companies and give them an opportunity to resolve the matter. If they are still not satisfied they should refer the matter to energywatch and/or the Energy Supply Ombudsman.

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<sup>1</sup> The relevant legislation is set out in Chapter 1

## Associated Documents

- "Statement of policy with respect to financial penalties" in October 2003  
<http://www.ofgem.gov.uk/About%20us/Documents1/Utilities%20Act%20%20Statement%20of%20policy%20with%20respect%20to%20financial%20penalties.pdf>
- "Industry Codes Compliance Review" (ICCR)  
<http://www.ofgem.gov.uk/Licensing/IndCodes/ICCR/Documents1/14530-ICCR%20Condoc%20FINAL.pdf>
- "Ofgem's draft guidelines for determining Disputes and Complaints arising under the European Directives 2003/54/EC and 2003/55/EC"  
<http://www.ofgem.gov.uk/Licensing/IndCodes/Governance/Documents1/11032-157052.pdf>

## Relevant Contacts

Consumers who have complaints about their supplier should, in the first instance, contact the company and give them an opportunity to resolve the matter. If the consumer is still not satisfied they should refer the matter to energywatch and/or the Energy Supply Ombudsman (see below).

Similarly, where appropriate, we would normally expect companies within the energy industry who wish to make a complaint to have first attempted to resolve the issue with the company concerned.

If you wish to make a complaint alleging a breach of the relevant legislation set out in Chapter 2 of these guidelines, please contact:

Enforcement and Competition Policy Team<sup>2</sup>

Ofgem

9 Millbank

London

SW1P 3GE

Email: [Enforcement@ofgem.gov.uk](mailto:Enforcement@ofgem.gov.uk)

### **Consumer complaints**

Following the passage of the Utilities Act 2000, it is the duty of energywatch to investigate complaints from consumers of the services provided by gas and

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<sup>2</sup> Generally, the 'Enforcement and Competition Policy Team' will be responsible for the handling of complaints and investigations. Where this is not the case, the complainant and subject of the complaint will be informed of this fact and will be given relevant details of the team(s) involved in the matter.

electricity suppliers. Therefore, if you are a consumer and have a complaint or require information or advice regarding your gas or electricity supply please contact energywatch on their dedicated helpline:

Telephone: 0845 9060708  
Fax: 020 7799 8341  
RNID Tynetalk no: 18001 08459 060708  
Web address: [www.energywatch.org.uk](http://www.energywatch.org.uk)  
Email enquiries: [enquiries@energywatch.org.uk](mailto:enquiries@energywatch.org.uk)

The Consumer, Estate Agents and Redress Act 2007 is designed to create a new stronger and more coherent consumer advocacy body and will bring together energywatch, Postwatch (the consumer body for postal services) and the National Consumer Council. These new arrangements are currently under discussion and, once finalised, the details of the resulting changes will be made available on the Ofgem website.<sup>3</sup>

The Energy Supply Ombudsman was established in July 2006 and can deal with complaints against supply companies that are members of its service. (Please note that complaints can currently only be made against licensed suppliers and not against other types of licensed energy companies). The Ombudsman can direct a supplier to take practical action to resolve a dispute and ask your supplier to apologise and in some cases make a financial award. For further information:

Telephone: 0845 055 0760 or 01925 530263  
Fax: 0845 055 0765 or 01925 530264  
Textphone: 18001 0845 0511513 or 18001 01925 430886  
Email: [enquiries@energy-ombudsman.org.uk](mailto:enquiries@energy-ombudsman.org.uk)  
Website: [www.energy-ombudsman.org.uk](http://www.energy-ombudsman.org.uk)

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<sup>3</sup> [www.ofgem.gov.uk/Consumers/Complain/Pages/Complain.aspx](http://www.ofgem.gov.uk/Consumers/Complain/Pages/Complain.aspx)

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## Table of Contents

<b>Summary</b> .....	<b>1</b>
Enforcement and industry code compliance.....	2
<b>1. Legislation under which Ofgem may take enforcement action</b> .....	<b>3</b>
Anti-competitive behaviour .....	5
Market monitoring and investigations.....	7
Super-complaints .....	7
Enforcement Orders under the Enterprise Act.....	8
<b>2. Making a complaint – information required</b> .....	<b>10</b>
Competition Pro Bono Scheme .....	11
<b>3. Criteria for opening an investigation</b> .....	<b>12</b>
Enforcement and industry code compliance.....	13
<b>4. The investigation and decision making process</b> .....	<b>15</b>
Notification of an investigation .....	15
Information gathering .....	15
Progressing the investigation .....	16
Decision-making.....	17
Appeals .....	17
Feedback.....	18
Gas and Electricity Acts .....	18
Gas and Electricity Acts process .....	19
Investigation.....	19
Trivial breach or appropriate steps being taken .....	20
Provisional Order .....	20
Undertakings .....	20
Statement of case .....	21
Oral hearing.....	21
Decision-making.....	22
Competition Act.....	23
Investigation.....	24
Interim measures .....	24
Commitments .....	25
Statement of Objections and representations .....	25
Decision .....	25
Consumer legislation.....	26
<b>Appendices</b> .....	<b>28</b>
<b>Appendix 1 - Consultation Questions</b> .....	<b>29</b>
List of Respondees .....	29
Summary of Responses .....	29
Confining the scope of enforcement action to where alternative mechanisms have been exhausted .....	30
Ofgem’s response .....	30
Greater Dialogue with the subjects of investigations .....	31
Ofgem’s response .....	31
Improving the Process.....	31
Ofgem’s response .....	31
Timescales.....	32
Ofgem’s response .....	32

<b>Appendix 2 - Summary of Ofgem's legislative powers .....</b>	<b>33</b>
<b>Appendix 3 – The Authority's Powers and Duties .....</b>	<b>37</b>
<b>Appendix 3 - Glossary.....</b>	<b>39</b>
<b>Appendix 4 - Feedback Questionnaire .....</b>	<b>41</b>

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## Summary

The Gas and Electricity Markets Authority (the Authority) has powers under the Gas Act 1986 and the Electricity Act 1989 to take enforcement action including imposing financial penalties for breaches of requirements imposed under or pursuant to those Acts. Under the Competition Act 1998, the Authority has concurrent powers with the OFT to bring an end to anti-competitive behaviour as well as impose financial penalties. Under Part 8 of the Enterprise Act, the Authority may apply to the court for an order to stop breaches of certain consumer legislation. The purpose of these guidelines is to set out Ofgem's approach to enforcing the above-mentioned legislation.

Effective enforcement of the relevant legislation is essential to ensure that the gas and electricity markets work well for consumers and that energy companies operate on a level playing field. Ofgem may conduct investigations into companies that it considers may be in breach of this legislation. Investigations can be undertaken on Ofgem's own initiative or on the receipt of complaints or on referrals from other regulatory bodies.

These guidelines are intended to enable Ofgem to act proportionately in investigating matters and to enhance the transparency of the investigation processes.

The guidelines explain the following:

- the information complainants should provide when alleging breaches of the requirements of the relevant legislation.<sup>4</sup> Complaints should be specific, well reasoned, clear and supported by all relevant evidence.
- the criteria Ofgem will apply in deciding whether to open an investigation. These include whether Ofgem has power to act, the seriousness of the alleged breach, whether or not its effects are continuing, the deterrent effect of enforcement action and whether appropriate action is already being taken by another body.
- the key stages of the investigation process that Ofgem will ordinarily follow.

In 90 per cent of cases within 4 weeks of receiving a complaint Ofgem will, acknowledge receipt and either inform the complainant whether Ofgem intends to investigate the matter or otherwise request further information to decide whether to investigate. Ofgem will also progress investigations in a timely manner. Within 9 months of launching an investigation, Ofgem intends to do one of the following:

- issue a detailed statement of the case against the party being investigated (in the form of a Statement of Objections (notice of a decision) for investigations under the Competition Act 1998 or a Statement of Case for investigations under the Gas Act 1986 and Electricity Act 1989); or

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<sup>4</sup> This will generally entail an allegation of a breach of a licence condition and/or statutory duty, an abuse of a dominant position or the existence of an anti-competitive agreement.

- 
- close the case for reasons of finding no breach or infringement or for reasons of administrative priorities; or
  - update the parties being investigated of the expected timescale for one of the above.

Ofgem will aim to achieve the above in shorter timescales where possible, taking into account the need to follow the appropriate processes and procedures. We consider that a 9 month target achieves a suitable balance between speed and the need for due process. We will review this after the first year of these guidelines coming into force.

### **Enforcement and industry code compliance**

Where the same contravention is a breach of a code and a licence condition, we will take account of sanctions already being imposed or proposed by code owners when considering whether to investigate or take enforcement action. This may lead us to decide not to exercise our discretionary investigative powers. However, in appropriate cases, including serious cases of consumer harm, we may nonetheless investigate and may ultimately take some form of enforcement action, including the imposition of a financial penalty.



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## 1. Legislation under which Ofgem may take enforcement action

### Chapter Summary

As a sector regulator, Ofgem has certain enforcement powers under legislation governing the gas and electricity markets in Great Britain.<sup>5</sup> The principal legislation comprises the Gas Act 1986, the Electricity Act 1989 and the Utilities Act 2000. As a competition authority, Ofgem also has concurrent powers with the Office of Fair Trading ("OFT") under the Competition Act 1998 as well as powers under the Enterprise Act 2002 in relation to those areas within our jurisdiction. In order to help complainants understand what action Ofgem might be able to take in a particular case, a brief overview of key aspects of this legislation is provided below.

1.1. Under the Gas and Electricity Acts,<sup>6</sup> the Authority has powers to ensure that persons<sup>7</sup> licensed by the Authority to operate in the gas and electricity markets in Great Britain comply with licence conditions and relevant requirements of the Acts.<sup>8</sup>

1.2. Where it appears to the Authority that a licensee may be contravening, or may have contravened, any licence condition or relevant requirement of the Acts, including any failure to achieve any prescribed standard of performance, Ofgem may decide to investigate and the Authority may serve a notice on any person, requiring that person to produce any documents specified in that notice, or requiring that person (if he is carrying on a business) to furnish to the Authority such information as may be specified, subject to certain conditions.<sup>9</sup>

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<sup>5</sup> Ofgem's powers do not extend to the UK. The Northern Ireland Authority for Energy Regulation is responsible for the regulation of the gas and electricity industries in Northern Ireland.

<sup>6</sup> Sections 28 to 30F of the Gas Act 1986 and sections 25 to 28 of the Electricity Act 1989 provide for enforcement powers in respect of breaches of licence conditions and breaches of relevant requirements.

<sup>7</sup> Under the Gas Act 1986 those licensed to operate in the market are set out in section 5. It includes a person who "(a) other than by means of a gas interconnector conveys gas through pipes to any premises, or to a pipe-line system operated by a gas transporter; (aa) participates in the operation of a gas interconnector; (b) supplies to any premises gas which has been conveyed to those premises through pipes; or (c) arranges with a gas transporter for gas to be introduced into, conveyed by means of or taken out of a pipe-line system operated by that transporter. Under the Electricity Act 1989 those licensed to operate in the market are set in section 4. It includes a person who, (a) generates electricity for the purpose of giving a supply to any premises or enabling a supply to be so given; (b) participates in the transmission of electricity for that purpose; (bb) distributes electricity for that purpose; (c) supplies electricity to any premises, or; (d) participates in the operation of an electricity interconnector.

<sup>8</sup> The relevant Acts are the Gas Act 1986, Electricity Act 1989, and Utilities Act 2000.

<sup>9</sup> Section 38 of the Gas Act 1986 and section 28 of the Electricity Act 1989

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1.3. Where the Authority is satisfied that a licence holder is contravening or is likely to contravene any licence condition or relevant requirement of the Acts, the Authority shall by final order<sup>10</sup> (or in certain circumstances by provisional order<sup>11</sup>) make such provision as is requisite for the purpose of securing compliance with that condition or requirement. A provisional order may be used to prevent loss or damage which might otherwise arise before a final order can be made.<sup>12</sup> As such, the making of a provisional order is not a reserved matter for the Authority and may not require the same degree of investigation as a final order but it will cease to have effect after a maximum of 3 months<sup>13</sup> if it is not subsequently confirmed.

1.4. However, the Authority shall not make an order where it is satisfied that its general duties under the Acts preclude the making of an order, or that the most appropriate way of proceeding is under the Competition Act 1998.<sup>14</sup> In addition, the Authority is not required to make an order where the licensee has agreed to take and is taking, all such steps as appear to the Authority to be appropriate for the purpose of securing or facilitating compliance with the condition or requirement, or where it considers that the breach is of a trivial nature.<sup>15</sup>

1.5. A licence holder may question the validity of a final or provisional order on the grounds that it was not within the powers conferred on the Authority by, or the procedural requirements of, the Gas or Electricity Acts. It may make an application to the court within 42 days from the date of the order being served on it.<sup>16</sup> The court has the power to quash the order or any provision of it if it is satisfied that the order was not within those powers or the interests of the licence holder have been substantially prejudiced by a failure to comply with those requirements.<sup>17</sup>

1.6. Where the Authority is satisfied that a licensee has contravened, or is contravening, any relevant condition or requirement, it may impose on the licensee a financial penalty of such amount as is reasonable in the circumstances of the case (not exceeding 10% of the licensee's applicable turnover in its business year preceding the date of the Authority's notice under s.27A(3) Electricity Act 1989 and s.30A(3) Gas Act 1986). The Authority shall not impose a penalty on a licensee where it is satisfied that the most appropriate way of proceeding is under the Competition Act 1998.<sup>18</sup>

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<sup>10</sup> Section 28(1) of the Gas Act 1986 and section 25(1) of the Electricity Act 1989

<sup>11</sup> Section 28(2) of the Gas Act 1986 and section 25(2) of the Electricity Act 1989

<sup>12</sup> Section 28(3) of the Gas Act 1986 and section 25(3) of the Electricity Act 1989

<sup>13</sup> Section 28(8) of the Gas Act 1986 and section 25(8) of the Electricity Act 1989

<sup>14</sup> Section 28(5) of the Gas Act 1986 and section 25(5) of the Electricity Act 1989

<sup>15</sup> Section 28(5A) of the Gas Act 1986 and section 25(5A) of the Electricity Act 1989

<sup>16</sup> Section 30 (1), Gas Act 1986 and section 27(1), Electricity Act 1989

<sup>17</sup> Section 30 (2), Gas Act 1986 and section 27(2), Electricity Act 1989

<sup>18</sup> Section 30(A)(2) of the Gas Act 1986, section 27(A)(2) of the Electricity Act 1989 and the Electricity and Gas (Determination of Turnover for Penalties) Order 2002

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1.7. Where a licence holder is aggrieved by the imposition of a penalty, the amount of the penalty, or the date by which the penalty is required to be paid, the licence holder may make an application to the court.<sup>19</sup> This application must be made within 42 days of receipt of notice of the decision.<sup>20</sup> The court may quash the penalty, substitute a penalty of a lesser amount or substitute the date or dates for payment imposed by the Authority.

### **Anti-competitive behaviour**

1.8. As a concurrent regulator with the OFT, Ofgem has powers under the Competition Act 1998 to apply and enforce the Chapter I and Chapter II prohibitions of the Competition Act and Articles 81 and 82 of the EC Treaty, in relation to those areas within its jurisdiction.<sup>21</sup>

1.9. The Chapter I prohibition and Article 81 EC (Article 81) prohibit agreements between undertakings, decisions by associations of undertakings and concerted practices (hereafter collectively referred to as agreements) which have as their object or effect the prevention, restriction or distortion of competition. The Chapter I prohibition applies to agreements implemented or intended to be implemented in the UK (or a part thereof), which may affect trade in the UK, while Article 81 applies to agreements which may affect trade between EU member states.

1.10. The Chapter II prohibition and Article 82 EC (Article 82) prohibit conduct by one or more undertakings which amounts to the abuse of a dominant position if it may affect trade in a market. The Chapter II prohibition applies if the dominant position is held within the UK and the conduct in question may affect trade within the UK (or a part thereof), while Article 82 applies to conduct within the common market in so far as it may affect trade between Member States.

1.11. Where Ofgem has reasonable grounds to suspect that the Chapter I or Chapter II prohibitions and Articles 81 or 82 have been infringed it has the powers of investigation including the following:

- to require the production of documents and/or provision of information;<sup>22</sup>
- to enter business premises without a warrant and require the production of a specified class of document (with or without prior notice);<sup>23</sup>

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<sup>19</sup> Section 30E, Gas Act 1986 and section 27E, Electricity Act 1989

<sup>20</sup> Section 30E(2), Gas Act 1986 and section 27E(2), Electricity Act 1989

<sup>21</sup> The jurisdiction of the Authority with regards to the application of Article 81, Article 82, Chapter I or Chapter II prohibitions is set out in section 36A of the Gas Act 1986 and section 43 of the Electricity Act 1989 and relates to "the carrying on of activities mentioned in section 5(1) of the Gas Act 1986" and to "commercial activities connected with the generation, transmission or supply of electricity {or the use of electricity interconnectors...}"

<sup>22</sup> Section 26, Competition Act 1998

<sup>23</sup> Section 27, Competition Act 1998

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- to enter and search business and domestic premises with a warrant (without prior notice).<sup>24</sup>

1.12. Prior to concluding an investigation, Ofgem has the power to issue interim measures directions as a matter of urgency for the purpose of preventing serious, irreparable damage to a particular person or category of person, or protecting the public interest<sup>25</sup> and to accept commitments to take action or refrain from taking such action as it considers appropriate.<sup>26</sup> After concluding that there has been an infringement, Ofgem has the power to issue directions<sup>27</sup> to bring an infringement to an end and to impose financial penalties<sup>28</sup> for any infringements committed intentionally or negligently (up to 10% of an undertaking's worldwide turnover).

1.13. The competition law guideline "Application in the energy sector"<sup>29</sup> provides advice and information about the factors which Ofgem will take into account when considering whether, and if so how, to exercise its powers under the Competition Act.

1.14. Competition Act decisions may be appealed to a specialist tribunal, the Competition Appeal Tribunal (the CAT), established under the Enterprise Act 2002. Appealable decisions include, among others, infringement decisions, non-infringement decisions, directions and the imposition of financial penalties.<sup>30</sup> Any party in respect of which the Authority has made a decision may appeal against that decision.<sup>31</sup> A third party who the CAT considers has sufficient interest may also appeal to the CAT.<sup>32</sup> The CAT's powers include the power to confirm or set aside the decision, to substitute its own decision for that of the Authority, to remit the matter to the Authority and to impose or revoke or vary the amount of penalty.<sup>33</sup>

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<sup>24</sup> Section 28, Competition Act 1998

<sup>25</sup> Section 35, Competition Act 1998

<sup>26</sup> Section 31A, Competition Act 1998

<sup>27</sup> Section 32 and 33, Competition Act 1998

<sup>28</sup> Section 36, Competition Act 1998

<sup>29</sup> See OFT competition law guidelines, "Application in the energy sector", [http://www.ofg.gov.uk/shared\\_ofg/business\\_leaflets/ca98\\_guidelines/oft428.pdf](http://www.ofg.gov.uk/shared_ofg/business_leaflets/ca98_guidelines/oft428.pdf)

<sup>30</sup> Except in the case of an appeal against the imposition, or the amount, of a penalty, the making of an appeal does not suspend the effect of the decision to which the appeal relates.

Section 46(4) Competition Act 1998

<sup>31</sup> Section 46, Competition Act 1998

<sup>32</sup> Section 47, Competition Act 1998

<sup>33</sup> Schedule 8 paragraph 3 of the Competition Act 1998

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## **Market monitoring and investigations**

1.15. As part of its on-going work, Ofgem has a general duty to keep the gas and electricity markets under review.<sup>34</sup> This may result in Ofgem proposing legislative changes to Government or proposing licence modifications.

1.16. Ofgem also has concurrent powers with the OFT to make a market investigation reference. Under Part 4 of the Enterprise Act 2002.<sup>35</sup> Ofgem may make a market investigation reference to the Competition Commission in relation to the gas and electricity markets, where it has reasonable grounds for suspecting that any feature, or combination of features, of a market prevents, restricts, or distorts competition in connection with the supply or acquisition of any goods or services.

1.17. Following a reference, it will be for the Competition Commission (CC) to decide whether competition is indeed prevented, restricted or distorted, and (if so) what, if any, action should be taken to remedy, mitigate or prevent the adverse effect on competition or any detrimental effect on consumers arising from the adverse effect.

1.18. The purpose of market monitoring and investigations is to determine whether the process of competition is working effectively in markets as a whole. They provide a framework for identifying, analysing and, where appropriate, remedying industry-wide or market-wide competition problems. The OFT's guidelines on market investigation references<sup>36</sup> provide further information on the handling of market investigations and their relationship with competition law.

1.19. Any person aggrieved by a decision by the Authority or the CC in connection with a reference or potential reference may apply to the CAT for a review of that decision. The CAT shall apply the same principles as would be applied by a court on application for judicial review. The CAT may dismiss the application or quash the whole or part of the decision and if quashed, refer the matter back to the original decision-maker with a direction to reconsider and make a new decision.

## **Super-complaints**

1.20. Under section 11 of the Enterprise Act 2002, a designated consumer body<sup>37</sup> can make a super-complaint when it thinks that a feature, or combination of features, of a market is, or appears to be, significantly harming the interests of consumers.

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<sup>34</sup> Section 34 of the Gas Act 1986 and section 47 of the Electricity Act 1989

<sup>35</sup> See OFT guidance on Market Investigation References,  
[http://www.ofg.gov.uk/shared\\_ofg/business\\_leaflets/enterprise\\_act/oft511.pdf](http://www.ofg.gov.uk/shared_ofg/business_leaflets/enterprise_act/oft511.pdf)

<sup>36</sup> OFT guidance on Market Investigation References,  
[http://www.ofg.gov.uk/shared\\_ofg/business\\_leaflets/enterprise\\_act/oft511.pdf](http://www.ofg.gov.uk/shared_ofg/business_leaflets/enterprise_act/oft511.pdf)

<sup>37</sup> These are designated by the Secretary of State for Trade and Industry and include: the

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1.21. As with the Competition Act and other parts of the Enterprise Act, section 11 is applied concurrently by the OFT and other regulators, including Ofgem.

1.22. Where a super-complaint falls to Ofgem, we will consider the evidence submitted and undertake whatever work is necessary to establish the extent, if any, of the alleged problems. Ofgem must then publish a response within 90 days from the day after which the super-complaint was received stating what action, if any, it proposes to take in response to the complaint and giving the reasons behind its decision.<sup>38</sup>

1.23. In some cases, it may be possible to resolve the concerns and propose remedies within the 90-day period but, in more complex cases, further work may be called for. Further information on the process can be found in the OFT's guidance on super-complaints.<sup>39</sup>

### **Enforcement Orders under the Enterprise Act**

1.24. Under Part 8 of the Enterprise Act, the OFT has a leading role in terms of promoting good consumer practice and enforcing certain consumer legislation. Ofgem is a designated enforcer and in certain circumstances has the power to seek to obtain an Enforcement Order (from the High Court or County Court) in relation to a breach of specific pieces of consumer protection legislation, where such a breach harms the collective interests of consumers. The effect of an Enforcement Order is similar to a prohibiting order/injunction and prohibits the respondent from carrying on a particular course of conduct.

1.25. Prior to launching an investigation Ofgem would notify the OFT, which is the central co-ordinator. We would expect to agree which enforcer is best placed to take forward the investigation and if necessary obtain an enforcement order. Ofgem would liaise closely with the OFT at the relevant steps of the process.<sup>40</sup>

1.26. The Act sets out a broad range of relevant consumer protection legislation under the headings "Community infringements"<sup>41</sup> and "domestic infringements".<sup>42</sup>

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Consumers' Association, National Consumer Council and Citizens Advice (designated in July 2004); Energywatch and Watervoice (designated in January 2005), and; Postwatch, CAMRA and the General Consumer Council of Northern Ireland (designated in October 2005) - Enterprise Act 2002 (Bodies Designated to make Super-complaints) Order 2004 as amended.

<sup>38</sup> For example, in July 2005, Ofgem responded to a super-complaint from energywatch. The super-complaint was sent on 6 April 2005 and, it highlighted energywatch's concerns in respect of gas and electricity supplier's billing processes and practices.

<sup>39</sup> Super-complaints, Guidance for designated consumer bodies, [http://www.ofg.gov.uk/shared\\_ofg/business\\_leaflets/enterprise\\_act/oft514.pdf](http://www.ofg.gov.uk/shared_ofg/business_leaflets/enterprise_act/oft514.pdf)

<sup>40</sup> Further information on Part 8 and on the OFT's role is set out in OFT's guidance document, [http://oft.gov.uk/shared\\_ofg/business\\_leaflets/enterprise\\_act/oft512.pdf](http://oft.gov.uk/shared_ofg/business_leaflets/enterprise_act/oft512.pdf)

<sup>41</sup> "Community infringements" are acts or omissions that breach the UK's and other European Economic Area (EEA) states' legislation and other provisions implementing the European

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Where an enforcer has the power to make an application for an Enforcement Order, it may instead accept undertakings in respect of a domestic infringement if the infringing conduct has occurred or is occurring, whilst such an undertaking may be obtained for a Community infringement also if the conduct is likely to occur.<sup>43</sup> This means that the power regarding community infringements is also prospective.

1.27. The legislation under which Ofgem can act as enforcer includes:

#### Community infringements<sup>44</sup>

- The Control of Misleading Advertisements Regulations 1998 (as amended), which are aimed at protecting the interests of consumers and traders from misleading or unacceptable comparative advertising;<sup>45</sup>
- The Consumer Protection (Cancellation of Contracts Concluded Away From Business Premises) Regulations 1987, which provide consumers with a seven-day cooling off period when they agree to buy goods or services worth more than £35 from a trader during an unsolicited visit to their home;
- The Unfair Terms in Consumer Contracts Regulations 1999, which protect consumers against unfair standard terms in contracts they make with traders;
- The Consumer Protection (Distance Selling) Regulations 2000, which are aimed at businesses that sell goods or services to consumers by: the internet; digital television; mail order, including catalogue shopping; phone or fax;<sup>46</sup>
- Sale of Goods Act 1979, and Supply of Goods and Services Act 1982, which cover consumers' statutory rights in respect of goods and services.

#### Domestic infringements<sup>47</sup>

- Trade Descriptions Act 1968 (which covers false descriptions applied to goods and services);
- Consumer Protection Act 1987 Part III (which covers misleading price indications).

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Directives listed in Schedule 13 to the Act.

<sup>42</sup> "Domestic infringements" relate to breaches of a wide range of UK laws listed in a Statutory Instrument made under Part 8

<sup>43</sup> See section 219, Enterprise Act 2002

<sup>44</sup> Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003, SI 2003/ 1374

<sup>45</sup> See OFT fact sheet on Misleading Advertisements, [http://www.offt.gov.uk/shared\\_offt/business\\_leaflets/general/oft022.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/general/oft022.pdf)

<sup>46</sup> For further information see the DTI/OFT "A guide for businesses on distance selling", [http://www.offt.gov.uk/shared\\_offt/business\\_leaflets/general/oft698.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/general/oft698.pdf)

<sup>47</sup> Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2003, SI 2003/1593

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## 2. Making a complaint – information required

### Chapter Summary

In order to be able to properly assess the merits of a complaint and decide whether it warrants investigation under any of the legislation outlined above, a minimum level of information is generally required. This section of the guidelines sets out the information that should be included in a complaint to enable Ofgem to carry out such an assessment.

2.1. The type and level of information required will depend on the nature of a particular complaint and the resources available to the complainant. However, the more relevant information that is provided at the outset, the more likely it is that Ofgem will be able to deal with the complaint with speed and efficiency. If all the information needed in order to make a proper assessment of the complaint is not provided, Ofgem may need to seek further information, thus delaying our decision on whether to open an investigation.

2.2. It should be noted that, where appropriate, we would expect the complainant to have raised the matter of concern with the relevant company and that it may not be appropriate for Ofgem to open an investigation in every case.

2.3. Complaints to Ofgem should be ***specific, well reasoned, clear and supported by all available relevant evidence.***

2.4. All complaints should generally include the following information:

- a clear explanation of the allegation – including a summary of events and dates relating to the alleged breach, details of any interaction with the subject of the complaint and any action taken by either the subject of the complaint or the complainant.<sup>48</sup> This should be accompanied by all available relevant evidence to support the alleged breach and the events which gave rise to it. For example, copies of any letters, emails, faxes, notes of meetings (including board minutes), notes of telephone calls, or any other documents or information, which support the allegation;
- a clear explanation of the harm that the complainant has been caused or may be caused, as a result of the behaviour or incident complained of. Again, this should be supported by all available relevant evidence. For example, documents showing increased costs or higher prices as a result of the conduct in question;
- an indication of the legal obligation that the complainant considers may have been breached;

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<sup>48</sup> This could include, for example, whether the complainant has raised the matter with the company and whether the company has sought to address the matter.



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- details of the company being complained about including the nature of their business and the complainant's relationship with them;
  - details of the complainant's own business or interests, including contact details, or those of a representative with whom we can speak in relation to the complaint.

2.5. Where the complaint concerns an alleged breach of the Competition Act 1998, complainants should have regard to the OFT's Competition Guidelines, Involving Third Parties in Competition Act Investigations, (incorporating guidance on the submission of complaints).<sup>49</sup> Ofgem will not necessarily treat a complaint as incomplete if it does not contain all the information mentioned in that guidance as obligatory.

2.6. There may also be cases where there is information that is relevant that is not outlined above or mentioned in the OFT guidance. Complainants should seek to provide as much relevant evidence and information as possible.

2.7. Ofgem recognises that some complainants, such as smaller companies or individuals, may find it difficult to provide all relevant information and we will work with complainants to help where necessary. This could take time and may impact on Ofgem's ability to progress the complaint within the usual timescales.

2.8. Complainants should also be aware that it may be necessary for Ofgem to disclose information provided to the company complained about or to other parties connected to the subject matter of the complaint. Where information is confidential or the complainant does not wish it to be disclosed, this should be made clear.

2.9. Even where information is marked as confidential or the complainant does not wish it to be disclosed, there may still be circumstances in which its disclosure is required. Ofgem will discuss this with the complainant, prior to disclosure, should such a situation arise.

### **Competition Pro Bono Scheme**

2.10. The Competition Pro Bono Scheme offers two hours of free legal advice to individuals and businesses who believe that their rights under competition law have been infringed. You can visit the Competition Pro Bono Scheme website at: <http://www.probonogroup.org.uk/competition/>.

2.11. Please note: by providing this link, Ofgem should not be seen to be endorsing the member advisers or the advice provided by the Pro Bono Scheme.

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<sup>49</sup> [http://www.ofg.gov.uk/shared\\_ofg/business\\_leaflets/ca98\\_guidelines/ofg451.pdf](http://www.ofg.gov.uk/shared_ofg/business_leaflets/ca98_guidelines/ofg451.pdf)

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## 3. Criteria for opening an investigation

### Chapter Summary

Investigations involve time and resources, not only for Ofgem and companies subject to the investigation but for other interested parties as well. Therefore, it is important to ensure that resources are efficiently allocated. This Chapter includes a non-exhaustive list of the factors that Ofgem will generally take into account in deciding whether to proceed with an investigation.

3.1. Ofgem can proceed with an investigation following the receipt of a complaint, a referral from another regulator, or on the basis of its own initiative. In deciding whether to proceed with an investigation we will consider the specific facts of the matter, the legal context and available resources.

3.2. We aim to ensure that possible infringements that are likely to cause the greatest harm to consumers or competition or may give rise to the most serious concerns are prioritised. In order to help parties understand how possible infringements that come to our attention will be addressed, a non-exhaustive list of the factors that Ofgem will generally take into account are set out below.

3.3. Ofgem will consider the facts and circumstances of the particular case but some factors will make an investigation more likely, for example, where there is evidence of serious harm to consumers or where enforcement action might be important to deter similar breaches. Conversely, where the evidence of a potential breach is weak, any breach is likely to be trivial, there is no or minimal harm to consumers or the behaviour in question has come to an end, it would make an investigation less likely.

3.4. The criteria fall under two broad categories:

- a. whether Ofgem has the power to take action and is best placed to act;
- b. whether it is a priority matter for Ofgem, due to its apparent seriousness and impact or potential impact on consumers.

3.5. The criteria that Ofgem will generally apply are:

- i. Does the matter relate to an area in which Ofgem has the power to take enforcement action? For example, does it appear likely that the case falls within the scope of the relevant provisions of the Gas Act 1986, Electricity Act 1989, Competition Act 1998 or Enterprise Act 2002?
- ii. Are there sufficient grounds to suspect that a breach may have occurred, is occurring, or is likely to occur? Does it appear likely, on the face of it, that the behaviour in question could constitute a breach of any requirement of the relevant legislation and/or licence condition?
- iii. Has action already been taken, or is action being taken, by another body to remedy the situation? In some cases, such as when considering action under the Competition Act 1998 or Enterprise Act 2002, the concurrency

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arrangements mean that Ofgem does not or cannot investigate if another regulator wishes to take or is already taking action, for example, in order to ensure that a company is not financially penalised for the same breach twice.<sup>50</sup> Ofgem's approach to investigating an alleged breach of licence or requirements under the Gas Act 1986 and the Electricity Act 1989 where a code owner or panel is already addressing the matter is set out in a separate section below.

- iv. How serious is the alleged breach? This will depend on a number of factors, such as:
- What is the harm, or potential harm, to consumers or to competition resulting from the alleged breach?
  - Is the alleged breach on-going? Is the company responsible for the potential breach taking action to address the situation? The extent to which this may impact on the decision to investigate will depend on other factors such as the harm to consumers.
  - Does it involve a repeat offence or a repeat offender?
  - Is it a widespread problem?
- v. What will be the effect, including the deterrent effect, of enforcement action? Would action be likely to discourage similar behaviour in the future, either by the company that may have committed a breach or by others?
- vi. What resources are required to investigate the matter? Ofgem has finite resources and the most serious potential breaches will be prioritised.

3.6. It should be noted that this is not an exhaustive list. The applicable criteria may depend on the nature of the enforcement action that is envisaged. There may be cases in which other considerations are applicable. Likewise, it may be that not all of the above criteria are applicable in every case.

### **Enforcement and industry code compliance**

3.7. Some licences contain conditions which require the licensee to accede to and to comply with industry codes and agreements.<sup>51</sup> Pursuant to these requirements, breaches of obligations under those industry codes and agreements can also constitute licence breaches and, therefore, are breaches in respect of which Ofgem can take enforcement action under the relevant legislation.

3.8. The code owners and panels<sup>52</sup> have certain powers to bring an end to a breach of the relevant code and to impose sanctions. When considering the merits of

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<sup>50</sup> See for example, OFT competition law guidance, Concurrent Application to Regulated Industries,

[http://www.ofg.gov.uk/shared\\_ofg/business\\_leaflets/ca98\\_guidelines/oft405.pdf](http://www.ofg.gov.uk/shared_ofg/business_leaflets/ca98_guidelines/oft405.pdf)

<sup>51</sup> For example, the Balancing and Settlement Code, the Connection and Use of System Code, the Uniform Network Code, or the System Operator – Transmission Owner Code.

<sup>52</sup> Code owners are network operators required by licence to provide codes or agreements. Panels are comprised of consumer and industry representatives and are responsible for

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launching an investigation and the possibility that enforcement action may be required in respect of any breach that is ultimately found, Ofgem will consider all of the facts. In doing so, we will assess the impact of any timely and suitable action that is being taken under a relevant industry code or agreement.

3.9. Where the Authority is satisfied that a company is no longer contravening or likely to contravene a relevant condition, it cannot impose an enforcement order to secure compliance. Therefore, appropriate action in such circumstances by the code owners or panels may lead Ofgem not to exercise its discretionary investigative powers as it could not take such enforcement action.

3.10. However, the sanctions which can be applied pursuant to industry codes and agreements for a breach of their terms do not include financial penalties. Such penalties can be imposed by the Authority where it finds a company to be in contravention of a term of its licence. As explained in our statement of policy with respect to financial penalties, a penalty is more likely to be imposed where the contravention has damaged the interests of consumers or other market participants or where to do so would be likely to deter future breaches. In such cases, Ofgem may use its investigative powers and may impose a financial penalty against a company even where a breach is no longer anticipated or continuing and/or code compliance mechanisms have been or are being pursued. Again, in considering such action, we will take into account the general criteria outlined above, as well as the impact of any sanction applied, or expected to be applied, by the relevant code administrative body.

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administering the code.

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## 4. The investigation and decision making process

### Chapter Summary

The purpose of this section is to provide an overview, for companies who are the subject of a complaint or investigation, or otherwise have an interest in it, of the key stages of the investigation and decision making process.

4.1. When Ofgem has received or is assessing a complaint, we may contact the company that is the subject of the complaint to ask them to clarify details of the complaint or allegation or to provide information in order that Ofgem might consider whether there is a case to answer.

4.2. Prompt responses at this stage may mean that the complaint can be dealt with swiftly and it might also avoid the need to use formal powers.

### Notification of an investigation

4.3. Should Ofgem decide to proceed to a formal investigation, we will inform the complainant and provide details of the Ofgem contact.

4.4. We will also write to the company being investigated providing as full details as possible of the allegations and of the focus of the investigation. A provisional timeline for the key steps of the investigation will be included but this may alter as the investigation progresses. The Ofgem contact (usually from the Enforcement and Competition Policy team), whose details will be provided, can be contacted for further details or updates on the progress of the investigation.

4.5. We will publish brief details of the fact and nature of the investigation on the Ofgem website.<sup>53</sup>

### Information gathering

4.6. Ofgem has formal powers under various legislation (see section 2) to require the provision of information by any person. We may need to issue several information requests in the course of an investigation. However, we will avoid requesting the same information more than once without good reason.<sup>54</sup>

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<sup>53</sup> Except in cases where this may adversely affect the investigation. For example, where it may prejudice Ofgem's ability to collect information.

<sup>54</sup> For example, where a company fails to provide the information requested then we may request the same information again.

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4.7. We will also seek to be as clear as possible in these information requests. However, if companies that receive information requests have further questions or wish to clarify their understanding, the Ofgem contact can help. The information we require may be submitted either electronically or as a hard copy.

4.8. Ofgem will take any failure to comply with an information request within the prescribed timescales very seriously. Under the Gas Act 1986 and the Electricity Act 1989 a person who without reasonable excuse fails to provide information required of him may be guilty of an offence and liable on summary conviction to a fine not exceeding level five on the standard scale.<sup>55</sup> Under the Competition Act, a person is guilty of an offence if he fails to comply with a request for information.<sup>56</sup> The penalty on summary conviction, is a fine not exceeding the statutory maximum or an unlimited fine on conviction on indictment. Where the recipient of an information request has good reason to believe that they will be unable to supply the requested information within the specified time, they should contact Ofgem in writing at the earliest possible opportunity. Ofgem may grant an extension to the specified time and will consider whether it would be reasonable to do so on a case by case basis.

### **Progressing the investigation**

4.9. We will keep the company being investigated and the complainant updated on the progress of the investigation on a quarterly basis. Additional updates, can be provided by the Ofgem contact on request.

4.10. Within 9 months of launching an investigation, Ofgem intends to do one of the following:

- issue a detailed statement of the case against the company being investigated (in the form of a Statement of Objections (notice of a decision) for investigations under the Competition Act 1998 or a statement of case for investigations under the Gas Act 1986 and Electricity Act 1989); or
- close the case explaining our reasons for no finding of breach or infringement or for reasons of administrative priorities; or
- update the company being investigated of the expected timescale for one of the above.

4.11. Ofgem will aim to achieve the above in shorter timescales where possible, taking into account the need to follow the appropriate processes and procedures. We

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<sup>55</sup> See section 38(2) of the Gas Act 1986 and section 28(4) of the Electricity Act. The standard scale is the scale established under section 37 of the Criminal Justice Act 1982 for England and Wales and by section 225 of the Criminal Procedure (Scotland) Act 1995, both Acts as amended (level 5 is £5,000).

<sup>56</sup> See section 42(1) of the Competition Act 1998. Under Section 26 of the Competition Act 1998 Ofgem may require any person to produce to it a specified document, or provide it with specified information, which it considers relates to any matter relevant to the investigation.

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consider that a 9 month target achieves a suitable balance between speed and the need for due process. We will review this after the first year of these guidelines coming into force.

## **Decision-making**

4.12. Decision-making on breaches (including the imposition or confirmation of enforcement orders under the Gas and Electricity Acts,<sup>57</sup> infringement decisions under the Competition Act<sup>58</sup> and the exercise of enforcement powers under Part 8 of the Enterprise Act<sup>59</sup>) and the imposition of penalties<sup>60</sup> are all matters reserved for a decision of the Authority. These may be delegated to senior Ofgem officials. Any delegation of decision-making will be made in accordance with the Authority's rules of procedure.<sup>61</sup> Where delegation of decision-making has been sought, Ofgem will confirm this in writing with the party subject to the investigation. We will also explain any relevant terms of the delegation that has been granted.

## **Appeals**

4.13. Under the Gas and Electricity Acts, where a company is aggrieved by the imposition of a penalty, the amount of the penalty, or the date by which the penalty is required to be paid, the company may make an application to the court (see paragraph 1.7 above).

4.14. Competition Act decisions may be appealed to a specialist tribunal, the Competition Appeal Tribunal (the CAT), established under the Enterprise Act 2002. Appealable decisions include, among others, infringement decisions, non-

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<sup>57</sup> See paragraphs 14 and 15 of the Schedule to the Rules of Procedure of the Gas and Electricity Markets Authority, <http://www.ofgem.gov.uk/About%20us/Documents1/Ofgem%20Rules%20of%20Procedure.pdf>

<sup>58</sup> See paragraph 20 the Schedule to the Rules of Procedure of the Gas and Electricity Markets Authority, <http://www.ofgem.gov.uk/About%20us/Documents1/Ofgem%20Rules%20of%20Procedure.pdf>

<sup>59</sup> See paragraph 29 the Schedule to the Rules of Procedure of the Gas and Electricity Markets Authority, <http://www.ofgem.gov.uk/About%20us/Documents1/Ofgem%20Rules%20of%20Procedure.pdf>

<sup>60</sup> See paragraphs 19 and 26 of the Schedule to the Rules of Procedure of the Gas and Electricity Markets Authority, <http://www.ofgem.gov.uk/About%20us/Documents1/Ofgem%20Rules%20of%20Procedure.pdf>

<sup>61</sup> For further information on the circumstances under which decision making may be delegated, see the Rules of Procedure of the Gas and Electricity Markets Authority, <http://www.ofgem.gov.uk/About%20us/Documents1/Ofgem%20Rules%20of%20Procedure.pdf>

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infringement decisions, directions and the imposition of financial penalties (see paragraph 1.14 above).

### **Feedback**

4.15. At the end of a formal investigation we may request feedback on the process from the complainant and the company investigated.

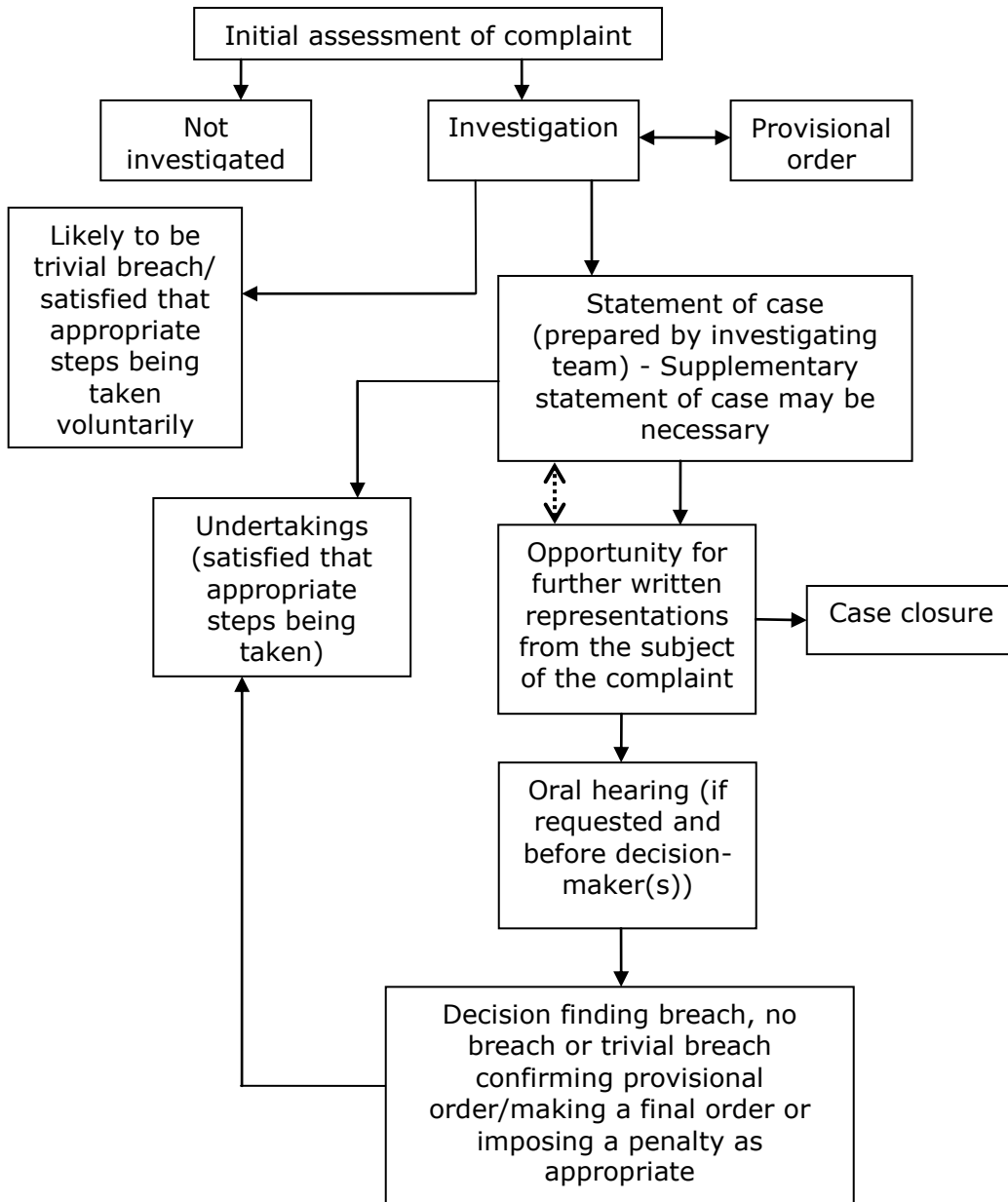
### **Gas and Electricity Acts**

There are a number of possible outcomes to an investigation under the Gas and Electricity Acts, and the process we follow can vary according to the facts and circumstances of the particular case. An indication of the possible outcomes and the likely stages are described below and outlined in the following flowchart.



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## Gas and Electricity Acts process



### Investigation

4.16. When a formal investigation is commenced, this will normally be recorded on Ofgem's website. Investigations under the Gas and Electricity Acts will focus on particular licensees rather than on the whole company or group.

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## **Trivial breach or appropriate steps being taken**

4.17. Where an investigation concludes that there has been or is a continuing breach but it appears that appropriate steps have been or are being taken to secure compliance or the breach is trivial, the Authority may serve notice on the licensee that the breach is trivial<sup>62</sup> or that it is satisfied that appropriate steps are being taken<sup>63</sup> and will publish that notice.

## **Provisional Order**

4.18. If it appears to the Authority that a licence holder is contravening, or is likely to contravene, any relevant condition or requirement, and it is not trivial, appropriate steps are not being taken to secure compliance, and its duties do not preclude it from doing so the Authority shall make such a provisional order if it considers the making of such an order to be requisite and secure compliance.<sup>64</sup> A provisional order may be made before a full investigation is concluded. Where appropriate, Ofgem may permit written representations prior to issuing a provisional order. However, there may be circumstances (such as where an ongoing or likely contravention requires immediate intervention to prevent detriment to consumers or competition), in which it may be necessary or appropriate for the Authority to make a provisional order without formal representations from the party concerned.

4.19. A provisional order will cease to have effect after a maximum of 3 months unless it is subsequently confirmed.

## **Undertakings**

4.20. Where it considers it appropriate, Ofgem may discuss with the company the possibility of accepting undertakings to comply with a particular licence condition (or other agreed action, such as licence modifications), as an alternative to formal enforcement action. These can be raised at any point. Failure to comply with such undertakings or agreed action may lead to further action and/or a more serious view being taken of any subsequent breach.

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<sup>62</sup> Section 28(5A)(b) & Section 6 Gas Act 1986 and Section 25(5A)(b) & Section 6 Electricity Act 1989.

<sup>63</sup> Section 28(5A)(a) & Section 6 Gas Act 1986 and Section 25(5A)(a) & Section 6 Electricity Act 1989.

<sup>64</sup> Under sections 28(3) Gas Act 1986 and 25(3) Electricity Act 1989, in determining whether it is requisite that a provisional order be made, "the Authority shall have regard (a) to the extent to which any person is likely to sustain loss or damage in consequence of anything which, in contravention of the relevant condition or requirement, is likely to be done, or omitted to be done, before a final order may be made; and (b) to the fact that the effect of the provision of this section and section 30 (GA '86)/section 27 (EA'89) below is to exclude the availability of any remedy (apart from under those provisions or for negligence) in respect of any contravention of a relevant condition or requirement."

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## **Statement of case**

4.21. Following an investigation, where the investigating team considers that there is or has been a breach, it will prepare a statement of case explaining its initial findings. The purpose of this is to set out the relevant facts and the case against the licence holder and to seek the licence holder's views. The company will have an opportunity to respond in writing. The period of time permitted will depend upon the facts and complexity of the case. However, we generally expect to allow 21 days.

4.22. Prior to or at the point of issuing a statement of case, Ofgem will set out the process it intends to follow. We will also update the licence holder, if changes to the process are subsequently deemed appropriate.

4.23. Following the written representations, the case team may decide there is insufficient evidence of a breach and may close the case. Alternatively it may remain persuaded of a breach but consider that it is necessary to amend its initial findings and prepare a supplementary statement of case. In some cases (particularly serious cases), it may be the Authority or the decision-maker that writes to the licence holder setting out a "minded to" find breach in a supplementary statement of case.<sup>65</sup> The company will again have an opportunity to respond in writing to any supplementary statement of case.

## **Oral hearing**

4.24. Following the final written representations on the statement of case(s), all companies will have an opportunity to have an oral hearing with the decision-maker(s). The company will be asked to indicate in its written response to the statement of case, whether it wishes to exercise this option.

4.25. Save in exceptional circumstances, it is not intended that the company should introduce any new material at the oral hearing which was not submitted in its written response to Ofgem's statement of case.

4.26. The form and duration of such a hearing will be determined by the decision-maker taking account of all circumstances of the case.

4.27. Where a company has exercised its option to have an oral hearing on the statement of case only those members of the Authority who were present at the oral hearing will be involved in the Authority's final decision on whether to impose the proposed financial penalty.

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<sup>65</sup> This was previously referred to as a "minded to" letter

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## Decision-making

4.28. Following the oral hearing (or in the absence of such a hearing following its consideration of the written representations) the decision-maker will consider whether the company being investigated has contravened, is contravening or is likely to contravene, a licence condition or relevant requirement. The decision-maker may find that no such contravention has occurred. The company will be informed of the case closure and a statement will be published on Ofgem's website. Alternatively, the decision-maker may find that there is or has been or is likely to be a contravention of a licence condition or relevant requirement. In this case, Ofgem will publish a notice on its website setting out the basis for that decision and the proposed action which may be one or more of the following:

- a. finding a breach is ongoing, or likely to occur and that the Authority proposes to confirm a provisional order or make a final order;
- b. finding a breach has occurred (or is ongoing) and that the Authority intends to impose a financial penalty;
- c. finding a breach has occurred, but the Authority does not intend to impose a financial penalty.

### *a) Making a Final Order or confirming a Provisional Order*

4.29. Where the Authority is satisfied that the contravention is ongoing or is likely to occur, it shall confirm any relevant provisional order or make a final order to bring the breach to an end. The Authority is not required to make an order if it is satisfied that the company has agreed to take the necessary steps to secure compliance or the breach is trivial. Where the Authority proposes to make or confirm an order the notice will set out:

- that the Authority proposes to make or confirm an order;
- the relevant condition or requirement with which it seeks compliance and the acts or omissions which, in its opinion, constitute contraventions of it, and any other facts justifying the making or confirmation of the order; and
- the time (not less than 21 days) for representations or objections to be made.

4.30. Following the close of the consultation the Authority will consider all the representations that are made and decide whether to confirm or make the order.

### *b) Imposing a Financial Penalty*

4.31. The decision-maker may impose a financial penalty where a contravention is ongoing or has occurred. It may not impose a financial penalty for a contravention

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that is likely to occur.<sup>66</sup> The notice will state the amount of the intended penalty and will set out the relevant conditions, relevant requirements or standards of performance in question and will explain which acts or omissions, in the opinion of the Authority, constitute the contravention or failure.

4.32. A minimum of 21 days must be allowed for the making of written representations and objections.<sup>67</sup> The precise timeframe will depend on the circumstances of the case.

4.33. Following the close of the consultation period the Authority will consider all the representations and objections that have been made and will decide whether or not to impose, vary or withdraw the proposed financial penalty.

### **Competition Act<sup>68</sup>**

4.34. The main stages of the process under the Competition Act and possible outcomes are described below and outlined in the following flow chart. For a more detailed guide to the Competition Act and its application, see the OFT's competition law guideline, "Application to the energy sector".<sup>69</sup>

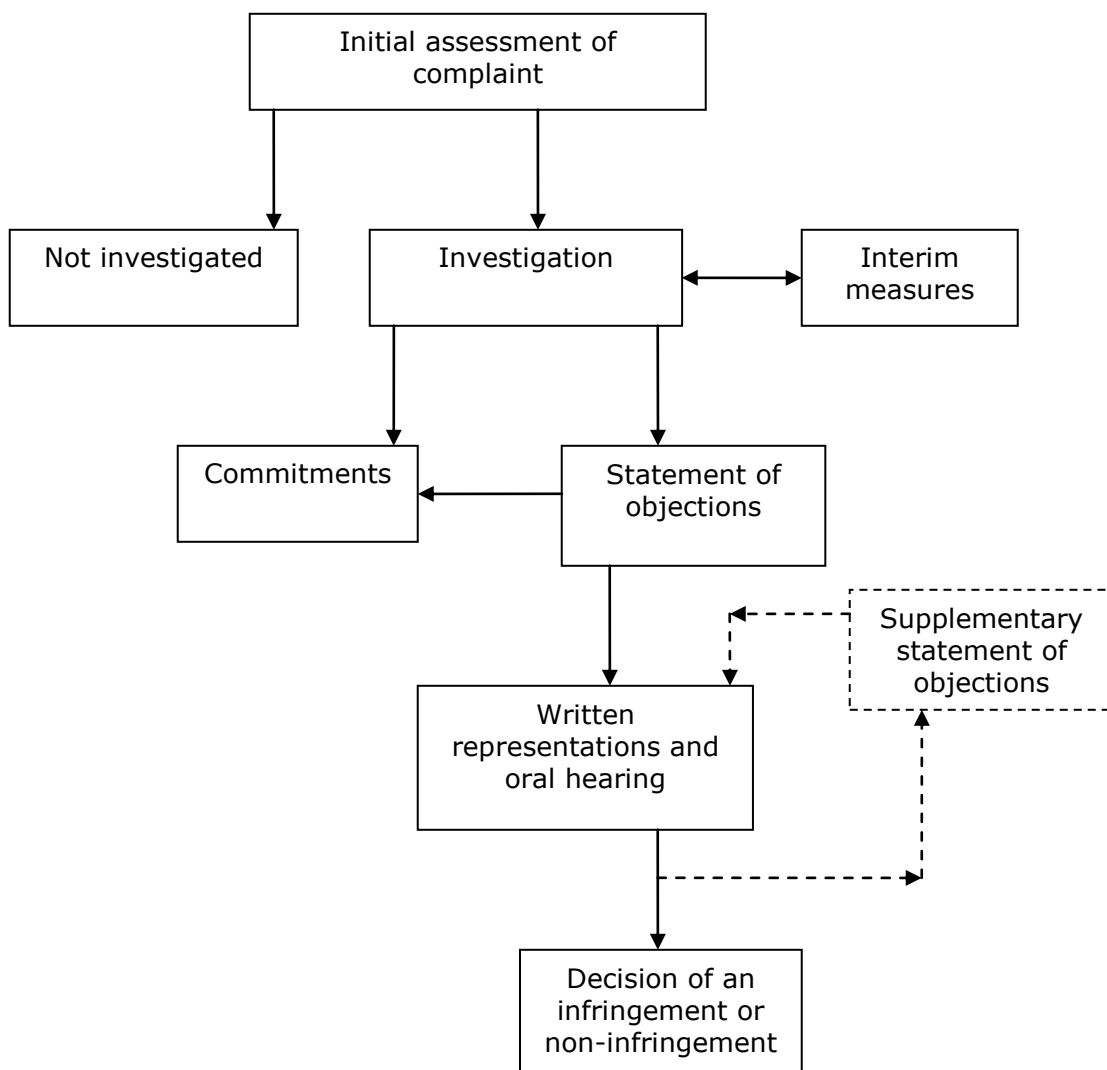
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<sup>66</sup> The procedure relating to the imposition of a financial penalty is set out in section 30A of the Gas Act 1986 and section 27A of the Electricity Act 1989

<sup>67</sup> See section 27A(4)(b) of the Electricity Act 1989 and section 30A(3)(d) of the Gas Act 1986. The timescales within which the Authority must impose a financial penalty are laid out in section 30C of the Gas Act and section 27C of the Electricity Act.

<sup>68</sup> In accordance with Regulation 1/2003, the same procedures will apply if we are applying Articles 81 or 82 EC

<sup>69</sup> OFT competition law guideline, "Application to the energy sector", [http://www.oft.gov.uk/shared\\_oft/business\\_leaflets/ca98\\_guidelines/oft428.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft428.pdf)



## Investigation

4.35. If Ofgem is satisfied that there are reasonable grounds for suspecting that the prohibitions of the Competition Act have been infringed,<sup>70</sup> then it may launch a formal investigation and consideration will be given to the use of the investigative powers under the Competition Act to obtain information.

## Interim measures

4.36. In certain urgent circumstances (e.g. where there is a real danger of serious permanent harm to a particular business), we may require a company to comply with

<sup>70</sup> Section 25, Competition Act 1998

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a temporary order (e.g. to stop certain conduct) while we complete our investigation. Further information on interim measures can be found in Chapter 3 of the OFT's competition law guidance, "Enforcement".<sup>71</sup>

## **Commitments**

4.37. Ofgem may accept binding commitments from undertakings suspected of infringing the Competition Act. Ofgem is required to have regard to the OFT's guidance when considering whether to accept commitments.<sup>72</sup> Ofgem is only likely to accept commitments in cases where the competition concerns are readily identifiable, where the concerns are fully addressed by the commitments offered and the commitments are capable of being implemented effectively<sup>73</sup>. Ofgem may accept commitments in respect of some of its competition concerns and continue its investigation in respect of other concerns arising from the same agreement or conduct.

## **Statement of Objections and representations**

4.38. Where Ofgem proposes to make an infringement decision, it will set out its case in a "Statement of Objections",<sup>74</sup> which will be issued to the relevant companies and they will have the opportunity to make written representations and oral representations<sup>75</sup> in response. It may be necessary to issue a supplementary statement of objections in some cases.

## **Decision**

4.39. Following any representations and the oral hearing, the decision-maker will consider the evidence, including the written and oral representations and make a final decision either to uphold or not an infringement of the Competition Act 1998. Alternatively, the decision-maker may find that no such infringement has occurred. The company will be informed of the decision and a statement will be published on Ofgem's website. If an infringement decision is made, the decision-maker will also decide whether to impose directions and/or a financial penalty, and if so, decide the

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<sup>71</sup> [http://www.ofg.gov.uk/shared\\_ofg/business\\_leaflets/ca98\\_guidelines/oft407.pdf](http://www.ofg.gov.uk/shared_ofg/business_leaflets/ca98_guidelines/oft407.pdf)

<sup>72</sup> OFT Competition law guidance, Enforcement, [http://www.ofg.gov.uk/shared\\_ofg/business\\_leaflets/ca98\\_guidelines/oft407.pdf](http://www.ofg.gov.uk/shared_ofg/business_leaflets/ca98_guidelines/oft407.pdf)

<sup>73</sup> Ofgem will not, other than in exceptional circumstances, accept commitments in cases involving cartels which include price-fixing, bid-rigging, output restrictions or quotas, sharing or dividing markets or cases involving the serious abuse of a dominant position.

<sup>74</sup> See rule 4, The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, Statutory Instrument 2004 No. 2751

<sup>75</sup> In conformity with the practice of other Competition Authorities, the oral representations will be chaired by a senior Ofgem official, who has not been involved in the investigation.

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content of the directions and level of the penalty and inform the party or parties concerned.<sup>76</sup>

### **Consumer legislation<sup>77</sup>**

4.40. Part 8 of the Enterprise Act establishes a consistent enforcement regime within the UK to improve the protection of consumers. Enforcers, including Ofgem, have strengthened powers to obtain court orders against companies infringing a wide range of consumer protection legislation

4.41. Part 8 only applies to an infringement which harms or has the potential to harm the collective interests of consumers; it is not a means of pursuing individual redress.

4.42. Generally, the Enterprise Act regime will involve a series of contacts with the company (by letter, telephone, and meeting) in attempts to secure compliance before undertakings or an Enforcement Order is considered (unless the matter is considered urgent and a more speedy approach is required).

4.43. The Enterprise Act also makes certain periods of consultation between Ofgem and the company mandatory:

- Where Ofgem wishes to seek an Enforcement Order a minimum of 14 days must be allowed for consultation with the business,
- If the enforcer wishes to apply for an interim order a minimum of 7 days must be allowed for consultation with the business.<sup>78</sup>

4.44. In some situations it may be necessary to formally request information. For example, details of the company's own complaint records might assist in the assessment of "harm to the collective interests of consumers". This power is available under s.225 of the Enterprise Act and a notice can be served on any person.

4.45. If compliance cannot be secured at an initial stage, it may be necessary for Ofgem to seek undertakings. Ofgem will usually publicise undertakings (after taking account of the appropriate confidentiality considerations under Part 9 of the Act) on its website.

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<sup>76</sup> See the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, Statutory Instrument 2004 No. 2751, <http://www.opsi.gov.uk/si/si2004/20042751.htm> and sections 32, 33 and 36 of the Competition Act 1998.

<sup>77</sup> See the OFT's guideline, Enforcement of Consumer Protection Legislation, Guidance on Part 8 of the Enterprise Act, [http://www.ofg.gov.uk/shared\\_ofg/business\\_leaflets/enterprise\\_act/ofg512.pdf](http://www.ofg.gov.uk/shared_ofg/business_leaflets/enterprise_act/ofg512.pdf)

<sup>78</sup> Section 214 of the Competition Act 1998.



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4.46. Where proceedings are brought against a company, the company will be informed about the proceedings and will have an opportunity to dispute the Authority's case and to make representations to the court. The court may accept an undertaking from the company instead of making an Enforcement Order/injunction. As part of the undertakings given to the court, the business may be required to publish, in a manner the court considers appropriate, the terms of the undertaking and a corrective statement. A subsequent breach of an undertaking given to the court could result in contempt of court proceedings.

## Appendices

### Index

<b>Appendix</b>	<b>Name of Appendix</b>	<b>Page Number</b>
1	Consultation questions (including 'Summary of Responses')	28
2	Summary of Ofgem's legislative powers	30
3	Glossary	32
4	Feedback questionnaire	34

## Appendix 1 - Consultation Questions

In its consultation document 'Proposed Enforcement Guidelines on Complaints and Investigations' (Ref: 156/07), Ofgem sought views on the questions below:

### CHAPTER: THREE

**Question:** Do you have any views on the information that Ofgem will require complainants to provide when making a complaint?

### CHAPTER: FOUR

**Question:** Do you have any views on the criteria that Ofgem is proposing to use to decide whether to commence an investigation?

### CHAPTER: FIVE

**Question:** Do you have any views on the process or timescales for investigations?

## List of Respondees

List	Name
1	Edf ENERGY
2	National grid
3	Northern Gas Networks Limited
4	RWE npower
5	Scottish Power
6	Scottish and Southern Energy Group
7	United Utilities PLC
8	energywatch

## Summary of Responses

1.1. Responses received by Ofgem which were not marked as being confidential have been published on Ofgem's website [www.ofgem.gov.uk](http://www.ofgem.gov.uk). Copies of non-confidential responses are also available from Ofgem's library.

1.2. Ofgem received 8 responses to the consultation on our proposed 'Enforcement Guidelines on complaints and Investigations'. The respondents generally welcomed our proposal to set out our approach to enforcing relevant legislation in guidelines. Outlined below is a summary of some of the key points raised.

**Confining the scope of enforcement action to where alternative mechanisms have been exhausted**

1.3. Many of the industry respondents suggested that Ofgem's intervention should be confined to circumstances where other mechanisms of resolving the complaint have been exhausted. For example, it was suggested that the subject of the complaint should have an opportunity to resolve the matter before any investigation is opened. It was also proposed that Ofgem would not take enforcement action where the activity is governed by a code, except in exceptional circumstances. One respondent suggested that Ofgem should not investigate complaints referring to business commercial or contractual issues. Another respondent considered that Ofgem should not launch an investigation where legislation provides for a specific remedy (such as the compensation payments in the Gas (Standards of Performance) Regulations 2005).

1.4. However, another respondent suggested that it may not always be appropriate for Ofgem to refer complainants back to companies. It also thought that the codes are not sufficiently robust to deal with serious breaches and that Ofgem should not shy away from enforcement action in this area.

**Ofgem's response**

1.5. Ofgem generally encourages complainants to seek redress with the subject of the complaint, where appropriate. However, such an approach may not be appropriate in all circumstances. There will be occasions, such as where the complainant fears jeopardising its relationship with the company in question by raising the matter, where it may be reasonable for the complainant to raise the matter directly with Ofgem.

1.6. The sanctions which can be applied pursuant to industry codes or agreements do not include financial penalties. There may be cases where, despite the fact that a separate remedy is required by legislation or by a Code, Ofgem considers that the imposition of a financial penalty is appropriate. In our view the proposed enforcement guidelines adequately set out this approach in the subsection on Enforcement and Code compliance.

1.7. Although Ofgem does not generally seek to get involved in commercial disputes between companies, we may investigate commercial or contractual issues, which we consider may breach the Competition Act 1998 or any relevant legislation. There may also be cases, where despite the fact a separate remedy is required by legislation Ofgem considers enforcement action is appropriate due to the seriousness of the breach or to create an incentive for greater compliance,

### **Greater Dialogue with the subjects of investigations**

1.8. A number of the industry respondents considered that Ofgem should engage in greater dialogue and provide more information early in the process. There were particular requests for us to consult companies that may be investigated prior to launching an investigation and prior to issuing an information request. It was also suggested that Ofgem should reveal the identity of the complainant or provide a copy of the complaint.

#### **Ofgem's response**

1.9. This is an area in which we identified further improvements could be made during the enforcement review and believe our measures improve transparency in the process. To this end, we had undertaken to provide an Ofgem contact for each investigation and to give quarterly updates on investigations. We will also write to each company at the start of any investigate to give full details of the allegations. We will provide an Ofgem contact in every case, which should facilitate dialogue and improve transparency more generally. However, it would not be appropriate to reveal the identity of the complainant, unless they were content for us to do so, as this may deter complainants from coming forward.

### **Improving the Process**

1.10. There were a number of suggestions for greater clarity on aspects of the process, such as giving stakeholders the opportunity to give feedback on the process at the end of the investigation. In respect of Gas and Electricity Act cases there was a request for a clearer explanation of when "minded to" letters would be issued and it was questioned whether provisional orders should be made without formal representations from the target company. A minimum timescale of 21 days was proposed for responding to Statement of Cases. On Part 8 of the Enterprise Act, there was a request for more detail on Ofgem's dialogue with the OFT. One respondent suggested that an independent review panel should be introduced to consider any Statements of Objections in Competition Act cases. It was suggested that the facts of the case should be checked with the subject of the investigation before the Statement of Objections is issued.

#### **Ofgem's response**

1.11. We have taken on board many of the suggestions to improve the process, such as requesting feedback on the process at the end of the investigation. We have revised the section on "minded to" letters to seek to make it clearer. We have clarified that we may, where appropriate, allow formal representations to provisional orders. We have included a general response period of 21 days for statement of cases (which may be less depending on the facts of the case). We have also provided explanation on agreeing concurrency under the Part 8 of the Enterprise Act.

1.12. However, we do not intend to alter the Statement of Objections in Competition Act cases. Ofgem's current internal processes already provide for scrutiny of the Statement of Objections before it is issued. We will consider any comments made on facts as part of the Statement of Objections process, which is in line with OFT practice.

### **Timescales**

1.13. One respondent thought it would be challenging for Ofgem to meet the 9 month deadline. Two respondents encouraged Ofgem to make use of opportunities for a quicker turnaround. One of those respondents specifically suggested aligning the general deadline to reflect article 23 of Directive 2003/54/EC concerning common rules for the internal market in electricity and under article 25 of Directive 2003/55/EC concerning common rules for the internal market in gas (The directive requires the Authority to issue a decision within two months of receiving a complaint against a network operator or, 4 months where additional information is required). Two respondents suggested it would be useful for Ofgem to establish timescales before the start of an investigation and notify the stakeholders of this in advance.

### **Ofgem's response**

The purpose of including a timescale in the guidelines is to improve transparency in the process. The timescales are set on a trial basis and will be reviewed within a year of these guidelines coming into force. The 9 month deadline is likely to be challenging, especially in more complex cases. We have recognised this by stating that within 9 months, we will seek to do one of the following: issue a statement, close the case or give an update on the expected timescales. Notwithstanding, Ofgem's overall commitment is to improve the existing arrangements by ensuring that those being investigated are given an indication of our intended timetable for the investigation.

## Appendix 2 - Summary of Ofgem's legislative powers

<b>Relevant legislation</b>	<b>Scope of enforcement powers</b>	<b>Powers to require information</b>	<b>Powers to order interim measures</b>	<b>Powers to accept other measures</b>	<b>Powers to bring an end to the breach</b>	<b>Powers to impose a financial penalty</b>	<b>Concurrent powers</b>
Gas Act 1986	To ensure licence holders comply with relevant licence conditions, the Gas Act and Utilities Act 2000	Power to require the production of specific documents and information - Section 38	Provisional Order – Section 28(2)&(4)	The licence holder may agree to take, or is taking, appropriate steps – Section 28(5A)(a)	Final Order-Section 28(1)	Power to impose a financial penalty – Section 30A(1)	No
Electricity Act 1989	To ensure licence holders comply with relevant licence conditions, the Electricity Act and Utilities Act 2000	Power to require the production of specific documents and information – Section 28	Provisional Order – Section 25(2) & (4)	The licence holder may agree to take, or is taking, appropriate steps – Section 25(5A)(a)	Final Order-Section 25(1)	Power to impose a financial penalty – Section 27A(1)	No

<b>Relevant legislation</b>	<b>Scope of enforcement powers</b>	<b>Powers to require information</b>	<b>Powers to order interim measures</b>	<b>Powers to accept other measures</b>	<b>Powers to bring an end to the breach</b>	<b>Powers to impose a financial penalty</b>	<b>Concurrent powers</b>
Competition Act 1998	To apply and enforce Chapter I and II prohibitions and Articles 81 and 82 of the EC Treaty	Power to: require the production of specific documents/provision of information - Section 26  enter business premises without a warrant and require a specified document (with or without notice) -Section 27  enter and search business and domestic premises with a warrant and without notice - Section 28	Directions for interim measures – Section 35	Accept commitments – Section 31A	Infringement decision – Sections 32 & 33	Power to impose a financial penalty – Section 36	Yes
Part 8 –	To apply to courts	Notice requiring	Apply to the court	Requirement	Enforcement	Financial	Yes



<b>Relevant legislation</b>	<b>Scope of enforcement powers</b>	<b>Powers to require information</b>	<b>Powers to order interim measures</b>	<b>Powers to accept other measures</b>	<b>Powers to bring an end to the breach</b>	<b>Powers to impose a financial penalty</b>	<b>Concurrent powers</b>
Enterprise Act 2002	for an Enforcement Order to stop a business from breaching certain consumer protection legislation; where the breach harms the collective interests of consumers.	information – Section 225	for an Interim Enforcement Order – Section 214(3)	to consult business for the purpose of ending the infringement to ensure there will be no repetition of the infringement – Section 214 and seek Undertakings under Section 219	order – Section 215 & 217  Non-compliance with Order or undertakings – Section 220	penalty can not be imposed	
Market Monitoring and Investigations	Power to review gas and electricity markets – Section 34 Gas Act/Section 47 Electricity Act  Concurrent power to make a reference of market(s) to the Competition Commission Part	Notice requiring specific documents and information - Section 174	Accept Interim Undertakings where a market reference has been made, the relevant report published, but the reference has not been determined - Section 157  Interim Order - where a market	Accept Undertakings in lieu of market investigation references - Section 152	Concurrent power to make a reference of market(s) to the Competition Commission - Section 131(1) Part 4 of the Enterprise Act		Yes (Only under Part 4 of the Enterprise Act)

<b>Relevant legislation</b>	<b>Scope of enforcement powers</b>	<b>Powers to require information</b>	<b>Powers to order interim measures</b>	<b>Powers to accept other measures</b>	<b>Powers to bring an end to the breach</b>	<b>Powers to impose a financial penalty</b>	<b>Concurrent powers</b>
	4 of the Enterprise Act. (by virtue of section 36A(2) of the Gas Act 1986 and section 43(2) Electricity Act 1989		reference has been made, the relevant report published, but the reference has not been determined - Section 158.				
Super – complaints - Enterprise Act 2002	Power to consider and act on a complaint from a designated consumer body - Section 11 Respond to super-complaints made to us in relation to our functions provided under the Gas Act 1986 and the Electricity Act 1989, (as amended by the Utilities Act 2000)						Yes

## Appendix 3 – The Authority’s Powers and Duties

1.1. Ofgem is the Office of Gas and Electricity Markets which supports the Gas and Electricity Markets Authority (“the Authority”), the regulator of the gas and electricity industries in Great Britain. This Appendix summarises the primary powers and duties of the Authority. It is not comprehensive and is not a substitute to reference to the relevant legal instruments (including, but not limited to, those referred to below).

1.2. The Authority's powers and duties are largely provided for in statute, principally the Gas Act 1986, the Electricity Act 1989, the Utilities Act 2000, the Competition Act 1998, the Enterprise Act 2002 and the Energy Act 2004, as well as arising from directly effective European Community legislation. References to the Gas Act and the Electricity Act in this Appendix are to Part 1 of each of those Acts.<sup>79</sup>

1.3. Duties and functions relating to gas are set out in the Gas Act and those relating to electricity are set out in the Electricity Act. This Appendix must be read accordingly<sup>80</sup>.

1.4. The Authority’s principal objective when carrying out certain of its functions under each of the Gas Act and the Electricity Act is to protect the interests of consumers, present and future, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the shipping, transportation or supply of gas conveyed through pipes, and the generation, transmission, distribution or supply of electricity or the provision or use of electricity interconnectors.

1.5. The Authority must when carrying out those functions have regard to:

- The need to secure that, so far as it is economical to meet them, all reasonable demands in Great Britain for gas conveyed through pipes are met;
- The need to secure that all reasonable demands for electricity are met;
- The need to secure that licence holders are able to finance the activities which are the subject of obligations on them<sup>81</sup>; and
- The interests of individuals who are disabled or chronically sick, of pensionable age, with low incomes, or residing in rural areas.<sup>82</sup>

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<sup>79</sup> entitled “Gas Supply” and “Electricity Supply” respectively.

<sup>80</sup> However, in exercising a function under the Electricity Act the Authority may have regard to the interests of consumers in relation to gas conveyed through pipes and vice versa in the case of it exercising a function under the Gas Act.

<sup>81</sup> Under the Gas Act and the Utilities Act, in the case of Gas Act functions, or the Electricity Act, the Utilities Act and certain parts of the Energy Act in the case of Electricity Act functions.

<sup>82</sup> The Authority may have regard to other descriptions of consumers.

1.6. Subject to the above, the Authority is required to carry out the functions referred to in the manner which it considers is best calculated to:

- Promote efficiency and economy on the part of those licensed<sup>83</sup> under the relevant Act and the efficient use of gas conveyed through pipes and electricity conveyed by distribution systems or transmission systems;
- Protect the public from dangers arising from the conveyance of gas through pipes or the use of gas conveyed through pipes and from the generation, transmission, distribution or supply of electricity;
- Contribute to the achievement of sustainable development; and
- Secure a diverse and viable long-term energy supply.

1.7. In carrying out the functions referred to, the Authority must also have regard, to:

- The effect on the environment of activities connected with the conveyance of gas through pipes or with the generation, transmission, distribution or supply of electricity;
- The principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed and any other principles that appear to it to represent the best regulatory practice; and
- Certain statutory guidance on social and environmental matters issued by the Secretary of State.

1.8. The Authority has powers under the Competition Act to investigate suspected anti-competitive activity and take action for breaches of the prohibitions in the legislation in respect of the gas and electricity sectors in Great Britain and is a designated National Competition Authority under the EC Modernisation Regulation<sup>84</sup> and therefore part of the European Competition Network. The Authority also has concurrent powers with the Office of Fair Trading in respect of market investigation references to the Competition Commission.

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<sup>83</sup> or persons authorised by exemptions to carry on any activity.

<sup>84</sup> Council Regulation (EC) 1/2003

## Appendix 3 - Glossary

### **C**

#### [Competition Act 1998](#)

The Act prohibits anti-competitive agreements and the abuse of a dominant position. Under the Act, Ofgem has the power to investigate alleged breaches of the Act and can take enforcement action, such as ordering that offending agreements or conduct be stopped and imposing financial penalties.

#### [Competition Appeal Tribunal \(CAT\)](#)

The CAT is a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy. Under United Kingdom law, the function of the CAT is to hear and decide appeals and other applications or claims involving competition or economic regulatory issues.

#### [Competition Commission \(CC\)](#)

The CC is an independent public body which conducts in-depth inquiries into mergers, markets and the regulation of the major regulated industries.

### **E**

#### [Energy Supply Ombudsman \(ESO\)](#)

The ESO provides a free and independent service. If a consumer has a problem sorting out a complaint with an energy supplier, it may be able to help. The Ombudsman is the person who decides what action should be taken when a consumer and an energy supplier can't agree.

#### [energywatch](#)

energywatch is the Gas and Electricity Consumer Council. It is the independent body responsible for providing energy consumers with information and advice and for investigating all complaints and enquiries on their behalf, including all the areas that Ofgem regulates. It also has an advocacy role and can raise matters with Ofgem if it detects issues that require regulatory consideration.

#### [Enterprise Act 2002](#)

The Act made a number of important reforms, designed to crack down on abuses that harm customers and fair-trading businesses alike and thus encourage productivity and enterprise. Included in the Act are provisions relating to market investigation references, super complaints and the enforcement of consumer legislation.

**o**

Office of Fair Trading (OFT)

The OFT is the UK's consumer and competition authority. Its mission is to make markets work well for consumers.

## Appendix 4 - Feedback Questionnaire

1.1. Ofgem considers that consultation is at the heart of good policy development. We are keen to consider any comments or complaints about the manner in which this consultation has been conducted. In any case we would be keen to get your answers to the following questions:

- Does the report adequately reflect your views? If not, why not?
- Does the report offer a clear explanation as to why not all the views offered had been taken forward?
- Did the report offer a clear explanation and justification for the decision? If not, how could this information have been better presented?
- Do you have any comments about the overall tone and content of the report?
- Was the report easy to read and understand, could it have been better written?
- Please add any further comments?

1.2. Please send your comments to:

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