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Dear Pamela

Proposed enforcement guidelines on complaints and investigations

energywatch welcomes the opportunity to respond to the issues raised in the consultation. This response is non-confidential and we are happy for it to be published on the Ofgem website.

Processes designed to protect consumers or to enhance their welfare must be transparent and accessible to those who need to use them – this includes consumers themselves as well as their representatives. The process must be clear and include timescales that are reasonable not only in terms of achievability but also in terms of appropriateness for the consumer or the person or entity alleging the breach. It is essential that this process is well documented and is available to anyone who may need to use it. Moreover it is also essential that the process is publicised because there will be many (both consumers and others) who will be unaware that a process exists, let alone where to start looking for it. Consumers must be clear about what they have to do and what they can expect from Ofgem. This will become even more important with the demise of energywatch and the changes to consumer representation. Consumers will need efficient and effective processes that enable them to bring to the attention of the regulator instances where they believe their supplier has not behaved appropriately and they cannot resolve the issue with their supplier or via other means. As part of the process Ofgem should look for best practice in other arenas, for example the financial sector.

Consumers cannot be expected to know or understand the regulations or be able to identify breaches but they will know when they feel they have been treated unfairly or if they feel their supplier is acting outside what they would expect - indeed Ofgem recognises this in the consultation. Ofgem must have processes in place to be able to recognise this and to deal with it so it can be sure that legitimate complaints do not fall between the cracks due to a lack of understanding by consumers (including small businesses). These processes cannot simply be to refer the consumer back to their supplier in every instance as this will lose the opportunity for monitoring of the industry and identifying trends. Equally, Ofgem must ensure it is sufficiently resourced to deal with the potential increase in complaints once the changes to consumer representation come into effect.

Equally, Ofgem must be both willing and able to act when the circumstances require it to and cannot be constrained by “resource issues”. Throughout the consultation Ofgem refers to the availability of resources being a key feature in progressing or otherwise an investigation. Whilst it is essential that public funds are spent appropriately, it is exactly that which means that relevant cases should be investigated. Whilst resources are an important factor they must never be the main driver or a limiting factor in protecting consumers. Major investigations, such as Competition Commission referrals, can be expensive and must, therefore, be considered very carefully but Ofgem must ensure that as it prioritises cases for investigation there is both consistency and fairness of practice and that consumers are not disadvantaged as a result of applying resources in the wrong areas.

In the consultation Ofgem speaks of enforcement as a tool to ensure a level playing field for licensees and second as a means of protecting consumers. Such order of emphasis belies a policy prioritisation which concerns energywatch. The protection for consumers should be the prime purpose behind the enforcement agenda which as a consequence creates a level playing field for licenses.

In chapter one Ofgem provides details of timescales and actions it might take in relation to particular cases. It states that “in 90 per cent of cases within 4 weeks of receiving a complaint, Ofgem will acknowledge receipt and either inform the complainant to whether Ofgem intends to investigate the matter, or otherwise request further information to decide whether to investigate” This causes concern because it does not give any assurance to consumers about how Ofgem will proceed in more urgent cases. We are uncertain as whether Ofgem is suggesting that only 10% of cases will be urgent or that it will not always be able to respond to all complainants within the 4 week timeframe. However, there will be instances where Ofgem is informed of a potential breach and immediate action should be taken. The process outlined assumes that all industry processes, including self regulatory process, are sufficiently robust and efficient to deal with urgent cases. The experience of energywatch demonstrates that this not the case. Consumers must feel confident that if they or their representatives raise an issue which requires urgent action, they will receive it and not be expected to wait four weeks.

Indeed, in relation to timescales, throughout the consultation Ofgem speaks of the need to be given the right information in order to progress an investigation, which is, of course, the right approach. Consumers would feel more assured, however, if the final document demonstrated a stronger commitment to keeping investigations moving rather than emphasising the delays that will be caused if more information is needed. The process should include steps for progressing information with the potential for penalties for those who fail to provide adequate information in a timely manner.

We also believe that Ofgem must continue to demonstrate its commitment to keeping investigations on track by reconsidering its 9 month target. Clearly there will be times where investigations are particularly complex and may take many months to investigate and resolve. These should be the exception rather than the rule and should, therefore, not form the basis of the benchmark or target. Ofgem should consider a two tier approach with a shorter timescale for investigations and a

slightly longer one for more complex cases. The target should also show the circumstances that would determine whether something was complex or otherwise. Here and in other areas of the guidelines the inclusion of examples would be helpful. In particular guidance for consumers of examples where Ofgem would and would not be likely to investigate, where consumers would be referred to their supplier or another organisation, etc.

There will be occasions where potential breaches involve more than one regulator or department. energywatch anticipates that the various departments would examine their own issues then decide who would be best placed to take this forward. The guidelines would benefit from an explanation of what would happen in these situations. In particular how it would be decided who would take the lead in such circumstances, whether this involves a hierarchy or relates to which department has the stronger powers in the particular instance or whether “double jeopardy” could occur, or would be prevented.

Further clarity would be welcomed in the section relating to industry code compliance. In particular it would be helpful to understand the analysis Ofgem has carried out of:

- the potential breaches that code parties may commit;
- the enforcement powers available under the various industry codes to deal with those potential breaches (including the steps by which a breach investigation under a code can be escalated);
- any impact assessment of how enforcement powers available to Ofgem or under industry codes will incentivise licensees, or otherwise;
- Ofgem’s ability under codes to enforce proportionately, transparently, consistently and appropriately given that consumers are not code parties so are reliant on any finding of wrongdoing to be pursued on their behalf by a code party or the regulator; and
- whether Ofgem believes that there are clear boundaries between where its powers end and the powers under the codes begin.

There has been concern for some time, in several quarters, that the codes are not sufficiently robust to deal with a potentially serious breach and this view is supported by the fact that Ofgem possesses far greater powers in terms of financial penalties than anything available under any of the industry codes. The guidelines should provide clarity in this area and show that Ofgem will sit in the background as “enforcer of last resort”. In relation to self regulatory codes Ofgem should not shy away from enforcement action in this area where it seems more appropriate or relevant. The test for this would be the impact on consumers both in terms of the actions of the supplier and in Ofgem failing to act in the circumstances.

Going forward, we will continue to keep these issues under review as and when they are raised, always considering the possible impact on consumers. We look forward to further engaging in DPCR 5 prior to the demise of energywatch.

If you do wish to discuss our response further please do not hesitate to contact me on 0191 2212072.

Yours sincerely

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Head of Regulatory Affairs