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Dear Pamela

Proposed Enforcement Guidelines on Complaints and Investigations – Consultation ref: 156/07

Thank you for the opportunity to comment on the Proposed Enforcement Guidelines on Complaints and Investigations.

We believe it is important for Ofgem to set out its processes for gathering information relating to complaints and the procedures it will undertake to determine whether to launch an investigation. We consider that the issue of such enforcement guidelines will aid clarity, improve transparency and may, provided that the procedures adopted contain appropriate safeguards, alleviate industry participants' concerns over regulatory risk.

That said, Ofgem should remain mindful that where it has concurrent enforcement powers with other regulators, especially in the field of competition law enforcement, its procedures must pay full regard to, and be fully consistent with, those adopted by the OFT. This will ensure that Ofgem is not only consistent with all competition law enforcement in the UK, but also that the objectives of the EC Modernisation directive (Directive 1/2003 EC) are met.

Our comments on the three questions raised within the consultation are as follows:

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

We agree with Ofgem that complaints should be specific, well reasoned and supported by all relevant evidence. If this is not the case, Ofgem should engage further with the complainant for this information. That said, we do recognise that Ofgem can be expected to have significant general "background" knowledge of energy markets so that complainants may be required to provide somewhat less general background information than would otherwise be the case for complainants to the OFT. However, we do not consider that this should absolve complainants from the requirement to present well reasoned and adequately supported arguments that a competition concern exists, especially where such complaints are made by large undertakings with access to specialist legal advice, or where there is the potential for a complainant to be seeking to use competition law to overturn properly negotiated commercial contracts rather than to address a legitimate competition concern. It is a basic tenet of competition law that it is not intended to be used to redress a "bad bargain". Furthermore, we do not believe that Ofgem should assume that it has perfect knowledge of all energy markets: it should be prepared to challenge (and have challenged) its own understanding of the manner in which individual energy and related markets operate.

If Ofgem is to endeavour to "enhance the transparency of the investigation processes", we feel it is essential that an early dialogue should be initiated with the company that is the focus of the alleged complaint/breach. We would encourage early engagement between Ofgem and all the companies involved, as this may lead to a satisfactory commitment/measure to be reached, without the need for a lengthy formal investigation that can be costly and disruptive for all involved. This approach would

help Ofgem to determine whether the particular issues involved were really part of what would more appropriately be dealt with as a commercial dispute through litigation between the parties, especially where the parties are both large undertakings. This will help Ofgem to focus its priorities on those cases where consumers are most affected, so that their interests can be protected by competition investigation/enforcement action. It will also help to ensure that Ofgem obtains an early and balanced view. Complainants, particularly those who are not party to relevant contractual arrangements, are unlikely to have a complete picture and will inevitably focus on the areas of concern to them. This may create a one-sided and narrow view of the real situation with the consequent risk of inaccurate conclusions being drawn prematurely and resources wasted in investigating a matter on the basis of a misunderstanding of the facts. To address this risk, Ofgem should ensure that any information obtained from the company that is the focus of the investigation will be backed by appropriate evidence, but this requirement must also apply to information obtained from, and allegations made by, the complainant.

We also note in section 2.2 that Ofgem "would expect the complainant to have raised the matter of concern with the relevant company in most cases". We feel that this would be a productive step in the process and should be actively encouraged where possible, before Ofgem is engaged. If the complainant is disclosed early on in the process, the company involved may be able to better understand the reasons behind the complaint and provide additional information relevant to the case which should in turn improve the process and enable Ofgem to take necessary actions in a timely manner. Clearly, there will always be some cases (such as secret cartels where a leniency application may be made, or severe cases of exclusionary activity which may lead to greater retaliatory action by the company against which the allegation is made) where this will not be appropriate, however, in the majority of cases, we agree that the complainant should be expected to seek to resolve the issue with the undertaking concerned directly.

The company whose conduct is complained about should be informed in some detail of the nature of the complaint and Ofgem's initial views as soon as reasonably practicable and preferably before the issue of any formal requests for information. When a formal request for information is issued, this should identify in as much detail as possible what Ofgem's concerns are so that the target company can focus on providing information that is truly relevant to the investigation, and avoid providing much extraneous and irrelevant information that merely increases the administrative burden on all parties involved. Ideally the company should not have to wait nine months to be told what the basis of the complaint is (issued with a detailed statement) or find out that the case has been closed (due to lack of evidence).

If Ofgem do decide to issue a detailed statement, we feel that the starting point is that the identity of the complainant should be disclosed (if it has not been done before), unless there is a strong and specific public-policy reason for not doing so as this would provide clarity and transparency to the process. As mentioned earlier we would encourage open discussion between all parties at the earliest opportunity. Ofgem should also consider before formally issuing any detailed statement whether it should check facts with the target company, in the same manner in which the Competition Commission seeks comments on the factual sections of its reports before they are published. Clearly the final decision on content in any formal statement must rest with Ofgem, but inaccurately reported "facts" which are not corrected and are subsequently relied on by third parties in commenting on statements of objection, reduce the value and reliability of third party input. There is a balance to be reached here between delaying proceedings whilst facts are checked and ensuring accuracy of any statements that are subsequently published, but in complex matters the benefit of having a factually accurate document is likely to outweigh any disadvantage in delay.

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

We have the following comments on the criteria Ofgem will apply in deciding whether to open an investigation. In section 3.5 (d), Ofgem considers the seriousness of the alleged breach and lists a number of factors that would influence this assessment. We feel that evaluating the harm to consumers and whether the breach is ongoing or a repeat offence; introduces the application of a

'reasonableness test' to the offence; however, this as rightly stated in the document, is not an exhaustive list. In addition to a test of reasonableness we also feel it is important for Ofgem to act 'proportionately' when investigating these matters. Certainly, whatever factors Ofgem uses, it should be mindful that its role as a competition enforcement agency is not to protect competitors, but rather to protect competition. As such, any criteria used by Ofgem which considers the damage done to a particular competitor in determining whether or not to commence an investigation should be used with care, especially as it may be the case that such "damage" is being used to try to introduce a "competition angle" into what is essentially normal commercial rivalry, or dispute.

The issue of the "proportionality" is also important, not only in the context of enforcement, but also in setting the underlying licence obligations against which such enforcement action may be taken. For example, as part of the Gas Distribution Price Control Review, Ofgem is proposing to remove a number of Overall Standards of Service and replace them with Guaranteed Standards of Service (GSOS) or licence conditions. We are concerned that a Gas Distribution Network operator ("GDN") may become automatically in breach of its licence through circumstances beyond its control, with the associated implications, if it fails to meet one of the new service standard licence conditions. However, it is important to recognise that failure of a standard may arise as result of exceptional events beyond the control of the GDN. In view of this, the underlying obligations ought also to be drafted in such a manner as to enable Ofgem to recognise the realities of the performance of such obligations, rather than creating a form of "strict liability" for GDNs where this is not appropriate.

Enforcement and industry Code compliance

As part of the Industry Codes Compliance Review (ICCR) held last year, we indicated that we believed there was merit in Ofgem publishing its enforcement policy principles, as it may provide clarity and transparency, alleviating other industry participants concerns regarding code enforcement.

We are not convinced that the guidelines as drafted will meet the industry's expectations in this regard. Respondents to the ICCR encouraged Ofgem to provide guidance on specific industry issues with relation to code compliance and the interaction with licences which set out Ofgem's role and involvement in their enforcement. This may be achievable by using a series of examples in the guidelines. Alternatively, Ofgem may wish to consider producing a more detailed supplementary document to the enforcement guidelines providing such detail.

Chapter: Four. Question: Do you have any views on the process or timescales for investigations?

We feel that the Guidance captures most of the key stages of the investigation process that Ofgem will ordinarily follow although there does seem to be one stage missing in this process. We understand that the OFT and the European Commission have systems under which, before any formal statements (e.g. statement of objections) are issued, the case is reviewed by an independent review panel, constituted of disinterested officials who have taken no part in the investigation. This was introduced in recognition of the understandable risk of a prosecuting case team carrying forward a case without there being any check on its impartiality at the administrative stage. Whilst there are of course formal provisions for appeal of any decisions, there are none (apart from judicial review which is unlikely to be appropriate) at the administrative stage. The inclusion in the process of review by an independent review panel would increase the trust that participants have in the process, remove obvious flaws from any statements or decisions and lead to more robust decision making.

As mentioned previously, we believe that there are benefits in early engagement between Ofgem and both the complainant and the party suspected of infringing the Competition Act. We feel that this early and open discussion may reduce the timescales involved in conducting the process and allow Ofgem to fully consider the appropriateness of alternative courses of action.

That said, we consider that in many cases, it could be challenging for Ofgem to commence an investigation and issue a statement of objections within nine months, especially if it is to give parties under investigation adequate time to respond to information requests. The challenging nature of this

timescale can be illustrated by the recent cartel investigation into British Airways and Virgin Airlines in which the investigation took over a year despite the OFT having the benefit of a relatively straightforward case.

We are also concerned that Ofgem does not appreciate the difficulties for undertakings in complying with information requests. They often require the examination of very large quantities of data (often including many thousands of e-mails) to enable the preparation an adequate response. In order to provide more realistic deadlines, it would be helpful if Ofgem were to discuss its requirements beforehand. This would have the advantage of avoiding requests for information which cannot be provided and perhaps enabling phasing of information provision thereby improving efficiency for both parties. This approach may help Ofgem to meet its nine-month target which, as we indicate above, we consider to be very challenging.

We hope you find these comments helpful and if you need further clarification please do not hesitate to contact James Wynn-Evans on 01926 655448.

Yours sincerely

[By E-mail]

Paul Whittaker