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Ofgem's Draft Enforcement Guidelines on Complaints and Investigations – Outcome of Consultation

Outcome

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Overview:

Ofgem is reviewing its approach to enforcement. This document represents the outcome of the first part of the review process.

We would like to thank stakeholders for their responses to our consultation on Ofgem's Draft Enforcement Guidelines on Complaints and Investigations ("the Enforcement Guidelines"), which was published on 16 December 2011. In this document, we summarise and address some of the key points made by stakeholders in relation to the six main areas of the Enforcement Guidelines where we proposed changes. We also outline the final changes we have decided to make to the Enforcement Guidelines taking into account those comments, in part one of the review process. Stakeholders' comments which have not been addressed in this document or reflected in the updated Enforcement Guidelines we are publishing alongside this document will be taken into consideration in our wider Enforcement Review during 2012-13.

Context

The Enforcement Guidelines, which set out our policies and procedures for enforcing sectoral, competition and consumer protection legislation, were published on 28 September 2007. Since then some of our procedures have evolved as our practical experience of using our powers has increased. There are also a number of wider developments taking place that are likely to have implications for the way in which we carry out our enforcement work, for example, reforms to the consumer and competition landscapes. Also, enforcement is receiving increasing emphasis within Ofgem's work. In our March 2011 Retail Market Review, we made public our intention to take a tougher stance on enforcement, for the benefit of consumers and with the aim of increasing competition amongst suppliers. In addition to the emphasis on our enforcement role, we have significantly increased the amount of enforcement work we do. This is therefore a timely opportunity to review our approach to enforcement.

The review process will be completed in two parts. The first part involves consulting on proposed updates to the Enforcement Guidelines that include expanded or new coverage on areas such as early resolution, consumer protection and provisional orders. The second part is a wholesale review of our approach to enforcement. It will take a fundamental look at procedures and policy, with a view to maximising the impact and efficiency of our enforcement work.

On 16 December 2011, we consulted on initial revisions to our Enforcement Guidelines proposed in part one of the review process. We committed to doing this in our Corporate Strategy and Plan 2011-16.

The consultation also included a Call for Evidence for stakeholders' views on our general enforcement approach to open the second part of the review. We expect to be able to share our initial thinking with stakeholders in relation to the wider Enforcement Review in the last quarter of financial year 2012-13.

Associated documents

- Draft Enforcement Guidelines on Complaints and Investigations (for consultation) (December 2011):
<http://www.ofgem.gov.uk/About%20us/enforcement/Documents1/Enforcement%20guidelines.pdf>
- Enforcement Guidelines on Complaints and Investigations (September 2007):
<http://www.ofgem.gov.uk/About%20us/enforcement/Documents1/Enforcement%20Guidelines%20post%20consultation.pdf>
- Enforcement Guidelines on Complaints and Investigations (2012)
<http://www.ofgem.gov.uk/About%20us/enforcement/Documents1/Enforcement%20Guidelines%202012.pdf>

- Open letter – Consultation - Ofgem's Draft Enforcement Guidelines on Complaints and Investigations (December 2011):
<http://www.ofgem.gov.uk/About%20us/enforcement/Documents1/Open%20letter.pdf>
- Responses (marked non-confidential) to Ofgem's Consultation on Draft Enforcement Guidelines on Complaints and Investigations:
<http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=38&refer=Aboutus/enforcement;>
- Statement of policy with respect to financial penalties (October 2003):
<http://www.ofgem.gov.uk/About%20us/Documents1/Utilities%20Act%20-%20Statement%20of%20policy%20with%20respect%20to%20financial%20penalties.pdf>

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Executive Summary


On 16 December 2011, Ofgem published a consultation¹ on revisions to its Enforcement Guidelines. The Enforcement Guidelines set out our policies and procedures for enforcing sectoral, competition and consumer protection legislation. They describe how Ofgem will act in accordance with Better Regulation principles when investigating matters. These principles require that regulation and its use is transparent, proportionate, accountable, consistent and targeted.

It should be noted that, while our Enforcement Guidelines seek to improve clarity for stakeholders on our enforcement processes and procedures, responsibility for compliance with the regulatory obligations ultimately rests with companies. We would encourage companies to be pro-active in evaluating compliance risks and ensuring they have adequate systems, policies and procedures in place to mitigate against any such risks. We would also encourage companies to engage with us in a constructive way, particularly when things have gone wrong and we decide that enforcement action is appropriate. These will be factors for consideration by Ofgem in the event that there is a finding of breach and for the purposes of assessing any financial penalty.

In our consultation, we explained that we would be undertaking a review of our approach to enforcement and that the review would be completed in two parts. The first part would involve consulting on proposed updates to the Enforcement Guidelines to include expanded or new coverage on early resolution, consumer protection legislation and provisional orders. The first part of our review process is now complete and we are publishing our [updated Enforcement Guidelines](#) alongside this document. The second part would be a wholesale review of our enforcement approach. It would take a fundamental look at procedures and policy, with a view to maximising the impact and efficiency of our enforcement work. It will cover the following key areas:

- comments received from stakeholders on our enforcement approach in response to the Retail Market Review and our December 2011 consultation;
- responses to the Call for Evidence for stakeholders' comments on our general enforcement approach, included in our December 2011 consultation;
- the likely impact of proposed changes to the landscape for consumer and competition policy, including proposed new consumer redress powers for Ofgem (subject to decisions by DECC and to legislation);
- our enforcement objectives and how these sit with our wider statutory duties;
- options for swifter enforcement action or quicker investigations;
- our communications with consumers regarding our enforcement activities and scope of powers;
- ensuring the best use of our resources;

¹ (Ref: 180/11 & 181/11)



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- alternative methods of regulation, for example placing greater emphasis on compliance work; and
- lessons learned and best practice from the enforcement approaches of other regulators.

Accordingly, our consultation invited stakeholders' views on:

- Initial revisions to the Enforcement Guidelines (2007) proposed in part one of the review process; and
- Our general enforcement approach, acting as a Call for Evidence for part two of the review process and our wider Enforcement Review.

Our proposed revisions focussed on six main areas:

- Early resolution or settlement (new section at paragraphs 4.26–4.33 of the [draft revised Enforcement Guidelines](#));
- Provisional orders (paragraphs 4.18-4.21 of the [draft revised Enforcement Guidelines](#));
- Consumer protection legislation (paragraphs 1.27 and 4.55-4.65 of the [draft revised Enforcement Guidelines](#));
- Criteria for opening an investigation (chapter 3 of the [draft revised Enforcement Guidelines](#));
- Making a complaint (chapter 2 of the [draft revised Enforcement Guidelines](#)); and
- Oral representations and decision making (paragraphs 4.37–4.40 and 4.41-4.46 of the [draft revised Enforcement Guidelines](#)).

We have taken account of responses and made changes accordingly. We are publishing our updated Enforcement Guidelines alongside this document. We have now decided that these guidelines will apply to all existing and future investigations. We hope that stakeholders will find the additional information we have included in the updated Enforcement Guidelines useful.

Many of the responses raised broader policy issues which we consider would be more appropriate to take into consideration during our wider Enforcement Review. This is particularly the case where suggestions raise process issues that may require further consultation before introduction. Some comments, whilst targeted at the key areas we had identified for revision, also raised broader issues which we again consider more appropriate to take account of when conducting our wider review.

Stakeholders should note that the revisions made in part one of the review process will not complete our review of the Enforcement Guidelines. They are initial changes, which aim to explain or clarify our enforcement processes and procedures in particular areas. The Enforcement Guidelines will be revised again, as appropriate, following the outcome of our wider Enforcement Review.

Respondents' comments which are not addressed in this document or reflected in the updated Enforcement Guidelines will be taken into consideration in our wider Enforcement Review.

We expect to be able to share our initial thinking with stakeholders in relation to the wider Enforcement Review in the last quarter of financial year 2012-2013.

1. Summary of responses

List of Respondents

1.1. We received 10 responses to the consultation, which are listed below:

List	Name
1	British Gas
2	Consumer Focus
3	EDF Energy
4	Energy Retail Association
5	National Grid
6	RWE npower
7	Scottish Power
8	SSE
9	UK Power Networks
10.	Northern Powergrid

1.2. Responses which were not marked as confidential have been published [here](#) on our website.

Initial revisions to the Enforcement Guidelines (part one)

1.3. We have set out below some of the key points raised by stakeholders in relation to the six main areas of the Enforcement Guidelines (2007) where we proposed changes.

Early resolution

1.4. We recently piloted a procedure whereby we work with a company under investigation to bring their case to an early resolution. Our [draft revised Enforcement Guidelines](#) included a new section to provide stakeholders, and particularly companies subject to investigations, with guidance on our general framework for the settlement of cases.

Stakeholder responses

1.5. A number of respondents expressed their support for our introduction of a settlement procedure (although this was not the subject of the consultation), and of its inclusion in the Enforcement Guidelines. Two respondents expressed concerns about us adopting a formal settlement procedure, for example, one suggestion was

that it could place unreasonable pressure on companies to settle at an early stage in the process.

1.6. Respondents also had some comments and questions around how the process worked in practice. One respondent thought it would be useful to have separate guidance setting out how the settlement procedure would work in practice. Several respondents called for more information about how we would decide whether a case was suitable for settlement and whether there were certain conditions that would apply before settlement was available (for example, an admission of breach or resolution of the breach in question).

1.7. A number of respondents requested more information on the differences between a full scale investigation and a case concluded under the early resolution procedure. In particular, respondents were keen to receive more information on the general process and timescales, the likely penalty, procedures for information gathering and the final stages of settlement.

1.8. Some respondents felt it would be useful to make clear how and when we would expect to advise the company of the case against it and the likely level of penalty. For example, one respondent suggested we could send the company a document setting out our preliminary conclusions, in order to facilitate settlement discussions. Another respondent thought we should set out the terms of engagement for entering into settlement negotiations.

1.9. Several respondents suggested that communications passing between the investigation team and the Settlement Committee should be disclosed to and/or agreed with the company under investigation. Two respondents felt we should go further by giving companies the option to present their case to the Settlement Committee.

1.10. One respondent expressed support for settlement negotiations being on a "without prejudice" basis and suggested we confirm that the existence of an offer to settle would also be on this basis.

1.11. Finally, there were some comments around financial penalties, for example, in relation to ensuring that any penalty reflected the severity of the breach or suggesting there may be circumstances where it would be appropriate for us not to impose a penalty where settlement was reached.

Our response

1.12. We proposed to introduce this new section to the Enforcement Guidelines as we considered it was important to provide stakeholders, and especially companies subject to investigations, with an outline of our framework for settlement and how it has worked so far in practice. We are keen to optimise our enforcement processes and policies and welcome respondents' suggestions on ways we can achieve this in relation to our settlement procedure. It is important to note that early resolution is a

relatively new procedure and addition to our enforcement toolkit. It is a process which is evolving and it will continue to do so, as our practical experience increases, particularly over the coming months during our wider Enforcement Review.

1.13. As we explained in our consultation, the aim of settlement is to reach agreement on the nature and extent of the breaches, the likely level of penalty and/or proposals for reparation where this may be relevant and appropriate. There is currently no requirement for the company to have resolved the breach and addressed any consumer detriment, before entering into settlement. However, as part of the settlement negotiations, we will expect a commitment from the company to take appropriate action to remedy the breach (for example, to make any system changes necessary) and fulfil any agreed proposals for reparation. As a key part of the settlement negotiations involves reaching an agreement on the nature and extent of the breaches, we will require an admission from the company. We would emphasise that settlement is a voluntary process and companies subject to investigations have the option to proceed through the contested enforcement process in cases where they decide an admission of breach is not appropriate.

1.14. Companies also have the option to use the contested enforcement process where they enter into settlement negotiations but are unable to reach agreement with Ofgem on the terms of settlement. However, if settlement negotiations are unsuccessful and the case moves to the contested enforcement process, this is not without cost: the overall process will be longer and more costly for both the company and Ofgem. Depending on the circumstances surrounding the breakdown in negotiations, the Enforcement Committee may decide to take this into account in the event that there is a finding of breach, for the purposes of assessing the degree of co-operation with Ofgem which may be a mitigating factor in determining any financial penalty.

1.15. We have made some changes to paragraph 4.28 in our updated Enforcement Guidelines to clarify how we would expect to share our views on the investigation (including breaches) with the company. This paragraph also now explains that we will provide the company with the terms on which any settlement discussions may proceed.

1.16. Many of the papers that are sent to the Settlement Committee will have already been seen and agreed by the company under investigation, for example the terms of the proposed settlement agreement and any draft notice of intention to impose a financial penalty.

1.17. We do not think it is necessary for the company to present its case to the Settlement Committee. This is because the Settlement Committee's role is to consider whether it is appropriate to accept the proposed settlement on the terms reached by the case team and the company (which will include an admission of breach), rather than the company's case and defence against the allegations.

1.18. We take the view that paragraph 4.31 in the updated Enforcement Guidelines already deals with the issue of negotiations (which would include any offer to settle)

being conducted on a “without prejudice” basis, without the need for further clarification.

1.19. Stakeholders should note that our policy on financial penalties is contained in separate guidance². We plan to include the Statement of policy with respect to financial penalties in our wider Enforcement Review. We will also be considering the impact of proposed new powers from Government that will allow us to order regulated companies to provide redress to consumers in appropriate cases³.

1.20. We have also added some further detail to paragraph 4.33 in the updated Enforcement Guidelines in relation to the membership of the Settlement Committee.

1.21. We will consider settlement in more detail and options for refining and improving our current procedure as part of our wider Enforcement Review, in particular because the process is evolving and will continue to do so over the coming months. A number of the comments we received from respondents in this area will be more appropriate for consideration in this wider review. As already noted, respondents' comments which are not addressed in this document or reflected in the updated Enforcement Guidelines will be taken into consideration in our wider Enforcement Review.

Provisional orders

1.22. Drawing on our experience over the past four years, our [draft revised Enforcement Guidelines](#) included more information about the circumstances in which we are likely to make a provisional order.

Stakeholder responses

1.23. Several respondents expressed the view that provisional orders should be used with caution and/or reserved for situations where other avenues had been exhausted.

1.24. A number of respondents thought it would be good practice for us to consult with the company subject to investigation before issuing a provisional order. Another respondent suggested we should confirm whether written representations could be accepted in each case, and if so, in what timeframe.

1.25. One respondent commented that the decision to impose a provisional order should be taken, at the very least, by someone at Senior Partner level who is not directly involved in the investigation.

² <http://www.ofgem.gov.uk/About%20us/Documents1/Utilities%20Act%20-%20Statement%20of%20policy%20with%20respect%20to%20financial%20penalties.pdf>

³ http://www.decc.gov.uk/en/content/cms/consultations/ofgem_redress/ofgem_redress.aspx

1.26. Another respondent suggested we consider how we could make the process around issuing provisional orders more transparent.

Our response

1.27. Sections 28(2) Gas Act 1986 and 25(2) Electricity Act 1989 set out the statutory tests that must be satisfied for making a provisional order. There is no requirement in the legislation or elsewhere for other avenues of redress to have been exhausted first. Such a requirement would limit the circumstances in which we could use provisional orders and ultimately, affect our ability to act quickly to protect consumers where necessary.

1.28. In paragraph 4.19 of the [draft revised Enforcement Guidelines](#), we included examples of the circumstances in which we are likely to make a provisional order – specifically, where appropriate steps are not being taken to secure compliance, where behaviour needs to be stopped as soon as possible or where there is detriment being suffered by consumers that needs to be stopped. These examples show that a provisional order will not be the usual enforcement route taken by Ofgem. Having said that, it is by its very nature a form of 'emergency' measure which means that the pursuit of other measures first may not be appropriate.

1.29. We have considered respondents' comments on consulting with the company subject to investigation and allowing written representations before making a provisional order. We have adjusted the drafting in paragraph 4.20 of the updated Enforcement Guidelines to clarify that as a general rule, we will allow written representations from the company prior to issuing a provisional order, unless the circumstances are such that it would be inappropriate to do so (for example, where immediate intervention is required to prevent detriment to consumers or competition).

1.30. The wider Enforcement Review process will consider whether there are ways in which the Enforcement Guidelines can be further clarified, including in the area of provisional orders. As already noted, respondents' comments which are not addressed in this document or reflected in the updated Enforcement Guidelines will be taken into consideration in our wider Enforcement Review.

Consumer protection legislation

1.31. Our [draft revised Enforcement Guidelines](#) included some further information and a flowchart to outline our general approach to investigating cases as a designated enforcer under Part 8 of the Enterprise Act ("EA") 2002. We added information about the Consumer Protection from Unfair Trading Regulations 2008, which had not been made when the Enforcement Guidelines were published in September 2007.

Stakeholder responses

1.32. The comments we received on this section of the Enforcement Guidelines were mostly from one respondent who suggested more information was needed around how our procedures for investigations under Part 8 of the EA 2002 would work in practice. For instance, they thought that more detail was needed on the timescales within which the various steps in the investigation process would be taken, the informal stage where there will generally be a series of contacts with the company, the mandatory consultation periods between Ofgem and the company under the EA 2002, information requests, and undertakings.

1.33. The same respondent suggested that the flowchart for investigations under Part 8 of the EA 2002 needed to reflect the situation where our concerns had been addressed without the need for formal undertakings. They felt that the way the flowchart was drafted suggested that having approached the company we would always seek an undertaking or apply to the court for an Enforcement Order.

1.34. Another respondent suggested that separate guidance should be produced to deal with our powers under Part 8 of the EA 2002 (and our competition law powers).

Our response

1.35. We proposed to add some further information to our Enforcement Guidelines (2007) on our general approach to investigating cases under Part 8 of the EA 2002 to help stakeholders better understand the process involved and when we might enforce consumer protection legislation. We understand stakeholders' requests for additional detail to be included in this section. However, we are also wary of including significant amounts of new information without a further round of consultation. Because of this, although we have provided some more information in paragraph 4.59 of the updated Enforcement Guidelines to clarify our approach to requesting information from companies, we have not at this stage included significant additional material. As explained below, we will instead be using our wider Enforcement Review to consider how best to provide appropriate guidance to different audiences.

1.36. We take the view that the flowchart already reflects the situation where our concerns have been addressed without the need for formal undertakings or court action, via the "decision not to proceed" box. We have made a slight change to the "seek undertaking" box to clarify this.

1.37. The wider Enforcement Review process will consider whether there are ways in which the Enforcement Guidelines can be further clarified and improved, including in relation to our powers under Part 8 of the EA 2002. As already noted, respondents' comments which are not addressed in this document or reflected in the updated Enforcement Guidelines will be taken into consideration in our wider Enforcement Review. In addition, we will be making amendments as needed to take account of the impact of the Government's changes to the consumer landscape and Ofgem's proposed new powers for consumer redress.

Criteria for opening an investigation

1.38. Our [draft revised Enforcement Guidelines](#) clarified the information provided in chapter 3 of the Enforcement Guidelines (2007), to explain our criteria for prioritising cases and how we assess whether to pursue an investigation.

Stakeholder responses

1.39. Respondents' comments on this chapter of the Enforcement Guidelines suggested more information was needed around the criteria we use for prioritising cases and deciding whether to proceed with an investigation and how we apply these in practice. One respondent thought we should list the range of situations where we will decide not to pursue a case or impose a penalty because the evidence of a potential breach is weak, any breach is likely to be trivial and/or there is no or minimal harm to consumers. The same respondent suggested we should indicate the relative weight we will give to each of the factors set out in paragraph 3.5 of the [draft revised Enforcement Guidelines](#) in assessing the seriousness of the issues raised. They also felt that the factors at paragraph 3.5 of the [draft revised Enforcement Guidelines](#) should be exhaustive so that companies had transparency as to the standards they were required to meet and the factors we would take into account in any enforcement action. Finally, the respondent disagreed that "potential harm" to consumers should be included as one of the relevant factors. They thought the concept was uncertain and would involve the respondent engaging in hypothetical arguments.

1.40. Another respondent suggested that companies should be given the opportunity to review and challenge the evidence at the initial stage, when Ofgem is deciding whether or not to proceed with an investigation.

1.41. Several respondents also commented on the section on Enforcement and Industry Code Compliance (paragraphs 3.7-3.10 of the [draft revised Enforcement Guidelines](#)) and requested more information on how we decide whether to enforce in these situations.

Our response

1.42. We proposed to clarify the information we provide on our approach in chapter 3 of the Enforcement Guidelines (2007) to help stakeholders better understand why we decide to open investigations. It should be noted that this section of the Enforcement Guidelines outlines the factors used to decide whether to open an investigation – not the decision on whether or not there has been a breach.

1.43. After careful consideration of respondents' comments, we have decided to finalise, with a small number of minor amendments, the changes proposed to this chapter in our [draft revised Enforcement Guidelines](#). In particular, we have considered whether we are able to provide more information on the criteria we will

apply in deciding whether to open an investigation and have explained our reasoning below.

1.44. We are not able to list the range of situations where we will decide not to pursue a case or impose a penalty, as requested by one respondent. It is impossible to anticipate all the potential scenarios that could arise and as such, cases will need to be considered on an individual basis. Each will include a mix of factors, which will make an investigation more or less likely. It is difficult to think of any specific factor that would always outweigh all other factors, no matter how strong, which might favour opening an investigation. Similarly, it is not possible to give an indication of the relative weight we will give to each of the factors set out in paragraph 3.5 of the updated Enforcement Guidelines, as this will inevitably vary from case to case, depending on the nature of the allegations.

1.45. We have provided stakeholders with the key factors to which we will have regard when assessing cases for the purposes of deciding whether to open an investigation. We have listed the main factors we will consider but it is not possible to provide an exhaustive list. We are confident that the information provided in our updated Enforcement Guidelines is sufficiently illustrative to allow stakeholders to understand the framework we will use when prioritising cases for investigation.

1.46. Taking account of potential harm is not a new addition to the Enforcement Guidelines and was a criterion for prioritisation in the 2007 edition of the Enforcement Guidelines. This factor will remain, as we believe that potential harm to consumers is an important consideration, as it allows us to factor into our decision the possibility that there may be consumer harm in the future. This will also be important in terms of considering our ability to take action using the full range of our powers, for example, whether a provisional order might be appropriate.

1.47. We open investigations in accordance with our prioritisation criteria following our initial assessment of available evidence and information about a particular case. This is one of the early steps in the investigation process. We do not therefore consider that a new step in the process, namely allowing for challenge to initial evidence, is appropriate at this very early stage. Once there has been further investigation will we pursue a case which could include issuing a statement of case. Companies under investigation will have the opportunity to challenge evidence or present their case if appropriate, at that stage.

1.48. We do not propose to make any changes to the section on Enforcement and Industry Code Compliance in light of respondents' comments. We consider that the information provided in this section allows stakeholders to understand the type of circumstances where we might enforce a breach of obligations under industry codes and agreements and the factors we will take into account in deciding whether to open an investigation, which include the general criteria set out in paragraphs 3.4 and 3.5 of the updated Enforcement Guidelines. We specifically state that we will consider all the facts and assess the impact of any action being taken under a relevant code or agreement.

1.49. The wider Enforcement Review will consider whether there are other ways in which the Enforcement Guidelines can be further clarified and improved, including in the area of how we prioritise cases and decide whether to pursue an investigation.

Making a complaint

1.50. Our [draft revised Enforcement Guidelines](#) included changes to chapter 2 of the Enforcement Guidelines (2007) to explain the process for consumers wishing to make an individual complaint about their energy supplier or network provider.

Stakeholder responses

1.51. Respondents' comments on this chapter of the Enforcement Guidelines raised a number of helpful points around how we communicate with stakeholders, and particularly consumers, in relation to making a complaint.

1.52. One respondent questioned whether complainants would seek information about making a complaint through published enforcement documentation, but noted that consumer groups may welcome the clarification.

1.53. One respondent welcomed the significant revision of the information provided in this chapter of our Enforcement Guidelines. They highlighted the importance of providing a comprehensive overview of the customer journey and the options available to consumers beyond those of making a complaint to the regulator. They also thought that given the changes to the consumer landscape and in the provision of first tier support to energy consumers, more direction was needed on the type and quality of data required for an investigation.

1.54. Other comments from respondents dealt with timescales for acknowledging and responding to complaints, for making decisions and announcements about whether we will open an investigation, and for updating the information for obtaining independent advice.

Our response

1.55. We proposed to update chapter 2 of the Enforcement Guidelines (2007) to better inform stakeholders, and particularly consumers, about how they could deal with a complaint and the role that Ofgem has in that process. After careful consideration of respondents' comments, we have finalised the changes proposed to this chapter in our [draft revised Enforcement Guidelines](#), with some changes to address some of the comments we received from respondents in these areas.

1.56. We have amended paragraph 2.2 in our updated Enforcement Guidelines to include reference to the consumer telephone service now being provided by Citizens Advice and Citizens Advice Scotland. We recognise in our Enforcement Guidelines that some complainants, such as smaller companies or individuals, may require

assistance from Ofgem with making a complaint (see paragraphs 2.11-2.12 of our updated Enforcement Guidelines). We confirm that we will work with complainants in these cases, for example by providing guidance on the type and level of information required (set out in paragraph 2.8 of the updated Enforcement Guidelines). As suggested by one respondent, we have also clarified the scope of “relevant legislation” (which is set out in more detail in chapter 1 of our updated Enforcement Guidelines), by way of a new footnote. Again, at the suggestion of one respondent, we have clarified that we will acknowledge receipt of all complaints within 20 working days.

1.57. We plan to consider our communications with consumers in more detail, including whether additional consumer focussed guidelines may be appropriate, and timescales for our processes, during our wider Enforcement Review.

Oral representations and decision making

1.58. Our [draft revised Enforcement Guidelines](#) included updates to these sections of the Enforcement Guidelines (2007) to provide stakeholders with more information on how decisions are made, who makes them and the role of oral representations within an enforcement case.

Stakeholder responses

Decision making

1.59. Respondents' comments on this section of the Enforcement Guidelines suggested there was a need for more information in two key areas: membership of the Enforcement Committee and the circumstances in which decision making on breaches may be delegated to senior Ofgem officials.

1.60. On the second point, one respondent suggested it should be the norm for decisions on breaches to be taken by the Enforcement Committee and that we should set out the exceptional circumstances in which such a decision would be delegated to senior Ofgem officials. Another respondent also thought the Enforcement Guidelines should make clear that matters of a more serious nature would remain within the remit of the Authority, or a Committee of the Authority, rather than in the hands of an individual person.

1.61. One respondent also suggested that recommendations to the Enforcement or Settlement Committees should be reviewed by an independent lawyer within Ofgem who has had no involvement in the investigation.

Oral representations

1.62. Respondents' comments on this section of the Enforcement Guidelines focussed on whether introducing new material at the oral hearing should be

permitted. One respondent suggested that it should not, either by the company or by Ofgem. Another respondent thought that introducing new material should be permitted, to allow the respondent to use the hearing as an opportunity to raise all arguments open to them.

Our response

1.63. After careful consideration of respondents' comments, we have finalised the changes proposed to these sections in our [draft revised Enforcement Guidelines](#) with further changes to address some of the comments we received from respondents in these areas.

1.64. We expanded on the information given on decision making in the Enforcement Guidelines (2007) to better explain how decisions are made and who makes them. This included giving more information on the membership of the Enforcement Committee. We have added further detail to this section (paragraphs 4.23-4.25) in our updated Enforcement Guidelines to address respondents' comments. In particular, we have clarified that Enforcement Committees are not standing committees, but are constituted as and when required.

1.65. We have also taken into account respondents' comments on the issue of delegated decision making. We have clarified that enforcement decisions are only delegated to senior Ofgem officials in certain circumstances and have given an indication of when delegated decision making might be appropriate. This reflects current practice in accordance with the Authority's existing Rules of Procedure⁴.

1.66. The suggestion from one respondent for recommendations to the Enforcement or Settlement Committees to be reviewed by an independent lawyer within Ofgem raises broader questions about resources, timing and process that would require additional consultation. It will therefore be more appropriate, to the extent that this is necessary, for consideration in our wider Enforcement Review.

1.67. We have always recognised that there may be exceptional circumstances where it is reasonable or appropriate for new material to be introduced at the oral hearing (see paragraph 4.25 of the Enforcement Guidelines (2007)). The same considerations apply to Ofgem when seeking to introduce new material at the oral hearing and we have clarified this in paragraph 4.38 of our updated Enforcement Guidelines.

⁴ Available on our website at <http://www.ofgem.gov.uk/About%20us/Documents1/Ofgem%20Rules%20of%20Procedure.pdf>

Other areas of comment

1.68. A number of respondents made comments and suggestions which went beyond our proposed revisions to the Enforcement Guidelines outlined above. These comments broadly covered our policies and procedures in the following areas:

- Undertakings;
- Information requests and updates on investigations;
- Ongoing prioritisation of cases;
- Sharing of information with companies (for example, complaints not investigated);
- Length of investigations;
- Our competition law powers;
- Statements of case; and
- Appeals.

1.69. As a result, we have made some clarifications in the updated Enforcement Guidelines. We will consider whether further changes to the Enforcement Guidelines are appropriate to address these comments as part of our wider Enforcement Review. There will of course be a further opportunity for consultation with stakeholders on any subsequent changes we propose to our processes and procedures and amendments to the Enforcement Guidelines to reflect those.

Call for Evidence (part two)

1.70. We would like to thank respondents for their comments and suggestions on our general enforcement approach, in response to the Call for Evidence. These comments will be used, together with comments to part one that have not been addressed in this document or reflected in the updated Enforcement Guidelines, to inform our wider Enforcement Review. We will continue to progress the Enforcement Review during the course of this year and expect to be able to share our initial thinking with stakeholders in the last quarter of financial year 2012-2013.

Appendices

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Appendix 1 - 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 Ombudsman (EO)

The EO 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 cannot agree.

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.