



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to Ofgem consultation: Draft Enforcement Guidelines on Complaints and Investigations

March 2012

About Consumer Focus

Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland.

We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do.

Consumer Focus tackles the issues that matter to consumers, and aims to give people a stronger voice. We don't just draw attention to problems – we work with consumers and with a range of organisations to champion creative solutions that make a difference to consumers' lives.

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Some of the information in our response is commercially sensitive and is only available to Ofgem. It has been removed from the text of this version.

Introduction

Consumer Focus agrees with the increasing emphasis that Ofgem is placing on enforcement, and welcomes this opportunity to respond to the consultation on draft enforcement guidelines for complaints and investigations.

Consumer Focus considers it essential that any investigation that finds a company in breach of a licence condition, or not compliant with its obligations, should result in a penalty which is a real deterrent (ie it should not be cheaper to pay a fine than it would be to do things right in the first place).

In the March 2011 Retail Market Review (RMR) the regulator set out its intention to take a tougher stance on enforcement for the benefit of consumers and with the aim of increasing competition among suppliers. Consumer Focus is in full support of this approach and is keen to work closely with Ofgem as it carries out its enforcement role. This response should be read in conjunction with our response to the RMR consultation¹ specifically our responses to questions 19 and 20 which relate to the option of introducing the standards of conduct into the supply licences. We note that some suppliers have expressed concern that introducing the standards of conduct into the supply licences would expose them to unacceptable risk. This view is driven by a perception that Ofgem may interpret them unreasonably, and that it is very difficult for a supplier to challenge an enforcement penalty. The draft guidance goes some way to alleviate those concerns.

The guidelines have now been in operation for over four years, and given the forthcoming changes to the consumer landscape for energy consumers, it is a pertinent time to review and make amendments to strengthen them.

Since October 2008 Consumer Focus has taken a ‘no surprises’ approach to working with energy companies when we have concerns that policy and/or process is causing consumer detriment. On the whole this approach has been successful, and we have been able to work with suppliers on a one to one basis to discuss and investigate concerns.

For example in 2009 Consumer Focus became concerned about whether ScottishPower was considering its customers’ ability to pay when agreeing repayment rates. We alerted Ofgem to our concerns in March, and again in May 2009. Evidence from the Extra Help Unit (EHU) showed that ScottishPower was setting repayment rates at high levels (often at a default figure of £15 a week), which some consumers were finding difficult to meet, leading in some cases to self disconnection. Although we had informed the regulator of our concerns, Consumer Focus actively pursued this as an issue directly with ScottishPower, and wrote to the supplier in August providing case evidence from the EHU and highlighting our concerns. This was followed by a meeting in October 2009 to discuss the issue further.

In early November as a result of our comments ScottishPower made significant changes to its processes which included improved communication and agreement of an affordable repayment rate in advance, including the introduction of a 10 day delay on setting the repayment rate. The supplier also removed debt recovery targets from all customer service agents’ objectives, and an introduced an increased emphasis and focus on the quality of service provided by its debt recovery agents. This had an immediate and enduring impact on customer experience, and was achieved without the intervention of the regulator.

¹ <http://bit.ly/xtA0Pc>

As the statutory consumer watchdog, Consumer Focus has taken a methodical and evidence based approach to identify concerns about company practice. Where we identify an issue that is not specific to one company alone, or we have concerns about practice across the industry, we have worked with Ofgem – and where appropriate the Energy Retail Association (ERA) – to address this. Examples include the joint review of vulnerable disconnection; wider debt and disconnection review; and the issue of domestic back-billing.

There have also been circumstances where we have had concerns about the behaviour or practice of a company, but these concerns may have not (in our opinion) been a direct breach of any licence condition or obligation. In these circumstances Consumer Focus has alerted Ofgem to our concerns, identified and articulated the consumer detriment and asked the regulator to investigate and/or take action as it sees fit. For example in June 2009 we wrote and informed the regulator of our concerns about a change that ScottishPower had made to its DTS (Dynamic TeleSwitching) accounts which altered the boosting periods, without informing customers about this change. We were concerned that there was a possible variation of contract licence breach and referred this matter to Ofgem.

These activities all demonstrate that Consumer Focus does not make formal licence compliance referrals to Ofgem lightly, and certainly not before we have made every endeavour to resolve concerns directly with the company involved. We have also worked with the regulator to investigate and address concerns. The consequences of non-compliance must be far greater than cost of actual compliance.

When we have had cause to make a formal referral to Ofgem we have had mixed experiences, and are keen to ensure that the revised guidelines are accessible and flexible, particularly given forthcoming changes to the consumer landscape.

As detailed, it is common for Consumer Focus to carry out investigations into consumer detriment on potential enforcement issues. We have agreed a Memorandum of Understanding with Ofgem to ensure that there is effective communications around such matters. However it may be worth further discussion to explore if and how this is reflected in Ofgem's enforcement guidance. We do not in any way want to interfere in Ofgem's role, and clearly there are obligations around compliance and enforcement activity. We seek to clarify respective roles to avoid duplication and provide certainty to market participants.

In order to ensure that we are addressing the most pertinent points and for ease of reference, this consultation response is set out under six sections:

1. Early resolution
2. Provisional orders
3. Consumer protection legislation
4. Criteria for opening an investigation
5. Making a complaint
6. Oral representations and decision making

Our response

1. Early resolution

The settlement procedure enables Ofgem to work with a company subject to investigation to bring the case to an early resolution by agreement. Consumer Focus understands that settlement often results in a lower penalty than would likely be imposed by an enforcement committee, and may take place at any stage of an investigation. The regulator makes clear that it is less likely to engage in settlement in the final stages of the investigation, and that the sooner settlement is reached the more significant any reduction in penalty is likely to be.

Consumer Focus supports attempts to reach an early resolution where appropriate. However, while we agree that settlement negotiations can be beneficial to all parties involved, it is imperative that any penalty applied by the regulator reflects the severity of the breach. Furthermore, it is essential that the company is obliged to evidence how it has addressed any deficiencies in its policy/practice/systems.

It is vital that the regulator makes it clear that there is an expectation that any company seeking to negotiate a settlement will demonstrate that it has been successful in addressing the problems caused by the breach. It must also have successfully addressed any consumer detriment that may have been caused (ie that the company has supported consumers back into their original state).

Investigation and enforcement must remain a deterrent, and therefore it is essential that even an early resolution is not seen as an 'easy option'. Settlement results in a lower penalty than would be imposed by an enforcement committee. If a company cannot demonstrate that it has attempted to address consumer detriment caused by the breach, this should be taken into account by the regulator when agreeing to negotiate a settlement and reach early resolution.

2. Provisional orders

A provisional order may be used to prevent loss or damage which might otherwise arise before a final order can be made. The draft guidance expands on the information that the original guidance set out in respect of provisional orders. Consumer Focus understands that Ofgem is seeking to provide more information about the circumstances in which a provisional order might be made. We welcome this intention.

The supply of energy for heat and light is an essential service, and given the potential consumer detriment that a breach of a licence condition might have, it is essential that the regulator is able to make provisional orders which companies must comply with. For example, the regulator made a provisional order to First Utility in December 2010 relating to its compliance with SLC 27 in fitting prepayment meters which provide an alternative to disconnection.

Consumer Focus recommends that the regulator considers how it can make the application of a provisional order more transparent where possible. It is our experience that often a breach (or potential breach) of a licence condition can highlight other underlying, systemic, issues. Given the changing consumer landscape, transparency about regulatory decisions such as provisional orders will be a key part of the 'joined up' consumer landscape.

3. Consumer protection legislation

Consumer Focus welcomes the additional information and clarity provided in the draft guidance about consumer protection legislation, in particular the chart demonstrating the investigation process on page 36.

We have highlighted Ofgem's role and the potential for the use of Consumer Protections from Unfair Trading Regulations (2008) (CPUTRs) in relation to our concerns about energy suppliers' doorstep sales practice and misselling. For example, our predecessor body energywatch made a referral in June 2008 about a particular sales script used by SSE. The referral asked Ofgem to consider whether the sales script was a breach of SLC 25 and the CPUTRs. This was the same sales script that Surrey Trading Standards used in their successful court case against SSE in May 2011. During 2008-2009, Ofgem declined to take any formal action against SSE. The formal misselling investigation against SSE, and the other three suppliers, was only opened in September 2010. Consumer Focus believes this was a missed opportunity by the regulator to use its powers under the CPUTRs. Efforts by Ofgem to tackle these misselling issues at an earlier date could have had a positive impact on overall consumer confidence in the market, and potentially avoided legislative action.

The CPUTRs can also be enforced in relation to other guidance issues by Ofgem – for example the Standards of Conduct for licence holders. For example, in June 2011 we raised concerns with the regulator about the ScottishPower Direct 2012 tariff – our concerns were set out in relation to the way in which the marketing of this tariff could mislead consumers. Ofgem subsequently opened an investigation under the CPUTRs.

The Government's intention to bring more synergy to the consumer landscape will mean a necessary increase in cross-sector working and learning across different markets. The CPUTRs are an example of legislation and enforcement opportunities to protect consumers. Consumer Focus welcomes this renewed focus from Ofgem and recommends that the regulator considers how it might make better use of the application of these regulations in conjunction with energy company obligations to protect consumers.

4. Criteria for opening an investigation

Consumer Focus welcomes the further clarity that Ofgem has provided in this section of the guidance. Our experience in referring issues and concerns for consideration and potential investigation has been mixed. We are encouraged by the renewed emphasis that the regulator is placing on how and why investigations are opened.

As discussed, Consumer Focus has only made referrals to Ofgem for investigation when we have exhausted other options including seeking to address the issue directly with the supplier. As the statutory consumer body for energy consumers, in advance of making a referral we are mindful of the need to keep the regular informed of our concerns and any investigation that we have carried out. Consumer Focus will always send any evidence we have to the regulator, and co-operate with any points of clarification or requests for further information.

In our experience, the regulator has often taken an unacceptable length of time to alert us to its decision about whether it has opened an investigation, and has failed to keep us informed about in relation to the referrals we have made.

Furthermore, we have been disappointed with the way in which certain evidence that we have presented to the regulator has been dismissed. Consumer Focus is of course aware that the regulator must have evidence which can withstand significant interrogation and analysis.

However, the abolition of energywatch has led to a significant change to the quality of data and evidence that is available, and the forthcoming changes to the consumer landscape may again impact on data and case evidence.

We recommend that Ofgem considers how it might consider evidence that has been submitted 'in support of' a referral, as this type of evidence can demonstrate that the problem is widespread and give an indication of the scale of potential consumer detriment.

For example, between December 2009 and June 2011 Consumer Focus shared evidence with Ofgem about EHU cases which led to an investigation into British Gas' debt recovery rates. We also gathered evidence from Citizens Advice which we submitted in support of our referral. Consumer Focus was mindful that that evidence from Citizens Advice is not as robust as EHU data, which is verified, and used the Citizens Advice Bureaux cases to demonstrate the widespread and severe nature of the problem.

Consumer Focus has a compliance and enforcement process in place which is used to gather evidence for any potential referrals to Ofgem. This includes gathering and analysing data from the Extra Help Unit (EHU), Consumer Direct or other data as appropriate. The continuing importance of this stream of work while there are changes to the consumer landscape will mean that it is important to ensure that we avoid duplication of effort before the new statutory consumer body arrangements for energy consumers are announced and established. We welcome any opportunities to work with Ofgem, Citizens Advice and other consumer bodies to establish shared protocols and ways of working on energy enforcement and investigation related issues prior to any formal transition work if that is appropriate.

Consumer Focus also recommends that the regulator considers how it can communicate timescales and rationale better with the referring body when an investigation is opened. We have some concerns about the length of time that the regulator can take to open and carry out an investigation where significant consumer detriment has been identified and evidenced. For example concerns about British Gas' debt repayment rates for vulnerable consumers and potential breach of SLC 27.8 was raised as an issue by energywatch and again by Consumer Focus in February 2009, September 2009 and December 2009. Only at that stage did Ofgem officially open an investigation, nearly two years after the problem was initially identified. Disappointingly, we continued to see problems and we were prompted to write again to British Gas and Ofgem in June 2010 with more evidence, and again provided further evidence to the regulator in July 2011.

In circumstances where Consumer Focus has made a referral to Ofgem for investigation and potential enforcement action, it is important for the regulator to recognise that a referral is just one option from an array of measures that are available to the statutory consumer body when it has concerns about an energy company. Early clarity on what the regulator is inclined to do and any advance indication of the regulator's views and intentions would be most helpful as we decide on our actions.

For example, following a two-year investigation the regulator announced in November 2011 that it would not take action, due to changes British Gas has made to its debt repayment rates policies and processes. Our concern with this case is the length of time it took Ofgem to undertake its investigation; that Ofgem did not seek undertakings from British Gas to change its processes; and that closing the investigation in this way risks sending the wrong message to industry about debt recovery practice at a time when consumers were (and continue to) struggle with historically high energy bills. Consumer Focus does of course welcome the changes which make a real difference to consumers. However, given the length of time and amount of evidence that we collated at various points in the investigation, we may have chosen to employ different policy and campaigning methods.

Given the changes to the consumer landscape and first tier support for energy consumers, it is essential that the regulator provides more direction on the type and quality of data that is necessary for an investigation.

At present the EHU only deals with a tiny proportion (0.15 per cent) of customers who experience problems with their energy supply, and indeed often the most vulnerable and marginalised never obtain help from a third party. It is essential that there is a mechanism in place to seek and gain a picture of the potential consumer detriment when carrying out an investigation.

5. Making a complaint

Consumer Focus understands that the changes and additions to this section of the guidance are directed toward individual consumers who make a complaint to Ofgem. There has been a significant revision of the information in the guidance, which we warmly welcome.

Given the changing consumer landscape it is becoming increasingly important to ensure that consumers are able to identify the correct organisation in the redress process to contact with their complaint. The revised guidance does not mention the consumer telephone service that will be provided by Citizens Advice (and Citizens Advice Scotland) from 2 April 2012. Given the statutory obligation on suppliers to signpost to this service as the first tier support for energy consumers we recommend that the regulator considers making reference to it in this section.

As this section of the guidance is aimed at consumers it is important that it provides a comprehensive overview of the customer journey and options available to consumers beyond those of making a complaint to the regulator or taking it the regulator. The first tier telephone service provides advice and information, and it is also able to refer consumers directly into dedicated complaints handling teams in the energy company. The service also identifies vulnerable consumers who have a complex case that they cannot manage or have been disconnected or threatened with disconnection.

Furthermore, the guidance discusses the role of the company, the regulator and the Energy Ombudsman in relation to consumer complaints. It is our understanding that both of these bodies have received high levels of contact from consumers with complaints that are outside of their respective remits. While we do of course recognise that both the ombudsman and Ofgem will signpost the consumer to the correct source of help and support, it is difficult to understand whether these consumers do go on to seek further help and resolve their complaint. Making information about the entirety of the redress process in this guidance is one way of ensuring that consumers are aware of all options available to them.

6. Oral representations and decision making

Consumer Focus welcomes the further clarity provided about the decision making process and the bodies involved.



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