

Anna Stacey  
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Competition and Enforcement  
Ofgem  
9 Millbank  
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SW1P 3GE

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Dear Anna

**Draft Enforcement Guidelines on Complaints and Investigations (“the Enforcement Guidelines”)**

EDF Energy is one of the UK’s largest energy companies with activities throughout the energy chain. Our interests include nuclear, coal and gas-fired electricity generation, renewables, combined heat and power plants, and energy supply to end users. We have over five million electricity and gas customer accounts in the UK, including residential and business users.

EDF Energy welcomes the opportunity to comment on the issues raised in your consultation on proposed revisions to Ofgem’s Enforcement Guidelines. We believe this review is appropriate and timely given the increasing emphasis on regulatory compliance, the proposed introduction of new standards of conduct for suppliers, and the clear need to improve trust and confidence in energy companies. We share a common goal with Ofgem to rebuild consumer trust and engagement, and together with safety the consumer trust agenda is a top priority for EDF Energy. A robust, transparent, consistent and fair enforcement regime is required in order to promote best practice, protect consumers’ interests and promote competition.

Our detailed response is set out in the attachment to this letter, which includes views on both the proposed initial revisions to Ofgem’s existing Enforcement Guidelines and the areas to be considered as part of Ofgem’s wider review of its enforcement approach.

Should you wish to discuss any of the issues raised in our response or have any queries please contact my Paul Delamare on 0207 752 2187, or myself.

I confirm that this letter and its attachment may be published on Ofgem’s website.

Yours sincerely,



**Denis Linford**  
Corporate Policy and Regulation Director

## **Attachment**

### **Draft Enforcement Guidelines on Complaints and Investigations (“the Enforcement Guidelines”)**

#### **EDF Energy response**

##### **Proposed Standards of Conduct**

As part of its Retail Market Review (RMR), Ofgem is proposing the introduction of new Standards of Conduct (SOC) as an overarching, enforceable licence condition.

Recognising the low level of trust and confidence amongst consumers, we agree that such SOC should be introduced as a legally binding obligation via a licence condition. The alternative of introducing the SOC on a non-binding basis, even if supported by a public commitment from all suppliers, would not, in our view, be sufficient to secure the desired outcomes.

However, it is important to recognise that the introduction of the SOC in the manner proposed by Ofgem would represent a significant move towards a principles based approach to regulation. We agree this has merit in terms of the perceived flexibility that would be afforded suppliers in how they achieve the new standards. At the same time, the inherently subjective nature of the SOC would also introduce additional regulatory risk and uncertainty in terms of managing compliance, particularly in circumstances where Ofgem has assumed or expected a different type of response and approach from suppliers towards meeting the new standards.

Current investigations have clearly demonstrated the gap that can exist between Ofgem and a supplier when it comes to the interpretation of licence requirements and the acceptability (or otherwise) of the compliance response. We firmly believe that the SOC will require a new approach to enforcement by Ofgem. Ofgem’s current enforcement approach would neither be acceptable nor appropriate and would run the risk of Ofgem launching formal investigations before reaching a full view of the legitimate approaches which can be taken by suppliers to achieve compliance. Such investigations are typically made public and will not be conducive to building consumer trust.

##### **Enforcement Approach**

Our view is that the introduction of the SOC and other new significant regulatory measures should be accompanied by guidance from Ofgem on its interpretation of the proposed licence condition to help remove uncertainty and to provide clarity to suppliers and consumers. Such guidance should, of course, be made in the context of allowing licensees sufficient time to implement.

In addition, we also believe it imperative that Ofgem adopt a two stage approach to investigation and enforcement:

1. Where Ofgem identifies a concern or suspects a breach, the process must allow adequate time for the supplier and Ofgem to undertake a dialogue, allowing the supplier to explain its approach and to agree improvements as appropriate;
2. Formal enforcement action should only commence where a supplier had not made appropriate changes in the agreed timescales or otherwise failed to resolve the issues giving rise to the original concerns or suspected breach.

We believe this new approach to enforcement would promote best practice, improve and rebuild trust in licensees and confidence in the sector generally. Furthermore, this approach is important towards ensuring that Ofgem's enforcement policies and procedures are more aligned with the principles of Better Regulation in terms of accountability, proportionality and consistency.

## **Evidence**

Given the significant reputational damage that can arise from formal investigations, it is imperative that the launching of any investigation is based on robust and transparent evidence. It is not in Ofgem's, nor licence holders', interests to launch investigations that can damage consumer confidence, based on little or weak evidence, and which is not made available to the relevant licence holder. Licensees require the opportunity to review, and challenge such evidence where appropriate, in order to fully understand the regulatory compliance issue and to determine the exact scope of any potential formal investigation.

Given that Ofgem effectively acts as judge, jury and executioner, a high standard of transparency is required to ensure a fair and robust approach is taken. It is important that investigations are launched based on robust evidence of suspected non-compliance. They should not be launched simply for strategic/political purposes, given the significant reputational damage an investigation can cause, regardless of whether a case has actually been made or indeed whether the investigation is eventually closed with no further action.

Although transparency around evidence is important for those parties subject to investigations, we do recognise that in some circumstances the confidentiality of the information on which the investigation is based may need to be maintained. However, that in itself should not be used as a reason to not act in a transparent and open manner. Where necessary, confidential information can be sufficiently described yet still remain protected so as to allow the party concerned to fully understand the nature and scope of the non-compliance.

## **Penalties**

Ofgem's approach to setting penalties where a contravention has occurred must reflect the Better Regulation principles of consistency and proportionality. Ofgem should be required to provide comprehensive reasoning for the basis on which the quantum/structure of any penalty has been calculated. This transparency will be required in order to demonstrate fairness and to fully explain how the severity of the breach matches the level of the penalty. To do otherwise, risks damaging the reputation of those under investigation, competition and consumer trust.

Furthermore, Ofgem should take account of any mitigating factors in determining the penalty, such as the degree of cooperation and the timeliness and completeness of responses to information requests.

In terms of precedence, we believe Ofgem should not only refer to its own previous investigations but also those of other sectoral regulators in order to ensure consistency in approach in the level of penalties applied. It is essential that penalties arising out of enforcement proceedings within the energy sector are set within societal norms and that consumer detriment and remedies are treated consistently irrespective of the specific utility/financial sector involved. If Ofgem adopted an individual approach it is possible that

this could disproportionately affect the level of public mistrust and confidence in the energy sector compared to that of other utility/financial sectors. An individual approach could also be interpreted as regulatory 'posturing'. This would clearly not be in the interests of Ofgem, consumers or energy market participants.

### **Settlement Process**

We fully support measures to bring, where appropriate, investigation proceedings to an early resolution without the need for formal enforcement. We welcome Ofgem's proposal to formally adopt a Settlement Procedure which, in principle, allows the option to seek resolution without the need for utilising significant resources and results in a reduction of the penalty imposed.

Given the individual nature of investigations, we recognise that the Settlement Procedure may not be an appropriate option in all cases. However, it is important that Ofgem is transparent in the factors it will consider, and consistent in the way it applies them, when deciding whether a case is suitable for early settlement.

The current Settlement Procedure process involves Ofgem undertaking a role that is in effect judge, jury and executioner. Further to these roles, it also undertakes the role of presenting the case for the defence to the Settlement Committee who determine the terms of settlement. We do not believe this is appropriate, fair or transparent. Parties subject to investigations should have the right to present their case to the Settlement Committee, similar to the process undertaken under the formal enforcement route. This will provide assurance to the party that its case is appropriately presented and that the Committee has made its decision on the basis of all of the information available to it.

Furthermore, there is a clear need for strong communication links between the Ofgem settlement and policy teams. Interpretation of, and thereby compliance with, regulatory requirements can evolve over time, both within Ofgem and individual licence holders. As this understanding develops, through direct meetings with Ofgem's policy teams or through published regulatory guidance, a view of expected standards and conduct may be formed. It is important therefore that any established interpretation is applied consistently within Ofgem, so as to avoid inappropriate investigations being launched as a result of, for example, a strict or overly narrow interpretation being adopted by the enforcement team. This may be of particular relevance if Ofgem's proposed SOCs become enforceable though a licence condition in view of their subjective nature.

### **General**

Finally, we recognise that there is balance to be struck between progressing an investigation in an efficient and expeditious manner and obtaining full and accurate information from all parties involved. However, given the potentially significant financial and reputational implications of an investigation, it is imperative that licensees are given, when replying to information requests, adequate time to review, collate and respond to such requests and that the requests themselves are complete, clear, focussed and relevant to the case in hand. It is in both Ofgem's and licensees interests that investigations are progressed in an efficient and comprehensive manner.