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Ms Anna Stacey
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Ofgem
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28th February 2012

Dear Ms Stacey

We write in relation to the consultation on the draft Enforcement Guidelines on Complaints and Investigations. We have the following comments:

1. In the contents section, (second paragraph), we do not believe it appropriate for Ofgem arbitrarily to state that it is going to take a tougher stance on enforcement or increase the emphasis on its enforcement role. We believe that enforcement action should be proportionate, based on good regulatory principles and on a clear basis for instigating action and not on some other criteria. Enforcement actions should not be taken because Ofgem has a policy wish to increase this level of activity.

2. In paragraph 3.10, Ofgem states that it is appropriate to impose a penalty to prevent a future breach – suggesting that there does not have to be a pre-existing breach in order to do so. Where there has been no breach or where there is no likely contravention, then it is we believe abusive to permit a power to impose a penalty, "just in case".

3. Sections 4.6 to 4.8 cover Ofgem making several information requests. We would request an acknowledgement and statement that in doing so Ofgem will take into account the level of detail required and the number of previous information requests and allow a reasonable time for the response to be provided.

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4. Section 4.20 relating to provisional orders state that there may be circumstances (such as where an ongoing or likely contravention requires immediate intervention to prevent detriment to consumers or competition) in which it may be necessary or appropriate for the Authority to make a provisional order without formal representations from the party concerned. We believe that this power should be used extremely sparingly. Indeed, it should not be exercised at all without allowing the company to make at least informal representations or to challenge the alleged facts on which Ofgem has based its decision.

5. We consider that the Guidelines should make clear the weight that will be given to self-regulatory codes before investigations are commenced.

6. In general we consider the enforcement arrangements for Ofgem investigations are not fit for purpose. Ofgem effectively acts as both the bringer of the action and decision maker, albeit through different parts of Ofgem. It is difficult to challenge Ofgem when the correct process has not been followed, because, unlike court proceedings, there is no judicial presence holding for example pre-trial reviews to ensure that Ofgem is compliant with the obligations in its enforcement guidelines. For example where Ofgem fails to provide, as required by section 4.4, as full details as possible of the allegations and the focus of the investigation, or fails to keep the company being investigated updated on a quarterly basis as required by section 4.9, there is no judicial presence to supervise the conduct of the investigation from both the Ofgem and company investigated perspective to ensure that both parties operate correctly and in accordance with the guidelines.

   The best approach would be that the overseeing of the conduct of the investigation and the decision in relation to any investigation were not made by Ofgem.

7. However if the arrangement is to continue by which Ofgem effectively remain both the bringer and the progressor of the claim through its enforcement section and the decider of the claim through the Authority then there must at the very least be:

   a) a third party who can intervene in the conduct of the investigation throughout that conduct if inappropriate actions are taken;

   b) a clear right of appeal to the decision. The provisions about appeal from Ofgem's decisions in the Guidelines are unclear, but it seems that the appeals criteria are very narrow. Essentially Ofgem must have acted ultra vires or failed to follow proper procedure. There is no reasonableness test. These criteria were established before Ofgem was given the power to levy penalties, but could only issue enforcement orders. The restrictive nature of the appeals criteria is now therefore much more of a concern.

      The EU Electricity and Gas Directives which were enacted after the Electricity and Gas Acts require (article 37 paragraphs 16 and 17) that regulatory decisions should be fully reasoned and justified to allow for judicial review. The Directive may intend therefore a review on the merits or at least on grounds of reasonableness otherwise there would be no point in requiring fully reasoned and justified decisions. The appeals criteria have not been updated to meet this requirement.

We believe there needs to be a right of appeal in enforcement matters against both the decision and the penalty and that the powers of the courts to deal with such appeals need to be set out clearly and transparently. The grounds of appeal need to be full and not solely on a judicial review basis.

We would be happy to discuss any of these issues further with you.

Yours sincerely

Guy Johnson