



*Promoting choice and value for
all gas and electricity customers*

To all interested parties,
including energy companies,
consumers and their
representatives

28 March 2013

Ref No.: **43/13**

Dear Sir/Madam,

Review of Ofgem's enforcement activities – consultation on strategic vision, objectives and decision makers

Summary

This letter sets out proposed changes on aspects of Ofgem's enforcement policies and procedures. Stakeholders are invited to submit views on our proposals for our strategic framework and for decision makers by 23 May 2013.

Introduction

We launched our Enforcement Review to take a fundamental look at our policies and procedures with a view to maximising the impact and efficiency of our enforcement work. The Review has been prompted by the following factors:

- enforcement is increasingly seen as a core Ofgem tool to deliver and reinforce policy objectives. The role of enforcement has been highlighted in Ofgem's response to its Retail Market Review
- since April 2010, Ofgem has completed 14 full scale investigations. More than £35 million of penalties have been imposed and around £6 million of redress payments have been made to benefit consumers. Altogether, this represents a significant increase in volume of cases
- in light of an increasing volume of work it is timely to ensure that Ofgem's enforcement activities create a credible deterrence to non-compliance
- the nature of investigations is changing due to increasing complexity and the extent to which they are contested.

Ofgem's enforcement activities also face new challenges ahead¹, which include:

- Ofgem being given the power to order companies to pay redress (both financial and non-financial) following a finding of breach of licence or other relevant requirements (to date redress has been paid on a voluntary basis)
- having the power to enforce REMIT (the EU Regulation which, amongst other things, prohibits insider trading and actual or attempted market manipulation in wholesale energy markets)
- enforcing Ofgem's proposed new Standards of Conduct.

¹ There has been or will be a separate consultation on each of these developments.

Enforcement is a core part of Ofgem's role and is an essential part of the way we deliver Ofgem's overall mission of making a positive difference for energy consumers.

Overview of the Enforcement Review

In June last year, we completed the **first phase** of our Enforcement Review, updating our Guidelines to take account of current procedures. Since then we have been progressing the **second phase** – a deeper look at our policies and procedures. The first part of this work has been internally focused and has concentrated on examining and improving Ofgem's internal decision-making procedures. We have commissioned KPMG to assist us and we are implementing a number of their recommendations aimed at increasing our efficiency. Those recommendations include the matters covered by this open letter on which we would welcome your views. The proposals in this letter (set out below) are aimed at establishing a more transparent strategic framework for Ofgem's enforcement activities.

The second part of this work (which will be the subject of further consultation) is now commencing and involves us obtaining a broad range of views from interested parties on the impact and efficiency of our enforcement work, including our approach to penalties and redress. Again KPMG are assisting us and they are conducting a number of structured interviews with interested parties during March and April, reporting back to Ofgem in early summer. We will also be holding a conference for all interested parties in the summer to share the findings of this second part of our work and how Ofgem will approach the issues raised.

The **third phase** of the Enforcement Review will be to update our Enforcement Guidelines and penalty policy to reflect the results of phase two. The updates to the Guidelines are likely to be done in stages, with the first being put to consultation by September 2013.

An outline of the various elements of the Enforcement Review work is below:

Ofgem's Enforcement Programme of work	Current stage of work	Next steps and target dates
Enforcement Objectives <ul style="list-style-type: none"> Vision and Strategic Objectives Strategic Priorities 	Consultation underway	Decision and *update guidelines – Sept 2013
	Consultation underway	Decision and *implement with next Forward Work Programme
Enforcement Framework <ul style="list-style-type: none"> Decision makers for concluding cases Oversight of progress of cases 	Consultation underway	Decision and *appoint panel members
	Implementation options under consideration	Implementation during 2013
Enforcement Principles <ul style="list-style-type: none"> Guidance for decision makers Range of enforcement tools 	Consultation underway	Decision and *update guidelines
	Review continues and implementation options under consideration	Report on findings in Summer 2013
Enforcement process and controls <ul style="list-style-type: none"> Data capture and evidence gathering Feedback and Review 	Review continues and implementation options under consideration	Report on findings in Summer 2013
Penalties Policy	Under review	Report on findings in Summer 2013
Consumer Redress Policy	Under review	Report on findings in Summer 2013

Related projects:		
REMIT <ul style="list-style-type: none"> Establish penalty policy Establish Enforcement Guidelines Criminal sanctions 	DECC drafting regulation Preparation of Ofgem consultation	Consultation will begin when DECC publishes the Regulations
	Preparation of Ofgem consultation	Consultation will begin when DECC publishes the Regulations
	To be reviewed by DECC	Awaiting outcome of DECC consideration
Competition Landscape Review <ul style="list-style-type: none"> Decision makers Procedure 	Engaging with OFT/CC/CMA and BIS on way forward	Awaiting outcome of engagement with CMA and BIS
Standards of Conduct <ul style="list-style-type: none"> Enforcement approach 	Consultation underway	Decision and *update guidelines – Sept 2013

*Subject to outcome of consultation

Establishing Ofgem's strategic framework

It is intended that the decision-making procedures which we adopt as part of the Enforcement Review will apply across the whole range of our enforcement work under different powers. We propose that they will apply to enforcement action in relation to licence breaches, including the new Standards of Conduct, other relevant requirements, and new powers such as REMIT. The way in which Competition Act cases will be decided in the future may be subject to change following reform to the competition regime arising from the Enterprise and Regulatory Reform Bill.

In summary, our proposals relate to the following:

- establishing a vision for our enforcement work and Strategic Objectives to provide greater clarity on how we will approach that work
- taking an annual look at Ofgem's strategic enforcement priorities so as to identify areas of particular concern
- adaptations to our decision-making processes to give greater visibility of the separation of final decision-making from our investigation work and to help us increase our capacity to deliver more enforcement decisions
- public guidance to be applied by our decision makers in contested and settlement cases.

We welcome stakeholders' views and comments on these proposals by **23 May 2013**.

The proposals in this open letter have been informed by phase one of our Enforcement Review work and the responses we received to our earlier Call for Evidence in December 2011². This work will continue and there are other aspects which have been highlighted which will be the subject of later proposals, for example our settlement procedures and communications with companies under investigation.

Proposals for consultation

Vision, Objectives and Strategic Priorities

Ofgem has an overall mission of making a positive difference for energy consumers. This is the shared goal for the organisation. To reflect the fundamental role that enforcement plays in Ofgem's work, we propose a number of tools which will provide a sharper focus on how Ofgem proposes to use enforcement to best contribute to the overall goal.

Our aim is to enable interested parties to see more clearly the framework within which our choices are made and to communicate our overall sense of purpose and direction.

² [http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=30&refer=About us/enforcement](http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=30&refer=About%20us/enforcement)

The first tool is the high-level vision for enforcement within Ofgem. There are several audiences for our vision. Regulated companies will be able to use it to give context to our actions and our relations with them. Consumers and other interested parties will have greater clarity about the purpose of our actions and choices. Within Ofgem (both inside the Enforcement team and elsewhere) the vision will help clarify our intended outcomes.

Proposed Vision for enforcement:

**To achieve a culture where businesses put energy consumers first
and act in line with their obligations.**

As a further tool to support the Vision and to provide further transparency, we have identified three Strategic Objectives, together with further explanation of how we will achieve these which we propose to adopt.

Proposed Strategic Objectives

- Deliver credible deterrence across the range of our functions.
- Ensure visible and meaningful consequences for businesses who fail consumers and do not comply.
- Achieve the greatest positive impact by targeting enforcement resources and powers.

We propose to achieve these Objectives by:

- using a range of enforcement tools – eg. warning letters, reputational measures, penalties and consumer redress
- identifying poor behaviour early and taking action
- being transparent and fair in enforcement processes and visible in actions taken
- learning from everything we do.

Our Enforcement Vision and Objectives give the high-level strategic direction for our work. However, enforcement is carried out within a changing environment, and we propose that this should be reflected through strategic enforcement priorities, set and reviewed annually by the Gas and Electricity Markets Authority (the Authority) in the light of the Forward Work Programme³.

Q1. Do you agree that this is the right Vision for Ofgem's enforcement work? Please provide us with any comments you have on the Vision.

Q2. Do you agree with Ofgem's proposed Strategic Objectives, and principles for achieving them, and do you think it would be helpful to adopt annual strategic priorities? Please explain the reasons for your answer and any aspects which you think we should consider.

Q3. What obstacles do you consider that Ofgem may encounter in achieving its Vision and Strategic Objectives?

Decision-making

We have listened to stakeholder views about the way Ofgem makes enforcement decisions and ensures oversight of those decisions. At present, decisions on contested cases are made by an Enforcement Committee of the Authority which is kept separate from the investigation team and forms an independent view of the case. We take the need to preserve the objectivity of our decision makers seriously, however we wish to ensure that our means for delivering objectivity and independence are clearly visible.

³ <http://www.ofgem.gov.uk/About%20us/CorpPlan/Documents1/Forward%20Work%20Programme%202013-14.pdf>

The need for visibly objective decision-making and oversight is at the heart of our proposals. Our proposals for new decision-making procedures seek to preserve the objectivity of decision makers as well as create capacity to deliver what may be an increased volume of enforcement decisions.

Decision-making for contested cases, and procedural secretariat

Ofgem has a range of statutory functions and powers that it can exercise in relation to enforcement. In particular, Ofgem has powers to make an order against a company, to find a company in breach of its licence obligations and to impose a financial penalty. Enforcement decisions in Ofgem are currently taken by a Committee of the Authority, known as an Enforcement Committee. These Committees currently comprise three people – two non-executives and an executive or other permitted senior employee of Ofgem. These are not standing committees but are constituted as and when required.

We are proposing new arrangements designed to allow cases to be decided by dedicated specialists, with an easily visible separation between the investigation and decision-making functions. We propose to establish an **Enforcement Decision Panel** of specialist decision makers, recruited to Ofgem for this purpose. Panel members would have relevant experience, which might include the energy industry, consumer affairs, law or finance backgrounds. One of the Panel members would be appointed as the Panel Chair and would be accountable to Ofgem's Executive and to the Authority for the work of the Panel. Panel members are likely to be given fixed-term appointments.

When an Enforcement Committee is needed, three Panel members would be selected by the Panel Chair, with one of them nominated as the Committee Chair. The Committee would be required to have regard to decision-making guidance, which would be set out by the Authority and which is described in the "Oversight" section below. The Committee would also be required to have regard to Ofgem's annual Strategic Priorities, as set by the Authority (see below). At least annually the Authority would review the panel's past decisions on contested cases, though it would not seek to influence 'live' cases.

The Enforcement Decision Panel would be supported by an **Enforcement Decision Secretariat** – a new unit within Ofgem, separate from the existing enforcement case teams who carry out investigations. The Secretariat would assist and provide advice to the Panel on administrative and legal issues, and would take decisions on procedural matters independently from the case team. This will benefit all parties, by providing support and allowing more efficient processing of cases by a team that is not carrying out the investigation.

Q4. Do you agree with the proposals for an Enforcement Decision Panel and Secretariat to take decisions in contested enforcement cases? Please explain the reasons for your answer.

Decision-making for settled cases

Not all cases will reach the stage where they need to be considered by an Enforcement Committee or the Enforcement Decision Panel as proposed. Ofgem has a settlement procedure whereby it is possible to bring cases to an early resolution by agreement with the party under investigation. Settlement is likely to result in a reduction in the penalty imposed.

Where a settlement agreement is reached with a company, decisions on whether to accept the terms of such agreement are taken by a Committee of the Authority, known as **Settlement Committee**. These Committees comprise one non-executive member of the Authority and one executive member or permitted senior employee. They are not standing committees but are constituted as and when required.

Members of the Settlement Committee in a particular case cannot later sit as members of the Enforcement Committee for the same case. This preserves separation of decision-making between settled and contested cases. We propose to continue these arrangements for the time being.

Currently, settlement decisions are delegated to a senior employee when the proposed penalty is less than £100,000. This option has not been used in practice. We propose that Settlement Committees would continue to decide cases where the penalty is above a delegation threshold (which will be determined by the Authority). Decisions on cases which are below the threshold would be taken by the Senior Partner in charge of enforcement, with advice from an **Enforcement Oversight Board** made up of Partners from across Ofgem. This Board would be a permanent body, which would take strategic decisions on enforcement cases throughout their duration.

Those taking decisions on settlement cases, whether a Settlement Committee or a Senior Partner, would be required to have regard to the same decision-making guidance which would be set out by the Authority and is described in the "Oversight" section below.

Q5. Do you agree with the proposals for settlement decisions? Please explain the reasons for your answer.

Oversight

We propose that the Authority would have strategic oversight of decision-making for both contested and settled cases. They would provide decision-making guidance to those making decisions in contested and settled cases in order to both provide direction to decision makers and to promote consistency of decision-making. This new guidance would set out the Authority's policies on issues such as standards of compliance expected, settlement, deterrence and any other relevant matters. The guidance would be published and may become part of the Enforcement Guidelines.

The table below sets out our proposals for the decision-making bodies.

Authority	<p>Sets</p> <ul style="list-style-type: none"> • Vision, Strategic Objectives • Decision-making framework • High-level guidance for Enforcement Decision Panel and Enforcement Oversight Board • Annual Strategic Priorities for Ofgem enforcement <p>Appoints</p> <ul style="list-style-type: none"> • Panel Chair • Panel members <p>Reviews</p> <ul style="list-style-type: none"> • all decisions (including all settled cases), decision-making functions and case progress performance on an annual basis • and amends framework as necessary and resets guidance and enforcement priorities for coming year
Enforcement Decision Panel	<ul style="list-style-type: none"> • Enforcement Committee drawn from Panel members decides on all contested cases • Chair reports annually to the Authority • Chair selects Panel members for cases
Settlement Committees	<ul style="list-style-type: none"> • Decide on all settlement cases above threshold* <p>*Cases below threshold delegated to Senior Partner in charge of enforcement with advice from the Enforcement Oversight Board</p>

Q6. Do you agree with the proposed arrangements for the Authority's oversight of the Panel's work? Please explain the reasons for your answer.

Additional comments

Q7. Do you have any additional comments on the matters covered in this Letter?

Timetable and next steps

Comments and replies to the questions posed in this letter should be sent to enforcementguidelines@ofgem.gov.uk by 23 May 2013.

Following this, we will be holding a conference for all interested parties in the summer to share the findings of the second stage of our Enforcement Review and how Ofgem will approach the issues raised.

We look forward to hearing from you.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Megan Forbes', is positioned below the 'Yours faithfully,' text.

Megan Forbes
Legal and Enforcement Partner, Sustainable Development