



**E.ON's response to Ofgem's March 2013 consultation
Review of Ofgem's enforcement activities – consultation on strategic vision,
objectives and decision makers**

Summary

E.ON welcomes the proposal for the Authority to establish a panel of independent members (the Enforcement Decision Panel) who can be called upon to consider contested cases of failures to comply with the requirements of the electricity or gas licences and determine appropriate sanctions. It will introduce a greater separation between those involved in investigation, sanction setting and handing contested cases. This combined with having cases reviewed by dedicated specialists will give greater confidence of objective decision making.

We would like to see the use of the Enforcement Decision Panel widened so that its members, with their greater level of independence, are used for determining the sanctions to be applied for all enforcement cases, including those determined through negotiation. This would also provide greater overall consistency in the settling of sanctions.

The opportunity should be taken so that the enforcement processes can better facilitate the use of a range of sanctions that help licensees provide better long term service to customers.

Ofgem's Questions

**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.**

Licence conditions provide the framework for enforcement of compliance. They set out the obligations for licensees, the enforcement of which is the purpose for Ofgem's enforcement. The licence conditions also provide the vehicle for delivering the vision set for Ofgem. With such a framework already established, we question if having a specific vision for enforcement is appropriate.

Notwithstanding our questioning of a vision for enforcement, the proposed enforcement vision seems to be targeting all businesses to put energy consumers first, even if the particular business is not involved with serving energy customers. We would suggest that the vision should relate to "electricity and gas licensees" not, as currently drafted, "businesses". More concerning is the narrowness of the vision, given it is relating to enforcement for all licensees. A large number of licensees are primarily operators of physical assets. Can an enforcement vision of these licensees putting energy consumers first, with the implication that the safety and integrity of electricity and gas assets has to be treated as a second priority, be appropriate?



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.

We believe that Ofgem's proposed Strategic Objectives would benefit from greater clarity within the text and facilitating greater flexibility in the selection of penalties.

The proposed Strategic Objective of "*Deliver credible deterrence across the range of our functions*" is not clear. As written, this reads as an internal deterrent to operate within and across Ofgem's functions. Also, the measure of "*businesses who fail consumers*", as presented in the second proposed Strategic Objective, is too subjective to be used as an objective for enforcement.

In support of better service for energy customers, there may be situations where sanctions in the form of a written warning together with compliance advice, or a requirement to work with Ofgem to achieve compliance, may be a more beneficial to customers and licensees than just financial penalties (fines and redress to customers). Adopting a more flexible approach could be particularly helpful with the new supply licence conditions coming into force. These licence conditions have an increased use of subjectivity, which may result in licence conditions being breached as a consequence of the licensee not fully understanding the condition. To gain maximum benefit from such an approach, so as to support the developing and sharing of best practice, it would be helpful if Ofgem were to publish its advice and the outcomes of any requirement to work with Ofgem to achieve compliance.

While seeking flexibility to support better service for customers, we recognise that there will still be situations warranting the use of sanctions that involved financial penalties (fines and redress to customers). Examples of such situations would be failure to comply with the requirements of written warnings and cases of wilful or negligent failure to comply with licence condition requirements. We would therefore suggest that Strategic Objectives, while providing a clear incentive for compliance, accommodate using a wide selection of sanctions.

Considering annual reviews of strategic enforcement priorities, we believe they would be helpful. Annual reviews would allow the prioritising of resources on areas of particular concern. However, while supporting prioritising of resources, this must not prevent Ofgem's enforcement teams responding to events that arise within year.

Based on the above points, we believe that customers could be better served if Ofgem's Strategic Objectives for enforcement were to;

Deliver credible incentives for better compliance with the requirements of electricity and gas licences;

Ensure visible, meaningful and appropriate consequences for licensees who fail to comply with the requirements of electricity and gas licences; and

Achieve the greatest positive impact by targeting enforcement resources and powers.



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

As explained in our answer to Question 1, we question if having a specific vision for enforcement is appropriate.

For the Strategic Objectives, the current lack of flexibility in relation to sanctions, as explained in our answer to Question 2, retains an existing obstacle to the development and sharing of best practice.

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.

Use of an Enforcement Decision Panel could provide a clear separation between those involved in investigation, sanction setting and handing contested cases. Having cases reviewed by dedicated specialists who are on fixed-term appointments will also give the decisions a greater level of independence. Together these two benefits will give greater confidence of objective decision making. We therefore not only agree with the proposals for an Enforcement Decision Panel to provide panel members for decisions in contested enforcement cases, but suggest these panel members are used for all sanction decisions.

We also support the establishment of an Enforcement Decision Secretariat to support the Enforcement Decision Panel members. Having an independent secretariat helps to strengthen the independence of the Enforcement Decision Panel members.

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

Using members of an Enforcement Decision Panel will provide the opportunity for a clear and appropriate separation between those involved in an investigation and those setting the sanction. Such independence is also appropriate when setting sanctions for settlement decisions.

With the Enforcement Decision Panel established there would be little, in financial cost, between using Enforcement Decision Panel members to:

- staff the Settlement Committee, compared to the arrangements as proposed by Ofgem: and
- determine penalties for cases where the financial penalty is likely to be below the threshold, compared to using a Senior Partner, as described by Ofgem.

Therefore, building on the opportunity to secure greater independence in the settlement of sanctions and providing greater overall consistency in their settlement, we believe that all settlement decisions should be determined by Enforcement Decision Panel members.

The settlement of all sanctions by Enforcement Decision Panel members should also include the negotiations for negotiated settlements. This could maintain the flexibility of negotiated settlements, but add greater consistency to the basis for such negotiations.



As with other settlement decisions, by having Enforcement Decision Panel members conduct the negotiations, it would allow greater separation and independence between investigation and the negotiated settlement. To achieve this, the investigation would be carried out as now and then the findings passed to the Enforcement Decision Panel members appointed to conduct the negotiations.

Whilst advocating wider use of Enforcement Decision Panel members, we agree that, for the same case, members who have carried out the role at one level, such as the Settlement Committee, should not later sit as members at a higher level, such as on the Enforcement Committee.

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.

We agree with the Authority having oversight of the Enforcement Decision Panel members' work. If the Authority provides guidance to the decision makers and publishes such guidance, the Authority's strategic objectives and focus can be implemented in a transparent and consistent way, whilst maintaining the Enforcement Decision Panel members' independence. The oversight should include reviewing completed cases and amending the guidance as appropriate. However, to maintain the integrity of the independence of the Enforcement Decision Panel members, the Authority's oversight of their work must exclude direct involvement with ongoing cases.

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

We have no further comments.