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Dear Megan

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

I am writing on behalf of Energy Networks Association (ENA), the voice of the networks. ENA is the industry body for UK and Ireland gas and electricity transmission and distribution networks, essentially, the 'wires and pipes' that deliver this vital service to our homes and businesses.

ENA members welcome Ofgem's review of its enforcement activities, with a view to maximising the impact and efficiency of its enforcement work. ENA welcomes the focus on the need to improve/increase Ofgem's efficiency, given that lengthy periods of investigation can cause great uncertainty and costs to regulated entities.

We also welcome the proposal by Ofgem to host a conference in summer 2013 as part of the Enforcement Review and feel that this is a welcome opportunity for an open and productive discussion with all interested parties; many of our members plan to attend.

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.

ENA members are supportive of Ofgem's vision "to achieve a culture where businesses put energy consumers first and act in line with their obligations". However, they feel that along with this key aim, Ofgem's vision for enforcement should be proportionate and transparent, both for regulated companies and for consumers. We would like to propose that the objective is changed to "Ensure visible, meaningful but proportionate consequences for businesses who fail consumers and do not comply."

By doing this Ofgem will be ensuring that the industry is helped to understand what is expected of it and what it can expect from Ofgem.

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.

One of Ofgem's strategic objectives is "credible deterrence". Delivering credible deterrence arguably sets the wrong tone for strategic objectives, as it draws the focus immediately on punishment and sanctions for non-compliance. We consider that Ofgem's strategic priorities should focus on changing behaviours and ensuring that regulated entities are acting in accordance with the regulatory standards they are subject to through establishing a transparent, open and co-operative regulatory environment.

Our members feel that the proposed strategic objectives and principles are fundamentally sound although given that they are currently in "headline" form, it remains difficult to understand the detail behind them and hence provide more detailed comments. Our members look forward to working with Ofgem to develop these proposals further.

ENA would also like to gain an understanding of what Ofgem intends to do "year on year" with regard to investigations that may be commenced under one year's set of strategic priorities, but continue into the next year when these sets of priorities may have changed. There are examples of where other sectoral regulators¹ have closed a case partway through an investigation, as it no longer reflected their strategic priorities. Our members are interested to know whether this would be an approach that would be considered by Ofgem.

In regard to the targeting of enforcement resources and powers, ENA feels that Ofgem should be cognisant of two of the five principles of Better Regulation, namely those of proportionality and targeting. As Ofgem is no doubt aware this is a stance adopted by several other regulators², whereby they focus their resources and the actioning of formal Enforcement to deal with persistent and or more serious breaches, or those that have the most material significance. Our members believe that Ofgem should also consider the use of alternative sanctions³ rather than lengthy investigations and financial penalties.

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

ENA members consider the obstacles that could be faced by Ofgem in achieving its vision and strategy are

- Ensuring that the vision and strategy is presented in such a way as to provide understanding and meaning to stakeholders
- To ensure the vision and strategy is capable of being applied in practice in line with the enforcement tools and the powers of Ofgem.
- That the views of a wide range of Stakeholders and the various interpretations of the vision and strategy are taken in to account.
- How the vision and strategy objectives will determine the function and activities of the various enforcement groups within Ofgem and the Authority.
- How the changes will interact with the new powers vested in Ofgem with regard to consumer redress

¹ For Example the Office of Fair Trading

² The Office of Rail Regulation (ORR), Office of Communication (Ofcom) and the Office of Water Services (Ofwat)

³ such as undertakings, warning letters, private notices and consumer redress orders.

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.

ENA members agree that we need to have a transparent and objective decision making process. An independent Enforcement Panel and Secretariat may support this goal but further work is needed to ensure the Panel Members, the terms of reference and interaction with Ofgem and the Government can work effectively and efficiently. We discuss some of the further work required below.

ENA would like to see Ofgem establishing a balanced Enforcement Panel, with each panel member having a different background and area of expertise in order to facilitate more objectivity in decision-making. For instance, any one panel could comprise a consumer protection representative, a legal or economic academic and an independent business leader with relevant experience. Such an approach could provide greater confidence and acceptance of panel judgements by all parties including members of the public and energy consumers.

It is also important that Ofgem provides for all members of the Panel to be flexible and able to meet in a way that is timely to the process of any investigation. This should then prevent any unnecessary delays to the Enforcement process.

Our members welcome the proposed establishment of the Enforcement Decision Secretariat, however they feel that further clarification is required as to the work that will fall within the remit of this secretariat and what role it will play in decision-making.

For both the Enforcement Decision Secretariat and the Panel, ENA members feel it is important that the terms of reference should be made available to the regulated entity under investigation and that these terms of reference are implicit in highlighting the requirement for parties to the Panel and Secretariat to be independent and impartial.

While ENA members fully support the need for transparent objective decision making, they also feel that fuller explanation is needed of how the Authority's proposed detachment from the decision in a contested case (as evidenced by the statement that "At least annually the Authority would review the panel's past decisions on contested cases, though it would not seek to influence live cases") is to be reconciled with the stipulation in sections 25 and 27A of the Electricity Act that the Authority must be satisfied that a licence holder has contravened or is contravening any relevant condition or requirement before an enforcement order or a financial penalty can be imposed.

If the panel decided that a relevant contravention had indeed occurred, would it be empowered to decide on enforcement action or the level of a financial penalty (in which case the Authority's Rules of Procedure would presumably be modified)? If that were to be the case, what would happen if the Authority, at its annual review, disagreed with the panel and considered that a relevant contravention had not occurred?

If, on the other hand, either the decision to make an enforcement order or the decision to impose a financial penalty is still to be reserved to the Authority itself, this raises the possibility that the panel would reach one view (e.g. that there had been a breach of an enforceable obligation) but the Authority might reach a different view (e.g. that there had been no such breach) when it came to decide whether it was satisfied that a penalty was appropriate.

The question is also begged as to whether the Authority can properly undertake not to seek to influence live cases, because of the role assigned to it by Parliament with regard to consequential action. What, for example would be the position if the Authority had been made aware that the panel was behaving unfairly or was about to act improperly in the exercise of one of the functions of the Authority?

In short, although it may be proper for the Authority to ask the panel to carry out one of its functions, is it legally possible for the Authority to indicate that it will not interfere in the carrying out of that function where it may have good reason to do so?

ENA would also like to see the "delegation threshold" set to a limit more in line with industry cost. Therefore would propose a threshold of £1m to enable the Senior Partner to make decisions on the "smaller" cases.

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

ENA Members believe that Ofgem should provide the regulated entity with further details in the settlement section of the Enforcement Guidelines regarding final steps to be taken once the settlement terms are approved following the period of consultation and how they are recorded in a final order.

ENA members do not want to be exposed to potential unilateral revisions by Ofgem or the Authority to the terms of a settlement following consultation.

In addition, a guideline as to the time to be taken by Ofgem to confirm the terms of settlement or the terms of the penalty notice should be included in the Enforcement Guidelines.

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

ENA members do agree with the current proposed arrangements for the Authority's oversight of the work of the Enforcement Panel's work. Our members agree that the Authority is well placed to provide the necessary strategic oversight of the decision-making processes as it should help to ensure a consistent and fair approach in respect of all regulated entities.

Generally within the overall enforcement framework greater credence and mitigation should be given to companies that bring matters directly to Ofgem's attention through their own compliance monitoring activities. Where such companies also propose remedies (including financial remedies) there should be the potential for the acceptance of such remedies without conducting the formal investigation process.

I trust that you find these comments useful, we would be happy to meet with you and the relevant members of your team to discuss them further.

Yours sincerely



Fiona Crawford

Head of Regulatory Policy

Energy Networks Association