

To all stakeholders

28 March 2014

Dear stakeholder

Consultation on revised enforcement guidelines

We have been reviewing our approach to enforcement. Now that we are at the end of our review, we are consulting on revised enforcement guidelines and are consulting separately on a statement of policy on financial penalties and consumer redress under the Gas Act and Electricity Act.¹

The new enforcement guidelines focus on ensuring a transparent, consistent and proportionate approach to enforcement. Comments are welcome on the questions in the attachment to this letter and indeed on any aspect of the proposed guidelines. Please send your responses by 23 May. Further details of how to do this are set out at the end of the attachment.

This work complements the open letter we have published setting out our position on regulatory compliance, the roles and responsibilities of different parties, and how our approaches to compliance and enforcement activities interact with one another.

I would also like to draw your attention to annex A of this document. This annex includes a table summarising the changes we are intending to make as a result of the enforcement review.

Yours faithfully

Sarah Harrison
Senior Partner, Sustainable Development

¹ In November 2013 we published separate guidance on REMIT [penalties](#) and [procedures](#). We expect to consult on proposed revisions to these documents later this year.

Enforcement guidelines consultation questions

In preparing these revised guidelines, we have carefully considered the suggestions put to us in earlier consultations and through our stakeholder engagement. Overall, we are aiming to ensure that our new processes are more transparent, efficient and effective. We welcome views on whether our proposals achieve these aims. In particular, we welcome responses to the questions below.

Opening investigations and alternative actions

We have expanded the section on how we identify suspected non-compliance and decide whether to open a case. We outline the sources of information we use most frequently and have changed the way we handle complaints (paragraphs 3.1 to 3.15 of the guidelines). We have added detail on how we will handle information (including confidential information) collected in connection with our cases (paragraphs 3.16 to 3.20). We have also modified our prioritisation criteria by expanding the range of factors we will look at when deciding whether a case is a priority matter for us (paragraphs 3.36 to 3.40). In line with our objective of using a range of enforcement tools, we have provided information about the range of actions we will consider as an alternative to using our statutory enforcement powers (paragraphs 3.24 and 3.25).

Q.1 Do you agree with the proposed changes to our prioritisation criteria?

Q.2 Is our approach to the range of alternative actions appropriate?

Making cases public

In relation to making public the opening of cases, some companies² have told us we should protect their anonymity and reputation until a decision is made. Other stakeholders have told us that it is in the interests of consumers to make public which parties are under investigation. Doing so may prompt other parties to consider whether they are complying fully with their obligations and encourage them to improve. It may also encourage witnesses to come forward with evidence and improve public confidence that the regulator is monitoring the market appropriately. We have weighed up these arguments carefully.

We propose to announce every case we open, except those under REMIT (the European Regulation on wholesale energy market integrity and transparency),³ unless this would adversely affect the investigation or where there are confidentiality or other considerations (see paragraphs 4.6 to 4.12). When combined with our proposals for alternative action, this means we will be making public types of cases that currently are not always made public even when they have been concluded. (That is to say, the most serious of those cases that we seek to resolve on a voluntary basis without making a finding of breach.)

Q.3 Do you agree with our proposals for making new cases public?

² The Gas Act 1986 and the Electricity Act 1989 impose obligations on 'regulated persons'. The Competition Act 1998 refers to 'undertakings' and consumer protection legislation refers to 'traders'. For simplicity we refer to 'companies' throughout this letter.

³ Our [REMIT enforcement guidelines](#) state that we will not normally publicise potential breaches of the core REMIT prohibitions of insider trading and attempted or actual market manipulation. However, we reserve our right to publicise the opening of any REMIT investigation, for example, if we consider that an announcement is in the interests of consumers, would avoid damage to market confidence or would aid the investigation. Where there is a proven breach we will publicise the case and the outcome.

Settlement procedures

The Authority considers that in many cases it is likely to be in the interests of consumers for a regulated party to be offered the chance to resolve matters through settlement. We propose to introduce a new process for settling cases under the Gas Act and Electricity Act.

We propose a system of early, middle and late settlement windows within which we offer fixed percentage discounts if a company agrees with our draft penalty statement and/or consumer redress order. The levels of discount will be part of our separate consultation on penalties and consumer redress and stakeholders will have the opportunity to comment on them in their responses to that consultation.

The enforcement guidelines state that we will give companies a “reasonable period” to reach an early settlement; we envisage that this will usually be 28 days from when we send a company the draft penalty statement and/or consumer redress order. The middle settlement window will end on the deadline for responding to a Statement of Case. The late window will end on a date notified to a company by the Secretariat to the Enforcement Decision Panel (EDP). Full details are in section 5 of the guidelines.

Q.4 Do you agree with the proposed settlement process?

Q.5 Do you agree with the proposed settlement windows?

Settlement is a voluntary process and we think that these proposals will encourage settlement as early as possible. For Competition Act 1998 cases, we have decided to adopt the Competition and Markets Authority’s settlement discounts and windows.

Decision-making process

We are creating the EDP to act as decision-makers in our enforcement cases (see paragraphs 6.13 to 6.34). We welcome views on the detail of how it will operate.

Q.6 Do you have any views on how we propose to implement the new decision-making framework?

Accounting for our enforcement activities

We are introducing new procedures to improve the efficiency and the transparency of our enforcement processes. In response to feedback we have received from companies, we will share a provisional timeline for the key steps of the investigation with the company under investigation and update the timeline as the case develops.

We also intend to publish figures annually in a balanced scorecard setting out metrics such as the number of cases opened and closed, the average time needed to reach the opening of the settlement procedure and the average time taken to process cases in total, along with more qualitative metrics to give a rounded picture.

We also intend to hold regular enforcement conferences to discuss our annual priorities and the lessons that can be learned from our enforcement investigations.

Q.7 Are these proposals an effective way to allow stakeholders visibility of our timetables and performance?

How to respond

We welcome views on these questions and any other comments or observations that you might have. Wherever possible, please supplement your views with reasoning and examples. We prefer to receive responses electronically but hard copies by post can also be sent.

The deadline for responding to this consultation is 23 May.

Electronic responses should be emailed to enforcementguidelines@ofgem.gov.uk and postal responses should be addressed to:

Andy MacFaul
Office of Gas and Electricity Markets
9 Millbank
London
SW1P 3GE

Consultation responses will be published unless marked confidential. If you have any comments or questions about this letter or the guidelines, please contact Anna Stacey on 020 7901 7000 or by email at anna.stacey@ofgem.gov.uk.

1. The vision for our enforcement work is to achieve a culture where businesses put energy consumers first and act in line with their obligations. Our strategic enforcement objectives are to:
 - deliver credible deterrence across the range of its functions
 - ensure visible and meaningful consequences for businesses who fail consumers and who do not comply
 - achieve the greatest positive impact by targeting enforcement resources and powers.
2. We've been reviewing what we can do to improve our enforcement methods and deliver better outcomes for consumers. We've taken views from discussions with customers and other stakeholders. Our enforcement review included:
 - a call for evidence, alongside our consultation on our previous update of the enforcement guidelines
 - a consultation on our enforcement vision, strategic objectives and plans for new decision-making arrangements
 - a stakeholder conference, where we consulted on some key aspects of our new procedures
 - stakeholder interviews carried out on our behalf by KPMG.
3. The conclusions from this review fall into a number of key themes, which are efficiency, transparency, predictability and fairness, and impact and deterrence. Essentially, we intend to:
 - put in place more transparent processes that the industry and the public will understand
 - introduce more efficient case handling
 - make deterrence of non-compliance more effective.
4. The table below summarises the actions we are taking as a result. In addition, we are consulting today on revised enforcement guidelines and will shortly consult on a new statement of policy on penalty and consumer redress powers.
5. We believe that the proposals in those documents, taken alongside the other actions mentioned below, will support our vision of achieving a culture where businesses put energy consumers first and act in line with their obligations.

Theme	Action	When
Efficiency	Improved procedures and systems	Internal changes being implemented now. External changes in proposed new enforcement guidelines
	Streamlined settlement procedure	Included in proposed new enforcement guidelines
Transparency	Making our cases public	Proposals included in proposed new enforcement guidelines
	Disclosure of evidence	Proposals included in proposed new enforcement guidelines
	Feedback to stakeholders	Regular enforcement conferences
	Annual Strategic Priorities	First set of priorities will be announced by Autumn 2014
	Balanced Scorecard reporting on our casework performance	Reporting from 2015
Predictability and fairness	Improved procedures and systems, including provisional timelines shared with companies under investigation	Internal changes being implemented now. External changes included in proposed new enforcement guidelines
	New decision-making framework	Enforcement Decision Panel in place by summer 2014
Impact and deterrence	Greater emphasis on deterrence when imposing future penalties means that penalties are likely to be substantially higher	Announcement made in an open letter from the Chairman of the Authority on 27 March 2014. Applies to behaviour that comes to our attention on or after 1 June 2014
	New penalty and redress framework	We will shortly consult on a new penalties and redress policy statement