



**By email only**

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Dear Sarah,

**Consultation on revised enforcement guidelines**

Please find RWE npower's response to the above consultation. Ofgem has undertaken its enforcement review in a constructive and engaging manner.

As the industry works hard to re-build trust with customers, it is important that Ofgem applies a transparent, consistent and proportionate approach to enforcement. Enforcement should be a means to an end, protecting the interests of consumers, rather than an end in itself as a response to political and media criticism.

Whilst enforcement may be inherently adversarial, we would encourage Ofgem to work in partnership with the industry on compliance. In its open letter on regulatory compliance, Ofgem states that it expects companies to take ownership of compliance and that it does not believe its role is to operate in an advisory function.

RWE npower accepts full responsibility for compliance with its obligations and to support this, operates a compliance framework accredited to quality management standard ISO9001:2008.

However, whilst we do not expect Ofgem to undertake assurance activity, we do believe it is Ofgem's responsibility to provide clarity of legal drafting in addition to underlying policy intent. We have found this particularly challenging in relation to the complexity of some of the Retail Market Review obligations. Where policy intent has been made clear, this should be applied and we would like Ofgem to be guided by that and not be unduly restricted by legal text that cannot cater for all eventualities.

It is our aim to put our customers at the heart of our business, but we require clarity and certainty to be fully confident that we are complying with our obligations. Uncertainty carries the risk of a never ending cycle of enforcement, criticism and mistrust. By working together to improve compliance, both regulator and licensees can demonstrate positive outcomes for customers, avoiding the need for enforcement.

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Customers rightly expect and deserve high standards of service and fair treatment. It may also be appropriate to provide redress when things go wrong. However, we believe that the interaction of enforcement and Ofgem's new consumer redress powers requires further consideration. We are concerned at the risk of an emerging compensation culture, which would further undermine efforts to re-build trust and increase consumer engagement. We will respond separately to the consultation on financial penalties and consumer redress policy.

Turning now to the specific questions:

**Question 1 Do you agree with the proposed changes to our prioritisation criteria**

Yes, although we have some comments.

Given the proposal to publicly announce every case, in deciding whether to open a case sufficient weight should be placed on the strength of the evidence (listed at bullet point 10). Otherwise, there is a risk of unnecessary reputational damage and a detrimental impact on efforts to rebuild trust.

We welcome the proposal to announce annual strategic enforcement priorities and discuss these at regular conferences. A common understanding will help licensees to focus compliance resource on key areas of concern, within the overall objective of complying with all obligations.

As we note that the list of criteria is not exhaustive, it is reasonable to expect Ofgem to abide by its guidelines, only departing in exceptional circumstances.

An additional criterion should be where circumstances surrounding the issue are clearly outside the reasonable control of a licensee as this would constrain the ability to take remedial action.

**Question 2 Is our approach to the range of alternative actions appropriate?**

Yes, a flexible approach to resolving issues without the need for formal enforcement action may be more expedient and efficient. It is also in keeping with better regulation principles. We support a two-stage approach to enforcement, providing the opportunity to discuss the issue and for Ofgem to determine the appropriate way forwards. We do not believe that self-reporting should automatically trigger formal enforcement and publication. We also consider that compliance monitoring should be considered as part of the solution, rather than formal enforcement activity.

**Question 3 Do you agree with our proposals for making new cases public?**

We would welcome clarification of what constitutes a "case" to be published. Ofgem proposes to publish every case that is opened. However, the consultation goes on to state that when combined with Ofgem's proposals for alternative action, this means that it will be making more cases public (that is to say, the most serious of those cases resolved on a voluntary basis). Neither seems consistent with the flowchart in the appendix, which indicates that cases are not published where alternative action is pursued.

We consider that a proportionate approach does not merit the publication of less serious issues being addressed by alternative action. This in itself could form part of discussions.

**Question 4 Do you agree with the proposed settlement process?**

In principle, we agree with the concept of early settlement as a means of resolving matters in a timely and efficient manner. However, this is inhibited by the requirement that a company must admit to a breach. Settlement on a without prejudice basis (or partial breach), would still enable Ofgem to achieve the desired outcome for affected parties. It would also be consistent with a general legal principle where disputes are settled quickly without a prolonged process under which parties are reluctant to accept liability.

The settlement process should also be subject to due process. For example, the ability of a licensee to comment on the content and timing of the Ofgem press release should not be dependent on whether a case is settled or not.

**Question 5 Do you agree with the proposed settlement windows**

The related discount will reduce the penal element of the overall financial liability imposed on the licensee. To ensure confidence in the settlement process it will be important that there is transparency around how the component parts of the financial package, including the penal amount and discount, are derived. This will also mitigate the difficulty for suppliers to calibrate the value of any discount as a result of Ofgem's intention to levy financial penalties that are substantially higher from 1 June.

As some previous cases have been settled on the basis of a notional penalty, generic fund payment and compensation, the penal element would need to be identifiable and entirely separate from any form of consumer redress payment.

**Question 6 Do you have any views on how we propose to implement the new decision making framework?**

The creation of the Enforcement Decision Panel (EDP) is a welcome step in the right direction. However, whilst EDP members are independent of the case team and the Authority's Executive, they are employees of the Authority. In essence, Ofgem remains investigator, judge and jury in the enforcement process, which is against the principles of natural justice.

Another effect of this lack of separation is that there is not the equivalent of a pre-trial review in civil proceedings. If the case team fails to follow the enforcement guidelines or act fairly during the settlement process, there is a lack of independent scrutiny.

We continue to believe that the best approach would be that the overseeing of the conduct of the investigation and the decision in relation to any investigation did not fall to Ofgem.

The above is compounded by the lack of a merits based appeal process.

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

We welcome these proposals and they build on the constructive approach and engagement with stakeholders during Ofgem's review of its enforcement work.

In terms of possible KPIs, we would suggest these recognise cases resolved through alternative action (i.e. without breach or use of statutory enforcement powers) and cases closed where it is concluded that there is no breach.

Finally, as a matter of good process, we believe that the guidelines should provide certainty around what licensees can expect from Ofgem. For example, Ofgem states that it will "usually" write to the company about drafting the statement of case (5.24) and "normally" publish a case closure statement (6.35).

I hope that our response is helpful in terms of finalising the guidelines.

Yours sincerely,

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Regulation

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