Sarah Harrison
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23rd June 2014

Dear Sarah

Consultation on Ofgem's Financial Penalties and Consumer Redress Policy Statement

RWE npower is pleased to respond to your letter of 31st March regarding your new policy statement on financial penalties and consumer redress.

Whilst we recognise the need for enforcement action in some cases, and welcome the intention to publish a policy statement to give transparency to the processes that Ofgem will use when calculating financial penalties and assessing the requirement to provide consumer redress, we do not believe that it is always in the best interests of the customer to pursue enforcement action.

When questions of compliance arise, we see merit in there being opportunity for discussion with the company concerned before proceeding to any decision on enforcement. Indeed, even when enforcement action is required, we think that engaging in discussion with the company and seeking voluntary action as a preference to pursuing Redress Orders will secure a more positive and constructive outcome for all involved.

Where enforcement action is required and appropriate, the governance process for determining financial penalties and consumer redress must be clear, open and understood by all industry participants. Whilst the policy statement you have published here goes some way towards this, we believe that further clarity is needed in some key areas, as noted in the response to the questions below.

Finally, it seems that Ofgem is seeking to treat the setting of any financial penalty and determining the redress almost independently of each other. We believe that the two have to be considered in tandem in order for there to be a fair outcome.

If you would like to discuss any of the points made in this letter, please do not hesitate to contact me.

Yours sincerely,

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Regulation

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Here are our detailed comments on each of the questions posed in the consultation paper:

Q1: Are the objectives appropriate?

We agree that the objectives are appropriate. However we think that there needs to be clear and strong governance around the financial penalty and redress process. We elaborate on this below (see answer to Question 2).

Q2: Is the proposed process for determining the amount of penalties and/or redress appropriate?

We are generally supportive of the process as outlined, however Ofgem needs to be clear about how it will determine what an appropriate financial penalty is and when it should be applied. Existing case law and precedents set by previous regulatory investigations need to be taken into account in setting penalties, in line with the principles of natural justice.

The measure for setting the initial figure for the penalty, before additions and deductions are applied, can only realistically be based on consumer detriment, and there is therefore a commonality between the penalty and the redress. We therefore believe that both need to be considered in tandem, not separately.

The level of harm that has been caused to consumers must be the starting point. Where the breach is victimless, the case should be treated less harshly, although a deterrent element will still be needed. This should be written into the process.

In addition, it is important to recognise the operational cost of redress, which should be deductable from the penalty.

Consequently, we think that this part of the process needs to be clarified further. It is important that companies know how penalties will be calculated. In case law, judges have clear parameters for sentencing, making financial awards and imposing fines. There is no reason why the same principles should not apply here. We believe this knowledge will be helpful in driving compliance and fairness.

We suggest that the process also determines the instances that do not require financial redress and clear timelines for investigating the causes of the potential non-compliance before the penalty becomes due. The right of appeal to both penalty and redress is also important.

Q3: Do you agree with the proposed factors that may aggravate or mitigate the amount of a penalty or redress payment?

Yes, generally, we agree. Where companies come forward and volunteer information regarding non-compliances, account should be taken of this in setting the amount of any penalty. There should be positive recognition of co-operative behaviour. Again, this would mirror what happens in cases brought before the courts.

Also, where the company carried out an investigation and can prove that it was not non-compliant then this should be taken into account when calculating any redress.

Q4: Do you agree with the proposed settlement percentage discounts in cases under the Gas Act or Electricity Act?

We agree in principle. However, we think it is unlikely that any company could or would respond in the timescales proposed for early settlement, and the proposed discounts may not be sufficient to encourage this.

We are concerned that the effect of these discounts may lead to a company entering into a plea bargain situation where it is expedient to settle a case of breach whereas in fact the company believes that no breach has occurred. Clearly, this would be wrong.

Where a company is prepared to settle but is unwilling to accept that a breach has occurred, we think it should be possible to proceed on a "without prejudice" basis. This is a well-accepted scenario in other areas of law where compensation or redress is being sought and we think the same principles should and could apply here.

Q5: Do you agree with the proposed policy on determining who receives payments where consumer redress powers are used?

We agree to some extent. However, Redress Orders are complicated and unwieldy. We do not believe that a redress order is the best way forward in most cases, and effort should be made to encourage the company concerned to enter into a voluntary arrangement. Redress orders should only be used as a last resort when this cannot be achieved.

We recommend that Ofgem should enter into discussion with the company concerned to understand if they have any proposals as to the steps to be taken to right any wrong that has been done.

The costs of rectification should not be excessive and must be proportionate. Redress needs to reflect the severity of the impact there has been on consumers.

Where it is not possible or appropriate to identify the consumers who have been harmed, or the payments to be made are very small, we agree that it is appropriate to require payment to be made to a suitable proxy. This proxy should be the closest possible to the group of consumers that have been harmed. An example of a proxy that recognises consumer need might be a supplier fund for debt forgiveness for consumers in genuine hardship.

Q6: Are there any other potential consumer redress requirements that we should specifically refer to in section 7 of the policy statement?

No.

Q7: Do you agree with the proposed approach to the treatment of detriment?

We agree to some extent, however we believe that Ofgem needs to clarify the extent of what it will consider as detriment. We think it would be reasonable for direct losses to be taken into account together with a reasonable consideration for other harm experienced by the consumer concerned e.g. time off work or the cost of outgoing telephone calls made to resolve the matter. Above all it is important that the monetary penalty is proportionate and appropriate to the non-compliance, reflecting the actual loss. We would expect some proof of such harm to be provided and we would seek a cap on the level of individual payments that could be made for such detriment. We would seek your assurances that indirect and consequential losses would not be included.

Q8: Should administrative costs be borne by the company in addition to any compensation or other payments that may be required?

No, the company should be able to provide an estimate of the administrative costs that will be incurred in putting things right and making redress payments. This sum should be deducted from any financial penalty applied.

We also suggest that where the complainant's conduct has been unreasonable and has caused delay, that an award against the complainant of the company's costs should be considered to deter vexatious or frivolous conduct by a consumer.