

Enforcement Decision Panel Annual Report 2014/15

Publication date: 26 June 2015

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Overview:

This report summarises the activity of the first year of the Enforcement Decision Panel which was established in June 2014 to take enforcement decisions on behalf of the Gas and Electricity Markets Authority.



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Executive Summary

- 1.1 The EDP was established to exercise the Authority's statutory functions in enforcement decisions. These had been discharged previously by non-executive members of the Authority.
- 1.2 These functions are: issuing a settlement mandate (in which a settlement committee consists of one EDP member and one senior partner appointed by the Authority), and making decisions over contested cases.
- 1.3 Between August 2014 and March 2015, a settlement committee issued a mandate for settlement in 11 cases, under which the Ofgem enforcement team was authorised to settle cases with companies, provided that the companies admitted breaching the relevant rules.
- 1.4 In all cases, a settlement was reached within the early settlement window, an interim penalty notice and press release issued. Eleven of those cases have now had the final penalty notice published following public consultations¹.
- 1.5 There has been a lot of publicity given to the Community Energy Savings Programme (CESP) and Carbon Emissions Reduction Target (CERT) cases, in which payments ranging from £750,000 to £28,000,000 were agreed, most of which were discharged through consumer redress payments and the rest through penalties. Details of those and the other cases are in section 2.
- 1.6 The EDP has not been engaged in any contested decisions during the period.
- 1.7 The EDP has contributed to a number of enforcement policy discussions, including advising on the new enforcement guidelines, the new penalties policy guidelines, the consultation and subsequent guidelines on REMIT, principles-based regulation, compliance policy and an internal consultation on how to handle criminal powers.

¹ One case did not have a public consultation as there was no penalty.

1. About the EDP

- 1.1. The EDP is chaired by John Swift QC. The other members are Amelia Fletcher, Andrew Long, Elizabeth France, Jonathan May, Robin Callender Smith and Trevor Jones.
- 1.2. The EDP Secretariat is headed by Wendy Parker and assisted by Alison Lee.
- 1.3. EDP members were appointed to the Panel in June 2014, following an external recruitment campaign. This followed an extensive process of consultation carried out by the Authority, in which consultees were invited to comment on the proposal to establish a new body, the EDP. This would be composed of independent specialists with legal, economic, public administration and business experience, to act as the Authority in exercising decision-making powers in enforcing licences, market integrity and transparency regulations, and exercising competition law powers. There was wide support in the consultation process for this move: to establish a visible separation between investigation and final decision-making, and to create a system where we have experts chosen for their knowledge and skill and with the time to do the work. Members of the EDP are appointed by its chair to individual cases and once appointed to a case, they have delegated power to take decisions on behalf of the Authority. The Authority will not change or overrule these decisions.
- 1.4. When the members of the EDP are selected either for settlement committee or for contested cases, the names of those members are communicated to the party under investigation to ensure full disclosure and transparency.
- 1.5. The EDP makes two main types of decisions:
 - 1.5.1. Settlement cases: A member of the EDP will chair a Settlement Committee which consists of that member and a senior partner from within Ofgem – usually the senior partner with policy responsibility for the matter being considered in the case. These two members have equal standing and must reach a unanimous decision.
 - 1.5.2. Contested cases: Three members of the EDP, with one selected as chair, will form a panel to hear contested cases and make a decision. The decision must be reached by a majority of the panel and in the event of a deadlock, the chair of the panel has the deciding vote.
- 1.6. The EDP meets as a group several times a year.
- 1.7. The chair of the EDP has met the chair of the Authority several times over the year and described the work of the EDP at an Authority meeting in January 2015. An annual report from the EDP to GEMA is required as part of the EDP terms of reference and this report is the first of these.

2. EDP Casework

All the cases that the EDP has been involved with so far have related to the Gas and Electricity Acts. No Competition Act 1998 cases or REMIT cases have reached the decision-making stage.

The rest of this chapter is a précis of the cases to date.

EDF complaints handling

- 2.1. Chair of settlement committee – John Swift; Authority-appointed member of settlement committee – Andrew Wright.
- 2.2. This was the last case under the former settlement process; a single meeting resulted in the approval of what had been negotiated which led to a total penalty and consumer redress package of £3million.

CERT/CESP

- 2.3. Chair of settlement committee – Andrew Long; Authority-appointed member of settlement committee – Andrew Wright.
- 2.4. These seven cases all related to the failure of six obligated parties (Scottish Power, InterGen, Scottish and Southern Energy (SSE), GDF Suez, Drax and British Gas) to comply with the CESP obligations by 31 December 2012 and one obligated party (British Gas) to comply with the CERT obligations by 31 December 2012.
- 2.5. Across five meetings, the committee considered the cases in the context of the new enforcement guidelines, under the 2003 Penalties policy, and granted settlement mandates for each. All cases settled in the first settlement window.
- 2.6. These were complex cases with some significant figures, notably for avoided costs, and resulted in a total penalty and consumer redress package of £54,000,000 including £28,000,000 to Drax.
- 2.7. There was a high volume of responses to the consultation on the penalty notices and the committee re-convened in January 2015 to consider the representations. The committee decided that levels of penalty should remain unchanged as the issues raised had previously been considered at length by the committee. However, the penalty notices were amended to reflect the views of respondents.
- 2.8. The final penalty notices for both British Gas cases, SSE, Scottish Power and GDF Suez were published on 04/03/2015. The final penalty notice for Drax

was published on 16/03/2015. The final penalty notice for InterGen was published on 26/03/2015.

Spark

- 2.9. Chair of settlement committee – Elizabeth France; Authority-appointed member of settlement committee – Rachel Fletcher.
- 2.10. In the course of one meeting, the committee considered the case in the context of the new enforcement guidelines, under the 2003 Penalties policy.
- 2.11. In this case, the focus was less on the level of penalty and more on stopping the bad behaviour and sending a clear message that all suppliers, regardless of size, must comply with the SLCs and the CHSRs.
- 2.12. The committee granted a settlement mandate which was a £1 penalty and consumer redress payment of £250,000 which was ultimately accepted by Spark and the case settled in the early settlement window.
- 2.13. There were no responses to the consultation, so the case closed and the final penalty notice was published on 21 April 2015.

E.on

- 2.14. Chair of settlement committee – John Swift; Authority-appointed member of settlement committee – Rachel Fletcher.
- 2.15. Over the course of two meetings the committee considered the case in the context of the new enforcement guidelines, under the 2003 Penalties policy. This was the first case in which a settlement committee had to take the chairman's letter of 27 March 2014 into account when setting a penalty.
- 2.16. The committee granted a settlement mandate which was a £1 penalty and a consumer redress payment of £7.75m which was accepted by E.ON after it incorrectly charged exit fees and/or overcharged customers following price rises. This was in addition to the approximately £400,000 E.ON had already paid back to potentially affected customers.
- 2.17. There were no responses to the consultation, so the case closed and the final penalty notice was published on 22 May 2015.

UK Capacity Reserve (UKCR)

- 2.18. Chair of settlement committee – John Swift; Authority-appointed member of Settlement Committee – Rachel Fletcher.

- 2.19. In one meeting, the committee tested the case team on the evidence provided, and decided that they were satisfied that UKCR submitted inaccurate information when it applied to be part of 2014's capacity auction. This resulted in the generator being banned from participating in the capacity auction for the next two years.
- 2.20. The capacity auction is run annually by National Grid to decide which generators and demand-side response providers will be awarded a capacity agreement, in return for providing capacity at times of system stress. UKCR wrongly stated that it had received planning consents for 11 of its generating units.

3. EDP Policy work

The EDP Members have shared their expertise on a number of different policy papers and developing guidelines this year. This is a good example of using resources effectively. Specific examples are as follows.

Principles-based regulation

- 3.1. Trevor Jones, Elizabeth France, Andrew Long and Amelia Fletcher contributed to a roundtable discussion to inform early thinking on a move to principles-based regulation with senior Ofgem staff. The expertise of the group from a variety of sectors helped both to confirm some of the early thinking and to suggest new strands of thinking and some practical approaches for how to take it forward.

Compliance

- 3.2. Trevor Jones added the benefit of his expertise to the team working on compliance, helping them to understand implications and critical concerns from both a regulatory and from a company perspective.

REMIT

- 3.3. John Swift and Andrew Long contributed views and suggestions at several stages in revising the elements of the REMIT procedural guidelines and penalties statement that covered procedures the EDP would be responsible for implementing. This was of considerable help to the team in ensuring the policy and procedures involving the EDP were practical and proportionate.

Penalties policy and enforcement guidelines

- 3.4. John Swift had input into the final versions of both of these sets of guidelines to ensure that the implications for the decision makers were reflected adequately.

Criminal powers

- 3.5. Andrew Long shared his expertise on this matter from other regulatory environments which helped develop options for the criminal prosecution policy.

4. Lessons learned

Independent decision-making

- 4.1. The EDP members put a great deal of importance on their responsibility to take decisions on behalf of the Authority within the statutory framework. They challenge and question the evidence provided to them to ensure that the decisions they make are robust and can stand up to scrutiny. This ensures fairness by maintaining appropriate independence from the investigating team. When working on cases, the EDP are extremely mindful that the decisions they take must be on the basis of the existing policy and on the merits of the case, not on their personal opinion of the underlying policy.
- 4.2. The EDP noted with interest the HM Treasury review of enforcement decision-making at the financial services regulators which was published in December 2014. This review compared two systems of regulation which are analogous to the way Ofgem took enforcement decisions before the enforcement review and the way it is done now.
- 4.3. The review clearly advocated separation in decision-making, saying: "*The government will review the legislation in due course with a view to strengthening the requirements on the regulators to ensure their procedures secure appropriate objectivity of decision-making*" which is an implicit endorsement of the approach Ofgem has taken.

Assessing penalties

- 4.4. EDP members have been impressed with the quality of analysis by the Enforcement team and their legal advisers. EDP members rely on the case team for consistent and accurate analysis, as there are a number of factors to take into account under the penalty statement. EDP members want to ensure that they get these things right.
- 4.5. EDP members have ensured a consistent approach between cases.

Consumer redress

- 4.6. The EDP welcomes Ofgem's policy to facilitate consumer redress, rather than requiring the whole of the penalty to be paid to the Treasury. It believes that enforcement is more likely to have a positive effect on the future conduct of licensees, by focusing their attention on the damage that infringements are causing to the welfare of consumers.

5. Conclusion

It has been a positive first year and the EDP has been actively involved in enforcement decision-making and policy work where appropriate.

Appendix 1 - Glossary

A

The Authority

The Gas and Electricity Markets Authority is Ofgem's governing body and is referred to variously as GEMA or the Authority. It comprises non-executive and executive members and a non-executive chair.

C

CERT

The Carbon Emissions Reduction Target ran between 1 April 2008 and 31 December 2012 and followed the Energy Efficiency Commitment (EEC) 2005-2008. CERT required certain gas and electricity suppliers to achieve targets for reducing carbon emissions within domestic properties.

CESP

The Community Energy Saving Programme (CESP) came into force on 1 September 2009 and the obligation period ran from 1 October 2009 to 31 December 2012. CESP was created as part of the government's Home Energy Saving Programme.

Chairman's Letter

Open letter setting out the Authority's position on future financial penalties.

CHSRs

The Gas and Electricity Consumer Complaints Handling Standards (CHSR) Regulations 2008. The CHSR prescribe standards for the handling of consumer complaints by regulated providers and for the supply of information to consumers about the prescribed standards and levels of compliance with those standards.

R

REMIT

Regulation Energy Market Integrity and Transparency is an EU regulation (No 1227/2011). It has been in force since 28 December 2011.

S

SLCs

Standard licence conditions. Licence conditions apply to electricity licencees and gas licencees. They place rules on how holders can operate within their licence.