

Report

Enforcement Decision Panel Annual Report 2019/20

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The Enforcement Decision Panel (EDP) takes enforcement decisions on behalf of the Gas and Electricity Markets Authority.

The EDP reports annually on its activity during the previous year.

This is the EDP's sixth annual report.

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Chair's Foreword

It is a privilege to chair Ofgem's Enforcement Decision Panel of regulatory experts who apply the breadth and depth of their experience and insight to helping to resolve Ofgem's more contentious enforcement cases. Our principal objective is to protect the interests of consumers today and in the future. We have a responsibility to offer an independent view on cases because the outcome can be decisive for the future trading of the company in question and our decisions resonate across the industry. Our careful consideration of the representations put by all parties, where the issues are complex and finely balanced, brings valuable independence into the decision making process.

I am pleased to report that we have been able to assist Ofgem to resolve more cases than in any previous reporting period for the EDP. There has been a significant increase in the number of cases referred to the EDP for decision – 26 cases as against four cases in the previous reporting period.

In addition to the casework summarised above, the EDP liaises with the executive team on an ad hoc basis on policy work relating to enforcement, such as review of settlement processes or changes to the Enforcement Guidelines.

We very much look forward to assisting the Authority in our role for the year ahead whether the issues referred to us relate to decarbonisation, security of supply or protecting consumers. It is a privilege to be asked to balance the welfare of customers, our environmental future and economic imperatives.

Megan Forbes

Chair, Enforcement Decision Panel

Background on the EDP

Section one of this report provides some background on the EDP. Section two provides more detail on the above cases, and the annex provides background on the individual panel members.

1. About the EDP

- 1.1 The Enforcement Decision Panel is a committee of the Authority, which has been in place since June 2014 to take enforcement decisions on the Authority's behalf. It was established to take decisions in enforcement cases by dedicated specialists so that there is a visible separation between the investigation and decision-making functions. The Panel's members and its secretariat are employees of Ofgem who are independent from the case team.
- 1.2 Megan Forbes chaired the EDP for this reporting period (July 2019 to October 2020). Colleagues on the panel members are Elizabeth France, Andrew Long, Professor Amelia Fletcher, Ali Nikpay, Dr Ulrike Hotopp, Peter Hinchliffe and Dr Philip Marsden. More information about each panel member can be found in the Annex. Stella Denny in the Secretariat has supported the EDP's work during this period. We thank her for all her support and wish her luck in her new role.
- 1.3 The scope of the EDP includes enforcing breaches under the Gas Act 1986, the Electricity Act 1989, the Competition Act 1998 and the European wide Regulation on Energy Market Integrity and Transparency (REMIT).
- 1.4 The EDP only acts when a case is referred to it by the case team. The case team sets out the facts of the case, their legal analysis and recommendations for handling. The EDP considers these materials alongside any representations from the party under investigation before reaching a conclusion. In most cases, the EDP absorbs a considerable mass of material at short notice, weighs it up against the Authority's statutory and strategic objectives, and seeks to make decisions which set standards of behaviour, influences the market and resonates with industry.
- 1.5 The EDP is involved in decision making in three main ways:
 - Contest Panels.** If a case is contested by the party under investigation three members of the EDP will be selected by the Chair of the EDP to take the decision on liability and any penalty.
 - Settlement Committees.** Two members of the EDP work alongside a senior member of the Ofgem Executive team to take decisions in Settlement Cases. The role of the SC is to give a settlement mandate to the Investigating team which is then offered to the party or parties under investigation. If a penalty is involved, it is discounted if the party settles the case.

Criminal cases. The Chair of the EDP, or any legally qualified member can take a decision on whether or not to commence a criminal prosecution.

- 1.6 The EDP is directly accountable to GEMA. The Chair of the EDP meets the Chair of GEMA regularly throughout each year, while the EDP annual report is presented by EDP members to a formal GEMA meeting once a year.

EDP Casework in 2019/20

2. Casework overview

2.1 The EDP members have been involved in twenty six cases in this reporting period.

Case	Findings	Penalty, redress or sanction
InterGen (UK) Ltd	<p>The Authority found that InterGen engaged in market manipulation to exploit Great Britain’s Balancing Mechanism, a Wholesale Energy Market. InterGen submitted false or misleading “Physical Notifications” which misrepresented its best estimate of expected generation for particular time periods. Physical Notifications inform the system operator (ESO) whether or not a power plant will generate electricity over an interval of time. The submission of misleading Physical Notifications led to the manipulation of the market from which InterGen derived profits. InterGen also, on several occasions submitted false or misleading signals to the ESO on the power plants’ operational characteristics (“Dynamic Parameters”) by submitting false or misleading Stable Export Limits. This was done with a view to achieving even higher revenues for the power plants within the Balancing Mechanism. The EDP approved the settlement mandate.</p> <p>Publication: Finding that InterGen has breached Article 5 (prohibition on market manipulation) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (‘REMIT’)</p>	£37.2m , of which the Penalty element went to the Consolidated Fund
Ovo Gas Ltd and Ovo Electricity Ltd	Ovo admitted systems and compliance failings that resulted in the majority of its customers receiving inaccurate or incomplete information. This was hard for customers to detect, and led to multiple instances of customers being over or under-charged. Although Ovo was	£8.8m payment to Ofgem’s Voluntary Redress Fund

	<p>aware of these failings, it did not self-report the majority of the issues uncovered by Ofgem’s investigation. The Authority concludes that Ovo failed, as it grew, to develop a culture of compliance with regulatory requirements. The EDP approved the settlement mandate.</p> <p>Publication: Notice of decision to impose a financial penalty on Ovo dated 9 April 2020</p>	
Engie Global Markets (EGM)	<p>The Authority found that EGM engaged in market manipulation in relation to the month ahead contract for the delivery of natural gas at the National Balancing Point on the Over-the-counter wholesale energy market. Transactions or orders were issued that gave, or were likely to give, false or misleading signals as to the supply of, or demand for, or price of wholesale energy products or that secured or were likely to secure the price of wholesale energy products at an artificial level. The EDP approved the settlement mandate.</p> <p>Publication: Finding that Engie Global Markets has breached Article 5 (prohibition on market manipulation) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (‘REMIT’)</p>	£2.1m Penalty to Consolidated Fund
E Ltd, Economy Energy and Dyball Associates	<p>The Authority has found that E (Gas and Electricity) Ltd , Economy Energy and Dyball Associates had committed an infringement of the Competition Act 1998. This was a contested case determined by the EDP.</p> <p>Publication: Investigation into whether Economy Energy, E (Gas and Electricity) and Dyball Associates have infringed Chapter I of the Competition Act 1998 with respect to a suspected anti-competitive agreement</p>	£650,000 £200,000 £20,000 Penalties to Consolidated Fund
Total		£48.9m

2.2 The EDP has made the following decisions in relation to Provisional Orders and Final Orders during 2019/20:

Date	Licensee and decisions made by EDP	Outcome
Aug 19	Solarplicity Supply Ltd, Provisional Order Failure to make FIT payments to generators	Licence revoked
Oct 19	Toto Energy Ltd, Proposed Final Order Failure to meet Renewables Obligation	Licence revoked
Oct 19	Robin Hood Energy Ltd, Proposed Final Order Failure to meet Renewables Obligation	Complied and paid
Oct 19	Delta Gas and Power Ltd, Proposed Final Order Failure to meet Renewables Obligation	Complied and paid
Oct 19	Nabuh Energy Ltd, Provisional Order Failure to meet Renewables Obligation	Complied and paid
Oct 19	Breeze Energy Supply Ltd, Provisional Order Failure to meet Renewables Obligation	Ceased trading, licence revoked
Jan 20	GnERGY Ltd, Final Order Failure to meet Renewables Obligation	Ceased trading, licence revoked
Jan 20	Green Supplier Ltd, Proposed Final Order Failure to become a DCC User	Sales ban, then complied
Jan 20	UK National Gas Ltd, Proposed Final Order Failure to become a DCC User	Proposed sales ban, then complied
Jan 20	Better Energy Supply Ltd, Final Order Failure to become a DCC User	Licence revoked
Jan 20	Ampoweruk Ltd, Proposed Final Order Failure to become a DCC User	Proposed sales ban, then complied

Jan 20	Daligas Ltd, Final Order Failure to become a DCC User	Sales ban, then complied
Feb 20	Foxglove Energy Supply Ltd, Provisional Order Failure to make FIT payment	Complied
Mar 20	Entice Energy Supply Ltd, Final Order Failure to become a DCC User	Sales ban, then complied
Mar 20	Enstroga Ltd, Final Order Failure to become a DCC User	Sales ban, then complied
Oct 20	Symbio Energy Ltd, Final Order Failure to meet Renewables Obligation	Complied, Consulting on revocation of Final Order at December 2020
Oct 20	MA Energy Limited, Proposed Final Order Failure to meet Renewables Obligation	Complied and paid
Oct 20	Robin Hood Energy Ltd, Final Order Failure to meet Renewables Obligation	Final Order for payment under Renewables Obligation. In progress at December 2020
Oct 20	Tonik Energy Ltd, Proposed Final Order Failure to meet Renewables Obligation	Ceased trading, licence revoked
Oct 20	Co-Operative Energy Ltd, Proposed Final Order Failure to meet Renewables Obligation	Complied and paid
Oct 20	Nabuh Energy Ltd, Final Order Failure to meet Renewables Obligation	Final Order for payment under Renewables Obligation. In progress at December 2020
Oct 20	Flow Energy Ltd, Proposed Final Order Failure to meet Renewables Obligation	Complied and paid

Comparison to previous years

2.3 Last year no cases were referred to the EDP for settlement; the EDP heard one contested case and made decisions on four orders.

* note that the reporting year for 2019/20 is 15 rather than 12 months.

Year	No. Settlement decisions	No. Contested decisions	No. Provisional and Final Orders	Total Penalty and Redress
2019/20*	3	1	22	48.9m
2018/19	0	1	4	2.4m
2017/18	1	0		0.2m
2016/17	2	0		14m
2015/16	8	0		52.7m
2014/15	11	0		65.7m

EDP Quarterly meetings

The EDP meets quarterly to discuss a range of policy and enforcement issues and to discuss lessons learned from closed cases. The EDP also receives updates relating to Ofgem’s strategy and policy direction. These are valuable sessions to the EDP members who appreciate the involvement of Senior Ofgem staff and the opportunity to discuss and learn about policy issues affecting the organisation.

Megan Forbes

Chair, Enforcement Decision Panel

GEMA

Appendix 1 – EDP Members' Biographies

The EDP members bring a wide pool of expertise and experience covering the law, economics, public administration, financial services, and ombudsmen services and also have direct experience of enforcement decision making at other regulators including Ofwat, the Financial Conduct Authority (FCA) and the Pensions Regulator.

Here is more information about each of them:

Megan Forbes – Chair of the EDP

Megan's experience as a lawyer and regulator spans several industry sectors and areas of government. Prior to her appointment to the Enforcement Decision Panel, she was Deputy Chief Executive and Director of Transformation at the General Pharmaceutical Council leading a programme of digital and cultural change. Prior to that she was a Director in the Enforcement Division at the Financial Conduct Authority (FCA) where her responsibilities included leading the IT, finance, HR, communications and legal teams to support the FCA's enforcement division. She led multidisciplinary teams of investigators tackling misconduct in across the financial services sector. Previously Megan led a major transformation of Ofgem's approach to enforcement and was Deputy Counsel to the Speaker in the House of Commons. The earlier stages of her career were spent in the Government Legal Department advising on energy, company investigations, information access and employment. She is a solicitor and has a Masters in European Law from the Universite de Paris II.

Amelia Fletcher

Amelia Fletcher is Professor of Competition Policy at the Centre for Competition Policy at the University of East Anglia and a Non-Executive Director at the Competition and Markets Authority. She is also a member of the Oxera Economic Council.

Amelia has extensive experience in competition and consumer policy. From 2013-2020, she was a Non-Executive Director at the Financial Conduct Authority and the Payment Systems Regulator. Prior to that, she was Chief Economist at the Office of Fair Trading (2001-2013), where she also led the Mergers and Competition Policy teams, as well as acting as a case Decision Maker. Before this, she was an economic consultant at Frontier Economics (1999-2001) and London Economics (1993-1999).

She has a DPhil and MPhil in economics from Nuffield College, Oxford. She is a member of the Council of the Royal Economic Society. In 2014 she was awarded an OBE for services to competition and consumer economics.

Elizabeth France

Elizabeth France is Chair of the Security Industry Authority. She is also Chair of the Police Advisory Board for England and Wales, Deputy Chair of the Regulatory Decisions Committee of the Financial Conduct Authority and the Enforcement Decisions Committee of the Payments Systems Regulator.

Elizabeth was a non- executive Director of the Serious Organised Crime Agency (2005-2010), Chair of the Office for Legal Complaints (2009-2014) and a member of British Transport Police Authority (2010-2018).

Elizabeth began her career in the Home Office in 1971 leaving to become Data Protection Registrar in 1994 (she was appointed Information Commissioner in 2001). In 2002 she was appointed Chief Ombudsman and Chief Executive of Ombudsman Services Ltd.

Elizabeth has been awarded honorary doctorates by the Universities of De Montfort, Loughborough and Bradford and is a Fellow of Aberystwyth University (where she completed her term as Pro Chancellor in 2018). In June 2002 she was awarded a CBE, for services to data protection.

Andrew Long

Andrew Long is an experienced regulatory decision maker and judge.

He previously chaired the Regulatory Decisions Committee of the Financial Conduct Authority and now chairs the Determinations Panel of the Pensions Regulator. He is also a Panel Chair for the Access Disputes Committee (of the regulated rail industry)

He was a Deputy District Judge of the High Court and County Court for fifteen years and has been a Judge of the First Tier Tax Tribunal since 2009. He was formerly a Board member of the Solicitors Regulation Authority where he chaired one of its principal committees. He has written extensively on regulatory law, including part of a major textbook on financial services regulation. His main career was as a partner at Pinsent Masons solicitors, where he led the financial services regulation practice.

Dr Ulrike Hotopp

Dr Ulrike Hotopp is Director of Live Economics Ltd a research based economic consultancy. She is a member of the CMA panel. She holds a readership for Economic Policy Analysis at the University of Kent. Until October 2018 Ulrike was Vice President at the UK Evaluation Society. She is a member of the Council of the Society for Professional Economists and the Advisory Board of the School for Business and Management at Queen Mary College, University of London. Ulrike has a PhD in Economics from the University of Sussex. She worked as a Civil Servant for the Government Economic Service between 2000 and 2016. In her last role she was Chief Economist and Director for Analysis at DEFRA. Other roles

included Deputy Director for Strategic Analysis at the then Department for Energy and Climate Change.

Ali Nikpay

Ali Nikpay is a partner at Gibson Dunn & Crutcher and head of its competition practice group in London. He has more than 20 years of EU and UK merger control, antitrust and litigation experience in both the private and public sectors. He has described in an editorial by the UK's leading broadsheet, the Daily Telegraph, as "one of the world's preeminent experts in European competition law"; by Chambers 2018 as "brilliant strategically and tactically, and is a great advocate"; and by Legal 500 2016 as "technically outstanding" and "very effective". In 2017, The Financial Times named Ali among the Top 10 Innovators in Europe at the 2017 FT European Innovative Lawyer Awards, which recognized the "ten original legal thinkers in a fast moving world". In 2010 he was identified as one of The Lawyer's "Hot 100".

During his time at the UK competition Authority, Ali held a number of important positions including Senior Director of its Cartels and Criminal Enforcement division, Senior Director for Merger Decisions and Senior Director of Policy International (in which capacity he interacted with senior officials at agencies in the US, the EU, Japan, South Korea, Australia, Canada etc). He was also a member of the authority's highest decision-making organ, its Executive Committee.

He has also served on the Confederation of British Industry's Competition Panel and on several occasions appeared before the House of Lords Select Committee on the European Union.

He is co-editor of "Faull & Nikpay: The EU Law of Competition," which was described by European Competition Law Review as "... the best single volume work dealing with EU competition law that is available. He serves on the editorial boards of the following journals: "European Competition Law", "World Competition", "Antitrust Enforcement Review" and "Competition Law International". Ali is a Visiting Lecturer at University of Oxford and was a Visiting Fellow at the London School of Economics and Political Science (LSE). In 2012, he authored an article "UK cartel enforcement: past, present, future", which was nominated by the Global Competition Review for an award.

Dr Philip Marsden

Dr Philip Marsden is Deputy Chair of the Bank of England's Enforcement Decision Making Committee, and a member of the Case Decisions Committee, the Enforcement Decisions

Committee and the Regulatory Decisions Committee at the Financial Conduct Authority and the Payment Systems Regulator.

Philip is also Professor of Law and Economics at the College of Europe, Bruges, teaching the core LL.M. competition course and is co-founder and General Editor of the European Competition Journal, and the Oxford Competition Law case reporter series. His research interests include innovation incentives, comparative competition law and online markets. He has for many years been Counsel to the fifty-CEO Board of the Consumer Goods Forum, and advised governments on competition issues under the auspices of the ICN, OECD, UN, ADB, EBRD, World Bank and IMF.

For ten years Philip held various roles at the UK competition authority, first as member of the Board of the Office of Fair Trading, then as Inquiry Chair and Senior Director, Case Decision Groups, at the Competition and Markets Authority, where he decided on Phase II mergers, market investigations and antitrust cases, post-SO. He was also a Board member of the Channel Islands Competition and Regulatory Authorities. He was also Senior Research Fellow at the British Institute of International and Comparative Law, and Director of its Competition Law Forum. In private practice he worked at major law firms in Toronto, Tokyo and London.

A competition official and prosecutor early on in his career, for the last 30 years Philip has also acted as independent counsel, specialising in advice to firms in the fast-moving consumer goods and high technology sectors, and to governments on competition agency effectiveness and decision-making.

Philip earned his doctorate in law from the University of Oxford.

Peter Hinchliffe

Peter Hinchliffe is a barrister with significant experience of making independent decisions in a legal or regulatory environment. He is a member of the Financial Reporting Council's Case Management Committee and a Panel Chair for the Access Disputes Committee (of the regulated rail industry). He sits as a tribunal judge in the General Regulatory Chamber and in other jurisdictions. He has previously held independent decision-making roles as Deputy Chair of the Regulatory Decisions Committee of the Financial Conduct Authority, as a member of the Determinations Panel of The Pensions Regulator and in similar roles with HM Treasury and with regulators in the telecoms and legal services sectors.

Peter was Lead Ombudsman for insurance at the Financial Ombudsman Service until 2010 and has spoken and written extensively on consumer issues. He is chair of the Behavioural

Insights Trustee Company and an experienced non-executive director and charity trustee. Prior to that he held senior management positions in the technology and charity sectors.