

EDP Annual Report 2016-17

Annual Report

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Contact: Wendy Watson

Team: EDP Secretariat

Tel: 020 7901 7000



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1. Chairman's Introduction

Introduction

- 1.1. The Enforcement Decision Panel ("EDP") was established by GEMA in June 2014 to perform two related functions.
- 1.2. The first was to relieve its Non-Executive Directors from decision making in contested cases and allow them to concentrate on their principal role; advice, scrutiny and participation in decisions reserved to the GEMA Board.
- 1.3. The second was to provide a clearer separation between the prosecution of a case against a party, appropriate for the Ofgem case team, and the decision maker. This was considered to be more appropriate for a new panel, recruited from outside the Authority, and thus separate from the case team but also from the Board. The next issue was whether the EDP should also be involved in decisions made through a Settlement Committee ("SC"), in which the SC would give a mandate to the case team to "settle" the case, if the party would admit liability and agree to pay a penalty set by the SC. That issue was resolved by the Board, after full consultation with the industry, in favour of the extension of the role of the EDP. In brief, the EDP was to be inserted into the decision making functions of GEMA, although limited to "enforcement", as its title demonstrated.
- 1.4. Over a period of almost three years, it is timely to look back on how the GEMA decision, to empower the EDP to exercise functions on behalf of GEMA and to bind it, has worked. I believe the EDP has worked well and efficiently as part of the GEMA decision making processes, and that the evidence is supportive.

Accountability

- 1.5. From its establishment, the EDP has been committed to one overriding principle. Every decision, whether that of an SC or following a contested case, has to be made in accordance with the statutory objectives set by Parliament for GEMA. The EDP is acting as the Authority and its accountability is tested by its adherence to those objectives, in addition to the general rules of law relating to due process in decision making.
- 1.6. I think that this aspect of accountability has helped to dispel any possible concern within GEMA that the EDP might be working to some agenda different from the policies of the Board. But it has also reinforced confidence among stakeholders that the EDP is truly independent from the Board in the implementation of those policies and that each case will be tested against the rules as they are, in the right context and with a full evaluation of the facts.

Efficiency and Effectiveness

- 1.7. Turning to the cases that have come to the EDP for decision making, all completed cases have so far been disposed of through the settlement processes. Moreover, most have been concerned with breaches of one or more licence conditions, so called sectoral regulation, as distinct from the general provisions of the Competition Act 1998 or REMIT (EU based regulations directed against market manipulation in wholesale energy markets). Other cases have involved breaches of the capacity auction rules, and complaints handling regulations, all of which are binding on licensees.
- 1.8. In each case the Chairman of the EDP selects the members of the EDP responsible for exercising the EDP functions, the SC constitution having been reformed in the course of the current year to allow two members of the EDP, including its Chair, to act together with one Partner or Senior Partner from Ofgem, selected by the Chairman of the Authority.
- 1.9. The change in the composition of the SC was aimed at increasing the efficiency and accountability of the SC. It followed feedback from stakeholders and reflects, in my view, the growing perception that the EDP stands as an independent unit within GEMA, separate from policy makers. The difference between the EDP role in contested and SC cases is that the decision is reached solely on the papers, with the SC relying on the case presented by the case team and the response of the party.
- 1.10. After scrutinising the cases carefully, in no case has the SC rejected the case team's assessment of liability, but in several cases it has substituted its own view on penalty for that recommended by the case team. The EDP has found the presence of the case team, at the SC decision stage, very helpful, in their elucidation of the facts and their willingness to answer questions, but the decision itself rests firmly in the hands of the SC, assisted by the Head of EDP Secretariat, who acts as the coordinator of the SC.
- 1.11. I am confident that the quality of decision making at SC rests on firm ground, enabling the Chair, in addition to the exercise of a vote, to take better account of the views of other SC members.

The CAA

- 1.12. In my last report I referred to the extension of the role of the EDP in assisting the CAA in implementing and enforcing the Competition Act 1998. In the past year one member of the EDP, represented the EDP in deciding such a case.

Enforcement and compliance

- 1.13. Finally, looking back, I have every confidence that the enforcement policies of the Authority, including the penalties set through the SC process, and agreed by the parties, have had a positive effect on concentrating the minds of

licensees that serious infringements of licence conditions will be detected and will be treated with appropriate penal measures. Energy companies are recognising, and reacting to, the adverse effects of their conduct on consumers and on the proper functioning of the retail energy market. The penalties, increased where relevant after the Chairman's letter of 27 March 2014, are aimed at deterring those and others from committing similar breaches. So I believe the system is working, without the penalties being disproportionate.

- 1.14. The distribution of the penalties through consumer redress payments to relevant charities and other bodies representing consumer interests has been of clear benefit to those directly or indirectly affected by the infringements.

Future role of the EDP

- 1.15. I can assure the Board that the EDP has sufficient resources for the management of the cases in the pipeline. The EDP will continue to meet quarterly, to discuss lessons learned and to benefit from a description by Ofgem senior management of policies relevant to our decisions. The EDP stands ready, as before, to offer any advice to Ofgem in the formulation and development of its policies relevant to enforcement and the matrix of regulatory rules.
- 1.16. In concluding this Introduction, I wish to place on record my thanks to my colleagues and to the Head EDP Secretariat (and her assistant) for their contribution over the past year. We act as a collegiate body, while fully recognising that each member will be exercising his or her individual judgment on the cases that come before the EDP.

2. About the EDP

- 2.1. The EDP was established in June 2014 to take Enforcement Decisions on behalf of the Gas and Electricity Markets Authority.
- 2.2. The scope of the EDP includes enforcing breaches under the Gas Act 1986, the Electricity Act 1989, the Utilities Act 2000, the Competition Act 1998, the Enterprise Act 2002, the Business Protection from Misleading Marketing Regulations 2008, the Consumer Rights Act 2015 and the European wide Regulation on Energy Market Integrity and Transparency (REMIT).
- 2.3. 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 member of the Ofgem Executive team (anyone who is at Partner level or above) 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, this 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.
- 2.4. In this reporting period, the EDP was chaired by John Swift QC and the other members were Amelia Fletcher, Andrew Long, Elizabeth France, Robin Callender Smith, Stuart McIntosh and Trevor Jones. More information about each member can be found in the Annex.
- 2.5. Robin Callender Smith has retired from the EDP – effective immediately following the conclusion of a case he is currently working on. The EDP wishes to thank him for his service and wish him well in his retirement in Malaysia.
- 2.6. The EDP Secretariat was headed by Wendy Watson and assisted by Alison Lee.
- 2.7. The EDP is directly accountable to GEMA and 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.

GEMA does not get involved in individual case decisions.

3. EDP Casework in 2016-17

Casework overview

- 3.1. The EDP members have been involved in 2 Ofgem cases this year. Table 1 gives an overview of the nature of the cases and the rest of section 3 is a precis of the cases in this year.

Case	Settlement outcome	Contested outcome
BG AMR	Settled at £4.5million.	n/a
BG Slingshot	Settled at £9.5million.	n/a

Table 1

BG AMR

- 3.2. Chair of Settlement Committee – Elizabeth France, EDP member of Settlement Committee – Stuart McIntosh, Authority appointed member of Settlement Committee – Rachel Fletcher.
- 3.3. The Committee granted a settlement mandate which was a total payment of £4.5million and asked the team to negotiate up to the full amount (minus £1 penalty) to be paid in consumer redress. This went to the Carbon Trust to fund delivery of energy saving audits, energy saving advice, and installation of energy efficiency measures to help small and medium sized businesses across Great Britain save energy.
- 3.4. The Penalty notice for this case can be found on the Ofgem website¹.

BG Slingshot

- 3.5. Chair of Settlement Committee – Robin Callender Smith, EDP member of Settlement Committee – Stuart McIntosh, Authority appointed member of Settlement Committee – Rob Salter Church.
- 3.6. The Committee granted a settlement mandate which was a total payment of £9.5million and asked the team negotiate up to the full amount (minus £1

¹

https://www.ofgem.gov.uk/system/files/docs/2017/01/notice_of_decision_to_impose_a_financial_penalty_on_british_gas_27_jan_2017.pdf

penalty) to be paid in consumer redress. This went to micro-business customers directly affected by its failings, and to the Money Advice Trust (which provides the Business Debtline service). The redress payments to Business Debtline will be used to provide debt advice services to business customers who are experiencing difficulties in paying their energy bills.

3.7. The Penalty notice for this case can be found on the Ofgem website².

Comparison to previous years

3.8. The number of decisions this year is far fewer than in previous years, primarily due to sequencing of cases. These are set out in Table 2.

Year	Number of Settlement decisions	Number of Contested decisions	Total Penalty and Redress
2016/17	2	0	14,000,000
2015/16	8	0	52,790,000
2014/15	11	0	65,700,001

Table 2

²

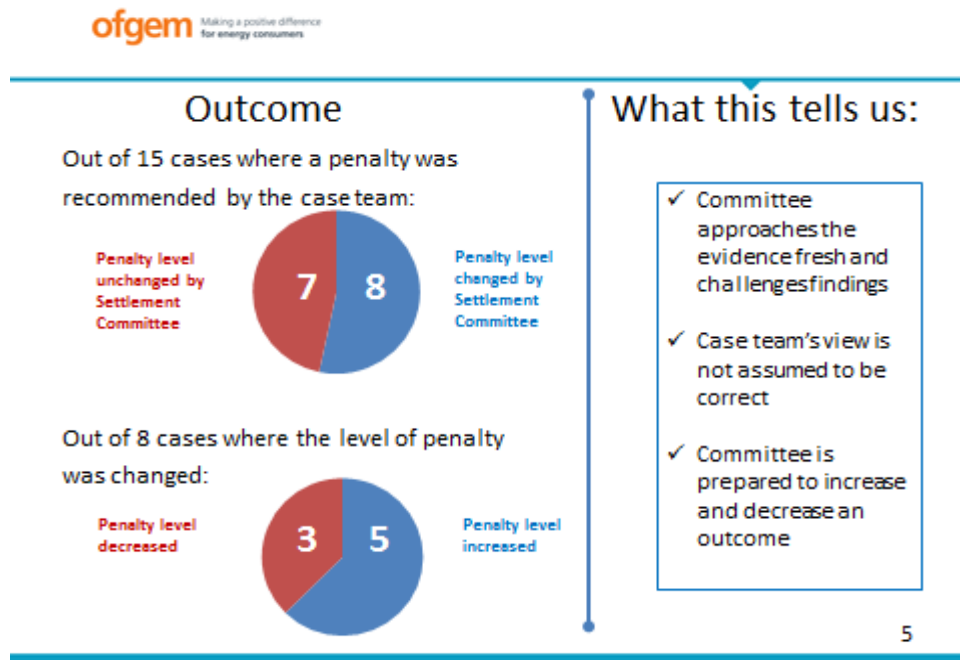
https://www.ofgem.gov.uk/system/files/docs/2017/06/notice_of_decision_to_impose_a_financial_penalty_on_british_gas_29_june_2017.pdf

4. EDP policy work

- 4.1. Members of the EDP have again shared their expertise on some policy issues and have participated in other Ofgem work.

Enforcement conference

- 4.2. Amelia Fletcher and Elizabeth France presented at the Enforcement Conference in September 2016. They gave an insight to their approach to decision making in Settlement Committees, drawing on experiences and demonstrating that the Committee is robust and does not always agree with the recommendation put forward by the case team. The following slide demonstrated this point well.



Changes to Settlement Committee terms of reference

- 4.3. The Enforcement Guidelines and the Settlement Committee terms of reference were updated in September to change the constitution of a Settlement Committee. Previously it had consisted of one EDP member who would act as the Chair, and one Ofgem Senior Partner. This has now changed so that two members of the EDP are on the panel, one of them acts as the Chair, and this panel is supplemented by someone from Ofgem who is at Partner level or above. This has been put into practice and has worked well (see 1.11 of the Chair's introduction).

Future Retail Regulation

- 4.4. Members of the EDP engaged closely with the Future Retail Regulation team prior to their consultation and welcomed several opportunities to meet to discuss the issues, drawing from their experiences on cases, as well as submitting a written response to several policy questions and issues.
- 4.5. The EDP members welcome the openness of policy teams and their willingness to debate key issues with the EDP.

Consumer Redress

- 4.6. Another area of policy development that members of the EDP contributed to was the changes to the process for allocating consumer redress payments. Members of the EDP, through work on individual cases, have consistently made the point that companies making the payments should not benefit from the allocation of funds and were pleased that this was a key tenet of the open letter. They also supported a clearer process for allocation and that this should be for a third party rather than the company or Ofgem.

5. EDP Quarterly meetings

- 5.1. The EDP meets quarterly to discuss a range of policy and enforcement issues and to discuss lessons learned from closed cases. 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.

Appendix – EDP Members’ Biographies

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

John Swift QC – Chair of the EDP

1.2. John Swift QC has combined private practice with public sector regulation over the whole of his professional career. He has appeared as Leading Counsel, for regulators and the private sector, in several of the key cases in the UK and EU in which Courts have tested the legality of decisions of regulators, such as the Competition Commission and the European Commission.

1.3. From 1993 to 1998 he was Rail Regulator, appointed under the controversial Railways Act to promote the interests of passengers in a new and complex network of relations between train companies. From 2009 to 2016 he was a member of the NHS Cooperation and Competition Panel and then adviser to NHS Improvement (formerly Monitor) established to promote the interests of patients for NHS funded services and an independent member of Ofwat’s Case Work Committee since 2014. In February 2017 he was appointed to the Pension Regulator’s Determination Panel, which makes decisions relating to pension law breaches and uses its powers upon application or to address problems arising within the scheme.

1.4. His background is that of a stevedoring family in Liverpool, with his further education at Oxford University and the School of Advanced International Studies, Bologna. He lives in South Oxfordshire, where he is also a Parish Councillor.

Robin Callender Smith

1.5. Robin Callender Smith is Professor of Media Law at Queen Mary, University of London (QMUL) at its postgraduate Centre for Commercial Law Studies (CCLS). He is a media law and information rights expert. He has worked as a barrister since 1977 after spending four years as a journalist.

1.6. He is an Information Rights Judge and an Immigration Judge. He is Chair of the Independent Appeals Board of Phonepay Plus, the premium rate telephone regulator, and is the Independent Adjudicator for the Qatar Financial Centre Regulatory Authority (QFCRA), in respect of its Customer Dispute Resolution Scheme.

1.7. He is a Lay Member of the Executive Board of the Chartered Insurance Institute (CII) and a chair of Metropolitan Police Disciplinary Committees. He is a former Deputy Chairman of the FCA’s Regulatory Decisions Committee having served the Committee from 2006 to 2014 and as Deputy Chairman from 2012. He is a former elected member of the Bar Council and Gray’s Inn Barristers’ Committee and is a Vice President of London Youth, London’s largest youth charity.

Amelia Fletcher

1.8. 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, the Financial Conduct Authority and the Payment Systems Regulator. She is also a policy advisor to Which? and a member of the Oxera Economic Council.

1.9. Amelia has extensive experience in competition and consumer policy. She was Chief Economist at the Office of Fair Trading (OFT) between 2001 and 2013, where she also led the OFT's 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).

1.10. She has a DPhil and MPhil in economics from Nuffield College, Oxford. She has been on the Councils of the Royal Economic Society and the Association of Competition Economics and on the advisory panel for the ESRC Centre for Economic Learning and Social Evolution. In 2014 she was awarded an OBE for services to competition and consumer economics.

Elizabeth France

1.11. Elizabeth France is Chair of the Security Industry Authority, Chair of the Police Advisory Board for England and Wales, a member of the British Transport Police Authority, Pro-Chancellor of Aberystwyth University, and Deputy Chair of the FCA's Regulatory Decisions Committee and the PSR's Enforcement Decisions Committee.

1.12. Until 31 March 2014 Elizabeth was Chair of the Office for Legal Complaints. From 2002 to 2009 she was Chief Ombudsman and Chief Executive of the Ombudsman Service Ltd., which provided the Telecommunications Ombudsman Service (Otelo), the Energy Ombudsman Service and the Surveyors Ombudsman Service. She was a Non-Executive Director of the Serious Organised Crime Agency from 2005-2010.

1.13. Elizabeth began her career in the Home Office, became the Data Protection Registrar in September 1994 and Information Commissioner in January 2001.

1.14. She has been awarded honorary doctorates by the Universities of De Montfort, Loughborough and Bradford and is a Fellow of Aberystwyth University. In June 2002 she was awarded a CBE for services to data protection.

Trevor Jones

1.15. Trevor Jones has gained over 30 years' experience in the Financial Services industry at businesses including Barclays Bank and Lloyds Banking Group. He has held a number of senior roles including the leadership of Risk, Financial Crime, Compliance, Audit and Finance functions, as well as shaping the business by driving the Governance and Compliance agendas for UK banks.

1.16. He has held a number of positions on Boards and chairing committees tasked with shaping compliance for large financial institutions. Having seen the regulatory landscape change over his career, he founded a consulting service specialising in the provision of compliance and risk advice to banking and insurance companies. He lectures on compliance. Trevor works for the Bank of London & Middle East as Chief Compliance Officer and Money Laundering Reporting Officer.

Andrew Long

1.17. Andrew Long is an experienced regulatory decision maker and judge.

1.18. 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).

1.19. 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.

Stuart McIntosh

1.20. Stuart McIntosh is a member of the FCA's and the PSR's Competition Decision Committees, a member of the PSR's Enforcement Decisions Committee, a senior adviser to KPMG's Economics and Regulatory Practice (on issues in the Communications Sector), and a member of the ManSat Advisory Board.

1.21. Between 2008 and 2014 Stuart was Group Director, Competition, at Ofcom, the UK Communications Regulator, and an executive member of the Ofcom Board. Stuart was responsible for Ofcom's work relating to the economic regulation of the telecommunications, broadcasting and postal sectors in the UK, dispute resolution (between companies in the communications sector) as well as Ofcom's work under the Competition Act.

1.22. Prior to Ofcom, Stuart held senior executive or partner positions in several major organisations including IBM, PricewaterhouseCoopers and British Telecom. Stuart began his career as a member of the UK Government Economic Service. Stuart holds a BSc and an MSc in Economics, both taken at the London School of Economics.