
9 January 2017

Trust in water

Summary of responses to the consultation on Ofwat's updated approach to enforcement

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1. Purpose of this document

On 23 March 2016 we issued a consultation document setting out our proposed update of our guidance on [Ofwat's approach to enforcement](#). As the original guidance had been in place since July 2009, we considered that it was timely to refresh certain elements of the document. This was designed to:

- reflect Ofwat's new strategy '[Trust in water](#)' and our approach as a regulator;
- recognise the changes to the regulatory landscape since 2009, in particular, the amendments to the Water Industry Act 1991 made by the Enterprise and Regulatory Reform Act 2013 and by the Water Act 2014;
- highlight our approach to the use of settlement in certain circumstances; and
- update contact details.

Stakeholders were invited to comment on our revised guidance document and, in particular, to let us have their views on:

- whether the proposed changes were proportional and targeted; and
- which areas, if any, we should focus on in any future review of our approach to enforcement.

The consultation closed on 6 May 2016. This document summarises the responses received and our process for finalising our guidance document.

2. Responses to the consultation

We received a total of twelve responses to our consultation. This included:

- 3 from water only companies;
- 8 from water and sewerage companies; and
- a response from the Consumer Council for Water (CCWater).

A copy of the responses received is published separately on our website.

The responses were universally supportive of the proposed changes to our guidance document, with the majority of respondents agreeing that the changes were proportionate and sensible. Severn Trent Water noted, for example, that “a more flexible approach to the use of enforcement tools is conducive to encouraging a culture of trust and confidence amongst regulated companies [... and ...] strikes the right balance between incentive and penalty”. Similarly, in Thames Water’s view “the proposed approach is conducive to encouraging early dialogue with Ofwat when non-compliance issues arise. The more flexible approach encourages openness, full disclosure and the making of appropriate redress”.

Respondents welcomed, in particular, the inclusion of a reference to the use of settlement in certain circumstances with several noting that this would encourage companies to take responsibility for any unfulfilled obligations and directly consider the impact on customers, rather than focusing on regulatory penalties and sanctions. South West Water expressed the view, for example, that “providing an opportunity for companies to address contraventions without the need to resort to formal enforcement action helps to maintain customer trust and confidence in the water sector without compromising the integrity of the regulatory and statutory framework”.

In its response to the consultation, CCWater also expressed support for the approach to enforcement set out in the revised guidance document and agreed that our powers should be applied:

- as a last resort if companies cannot or do not remedy their behaviour to address their non-compliance and apply appropriate remedies for customers as a proposed settlement;
- in a proportionate way, relative to the scale and level of harm, risk of detriment to customers caused by the non-compliance and taking into account any harm or detriment that may arise from a lack of enforcement;

- in a way that identified remedies – through either settlement or enforcement actions – that focus on service improvement and/or compensation for customers who are affected by the company's failure.

While respondents were generally supportive of our proposed amendments to the enforcement guidance, some requested further clarification of some of the references in the document or suggested the use of case studies to illustrate how we might use our enforcement powers in different circumstances. These comments, and our response to them, are summarised in the following table.

Table 1 Main issues raised in response to the consultation

Respondent	Issue raised	Ofwat response	Have we amended the approach to enforcement to reflect this?
<p>Anglian Water</p>	<p>Anglian noted that the document is light in relation to Competition Act enforcement. In its view, it would be helpful to reference the CMA guidance: "Regulated Industries: Guidance on concurrent application of competition law to regulated industries" and the "Memorandum of understanding between the CMA and Ofwat – concurrent competition powers".</p> <p>In addition, Anglian felt that there would be merit in Ofwat updating its "Guidance on the application of the Competition Act 1998 in the water and sewerage sectors" and its "Prioritisation principles: application to the Competition Act 1998" as these contain out of date references.</p>	<p>We are in the process of updating our separate guidance on our approach to enforcement under the Competition Act 1998 (CA98) to reflect the significant changes made by Government to the concurrent competition regime and to the retail non-household market. We expect to publish this later this year.</p>	<p>No</p>

Bristol Water	<p>Bristol Water noted that the Civil Aviation Authority is to share the use of Ofgem's Enforcement Decision Panel. (See link here).</p> <p>It queried whether, in a future review of our approach to enforcement, we would consider adopting this approach to our enforcement cases and what scope there is for greater consistency among members of the UK Regulators Network (UKRN).</p>	<p>Ofwat engages regularly with other members of UKRN to discuss issues of mutual interest and to share best practice. While we do not have any plans to share the use of Ofgem's Enforcement Decision Panel at this time, we will continue to keep our overall approach under review.</p>	No
CCWater	<p>CCWater queried whether self-reporting of non-compliance by a company may lead to a more lenient settlement or enforcement action.</p>	<p>As indicated in paragraph 47 of our guidance document, we encourage companies to come forward if they consider a breach is occurring and to take action to remedy the damage that the breach has caused. Our aim is also to make sure that any enforcement action we take is proportionate and in the circumstances of the contravention or failure. However, as we also indicate in paragraph 20, the decision on whether to enter in to a settlement agreement will depend on:</p> <ul style="list-style-type: none"> • the facts of the case; • the legal context; and • whether we consider that a formal decision will establish an important and valuable precedent for the sector. 	Yes. We have amended paragraph 47.

		<p>If we are satisfied that a contravention or failure of service standard has occurred or is occurring, we will consider if a financial penalty should be imposed and the level of that penalty. As indicated in paragraph 19 of Section 22A Water Industry Act 1991 Statement of policy with respect to financial penalties, in doing so, we may also take account of mitigating factors – including the proactive reporting of the contravention or failure.</p>	
	<p>It also sought clarification on how our enforcement approach will work alongside forthcoming charging rules for new connections.</p>	<p>If a company fails to comply with a charging rule or fails to charge its customers in line with its charges scheme, we may issue a direction to that company. A failure to comply with a direction is enforceable by us under section 18 of the Water Industry Act 1991. This is dealt with in paragraph 65 of the guidance.</p>	No
	<p>CCWater queried the actions we would take if a company failed to fully comply with requests for information from Ofwat in the process of assessing a breach of statutory or licence conditions.</p>	<p>A failure to comply with a request for information is a breach of Condition M of a company's instrument of appointment, and is enforceable by us under section 18 of the Water Industry Act 1991.</p>	No
	<p>CCWater also sought confirmation that we will recognise the role of CCWater and other stakeholders in possibly triggering the settlement/enforcement process and also that</p>	<p>We recognise that information that may lead to us opening a case to consider enforcement action can come from a variety of sources. We welcome this and will use any types of</p>	No

	we will consult stakeholders, including CCWater, on potential remedies (either through settlement or enforcement action).	intelligence available to us when triggering the settlement/enforcement process, including that from CCWater. Section 20(1) of the Water Industry Act 1991 requires Ofwat to consult for a minimum of 21 days before making a final enforcement order or confirming a provisional enforcement order.	
Dee Valley Water	In relation to section 2 of the consultation document, Dee Valley Water requested further clarification of what is meant by "outcomes" and "expectations".	As set out in paragraph 10 of our guidance document, in considering and pursuing enforcement action our aim is to secure companies' compliance with their statutory and licence obligations and change behaviour so that customers' interests are protected. More generally, at PR14, we set out clear expectations about the need for companies to engage with their customers and customer challenge groups to agree the long-term outcomes customers wanted. When we say expectations, we are referring to legal obligations. When we say outcomes, we are referring to those outcomes as defined in price reviews and determinations.	Yes. We have amended the guidance so that instead of using 'outcomes and expectations' we consistently refer to companies' obligations.

	<p>In relation to section 4.3 of the consultation document, Dee Valley Water noted that whilst we had provided a general example of mitigation that might be considered in setting financial penalties, we should consider outlining specific scenarios where mitigation may reduce the level of financial penalty and the extent to which it may do so.</p>	<p>Section 22A Water Industry Act 1991 Statement of policy with respect to financial penalties was published jointly by Ofwat, Defra and the Welsh Government in November 2010. This document, which should be read alongside our guidance document on our approach to enforcement, provides further detail on aggravating and mitigating factors. As a general point, however, each case is investigated on its merits, and the mitigating factors of each case may have a different impact on the level of financial penalty.</p> <p>We therefore consider that no further changes are necessary to our guidance document in this area.</p>	<p>No</p>
	<p>Dee Valley Water noted that the issue of proportionality causes concern for small companies and those operating in Wales in the context of retail market opening. Whilst these concerns have been raised directly with Ofwat and Market Operator Services Limited (MOSL), it requested the inclusion of an acknowledgement that proportionality will be applied to enforcement in the context of retail market opening in Ofwat's published enforcement guidance.</p>	<p>Our guidance document already states that our aim is to make sure that any enforcement action we take is proportionate in the circumstances of the contravention or failure, and this applies to enforcement in the context of retail market opening.</p> <p>We do not consider that any further changes are needed to our guidance document on this point.</p>	<p>No</p>

<p>Northumbrian Water</p>	<p>Northumbrian Water queried the reference in paragraph 55 of the consultation document that Ofwat can enforce against a company that causes or contributes to another regulated company contravening its licence or statutory obligations, and wondered if Ofwat might be able to give some hypothetical examples.</p>	<p>Section 18(1A) of the Water Industry Act 1991, which has been in effect since 1 December 2005, provides that if an undertaker causes a licensee to breach its licence conditions or a licensee causes an undertaker to breach its conditions of appointment, we may take enforcement action against the party that caused the other party to breach its licence conditions. For example, if an undertaker reasonably requests information from a licensee to enable it to report to Ofwat and the licensee fails to comply with that request, with the result that the undertaker is in breach of its licence, we could take enforcement action against the licensee. Similarly, if an infrastructure provider fails to make the infrastructure available to the undertaker, once built, thereby causing the undertaker to breach its statutory obligations, we could take enforcement action against the infrastructure provider.</p>	<p>Yes. We have inserted a footnote referencing section 18(1A) of the Water Industry Act 1991.</p>
<p>Severn Trent Water</p>	<p>Whilst endorsing the move to a flexible, risk based approach to enforcement, Severn Trent indicated that it would like to see a greater emphasis on sharing of best practice and case studies. In its view, this would help to instil and build trust and confidence for all participants.</p>	<p>We are open and transparent in publishing details of all our enforcement cases on our website, here. This includes information about financial penalties incurred, and settlement provided by companies.</p>	<p>No</p>

		<p>We do not propose to include specific case studies in our enforcement guidance at this time. Nevertheless, this is something that we can keep under review.</p> <p>For other cases we have already started to publish details of lessons learnt and will look to do the same for any future enforcement cases.</p>	
Thames Water	<p>Thames Water requested clarification of Ofwat's approach to enforcing compliance with licence obligations (paragraph 14) when some of the obligations currently described in the licence have been superseded by more recent Ofwat requirements (such as Information Notices).</p>	<p>Ofwat acknowledges that some licence obligations need to be updated, and has set up a working group involving the sector to consider possible changes to streamline and modernise the licence.</p>	No
Welsh Water	<p>Welsh Water noted that in paragraph 30 we refer to the assessment of the benefits the company may have gained as a result of the failure or contravention and queried whether in making this assessment, there would be scope</p>	<p>We will use a range of potential sources of intelligence to inform our assessment. This is likely to vary depending on the circumstances but could, potentially, include input from an independent expert.</p>	No

	for the involvement of an independent expert to consider the appropriate quantum of the resulting penalty or sanction in any enforcement action.	Paragraphs 15 and 19 of Section 22A Water Industry Act 1991 Statement of policy with respect to financial penalties provide a non-exhaustive list of the factors that we will consider in deciding on the appropriateness of imposing a financial penalty and the quantum of that penalty and outline a number of aggravating or mitigating factors that may also be taken into consideration.	
	Whilst appreciating each case is different, Welsh Water suggested that the provision of an indicative timescales would be a helpful addition to the process set out in section 3.	It is difficult to provide a definitive timescale as this can vary depending on the complexity of individual cases. We would, nevertheless, expect to be able to reach a decision in most formal enforcement cases within two years.	No
Wessex Water	Wessex Water suggested that it would help companies if, within the approach to enforcement document, we could also cover our enforcement powers under CA98.	Our approach to enforcement guidance document does not deal directly with our approach to enforcing our concurrent powers under the Competition Act 1998 (CA98). This is dealt with in a separate guidance document but given the significant changes made by Government to the concurrent competition regime and to the retail non-household market since it was published, we are also in the process of updating our CA98 guidance and expect that this will be published later this year.	No

<p>Yorkshire Water</p>	<p>Yorkshire Water noted that the use of a "targeted review" has been added to the enforcement pyramid diagram within paragraph 39 and requested further clarification of its use.</p>	<p>As set out in Monitoring and assuring delivery, we will use a range of targeted actions to ensure that customers are protected. This includes the use of targeted reports to look at specific sector wide topics across the industry to highlight good performance as well as areas that need work. This could be prompted by performance concerns and/or customer or stakeholder interest. But this could also just be routine analysis or updates.</p> <p>In addition, we may also use targeted reviews to provide extra visibility of the sector's approach to a particular topic. This allows us to challenge the sector to improve through gathering intelligence and assessing where companies have not identified or managed their risks. This is a proportionate response where, for example:</p> <ul style="list-style-type: none"> • There are significant concerns identified by stakeholders; • There is a high risk to customers or other stakeholders; or • There is an opportunity for major benefits for customers or other stakeholders. <p>For an example, see Ofwat's targeted review of sludge and water resources, published 31 March 2016.</p>	<p>Yes. We have included a description of what is meant by a targeted review.</p>
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3. Next steps

Having reviewed the consultation responses received, on balance, we have not made any major revisions to the guidance document at this point in time. We have, however, made minor changes to explain certain terms. We propose to keep the document under review and in doing so, we will be mindful of respondents' suggestions for potential areas for future changes.