

Licence contraventions – Enforcement procedure

December 2008

This document presents the guidelines the Commission proposes to introduce for dealing with an allegation that a licensed provider has contravened, or is contravening, a term or condition of its licence.

The Commission welcomes comments on these materials. Comments should be sent to the address below before 12 January 2009.

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Background

Although WaterWatch remains responsible for dealing with customer complaints (including complaints against licensed providers), the Commission is statutorily responsible for investigating all allegations of licence breach.

Section 8 of the Water Services etc (Scotland) Act 2005 (**the 2005 Act**) requires the Commission to "*monitor compliance with the terms and conditions of water services licences and sewerage services licences*".

Further, Schedule 2 of the 2005 Act provides the Commission with a variety of enforcement options where it appears that a licensed provider is not complying, or is unable to comply, with the terms and conditions of its licence. In broad terms these include:

- serving of **enforcement notices** which require licensees to take action to remedy licence breaches;
- imposition of **financial penalties** in circumstances where a licence breach has occurred; and
- the **revocation** of a licence, e.g., where the Commission considers that a licensee is no longer able to carry out its licensed functions.

The Commission has previously consulted on and published a monitoring, enforcement and penalties policy which can be found on our website¹.

In order to ensure the Commission complies with its statutory obligations, we propose to introduce an enforcement procedure in line with current best practice in utility regulation. We set out below an overview of the procedure. The detailed procedure can be found at the annex to this paper.

¹ www.watercommission.co.uk

Proposed complaints procedure

Effective enforcement of the terms and conditions of all licenses is essential to ensure that the competitive water market works well for customers, and that licensed providers are able to operate on a level playing field.

The enforcement procedure is intended to enable the Commission to act proportionately in investigating matters and to enhance the transparency of the investigation processes.

The procedure is split into two main sections and explains the following:

- Section 1 first sets out the information complainants should provide when alleging a breach of licence conditions – complaints should be specific, well reasoned, clear and supported by all relevant evidence. Second, it lists the factors the Commission will take into consideration when deciding whether to open an investigation.
- Section 2 then sets out the key stages of the investigation process that the Commission will ordinarily follow.

We intend to keep these guidelines under review and update them as required to ensure the Commission is adhering to best practice in utility regulation.

We welcome comments on the proposed enforcement procedure which should be sent to us before 12 January 2009.

Licence contraventions – Enforcement procedure

December 2008

This document sets out the guidelines the Commission will follow when dealing with an allegation that a licensed provider has contravened, or is contravening, a term or condition of its licence.

Overview

The Water Industry Commission for Scotland (**the Commission**) has powers under the Water Services etc. (Scotland) Act 2005 (**the 2005 Act**) to investigate and take enforcement action, including imposing financial penalties, where it appears to the Commission that a licensed provider has contravened, or is contravening, a term or condition of its licence. The purpose of these guidelines is to set out the Commission's approach to exercising those powers. These guidelines supplement the Commission's monitoring, enforcement and penalties policy (available on the Commission's website at www.watercommission.co.uk).

Effective enforcement of the terms and conditions of all licenses is essential to ensure that the competitive water market in Scotland works well for customers and that licensed providers are able to operate on a level playing field. The Commission may conduct investigations into licensed providers that it considers may be in contravention of their licenses. Investigations can be undertaken on the Commission's own initiative or on the receipt of complaints from stakeholders (including Scottish Water or other regulators).

These guidelines are intended to enable the Commission to act proportionately in investigating matters and to enhance the transparency of the investigation processes.

The guidelines are split into two main sections and explain the following:

- Section 1 first sets out the information complainants should provide when alleging a contravention of licence conditions – complaints should be specific, well reasoned, clear and supported by all relevant evidence. Second, it lists the factors the Commission will take into consideration when deciding whether to open an investigation.
- Section 2 then sets out the key stages of the investigation process that the Commission will ordinarily follow.

The Commission will keep these guidelines under review and will update them as required to ensure it is adhering to best practice in utility regulation.

Section 1

Opening investigations

The Commission can proceed with an investigation following the receipt of a complaint from a stakeholder (including Scottish Water or other regulators) or on the basis of its own initiative. In deciding whether to proceed with an investigation we identify whether or not we have the power to take action and are best placed to act and will then make an assessment of the seriousness of the potential licence contravention and a judgment on the appropriate use of resources.

The Commission's primary responsibility is to promote the interests of all water and sewerage customers in Scotland². The Commission will therefore consider possible contraventions which are likely to cause damage to the interests of customers, other market participants or the environment to be particularly serious. Further examples of the factors that the Commission will consider in assessing the seriousness of a potential contravention are listed below.

Investigations involve time and resources, not only for the Commission and licensed providers subject to the investigation, but for other interested parties as well. Accordingly, it is important to ensure that all resources, most particularly the Commission's, are efficiently allocated. We therefore set out below a non-exhaustive list of the factors the Commission will take into account in deciding whether to proceed with an investigation.

The factors fall under two broad categories:

- whether the Commission has the power to take action and is best placed to act; and
- whether it is a priority matter for the Commission, due to its apparent seriousness and the resource implications of an investigation.

The factors the Commission will take into account include:

1. Does the matter relate to an area in which the Commission has the power to take enforcement action? For example, does it appear likely that the case falls within the scope of the relevant provisions of the 2005 Act?
2. Are there sufficient grounds to suspect that a contravention may have occurred, is occurring, or is likely to occur? Does it appear, on the face of it, that the behaviour in question could constitute a contravention of any requirement of the relevant legislation and/or licence condition?
3. Has action already been taken, or is action being taken, by the licensed provider or another body to remedy the situation?

² See section 1 of the 2005 Act.

4. How serious is the alleged contravention? This will depend on a number of factors, such as:
 - a. What is the harm, or potential harm, to customers, other market participants or the environment resulting from the alleged contravention?
 - b. Is the alleged contravention on-going? Is the licensed provider responsible for the potential contravention taking action to address the situation? The extent to which this may impact on the decision to investigate will depend on other factors such as the harm to customers.
 - c. Does it involve a repeat offence or a repeat offender?
 - d. Is it a widespread problem?
5. What will be the effect, including the deterrent effect, of enforcement action? Would action be likely to discourage similar behaviour in the future, either by the licensed provider that may have committed a contravention or by others?
6. What resources are required to investigate the matter? The Commission has finite resources and the most serious potential contraventions will be prioritised.

It should be noted that this is not an exhaustive list. The factors to be taken into consideration may depend on the nature of the possible contravention. There may be cases in which other considerations are applicable. Likewise, it may be that not all of the factors listed above are applicable in every case.

Information

In order to be able to decide whether the complaint warrants investigation by the Commission, a minimum level of information will be required. We therefore set out below the information that should be included in any complaint to enable the Commission to carry out such an assessment.

The type and level of information required will depend on the nature of the complaint and the resources available to the complainant. However, the more relevant information that the complainant can provide at the outset, the more likely it is that we will be able to deal with the complaint with speed and efficiency. If all the information needed in order to make a proper assessment of the complaint is not provided, we may need to seek further information from the complainant, thus delaying our decision on whether to open an investigation.

It should be noted that, where appropriate, we would expect the complainant to have raised the matter of concern with the relevant licensed provider, and that it may not be appropriate for the Commission to open an investigation in every case.

In general, all complaints should include the following information:

1. A clear explanation of the allegation – including a summary of events and dates relating to the alleged contravention, details of any interaction with the licensed provider and any action taken by either the complainant or the licensed provider³. This should be accompanied by all available relevant evidence to support the alleged contravention and the events which gave rise to it. For example, copies of any letters, emails, faxes, notes of meetings (including board minutes), notes of telephone calls, or any other documents or information which support the allegation.
2. A clear explanation of the harm that the complainant has been caused or may be caused, as a result of the behaviour or incident complained of. Again, this should be supported by all available relevant evidence. For example, documents showing increased costs or higher prices as a result of the conduct in question.
3. Wherever possible, an indication of the licence condition that the complainant considers may have been contravened.
4. Details of the licensed provider being complained about and the complainant's relationship with them.
5. Details of the complainant's business or interests, including contact details, or those of a representative with whom we can speak in relation to the complaint.

There may also be cases where there is information that is relevant that is not outlined above. The complainant should seek to provide as much relevant evidence and information as possible.

³ This could include, for example, whether you have raised the matter with the licensed provider and whether the licensed provider has sought to address the matter.

The Commission recognises that if the complainant is a smaller company or an individual, it may be more difficult to provide all relevant information and we will therefore work with the complainant to help where necessary. This could take time and may impact on the Commission's ability to progress the complaint within the usual timescales.

The complainant should also be aware that it may be necessary for us to disclose information provided to the licensed provider complained about or to other parties connected to the subject matter of the complaint. Where information is confidential or the complainant does not wish it to be disclosed, this should be made clear on the face of the complaint.

Even where information is marked as confidential or the complainant does not wish it to be disclosed, there may still be circumstances in which its disclosure is required. We will discuss this with the complainant, prior to disclosure, should such a situation arise.

Section 2

The investigation and decision making process

We set out below the key stages of an investigation by the Commission and any subsequent decision making process.

Receipt of a complaint

Within 5 business days of receiving a complaint the Commission will acknowledge receipt and provide details of the Commission contact and the complaint's unique reference number. This reference number should be included on all subsequent correspondence with the Commission.

The Commission contact can be contacted for further details or updates on the progress of the complaint and any subsequent investigation.

Notification of an investigation

Having acknowledged receipt of a complaint, the Commission will endeavour to make a decision as to whether to proceed with a formal investigation within 20 business days.

Should the Commission decide not to proceed to a formal investigation, we will inform the complainant promptly of that decision. We will also include with the notification, the reasons for the Commission's decision not to investigate.

Should the Commission decide to proceed to a formal investigation, we will usually publish brief details of the fact and nature of the investigation on the Commission's website⁴.

Information gathering

The Commission has formal powers under section 10 of the 2005 Act to require licensed providers to provide such information as the Commission reasonably requires in order to exercise its functions. Non-compliance with this obligation may give rise to criminal prosecution and liability to pay a fine.

We may need to issue several information requests in the course of an investigation. However, we will avoid requesting the same information more than once without good reason. We will also seek to be as clear as possible in these information requests. However, if a licensed provider that receives an information request has further questions or wishes to clarify its understanding, the Commission contact

⁴ We will not publish details where this may adversely affect the investigation for example, where it may prejudice the Commission's ability to collect information. We will also be mindful of the negative impact publication may have on the standing of licensed providers when considering whether or not to publish details.

can help. We will specify the format in which we require the responses, which will either be electronically or as a hard copy (or both).

In the absence of a reasonable explanation, the Commission may treat a failure to comply with an information request within the prescribed timescale as a refusal to provide the information. A refusal to provide information may give rise to criminal prosecution and liability to pay a fine.

Where the recipient of an information request has good reason to believe that they will be unable to supply the requested information within the specified time, they should contact the Commission in writing at the earliest possible opportunity, and in any event at least 5 business days before the specified time. The Commission may grant an extension to the specified time, and will consider whether it would be reasonable to do so, on a case by case basis.

It should also be noted that as well as a power to require licensed providers to provide information, under the 2005 Act the Commission (or someone authorised by it) has powers of entry, inspection and seizure for the purposes of monitoring and ensuring compliance with the terms and conditions of licences⁵. Under this power the Commission power may inspect any document or article found on a licensed provider's premises and may remove that document for the purpose of inspection.

Progressing the investigation

We will keep the licensed provider being investigated and the complainant updated on the progress of the investigation on a quarterly basis at a minimum. Additional updates can be provided by the Commission contact on request.

Within 6 months of notifying the complainant and the licensed provider of the decision to investigate, the Commission will endeavour to do one of the following:

- issue a detailed statement of the case against licensed provider being investigated; or
- close the case explaining our reasons for no finding of a contravention or for reasons of administrative priorities; or
- update the licensed provider being investigated and the complainant of the expected timescale for one of the above.

The Commission will aim to achieve the above in shorter timescales where possible, taking into account the need to follow the appropriate processes and procedures and the possible need to take action in much shorter timescales where the circumstances of any particular case demand it. We consider that a 6 month target achieves a suitable balance between speed and the need for due process. We will review this after the first year of these guidelines coming into force.

⁵ Paragraph 5 of schedule 2 of the 2005 Act.

Statement of case

Where the Commission considers that there is sufficient evidence to justify it in taking enforcement action in a particular case, we will prepare a statement of case explaining our proposed decision (including our proposed findings in fact and in law) and the remedy that we intend to impose.

The licensed provider will have an opportunity to respond in writing to the statement of case. The Commission may also permit the complainant or other stakeholders (for example, Scottish Water) to comment on the complete or an abbreviated version of the statement of case. The period of time permitted for any written representations will depend upon the facts and complexity of the case and the nature of the remedy proposed. However, we generally expect to allow 20 business days.

Following the receipt of any written representations from the licensed provider or other stakeholders, the Commission may decide that there is insufficient evidence of a contravention to justify it taking further action and may close the case. Alternatively it may consider that it is appropriate to amend its proposals and prepare a supplementary statement of case. The licensed provider will again have an opportunity to respond in writing to any supplementary statement of case⁶.

Decision-making

Decision-making on contraventions of the terms and conditions of licenses as well as the issuing of enforcement notices⁷, the imposition of penalties⁸ and the revocation of licenses⁹ are all matters that will be decided at a formal meeting of the Members of the Commission.

Each investigation undertaken by the Commission into whether a licensed provider has contravened, is contravening or is likely to contravene, the terms and conditions of its licence(s), will result in the Commission reaching three possible conclusions:

1. *No contravention*

If it does not appear to the Commission that a contravention has occurred, the licensed provider and the complainant will be informed of the case closure and a statement will be published on the Commission's website.

⁶ The Commission may also permit the complainant or other stakeholders to comment on the complete or an abbreviated version of any supplementary statement of case. The period of time permitted for any written representations will again depend upon the facts and complexity of the case, but we generally expect to allow 20 business days.

⁷ Pursuant to paragraph 8 of schedule 2 of the 2005 Act.

⁸ Pursuant to paragraph 11 of schedule 2 *ibid*.

⁹ Pursuant to paragraph 10 of schedule 2 *ibid*.

2. Trivial contravention

If it appears to the Commission that there has been or is a continuing contravention, but it appears that the contravention is trivial, the Commission may inform both the complainant and the licensed provider that no further action will be taken.

If the Commission reaches such a conclusion, a notice to that effect will be published on the Commission's website.

3. Substantive contravention

If it appears to the Commission that there has been or is a continuing contravention which is not trivial, then the Commission may proceed to take a decision to that effect which may or may not also involve the imposition of one or more remedies.

Remedies

Where it appears to the Commission that a licensed provider has contravened, or is contravening, a term or condition of its licence and it makes a decision to that effect, the Commission will notify the licensed provider and the complainant and publish a notice on its website setting out the basis for that decision and the proposed action, which may be one or more of the following:

a) The issuance of an Enforcement Notice¹⁰

The Commission may issue an Enforcement Notice where a contravention has occurred or is occurring, or is likely to continue or to recur (or both) and the licensed provider is not taking appropriate steps to rectify the contravention or prevent its recurrence.

An Enforcement Notice will include details of the contravention to which it relates and the reasons for issue. It will also specify the steps that the Commission requires the licensed provider to take to rectify the non-compliance or prevent any future non-compliance, and the date(s) by which the licensed provider is required to complete such steps (as well as the date on which the notice will take effect)¹¹.

Failure to comply with an Enforcement Notice constitutes a criminal offence, giving rise to possible liability to pay a fine. The Commission may also exercise its right in those circumstances to revoke the provider's Licence, by means of a Notice of Revocation¹².

¹⁰ Pursuant to paragraph 8 of Schedule 2 of the 2005 Act.

¹¹ Before an Enforcement Notice can be issued, the Commission must consult with Scottish Water and such other persons as it considers appropriate. Once issued, a copy of the Notice must be sent to the Scottish Ministers and Scottish Water.

¹² Pursuant to paragraph 10(2) of Schedule 2 *ibid*, see sub-paragraph (c) below.

b) *The imposition of a financial penalty*¹³

The Commission may decide to impose a financial penalty of such amount as it considers reasonable in the circumstances of the case.

In determining whether to impose a financial penalty and as to the extent of any such penalty, the Commission will take account of its published monitoring, enforcement and penalty policy¹⁴ and any representations made by the provider.

c) *Revocation of a licensed provider's licence*¹⁵

The Commission may revoke a licence both for non-compliance with enforcement notices validly issued under the 2005 Act (see sub-paragraph (a) above), as well as where it appears to the Commission that the licensed provider has contravened the terms and conditions of its licence and *would* fail to comply with the terms of an Enforcement Notice pertaining to that contravention were such an Enforcement Notice to be issued¹⁶.

The Commission is not able to revoke a Licence unless it is satisfied that it is reasonable to do so having regard to the terms and conditions of the Licence, the provider's responsibilities to its customers and any other matters considered by the Commission to be relevant.

In order to revoke a Licence, the Commission is required to serve a Notice of Revocation on the licensed provider concerned¹⁷.

¹³ Pursuant to paragraph 11 of Schedule 2 *ibid*. Non-compliance with Directions validly issued under the 2005 Act would constitute a Licence contravention for these purposes.

¹⁴ See the Commission's website:
<http://www.watercommission.co.uk/UserFiles/Documents/Monitoring,%20enforcement%20and%20penalty%20policy.pdf>

¹⁵ Paragraph 10 of Schedule 2 of the 2005 Act.

¹⁶ Paragraph 10(3) of Schedule 2 *ibid*.

¹⁷ The Notice of Revocation must state the reasons why the Licence is being revoked and the date from which the revocation will have effect. This date must be at least 15 days after the Notice of Revocation was served. After revocation has taken effect, the Notice of Revocation will be published and a copy sent to both Scottish Water and Scottish Ministers.

Appeals

The appeals process for the issue of an Enforcement Notice, the imposition of a financial penalty or the revocation of a licence is set out in the 2005 Act¹⁸. All such appeals must be lodged within a certain timeframe with the Sheriff Court.

Feedback

At the end of a formal investigation we may request feedback on the process from the complainant and the licensed provider investigated.

¹⁸ Paragraphs 8, 10 and 11 of Schedule 2 of the 2005 Act.