

# Monitoring, Enforcement and Penalties

## 1. Monitoring

Section 8 of the Water Services etc (Scotland) Act 2005 (the WSSA) requires us to "monitor compliance with the terms and conditions of water services licences and sewerage services licences". In addition, the Commission is also concerned to monitor compliance with other relevant regulatory requirements, e.g., any directions made under section 11 of the WSSA. For these purposes, and to enable us to check the ongoing fitness of licensees, the Commission will carry out monitoring activities.

Our monitoring activities will, broadly speaking, involve:

- **routine** monitoring – this will usually take the form of requesting industry participants to provide, at regular intervals to be specified by the Commission, certain key data. The data requested is likely to relate to specific aspects of (a) the application form and (b) the licence conditions;
- **programmed or themed** monitoring – we will, from time to time, undertake monitoring work focussing on particular issues or aspects of the market. We will then instigate particular monitoring activities to support these priorities in consultation with industry participants; and
- **ad hoc** monitoring – we will also undertake monitoring activities in response to specific reports or concerns that have come to our attention, such as reports from customers or Scottish Water concerning possible licence breaches.

In carrying out these monitoring activities, the Commission will have regard to the principles of good regulation in that such activities will be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed. In essence, the Commission will be guided by an overarching principle of reasonableness in all its monitoring activities.

The Commission intends to undertake its monitoring activities primarily by way of information gathering, both through industry co-operation and also by using our statutory or regulatory powers to require information. The Commission does not intend to use its powers of investigation, as set out in Schedule 2 of the WSSA, except where such action appears reasonable in all the circumstances.

## 2. Enforcement

Schedule 2 of the WSSA provides the Commission with a variety of enforcement options where it appears to us 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 we consider that a licensee is no longer able to carry out its licensed functions.

In exercising our enforcement powers, the Commission will have regard to the principles of good regulation mentioned above.

Any enforcement action taken must be appropriate in the circumstances of the case and should also be such as to provide an adequate incentive both to the provider concerned and to other companies to comply with all requirements in the future. Particular factors that will be taken into account by the Commission in deciding whether and what type of enforcement action to take include:

- whether the non-compliance has damaged the interests of customers or other market participants or damaged the environment; and
- whether pursuing enforcement action would be likely to create an incentive to comply and deter future non-compliance.

### **3. Financial Penalties**

Paragraph 11(2) of Schedule 2 of the WSSA requires the Commission to publish a "statement of policy with respect to the imposition of penalties and the determination of their amount". This section contains the Commission's policy statement on these matters.

The Commission will only impose a financial penalty where it considers that it is reasonable to do so in all the circumstances of the case, taking account of such factors as those set out in section 2 above.

Once it is decided to impose a financial penalty, the amount of any penalty to be imposed will be reasonable in all the circumstances, taking account of the following factors:

- the seriousness and duration of the non-compliance and whether the licensee has failed to comply with its licence before;
- the degree of nuisance, harm or increased cost incurred by customers, other market participants or the environment and any steps that the licensee has taken to rectify and/or pay appropriate compensation for harm caused by the non-compliance;

- any gain (financial or otherwise) made by the provider as a result of the non-compliance;
- the cause of the non-compliance, including the involvement of senior management, the absence of appropriate steps to avoid non-compliance, and the impact of events outside management control;
- whether the non-compliance was concealed or proactively reported to the Commission and the degree of co-operation with the Commission's investigation into the non-compliance;
- precedents set under equivalent provisions for other utilities and public services; and
- the level of any other penalty already or potentially imposed in relation to the same non-compliance.

The Commission's starting point for deciding the amount of any penalty will be to ensure that:

- breach of licence conditions confers no benefit on the infringing licence holder in terms either of profits or gains made by it or of costs imposed on competitors or customers, and
- the incentive to continuing compliance provided by the possibility of a financial penalty is realistic, reasonable and proportionate (whether generally or in relation to any gains that may arise, directly or indirectly, from non-compliance).

The Commission may also have regard to the need to deter similar breaches of licence conditions by other licensed providers in setting the amount of penalty imposed.

In setting the level of any financial penalty, the Commission would have regard to the policy and practice of other utility regulators and the levels of penalty set by them in similar cases.