

Policy for Licence Contraventions - Enforcement Procedure February 2009

This document sets out the Commission's current policy on the investigation and enforcement of licence contraventions. There are four sections:

1. The first section details the principles of the policy and the legal background.
2. The second section deals with the complaints process and advises what factors the Commission will take into account in deciding whether or not to proceed with an investigation.
3. The third section lists the key stages in any investigation process that the Commission will follow.
4. The fourth section sets out the remedies available to the Commission should a licensed provider be found to be in breach of their licence conditions.

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Section 1

Principles

The Commission is statutorily responsible for investigating all allegations of licence breach against a licenced provider. All other types of complaints against a licensed provider remain the responsibility of The Scottish Public Services Ombudsman. The Commission can proceed with an investigation into an alleged licence contravention on receipt of a complaint from a stakeholder (including Scottish Water or other regulators) or on the basis of its own initiative.

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

The enforcement procedure is also intended to enable the Commission to act proportionately when conducting investigations and to enhance the transparency of the investigation processes.

Whilst the Commission must comply with its statutory obligations it is also mindful of the fact that both customers and licensed providers must feel confident in the process and believe that it is fair and in keeping with best practice in the utility industry as a whole. However, the Commission intends to keep these guidelines under review and will update them as required to ensure that we are adhering to best practice in utility regulation.

The Commission's primary responsibility however, remains to promote and safeguard the interests of all water and sewerage customers in Scotland.

The legal position

- 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"*.
- Furthermore, 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. These include:
 - The serving of enforcement notices which require licensees to take action to remedy licence breaches;
 - The 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.

Section 2

Opening Investigations

Below are a non-exhaustive list of factors the Commission will take into account in deciding whether or not to proceed with an investigation. They are split into two broad categories which need to be considered before deciding whether or not to conduct an investigation which are:

- 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 the apparent seriousness of the complaint 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 that the alleged contravention 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 behavior 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 being taken, by the licensed provider or another body to remedy the situation?
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 contraventions 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 being done 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? What action would be most likely to discourage similar behavior 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.

The factors to be taken into consideration could of course, depend, on the nature of the alleged contravention. There may be cases where other considerations are also applicable. Likewise, not every factor listed above will be applicable in every case.

Necessary Information

The Commission will require a minimum criteria of information before it can decide whether or not a complaint warrants investigation. The information required is therefore set out below which should be included in any complaint to enable the Commission to carry out an assessment of the merits of the complaint.

It should be noted that the complainant must have raised the matter of concern with the relevant licensed provider in the first instance. It should also be noted 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 provider. This should be accompanied by all 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 behavior or incident of which they are complaining. 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 to 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 which is not outlined above. The complainant should seek to provide as much relevant evidence and information as possible.

The Commission recognises that if the complainant is a smaller company or an individual, it may be more difficult for them to provide all relevant information and we will aim to work with the complainant to help where necessary to ensure that all necessary information is attained. This could however, 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 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 certain information 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 3

The investigation

- **Receipt of a complaint.** Within 5 business days of receiving a complaint the Commission will acknowledge receipt and provide details of a contact at the Commission and a unique reference number which will be assigned to the complaint. This reference number should be included on all subsequent correspondence with the Commission.¹
- **Notification of an investigation.** Having acknowledged receipt of a complaint, the Commission will endeavor 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 website.²
- **Information gathering.** Section 10 of the 2005 Act, gives the Commission formal powers 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 during the course of any investigation. In such cases 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 receives an information request, and has further questions or wishes to clarify its understanding of the request, the contact at the Commission can help. We will also specify the format of how we wish to receive any information requests.
- **Failure to comply.** The Commission may treat a failure to comply with an information request within the prescribed timescale as a refusal to provide information, in cases where no reasonable explanation has been provided. A refusal to provide information may give rise to a criminal prosecution and liability to pay a fine.
- **Unable to comply.** 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 available 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.
- **Powers of entry.** 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 licenses.³ Under this power the Commission may inspect any document or article found on a licensed provider's premises and may remove that document for the purpose of inspection.

¹ The nominated contact at the Commission can be contacted for further details or updates on the progress of the complaint and any subsequent investigation.

² 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 the licensed provider in question when considering whether or not to publish details.

³ Paragraph 5, schedule 2, 2005 Act

Progressing the investigation

We will keep the licensed provider 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 on request.

However, within 6 months of notification of a 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 finding no 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.

Whilst we will aim to achieve the above in shorter timescales wherever possible, we will take 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.

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 findings in fact and law) and the remedy that we intend to impose.

- The licensed provider will have an opportunity to respond in writing to the statement of the case.
- The complainant or other stakeholders may also be permitted to comment on the complete, or abbreviated version of the case.⁴

Following receipt of any written representations from the licensed provider or other stakeholders, the Commission may decide 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 the case. The licensed provider will again, have an opportunity to respond in writing to any supplementary statement of case.

The Commission may also permit the complainant or other stakeholders to comment on the complete or an abbreviated version of any supplementary statement of the 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.

⁴ 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.

Section 4

Decision-making

Decision-making on contraventions of the terms and conditions of licenses as well as the issuing of enforcement notices⁵, the imposition of penalties⁶ and the revocation of licenses⁷ are all formal matters that will be decided at a formal meeting of the Members of the Commission.

Conclusions

There are 3 possible conclusions the Commission can reach when undertaking an investigation to decide if a licensed provider is contravening or is likely to contravene the terms and conditions of its licence(s):

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 closure of the case and a statement will be published on the Commission's website.
2. **Trivial contravention.** If it appears to the Commission that there has been a contravention, or there 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 that there has been a contravention, or there 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 license 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 Notice*

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

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

⁵ Pursuant to paragraph 8, schedule 2, the 2005 Act

⁶ Pursuant to paragraph 11, *ibid*

⁷ Pursuant to paragraph 10, *ibid*

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)⁸.

Failure to comply with an Enforcement Notice constitutes a criminal offence, giving rise to a liability to pay a fine. The Commission may also exercise its right in such circumstances to revoke the provider's licence, by means of a Notice of Revocation⁹.

b) The imposition of a financial penalty¹⁰

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

In determining whether or not 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 policy¹¹ and any representations made by the provider.

c) Revocation of a licensed provider's licence¹²

The Commission may revoke a licence both 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 issued¹³.

The Commission is unable 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 matter 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 concerned.¹⁴

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 Act¹⁵. All such appeals must be lodged within a certain timeframe with the Sheriff Court.

⁸ 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.

⁹ Pursuant to paragraph 10(2), Schedule 2, 2005 Act- see sub-paragraph (c) below.

¹⁰ Pursuant to paragraph 11, schedule 2, *ibid*. Non-compliance with Directions validly issued under the 2005 Act would constitute a Licence contravention for these purposes.

¹¹ See the commission's website

<http://www.watercommission.co.uk/UserFiles/Documents/Monitoring,%20enforcement%20and%20penalty%20policy.pdf>

¹² Paragraph 10, schedule 2, 2005 Act

¹³ Paragraph 10(3), schedule 2, *ibid*

¹⁴ 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.

¹⁵ Paragraphs 8, 10 and 11, schedule 2, 2005 Act