

Response to industry

The OGA first presented high level options on its proposed Enquiry process at the Commercial Managers Forum in October 2018. This was followed up with a consultation on the draft Enquiry Guidance (the “Guidance”) with the Commercial Managers Forum Steering Group (‘The Steering Group’) between November and December 2018.

The Steering Group were broadly supportive of the OGA’s proposed changes to its enquiry process. However, they had some specific concerns on the OGA’s proposals which can be summarised into two broad categories:

- Publication
- The OGA’s use of broader outcomes

Publication

The comments received from the Steering Group in relation to publication outlined that on one hand publication is helpful as it can give an indication of the type of scenario that is subject to an Enquiry and demonstrates that Enquires do take place. Respondents did however raise the following concerns:

- **Publication of information surrounding an Enquiry and/or Investigation may lead to bad company behaviours whereby this information is used in separate commercial negotiations.**
- **Some companies may be more sensitive to information being published and this could be exploited by others leading to less collaborative behaviours.**

It is considered standard practice that in many commercial negotiations (e.g. the sale of an asset) due diligence process would usually require the disclosure of on-going regulatory investigations. As such, the OGA does not consider that the publication of information in respect of the opening of an Investigation or closure of Enquiry makes a material difference to on-going commercial negotiations.

The OGA also notes the importance of transparency in this area being important to ensure that its targeted regulatory interventions deter non-compliance and signal OGA’s intent to use the full range of its regulatory powers when appropriate to do so.

- **Publication of details at Enquiry/Investigation stage brings the risk that the impression of wrong-doing by a party may be created when it could ultimately be determined that this is not the case.**

The OGA notes the need to steer an appropriate course between any potential disincentives of publicising the outcome of an Enquiry or indeed the opening of an Investigation. In particular, OGA will ensure that any such publication makes it clear that the opening of an Enquiry or Investigation should not be taken to mean that an adverse finding has been made.

- **Publishing details of any Enquiry before the matter is fully resolved creates the potential for false precedents to appear to be established.**

The OGA does not propose to publish details of Enquiries before they are opened. Any Information published will be at the culmination of an Enquiry or at the launch of an investigation and will be high level factual information relating to the issue(s) being decided.

- **There is a risk parties may be discouraged from co-operating positively with the OGA due to concerns about details of the Enquiry being potentially publicised before the matter is fully resolved. This could lead to parties seeking legal advice in responding to the Enquiry with adverse impacts on the openness of the responses plus potentially incurring extra costs.**

As outlined above the OGA does not intend to publish any information regarding an Enquiry before it is concluded. All parties are expected to co-operate with an OGA Enquiry or Investigation and in some cases, there is a statutory obligation on parties to do so. Whether parties choose to involve legal representation is solely a matter for them and not one for the OGA to comment on.

OGA's use of broader outcomes

- **The broader range of outcomes available to the OGA could increase the overall time an Enquiry could take.**

The OGA also received various comments about the additional outcomes as a result of the Enquiry process increasing the time taken to complete an Enquiry. In response to requests for the OGA to simplify and quicken its Enquiry process, it is our intention to monitor our performance regularly and manage our resources in such a way that the cases we handle are prioritised appropriately, having due regard to our prioritisation principles and worked as efficiently as possible.

Deciding outcomes are at the end of an Enquiry, therefore it should not take an excessive amount of time to decide which power [if any] is most appropriate to deploy, having regard to proportionality and the evidence before us.

- **The greater range of outcomes from an Enquiry could encourage poor behaviours as more options could be seen as reducing the chance of a company facing sanctions and provide a disincentive for parties to settle at the stewardship stage**

The incentive for parties to resolve an issue at the stewardship or facilitation stage is clear. If this does not happen then the OGA's measured escalation process means they could face a regulatory Enquiry and possible formal Investigation.

As set out above, parties are expected to co-operate with the OGA in the course of an Enquiry or Investigation" and in some cases, there is a statutory obligation for parties to do so.

In summary, the OGA considers that the Guidance reflects the OGA's aims to be transparent, proportionate, evidence-based and targeted in its handling of enquiries, selecting the right resolution of each case.

The OGA further considers that transparency is an important regulatory principle which the OGA considers will not only encourage companies to be compliant but will also benefit industry as a whole.

The OGA also notes that such a practice, to publish information about the opening of an Enquiry/Investigation and case timetables is a common practice followed by many Regulators across the UK.

Finally, along with the publication of the Guidance, the OGA has made consequential amendments to its Dispute Resolution, Guidance on disputes over Third Party Access to upstream oil and gas infrastructure and Sanctions Procedure.