

Consultation on changes to Ofgem's Enforcement Guidelines and Sectoral Penalty Statement.

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Customers of businesses who operate in the energy sector rightly expect to be treated fairly and to be confident that businesses will meet their obligations and provide good services. It is important that, where energy businesses breach their obligations, we act decisively to put things right.

We have been reviewing our approach to enforcement. Now that we are at the end of our review, we are consulting on revised versions of our Enforcement Guidelines and the Sectoral Statement of Policy with respect to Financial Penalties and Consumer Redress.

We are seeking views on the proposals set out in this consultation document, from regulated businesses and all other parties with an interest in our enforcement work. The responses will help us to ensure that our enforcement processes, and penalty policy, are relevant and adaptable in an innovative and evolving energy market.

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Executive summary

The Gas and Electricity Markets Authority (the Authority) regulates the gas and electricity markets in Great Britain.¹ The Office of Gas and Electricity Markets (Ofgem) carries out the Authority's day-to-day work and investigates matters on its behalf. It also has concurrent powers with the Competition and Markets Authority (CMA) to investigate suspected infringements of competition law.

As the sector regulator, we have duties to identify and respond to conduct in the gas and electricity sector that may be unlawful, anticompetitive, or otherwise harm consumer interests. The Enforcement Guidelines describe:

- how we may use our enforcement powers and tools in situations relating to breaches or infringements;
- how our decision-making process works;
- how we will provide redress and remedies for consumers;
- how breaches will be addressed and deterred; and
- the actions we may take as an alternative to exercising our statutory enforcement powers.

The aim of the Enforcement Guidelines is to provide greater clarity, consistency and transparency to our enforcement policies and processes, and to describe the framework we have in place to maximise the impact and efficiency of our work.

Ofgem's Enforcement Guidelines were last revised in 2017 and the Sectoral Statement of Policy with respect to Financial Penalties and Consumer Redress was last revised in 2014. Since these documents were published, the energy market and enforcement landscape have evolved and will continue to evolve. We need to make sure our tools and processes keep pace with the changes and remain fit for purpose.

We have conducted a thorough review of the Enforcement Guidelines and Sectoral Penalty Statement. This consultation details the changes we aim to make to update and streamline

¹ The enforcement powers under the Electricity Act 1989 extend to Great Britain, a place in the territorial sea adjacent to Great Britain or in a Renewable Energy Zone as defined at s.84(4) of the Energy Act 2004. Its powers under the Gas Act 1986 extend to Great Britain. The Northern Ireland Authority for Energy Regulation is responsible for the regulation of the gas and electricity industries in Northern Ireland.

our processes and to reflect new requirements brought in under the Supplier Licencing Review (SLR).²

The consultation is open until 04 August 2021. Responses should be sent to Heather Swan and Megan Pickard at EGPPconsultation@ofgem.gov.uk.

Please note that we plan to publish a separate consultation in respect of proposed changes to the Authority's Statement of Policy on Financial Penalties and Restitution under REMIT and the REMIT Procedural Guidelines.³ We expect to publish this consultation in July 2021.

² [Decision on the Supplier Licensing Review: Ongoing requirements and exit arrangements | Ofgem](#)

³ REMIT is the retained European Regulation (1227/2011) on wholesale energy market integrity and transparency. We have powers to enforce the prohibitions on a range of matters set out in REMIT, including insider trading and market manipulation. These powers are set out in the Electricity and Gas (Market Integrity and Transparency) (Enforcement Etc.) Regulations 2013 (as amended).

1. Introduction

- 1.1. Our vision for our enforcement work is to achieve a culture where businesses put energy consumers first and act in line with their obligations.
- 1.2. Our strategic enforcement objectives are to:
 - Deliver credible deterrence across the range of our functions, stamping out bad and sharp practice and ensuring fair treatment for all consumers, especially those in vulnerable situations.
 - Enable competition and innovation, which drives down prices and results in better quality and new products and services for consumers.
 - Ensure visible and meaningful consequences for businesses and, when appropriate, company directors, who fail consumers and who do not comply.⁴
 - Achieve the greatest positive impact by prioritising enforcement resources and using the full range of our powers and regulatory “toolkit”.
- 1.3. We aim to achieve these objectives by:
 - Identifying poor conduct or behaviour early and taking action in a timely manner;
 - using a range of appropriate enforcement processes, including informal processes where that will deliver results more effectively;
 - being fair and transparent throughout the enforcement process and in the actions that we take, and
 - learning from everything we do, including sharing lessons learned across Ofgem and from across the energy industry.
- 1.4. We will, as appropriate, have regard to the better regulation principles of transparency, accountability, proportionality, consistency and targeting regulatory activities only at

⁴ This refers to our powers under the Company Directors Disqualification Act 1986 (CDDA). In addition, recent changes to the licensing process mean that a history of non-compliance by a business of which a person was senior manager may mean that the Authority will refuse a licence to any business of which that person is a Director. Where it considers it appropriate to do so, the Authority will also provide support and information to assist the Insolvency Service in investigating the circumstances of an energy licensee’s failure and/or pursuing a person’s disqualification as a company director.

cases in which action is needed, and to other principles that we consider represents best regulatory practice.⁵

1.5. We have powers to make decisions to conduct investigations or take enforcement actions, including but not limited to:

- Issuing directions or Orders to bring an end to a breach or remedy a harm that was caused;⁶
- Investigating energy businesses when we think they may be breaching any relevant conditions or requirements under their licences, or competition law/consumer protection law;⁷
- Imposing financial penalties;⁸
- Accepting commitments or undertakings relating to future conduct or arrangements.

Current and future enforcement landscape

1.6. The energy market and enforcement landscape have evolved significantly since our Enforcement Guidelines were last revised in 2017 and Penalty Statement was introduced in 2014.

1.7. In that time, there has been a significant increase in our use of certain enforcement tools, notably Provisional and Final Orders. This reflects the evolving nature of the sector and the need to address more widespread non-compliance.

1.8. We have conducted a review of the Enforcement Guidelines and Sectoral Penalty Statement, taking account of the evolving market and recent enforcement experiences. As a result, we aim to make certain changes which will enhance our ability to act

⁵ Section 4AA(5A) of the Gas Act and section 3A(5A) of the Electricity Act provide that the Authority must have regard to certain principles in respect of its functions under Part 1 of the Gas Act and Part 1 of the Electricity Act. However, the Authority will have regard to these principles in respect of its other functions where appropriate.

⁶ Section 28 and 29 of the Gas Act 1986 and sections 25 and 26 of the Electricity Act 1989.

⁷ Obligations come from a range of legislation including: the Gas Act 1986; the Electricity Act 1989; the Utilities Act 2000; the Competition Act 1998; the Enterprise Act 2002 and the Consumers Rights Act 2015.

⁸ Section 30A of the Gas Act 1986 and section 27A of the Electricity Act 1989.

swiftly to ensure things are put right, send strong deterrence messages and, where appropriate, ensure consumers are compensated in a timely manner.

- 1.9. This consultation sets out the changes and enhancements we propose to make to ensure we have the flexibility to take appropriate action in an evolving market. We summarise the areas where we are proposing significant changes below. Further details of all changes are provided in each of the relevant sections of this document.

Settlement process

- 1.10. Ofgem may open a “Sectoral” investigation or enforcement case into a business or person in respect of their compliance with any relevant licence condition or requirement.⁹ Following the opening of an investigation or enforcement case, resolution may be reached through the settlement process, as set out in the Enforcement Guidelines.
- 1.11. To settle a case, a business under investigation must admit to the breach/es that has/have occurred, and this will lead to a formal finding of a breach by the Authority. The business will also be expected to agree not to challenge or appeal any finding of breach, and the penalty and/or consumer redress order that is agreed as part of the settlement.
- 1.12. We currently have three settlement windows which provide an opportunity for businesses to receive a discount to the penal element of the agreed settlement amount. These discounts are available on a sliding scale, depending on when settlement is agreed (early, middle, and late windows). We are consulting on a proposal to remove the middle and late settlement windows and retaining a 30% discount for settlement.
- 1.13. Currently, settlement decisions are always made by a Settlement Committee, which is usually made up of two members of the Enforcement Decision Panel (EDP) and one Ofgem Director.¹⁰ We are consulting on a proposal to change the decision-making process to allow the Director responsible for Enforcement to be a decision maker for

⁹ “Sectoral cases” refers to cases where obligations or requirements are enforced against regulated persons as breaches of relevant conditions or requirements under the Gas Act and the Electricity Act. This is distinct, for example, from competition cases, where we use our competition powers and consumer law cases where we use consumer law powers.

¹⁰ [Enforcement Decision Panel | Ofgem.](#)

settlement, where appropriate, as an alternative to a Settlement Committee, whilst retaining the option to use a Settlement Committee.

Imposing a Penalty following a confirmed provisional or final order.

1.14. The Authority has the power to make provisional or final orders or confirm a provisional order to bring energy companies into compliance with relevant conditions or requirements.¹¹

1.15. Since making our first provisional order in 2014, we have increasingly used Provisional and final orders to address non-compliance. In 2019, we consulted on six final orders, with three being made. In 2020 we consulted on 17 final orders and made eight final orders.¹²

1.16. Following confirming a provisional order or making a final order, we have the option to pursue a penalty within 3 months. Where a provisional order is made but not confirmed, we have the option to pursue a penalty within 6 months.

1.17. To ensure that the Enforcement Guidelines reflect the increased use of orders, we are updating them to provide further information on the orders framework.

Sectoral Penalty Statement

1.18. This document outlines the factors that the Authority will consider when:

- deciding whether to impose a financial penalty and/or a consumer redress order in respect of Sectoral investigations;
- determining the amount of any financial penalty; and
- determining the requirements of any consumer redress order.

1.19. Through the Supplier Licensing Review ("SLR") Decision, and the requirements that came into effect on 22 January 2021, there are some new and amended conditions for

¹¹ Section 28(2) of the Gas Act and section 25(2) of the Electricity Act.

¹² Initially, we publish a notice of proposal to make a Final Order, this is consulted on for a minimum of 21 days. Following this consultation, the Authority decides whether or not to make a Final Order.

licenced suppliers.¹³ These interact with the factors that are considered when assessing a penalty in cases where licenced suppliers are found to be in breach of a relevant requirement or condition.

1.20. We are therefore proposing to amend the Sectoral Penalty Statement to clarify how licence condition changes, including those introduced through the SLR, will interact with the Authority's decision in respect of determining the level of penalty imposed upon a regulated person.

1.21. We are also consulting on proposals, applicable to all regulated persons, to:

- Only calculate detriment and gain where it is proportionate, reasonable and practicable to quantify it;
- Reflect unquantified detriment and gain through the Authority's assessment of seriousness.

Summary of consultation content

1.22. In summary, we are consulting on proposals to amend the specific areas listed below:

- Removing the middle and late settlement windows, see section 2, page 13;
- Decision making in settlement- see section 3, page 15;
- Penalty and redress options following a final order or confirmed provisional Order, see section 4, page 18;
- General updates to the Enforcement Guidelines, including proposals for changes to the Enforcement Guidelines as necessary to reflect the new SLR requirements, see section 5, page 21;

¹³ On 26 November 2020, we published the [Decision on the Supplier Licensing Review: Ongoing requirements and exit arrangements](#). The majority of the new licence conditions from the SLR came into effect on 22 January 2021, with the exception of the Customer Supply Continuity Plans requirement, which came into effect on 18 March 2021.

- Amendments to the Sectoral Penalty Statement, including proposals for changes to the Statement which are necessary to reflect the new SLR requirements, see section 6, page 23.

1.23. Any proposed changes that are adopted in the Enforcement Guidelines will come into effect on the date on which we publish the final version of the document and will apply to all current and future investigations. The Authority will have regard to the updated version of the Penalty Statement in respect of any contravention which occurred on or after the date on which the updated Penalty Statement is published.

1.24. We will be updating and aligning other Ofgem materials to reflect the new Enforcement Guidelines and Penalty Statement when they are published.

2. Middle and late settlement windows

Section summary

There are currently three settlement windows, with sliding discounts applied to the penalty amount that has been agreed in the settlement.

We are consulting on removing the middle and late settlement windows and having one settlement window with a discount of 30%.

Questions

Question 1: What is your view on the proposal to remove the middle and late settlement windows, and associated settlement discounts?

Background

- 2.1. The purpose of a settlement discount is to incentivise settling a case, recognising the benefits of resource savings, and securing compensation or redress for consumers earlier than would otherwise be the case. However, we have experienced increased amounts of time and resource being used to reach settlement, negating these benefits.
- 2.2. There are currently three settlement windows available for a party to settle in, with associated discounts to the penalty amount: early (30% discount), middle (20% discount) and late (10% discount).¹⁴ Since the guidelines were introduced in 2014, and last revised in 2017 no party has settled in the middle or late windows.

Proposed Changes: Removal of the middle and late settlement windows

- 2.3. We are proposing to remove the middle and late settlement windows and the respective 20% and 10% discounts. This will mean we have one settlement window, as follows:
-

¹⁴ This can be found at:

https://www.ofgem.gov.uk/sites/default/files/docs/2014/11/financial_penalties_and_consumer_redress_policy_statement_6_november_2014.pdf. This statement is the current version, following consultation this will be amended to reflect the new statement.

- **30 percent discount:** This will usually be the only offer of discount available and settlement must be achieved within the settlement window to receive it. However, we may consider offering a discount outside of the settlement window in exceptional circumstances;
- **The settlement window will open when the settlement mandate, draft penalty notice and/or redress order and press notice are provided to the company;**
- **The settlement window will close on expiry of a reasonable period (usually 28 days) which will be notified to the business when the above documents are provided.** The settlement window may be reopened at the Authority's discretion in exceptional circumstances, however if the settlement window is reopened there is no guarantee that a settlement discount will remain available.

2.4. If a business is willing to enter settlement, having only one settlement window should incentivise it to do so early, as otherwise the benefit of a discounted penalty could be lost. This will result in findings of breach being made closer to the time they occurred, redress/compensation to consumers being made earlier and swifter deterrent signals to the market. If a business is not willing to settle within the window, the case will likely move to contest, and ultimately be resolved more quickly than currently, as the process will be simpler than having continued with settlement and contest processes running in parallel.

2.5. In the current structure, settlement and contest can run in parallel. This will no longer be an option under the revised process proposed. Settlement and contest processes will always run separately from each other.

3. Decision making in settlement cases

Section summary

Currently, a Settlement Committee made up of two Enforcement Decision Panel (EDP) members and one Ofgem Director makes settlement decisions.

We are proposing that the Director responsible for Enforcement can also be a decision maker for settlement, dependant on the circumstances of the case.

Questions

Question 2: What are your views on the option of allowing the Director responsible for Enforcement to be a decision maker in settlement cases?

Question 3: In your view, are there any other steps you think we could take to speed up the settlement process, without undermining the evidence - based nature of our decision making?

Background

- 3.1. Early settlement saves resources for both the business under investigation and Ofgem. It may also result in consumers obtaining compensation or redress earlier than would otherwise be the case.
- 3.2. Currently, the Authority has delegated certain enforcement decisions to the Enforcement Decision Panel (EDP), including settlement decisions. A Settlement Committee, made up of two members of the EDP and one Ofgem Director make decisions on settlement. The Settlement Committee is currently the only decision-making option for settlement of a case. The EDP was established in 2014 to take decisions in contested and settlement enforcement cases and to provide separation between the case team and the decision maker. There is no statutory obligation to have an EDP, nor specifically to use them on settlement cases.
- 3.3. As the energy market has evolved with an increase in the number of suppliers, we have had to address non-compliant behaviours and conduct issues across a broader

range of businesses. This has increasingly been addressed through use of Alternative Action,¹⁵ as this is generally a swifter means to address concerns and secure voluntary redress payments and/or compensation for consumers. However, alternative action outcomes do not include a formal finding of a breach by the Authority, and we are concerned that the deterrent message may in some cases be weakened as a result.

3.4. We have also seen an increase in the amount of time taken to conclude cases through settlement.

Proposed changes

3.5. To address the concerns above, we are proposing to introduce a process whereby the Director responsible for Enforcement can be a decision maker in settlement or delegate another Ofgem Director to act on their behalf. We expect this will result in more cases being taken through the settlement process, where appropriate, rather than being resolved through Alternative Action, leading to formal finding/s of a breach/es. It should also speed up the process and reduce the resource burden on us and businesses under investigation. This will send stronger deterrent signals to the sector and create valuable precedents.

3.6. We are proposing that, in certain cases, an Ofgem Director will be able to:

- issue a settlement mandate; and
- approve and issue the settlement penalty notice; and
- approve final settlement decisions.

3.7. The option to use a Settlement Committee will remain.

3.8. We understand that parties under investigation may value the visible separation from the case team provided by a Settlement Committee. However, it is important to note that the Director responsible for Enforcement is not involved in the day to day running, or oversight, of our investigations and all decisions are evidence-based. The option for

¹⁵ Alternative action can be used in lieu of opening an investigation into a potential breach, as part of closing a formal investigation or during an investigation to address any ongoing concerns.

a Settlement Committee remains for cases where it is considered the EDP's specialist expertise may bring benefit to the case.

- 3.9. It is also important to note that we have achieved many successful outcomes through Alternative Action and informal compliance action, where an Ofgem Director has been the decision maker. This shows that regulated parties have had confidence in, and been willing to engage with, this process, with an Ofgem Director as decision maker and it has delivered good outcomes.
- 3.10. There is a benefit to both Ofgem and the party under investigation in terms of resource savings, and to consumers in terms of the swifter outcomes, to streamlining the process and reaching settlement more quickly.
- 3.11. Please note that the proposed changes apply only to case that go through settlement and that the EDP will remain the decision maker in contested cases.

4. Penalty and redress options following a final order or confirmed provisional order

Section summary

We are increasingly using orders to address poor behaviours and conduct. We are looking to reflect our experience of orders in the Enforcement Guidelines and provide more detailed information on the processes for imposing a penalty/ redress order following the making of a Final Order or confirming a Provisional Order.

Questions

Question 4: Do you have any comments on the updated guidance on Provisional and Final Orders in section 7 of the guidelines?

Question 5: Is there any other information on Provisional or Final Orders you would find helpful to be in the Guidelines?

Background

4.1. The Authority has the power to make provisional or final orders or confirm a provisional order to bring energy companies into compliance with relevant conditions or requirements.

Final orders/confirmation of a provisional order

4.2. The Authority may make a final order or confirm a provisional order, if the Authority is satisfied that a regulated person is contravening or is likely to contravene any relevant condition or requirement and where that that order is requisite to bring the breach/es to an end, after following certain procedural requirements.¹⁶

Provisional orders

¹⁶ Section 28(1) and 29 of the Gas Act and sections 25(1) and 26 of the Electricity Act.

4.3. The Authority will usually make a provisional order, if it appears to the Authority a regulated person is contravening or is likely to contravene any relevant condition or requirement and where that that order is requisite to bring the breach/es to an end. A provisional order may be considered necessary, to require a regulated person to take action to improve poor behaviours or conduct, and therefore bring it into compliance with its obligations, to prevent existing or future loss or harm that might arise before a final order can be made.

4.4. We have used Provisional Orders for example to:

- Require an energy supplier to stop selling energy contracts to new customers until they had resolved their customer service and customer contact issues which included significantly long call waiting times, long email responses times and withholding refunds;
- Prevent serious harm to consumers who were being charged for additional direct debit payments, without clear communication and without their energy account being managed appropriately, such as using incorrect or estimated readings when the customer had provided accurate readings.

Final orders

4.5. If the Authority is satisfied that a regulated person is contravening or is likely to contravene any relevant condition or requirement, it may impose a final order where that order is requisite to bring the breach/es to an end, after following certain procedural requirements.¹⁷

4.6. We have used final orders for example to:

- Ensure that energy suppliers paid their Renewables Obligation for the relevant period, following their failure to produce adequate Renewables Obligation Certificates within the deadline and to provide assurances that they would be able to pay outstanding amounts in the late payment window. The Authority was not satisfied that the suppliers would make the payment in absence of a final order.

¹⁷ Sections 28(1) and 29 of the Gas Act and sections 25(1) and 26 of the Electricity Act.

- Ensure that energy suppliers became a Data Communications Company User to ensure consumers would continue to be able to benefit from the functionality of their smart meter, following a switch to or from the supplier.

Imposing a penalty following the making of Final Order or confirming a Provisional Order

- 4.7. Following the making of a final order, or confirming a provisional order, there is a three month¹⁸ window from the date of the made final order or confirmed provisional order to pursue a penalty and/or a redress payment, related to, but not limited to, the breaches referred to in the order.
- 4.8. Where a penalty is pursued in this scenario, the rest of the enforcement guidelines will not apply, including the concepts of settlement and contest.
- 4.9. In this scenario, the business (and other parties) has the opportunity to submit their representations during the Notice of Proposal consultation period/s, which are a minimum of 21 days.

Proposed changes

- 4.10. We are proposing to expand the guidance on provisional and final orders, in particular around imposing a penalty and/or redress order following the making of a final order or confirmation of a provisional order, to provide more clarity and transparency. We are seeking views on this revised wording in the Enforcement Guidelines in section 7 of annex 1.
- 4.11. Please be aware that the legislation underpinning our use of Orders has not changed and is derived from the Gas and Electricity Acts, which remain unchanged.

¹⁸ Where the Authority makes, but does not confirm, a provisional order, it has a six month period (from the date on which it makes the provisional order) to impose a financial penalty in relation to a breach or failure to which the provisional order relates.

5. General guidance revisions

Section summary

In addition to the specific areas noted in sections 2-4, we have conducted a full review of the guidelines and are proposing revised text, to improve clarity of the wording, and provide greater transparency around our enforcement processes and procedures.

We welcome views on the revised wording of any areas of the Enforcement Guidelines.

Questions

Question 6: Do you have any comments on any areas of the revised guidelines?

- 5.1. We have conducted a thorough review of the Enforcement Guidelines and made amendments where we have deemed it necessary, appropriate, or helpful including changes to reflect the recent Supplier Licencing Review (SLR) changes. Overall, we are aiming to provide greater clarity and transparency of our processes where appropriate.
- 5.2. The main changes have been made to the following sections:
- Section 3: Governance: This section previously included decision making and appeals. This information has been moved to sit alongside the specific processes, such as settlement or Orders.
 - Section 4: Information gathering: details about information gathering was previously set out in various sections across the guidelines. It is now, in the main, set out in section 4.
 - Section 5: Enforcement tools and processes: This section provides increased detail on our enforcement tools and how they are used. The section on provisional and final orders is the most significant addition.
 - Section 6: Settling or contesting a case: This section now includes more information regarding decision making (which was previously section 3).

5.3. We are seeking views on the revised wording and updated process flowcharts.

6. Sectoral Penalty Statement

Section summary

We are proposing to simplify and clarify Ofgem's Sectoral Penalty Statement. We are also proposing to update the Sectoral Penalty Statement to reflect the new requirements introduced through the Supplier Licencing Review (SLR) in January 2021.

Questions

Question 7: What are your views on the changes to the Sectoral Penalty Statement?

Background

Penalty Statements

- 6.1. Under the Gas and Electricity Acts the Authority may impose a financial penalty and/or a consumer redress order. The current Sectoral Penalty Policy was published in 2014 and sets out a range of factors which the Authority will normally consider when:¹⁹
- Deciding whether to impose a financial penalty and/or a consumer redress order;
 - Determining the amount of any financial penalty;
 - Determining the requirements of any consumer redress order.
- 6.2. The current Sectoral Penalty Statement outlines the elements which the Authority will normally consider when calculating the total amount payable by a regulated person, namely:

¹⁹ [Statement of Policy with respect to Financial Penalties and Consumer Redress](#), dated 6 November 2014.

- The 'gain and detriment element'. This includes any gain made by the regulated person and/or any detriment suffered by consumers as a result of the contravention or failure;
- The 'penal element'. This covers the seriousness and any aggravating and/or mitigating factors related to the contravention or failure, together with the need for deterrence.

6.3. The penal element of a penalty amount may be eligible for a settlement discount. The full penalty amount is then subject to a test of reasonableness, and it must not exceed 10% of turnover.

Supplier Licencing Review

6.4. On 22 January 2021, several new licence requirements were introduced through the Supplier Licencing Review ("SLR"). These new SLR requirements mean that for licensed suppliers:

- Some behaviours become a breach in themselves, rather than a factor increasing penalty;
- Some behaviours will no longer be mitigating factors reducing a penalty as they are required by the licence. This includes the requirement to self-report.

Proposed changes

6.5. We are proposing to make the following changes to the Sectoral Penalty Statement:

- a) We are clarifying how licence condition changes, including those introduced through the SLR, will interact with the Authority's decision in respect of determining the level of penalty imposed upon a regulated person. The Sectoral Penalty Statement will be updated to include the following wording:

The Authority regularly introduces and amends relevant conditions and requirements. Conduct which the Authority may, at one point, have taken into account in deciding whether to impose a penalty or make a consumer redress order, and at what level, may, as a result of such changes, amount to a contravention in itself. Where the Authority considers that conduct may amount

to a contravention in itself, it reserves the right not to take that conduct into account in deciding whether to impose a penalty or make a consumer address order and at what level. It may, instead, decide to investigate and impose a penalty or make a consumer redress order in respect of that conduct. That decision will be made in line with Ofgem's Enforcement Guidelines.²⁰

- b) We are proposing to condense the large number of prescriptive factors currently listed in the Sectoral Penalty Statement into more concise paragraphs with higher level descriptions. This principles-based approach will reduce the number of factors currently listed in relation to the Authority's assessment of seriousness and aggravating and mitigating factors, thereby addressing some overlap which currently exists between these sections of the Penalty Statement. Collectively, these proposed changes will clarify and future-proof the Penalty Statement.
- c) We are proposing to update the Sectoral Penalty Statement to reflect the following principles related to the Authority's consideration of gain and detriment:
 - i. Ofgem will calculate supplier gain and/or consumer detriment only where it is proportionate, reasonable and practicable to quantify it.
 - ii. In circumstances where it is not proportionate, reasonable and practicable to quantify gain and/or consumer detriment resulting from the contravention or failure, the Authority will consider such unquantified gain and/or detriment qualitatively as part of its assessment of seriousness.

In Sectoral enforcement cases we often need to rely on the use of assumptions, estimates and complex calculations when calculating licensee gain and consumer detriment resulting from a breach behaviour, which is often a lengthy process. These proposed changes will prevent significant time and resource being spent on

²⁰ For example, regulated suppliers are required to self-report under Standard Licence Condition 5A of the Electricity and Gas Supply Licences. Therefore, self-reporting will not be considered as an aggravating or mitigating factor in the Authority's consideration of penal element in respect of a contravention or failure by a regulated supplier. In the event that a supplier should fail to self-report, the Authority may, instead, decide to investigate and impose a penalty or make a consumer redress order in respect of that conduct.

calculating gain and detriment in circumstances where it is not proportionate, reasonable and practicable to do so.

- d) In accordance with the proposed changes to the Enforcement Guidelines, as outlined in section 2, we are proposing to update the Sectoral Penalty Statement to include details of the proposed amendments to the settlement process.

7. Next steps

List of consultation questions

- Question 1: What is your view on the proposal to remove the middle and late settlement windows, and associated settlement discounts?
- Question 2: What are your views on the option of allowing the Director responsible for Enforcement to be a decision maker in settlement cases?
- Question 3: In your view, are there any other steps you think we could take to speed up the settlement process, without undermining the evidence - based nature of our decision making?
- Question 4: Do you have any comments on the updated guidance on Provisional and Final Orders in section 7 of the guidelines?
- Question 5: Is there any other information on Provisional or Final Orders you would find helpful to be in the Guidelines?
- Question 6: Do you have any comments on any areas of the revised guidelines?
- Question 7: What are your views on the changes to the Sectoral Penalty Statement?

Deadline for responses

- 7.1. Please send your responses to EGPPconsultation@ofgem.gov.uk on or before 04 August 2021.
- 7.2. If you have any questions requesting about the consultation, please contact us on the above email address.

Please see appendix 3 for privacy information.

The documents in appendix 1 may assist you with responding to this consultation.

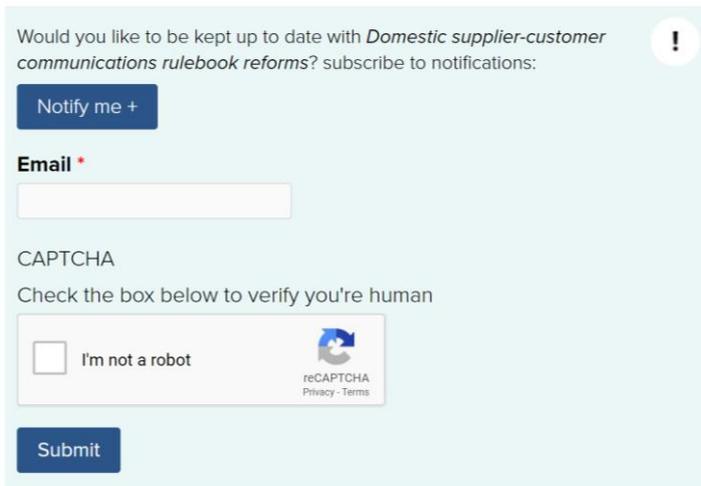
Consultation responses

- 7.3. Unless marked confidential, all responses will be published by placing them in Ofgem's library and on its website www.ofgem.gov.uk. Respondents may request that their response is kept confidential. Ofgem shall respect this request, subject to any obligations to disclose information, for example, under the Freedom of Information Act 2000, or the Environmental Information Regulations 2004. Respondents who wish to have their responses remain confidential should clearly mark the document/s to that effect and include the reasons for confidentiality.
- 7.4. To the extent information provided in any response contains personal data, your rights are set out at Appendix 3. Please note that Ofgem intends to use information contained in responses in performance of its statutory functions, including those applicable to voluntary redress payments, and in accordance with section 105 of the Utilities Act 2000.

How to track the progress of the consultation

- 7.5. You can track the progress of a consultation from upcoming to decision status using the 'notify me' function on a consultation page when published on our website. [Ofgem.gov.uk/consultations](https://www.ofgem.gov.uk/consultations).

Notifications



Would you like to be kept up to date with *Domestic supplier-customer communications rulebook reforms*? subscribe to notifications: !

Email *

CAPTCHA

Check the box below to verify you're human

I'm not a robot  reCAPTCHA
Privacy - Terms

- 7.6. Once subscribed to the notifications for a particular consultation, you will receive an email to notify you when it has changed status. Our consultation stages are:



Appendix 1- Related publications

The below documents may assist you with responding to this consultation.

Enforcement Guidelines

- The current [Enforcement Guidelines](#), revised in 2017.

Penalty Statement

- The current Sectoral [Penalty Statement](#), published in 2014.

Supplier Licencing Review

- [Supplier Licensing Review: Ongoing requirements and exit arrangements](#) consultation
- [Decision on the Supplier Licensing Review: Ongoing requirements and exit arrangements](#)

Appendix 2- General feedback

We believe that consultation is at the heart of good policy development. We welcome any comments about how we've run this consultation. We'd also like to get your answers to these questions:

1. Do you have any comments about the overall process of this consultation?
2. Do you have any comments about its tone and content?
3. Was it easy to read and understand? Or could it have been better written?
4. Were its conclusions balanced?
5. Did it make reasoned recommendations for improvement?
6. Any further comments?

Please send any general feedback comments to stakeholders@ofgem.gov.uk

Appendix 3 – Privacy notice on consultations

Personal data

The following explains your rights and gives you the information you are entitled to under the General Data Protection Regulation (GDPR).

Note that this section only refers to your personal data (your name address and anything that could be used to identify you personally) not the content of your response to the consultation.

1. The identity of the controller and contact details of our Data Protection Officer

The Gas and Electricity Markets Authority is the controller, (for ease of reference, "Ofgem"). The Data Protection Officer can be contacted at dpo@ofgem.gov.uk

2. Why we are collecting your personal data

Your personal data is being collected as an essential part of the consultation process, so that we can contact you regarding your response and for statistical purposes. We may also use it to contact you about related matters.

3. Our legal basis for processing your personal data

As a public authority, the GDPR makes provision for Ofgem to process personal data as necessary for the effective performance of a task carried out in the public interest. i.e. a consultation.

3. With whom we will be sharing your personal data

Your data will not be shared outside of Ofgem.

4. For how long we will keep your personal data, or criteria used to determine the retention period.

Your personal data will be held in line with our processes.

5. Your rights

The data we are collecting is your personal data, and you have considerable say over what happens to it. You have the right to:

- know how we use your personal data
- access your personal data
- have personal data corrected if it is inaccurate or incomplete
- ask us to delete personal data when we no longer need it
- ask us to restrict how we process your data

- get your data from us and re-use it across other services
- object to certain ways we use your data
- be safeguarded against risks where decisions based on your data are taken entirely automatically
- tell us if we can share your information with 3rd parties
- tell us your preferred frequency, content and format of our communications with you
- to lodge a complaint with the independent Information Commissioner (ICO) if you think we are not handling your data fairly or in accordance with the law. You can contact the ICO at <https://ico.org.uk/>, or telephone 0303 123 1113.

6. Your personal data will not be sent overseas

7. Your personal data will not be used for any automated decision making.

8. Your personal data will be stored in a secure government IT system.

9. More information For more information on how Ofgem processes your data, click on the link to our "[Ofgem privacy promise](#)".