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Heather Swan and Megan Pickard
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Office of Gas & Electricity Markets
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Dear Heather/Megan

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

I am writing on behalf of SGN with reference to the consultation detailed above and published by the Authority on 9 June 2021.

Due to the fact that we have not seen the operational side of the Enforcement Guidelines and Sectoral Penalty in practice and given the extent of the changes introduced, it is difficult for us to pass comment on this consultation. Whilst we recognise there is an ambition to improve transparency, we have a specific concern regarding the removal of the late and middle settlements and question whether this is in customer interests.

You'll find answers to the questions posed within the consultation in the annex of this document.

If you have any questions regarding our comments and responses, please do not hesitate to get in touch.

Yours Sincerely,

David Handley
Head of Regulation, SGN



Annex 1 - Response to consultation questions

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

We are concerned with Ofgem's proposal to remove the middle and late settlement windows.

We agree every opportunity should be taken to reach an early settlement where possible, and there should be recognition of the additional resource requirements and costs associated with extending a process for longer. However, we consider this is already reflected in the sliding scale available for settlement from 30% to 10%.

By moving to a single settlement window there is a risk that once the settlement window has closed then there is no longer an incentive for a regulated business to reach a settlement, particularly if it is at the authority's discretion to allow for settlement discounts. This is likely to disincentivise businesses from seeking settlement after the settlement window has closed despite the fact that settlement, even at the middle and late windows, would still result in significant savings in costs for both parties and therefore is more beneficial for consumers than progressing to a hearing.

The period of 28 days for a complex case appears to be a short window if the business involved has limited visibility on the enforcement process being undertaken prior to the start of the 28 day period and it is a complex case. Therefore, again it may simply not be possible for the business to make an informed decision within the first window to undertake investigations, make a decision and obtain board consent if required to settle a matter. Additional periods of time would allow for investigations to be undertaken and internal processes to be completed which are proportional to the sliding scale settlement discounts currently available

The basis for making this adjustment appears to be that it has not been used to date. Without knowing the number of enforcement disputes and the settlements delivered it is not easy to take a view on whether this is a robust point of reference or not.

Finally, it appears there is a move from having settlement and contested matters running in parallel to running at different times. It is not clear why this change is required or why it is beneficial to any parties. By not running the matters in parallel this can lead to increased costs and resources by having to run separate matters and further delays in ultimately receiving a decision. We consider any such change is therefore detrimental.

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

We note the current proposal to allow the Director responsible for enforcement to be a decision maker in the settlement process due to current burdens on the Enforcement Decision Panel (EDP).

The current drafting is not clear as to when the EDP or a Director responsible for Enforcement would be making a decision. Whilst we note that the Director responsible for Enforcement has been involved to date, these decisions have been part of alternative action and therefore the findings have not been formal. It is our view however the regulated business should have the opportunity to request the involvement of the EDP, should they consider the panel to provide a perspective or independence that may not be present with an Ofgem Director.

We would like to note, it remains important the EDP are engaged at an early enough stage where a decision is contested and they are afforded the time and capacity to build an understanding of potentially complex cases in order to maintain their level of independence and challenge.



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?

We do not have a specific view on opportunities to speed up the settlement process, however we would stress it should not risk undermining a high quality, evidence based, decision making process. By involving regulated companies early in the investigation, it will give them an opportunity to also undertake their own investigations at an early stage and be in a better position to potentially approach early settlement.

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

In principle, we think the additional guidance is helpful in providing greater transparency. However, we note the guidance has changed substantially from the previous document. The amendments are difficult in part to follow and track as the previous guidance did not contain the same level of detail. We would therefore welcome greater visibility of the changes in order that we may be in a position to comment on the same.

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

We would like to see greater clarity in how Ofgem will determine the application of a provisional or final order.

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

Whilst we are supportive in principle of the revised guidelines on the basis that it provides greater clarity, important change with regards to the removal of the middle and late settlement discounts have not been referenced in this section. We are therefore concerned that not all amendments and inclusions are clear. Given the extent of the changes it is difficult for us to provide an informed view without an appropriately itemised list of significant changes. As per our example above section 5.2 of the consultation doesn't provide enough detail.

Given our position on question 1, we would like to see the reinstatement of the middle and late settlement discounts reintroduced back into the flowchart.

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

We recognise the attractiveness of moving to a principles-based approach rather than a highly prescriptive approach to the penalty setting. It's important this rigour and transparency is maintained and where a calculation to determine a penalty is established the underlying analysis should be made available for scrutiny.