Decision

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

Subject	Details
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This document sets out the Gas and Electricity Markets Authority's ("the Authority") revisions to the Enforcement Guidelines and the Sectoral Statement of Policy with respect to Financial Penalties and Consumer Redress (the "Penalty Statement") following our consultation of 9 June 2021. Having considered and taken account of stakeholder feedback received in response to our consultation, we have decided to progress our proposed amendments with the exception of minor drafting amendments.

The Authority has made the following main decisions:

1. To remove the middle and late settlement windows from our settlement process.
2. To allow the Director responsible for Enforcement to be the sole decision maker in settlement, in addition to Settlement Committees.
3. To amend our Enforcement Guidelines to reflect the above changes and other general updates, including changes to the section on provisional and final orders.
4. To amend our sectoral Penalty Statement in accordance with the changes proposed in our consultation.

Contents

Executive summary

Ofgem's Enforcement Guidelines were last revised in 2017 and the Penalty Statement 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.[1]

We conducted a review of the Enforcement Guidelines and Penalty Statement and on 9 June 2021 we launched a consultation on our proposed changes to these documents.[2] The proposed changes involved updating and streamlining our processes and reflecting new requirements brought in under the Supplier Licencing Review ("SLR").[3]

The consultation outlined our proposed changes in respect of the specific areas listed below:

- middle and late settlement windows;
- decision-making in settlement cases;
- penalty and redress options following a final order or provisional order;
- general updates to the Enforcement Guidelines, including proposals for changes to the Enforcement Guidelines as necessary to reflect the new SLR requirements,
- updates to our Penalty Statement, including proposed changes which are necessary to reflect the new SLR requirements.

During the consultation period we conducted further engagement with stakeholders.[4] Since the consultation closed on 4 August 2021, we have carefully considered all responses and for the reasons explained in this document, the updated version of the Enforcement Guidelines published alongside this decision document is largely in the form published in our consultation, except for a number of minor drafting changes, aligning terminology and definitions.

[1] For the purposes of this decision document, the 'Authority' and 'Ofgem' are used interchangeably, collectively referred to with pronouns such as 'we' and 'our'
[2] Consultation on changes to Ofgem's Enforcement Guidelines and Sectoral Penalty Statement | Ofgem
[3] Decision on the Supplier Licensing Review: Ongoing requirements and exit arrangements | Ofgem
[4] Industry forum of 20 July 2021.

1. Introduction

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

1.2. 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.

1.3. We conducted a review of the Enforcement Guidelines and Penalty Statement, taking account of the evolving market and recent enforcement experiences.

1.4. Following this review, on 9 June 2021 we launched a consultation on amendments to the Enforcement Guidelines and Penalty Statement. Our consultation document outlined our proposals to enhance our ability to act swiftly to stamp out bad and sharp practice, ensure non-compliant conduct is put right, send strong deterrence messages and, where appropriate, ensure consumers are compensated in a timely manner.

1.5. We also held a forum with industry on 20 July 2021 to outline the proposed changes and hold a question and answer session.

1.6. Our consultation closed on 4 August 2021. Following careful consideration of the feedback received, this document sets out our decisions following the consultation.

Our decision-making process

1.7. A total of 15 responses were received to the consultation from a range of stakeholders.[5]

1.8. We have carefully considered all responses before making our decisions on the proposed changes. This document sets out our decisions.

[5] All responses are published at Consultation on changes to Ofgem's Enforcement Guidelines and Sectoral Penalty Statement | Ofgem

1.9. Please note the Authority can take enforcement action against both companies and other undertakings (such as a sole trader, partnership, company, or a group of companies where appropriate). The word "company" or "business" in this document should be understood to include all forms of undertakings.

1.10. The revised Enforcement Guidelines will come into effect on the date of publication and will apply to all current and future investigations. The Authority will have regard to the revised version of the Penalty Statement when deciding whether to impose a financial penalty and in determining the amount of any financial penalty in respect of any contravention or failure which occurs on or after the date on which the revised Penalty Statement is published. The Authority will have regard to the revised version of the Penalty Statement when deciding whether to make a consumer redress order in respect of any contravention and in determining the requirements to be imposed by any such order.

Related publications

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

The Enforcement Guidelines | Ofgem

Statement of Policy with respect to Financial Penalties and Consumer Redress | Ofgem

Your feedback

General feedback

1.11. We believe that consultation is at the heart of good policy development. We are keen to receive your comments about this report. We'd also like to get your answers to these questions:

1. Do you have any comments about the overall quality of this document?
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. Are its conclusions balanced?
5. Did it make reasoned recommendations?
6. Any further comments?

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

2. Middle and late settlement windows

Section summary

This section summarises our decision to remove the middle and late settlement windows and associated discounts from our settlement process.

What did we consult on?

2.1. The consultation proposed removing the middle and late settlement windows and the associated 20% and 10% settlement discounts.

2.2. We proposed this change to incentivise settlement and to avoid settlement and contest running in parallel.

Stakeholder feedback from the consultation

2.3. We asked stakeholders for their views on our proposal and received a range of views in response. There was some support for streamlining the current process to encourage businesses under investigation to settle earlier in the process and therefore ensure that redress and deterrent impact are achieved closer to the breach period.

2.4. However, there was also support for retaining the middle and late settlement windows and associated discounts. Concern for the removal of the latter two settlement windows fell into the following themes:

Evidence that the process will be quicker

2.5. *Point raised in consultation:* There was some support for redress to be secured and deterrence to be signalled closer to the breach period. There was also a desire amongst respondents to see more evidence that the changes that the Authority proposes to make will speed up the process of decision-making.

2.6. *Ofgem response:* During the review of our current processes, we engaged with other regulators on their processes and lessons learned. The Financial Conduct Authority removed

discounts for settling at stage 2 (with an associated 20% discount) and stage 3 (with an associated 10% discount) in 2017.[6]

2.7. Further, in our own experience of past enforcement cases, it is often clear whether or not a case will be contested from the point of the first window opening. Therefore, removal of the second and third windows would reduce the length of time taken to reach contest as it will avoid the settlement and contested processes running in parallel, which diverts resource from progressing with the arrangements for a contested decision. A deterrent signal would therefore also be sent out to industry quicker, which we believe would help prevent further detriment arising.

2.8. The Authority recognises that, whilst the later settlement windows have not been used to date, this is not, on its own a reason to remove them. However, we consider that their removal will focus minds onto settling in the one window of opportunity, where a significant discount is still available. By removing the latter windows there is greater incentive to settle sooner.

Enforcement of principles-based provisions

2.9. *Point raised in consultation:* Some respondents noted that as the Authority moves towards principles-based regulation, the two later settlement windows may be more likely to be utilised. This is based on respondents' view that principles-based provisions will be more complicated to enforce, or breaches could potentially be more likely to be disputed.

2.10. *Ofgem response:* The Authority has secured successful enforcement outcomes on breaches of principle-based provisions without the use of the middle or late settlement windows. Further, the Authority applies the same level of rigour to investigations dealing with principles-based provisions as we do in other investigations and makes considered decisions based on the available evidence. Licensees under investigation have the opportunity to respond to Ofgem's findings prior to the opening of the settlement window in their response to the Summary Statement of Initial Findings ("Summary Statement"), which will outline the outcome of the investigation phase, including the breaches we consider have been committed. As outlined in the consulted version of the Enforcement Guidelines, we will allow a reasonable period (normally 21 days for standard cases and 7-14 days for more straightforward cases) for written representations in response to the Summary Statement.

[6] PS17/1: Implementation of the Enforcement Review and the Green Report (fca.org.uk)

We may also offer the business an opportunity to make oral representations on it to the case team, at an optional case direction meeting ("CDM"), for example if the nature of the breach is complex. Therefore, by the time a settlement mandate is served, and the settlement window opens, the company will be fully aware of the details of the case. The amount of time the settlement window is open will reflect the complexity of the case.

2.11. Further, as outlined in the consultation version of the Enforcement Guidelines, we may consider offering a discount outside of the settlement window in exceptional circumstances.

Increased number of contested cases

2.12. *Point raised in consultation:* Several respondents raised concerns that by removing the middle and late settlement windows, which they believe are more likely to be used in the future (see paragraphs 2.9 – 2.11 above), the Authority risks increasing the number of cases that go to contest.

2.13. *Ofgem response:* The Authority considers this point is a possible outcome, but considers it too early to see how energy companies will respond and it will progress contested cases where necessary. The resources we expect to save on cases being settled earlier will outweigh the potential added resources of contest. In any event, the cases that do progress to contest will be resolved more quickly because they would not have gone through two extra settlement windows and the Authority will not have to produce a Statement of Case at the same time as going through the settlement process. One of the reasons companies choose to go through settlement or Alternative Action[7] is the cost and resource benefits saved through these processes in comparison to contest.

2.14. Further, as the second and third windows have not been used in the past, we expect that the majority of cases that go through to contest would have been contested anyway,

[7] In certain circumstances, Alternative Action may be used to bring the business into compliance and remedy the consequences of any non-compliance. Please see paragraphs 5.57-5.65 of the Enforcement Guidelines.

even with three opportunities to settle. Therefore, the time savings made from contested cases outweigh the small risk of additional contested cases.

Settlement window length

2.15. *Point raised in consultation:* A number of respondents raised concerns that the proposed settlement window was not long enough and therefore the middle and late windows are a good option for complex cases where settlement cannot be reached in this window. Some respondents commented that the proposed settlement window length of 28 days is long enough.

2.16. *Ofgem response:* The Authority confirms that the 30% discount and 28 days are the default settlement window options and, unless there are exceptional circumstances, this will be offered proactively by Ofgem i.e. the business won't have to request this. In exceptional circumstances and on a case by case basis where this process is not followed, we will make our reasoning known to the business under investigation as to why the default options are not offered.

2.17. The Authority has the discretion to extend or reopen the settlement window in exceptional circumstances and may offer a settlement discount in such cases, although there is no guarantee of this. It is the responsibility of the company under investigation to request to extend or reopen the settlement window and the Authority will consider this on a case-by-case basis.

2.18. Prior to settlement, the company under investigation will have been served with a Summary Statement and, if appropriate, offered a CDM to discuss the case. This means that at the point a settlement mandate is served, and the settlement window opens, the company under investigation should be sufficiently informed about the details of the case and the rationale behind the settlement offer.

Details on exceptional circumstances

2.19. *Point raised in consultation:* Several respondents requested more detail regarding circumstances that would lead to reopening or extending the settlement window.

2.20. *Ofgem response:* We do not intend to give a list of factors that would lead to a change to the usual process. The option is there to account for exceptional circumstances which are outside of the norm; for example, where exceptional unforeseen issues present themselves. Parties under investigation will need to present their case to us and demonstrate that the

circumstances are exceptional and we will consider each case on its merits. It could be that new evidence comes to light that was not available during the investigation phase and may significantly change the position of the company under investigation and the party under investigation may believe they may need more time to consider their position.

Investigation check points

2.21. *Point raised in consultation:* Within the consultation responses there was a suggestion of introducing checkpoints to ensure that companies under investigation are ready to move onto the next stage of an investigation.

2.22. *Ofgem response:* At each stage of the investigation Ofgem has a number of internal processes and checks and balances in place and the issues are usually discussed with the Enforcement Oversight Board to help make informed decisions on whether to progress to the next stage of an investigation. We usually keep the company informed of the outcome of any key decisions made. More generally, we endeavour to keep the company updated with the progress of the investigation and any changes to timelines or the investigation as they arise.

Alternative settlement process suggestions

2.23. *Point raised in consultation:* There were also a small number of respondents that supported reviewing the settlement process, but instead suggested an alternative approach to either of the current and proposed approaches. For example, introducing two settlement windows instead of three, with different discounts suggested.

2.24. *Ofgem response:* As noted in paragraph 2.6 above, the proposed approach is similar to that of the FCA in removing the latter two windows. Further, in our experience, it is clear from the first window whether the case will be settled or contested. Additionally, Ofgem has no evidence that altering the discounts will encourage more people to settle in the early window, and not contest. As a result, removing only one window or adjusting the discounts may not reduce the time it takes to get through the process from what it is now.

2.25. *Point raised in consultation:* There were a small number of respondents that would like the Authority to consider running the settlement and contest processes in parallel.

2.26. *Ofgem response:* In the current process settlement and contest run in parallel and, based on the experience that Ofgem has of working through the enforcement process, we consider that this approach is resource intensive and impractical; settlement and contest involve differing processes and interactions with the company under investigation and

running both in parallel requires significant time and resource from the case team and reduces the appropriate focus and attention needed for each process. In addition, settlement is intended to expedite the resolution of a case and avoid the resource needed for contest. If we continue to run the two approaches in parallel, it is not clear how there would be a resource saving.

Impact on penalty calculation

2.27. *Point raised in consultation:* A respondent was concerned that with one settlement window and a set 30% discount, Ofgem would be minded to calculate the penalty and then, as an additional step, proceed to inflate the penalty to account for the discount. The respondent also wanted confirmation that the settlement discount is applied consistently, transparently and proactively by Ofgem.

2.28. *Ofgem response:* In all cases the Authority has regard to the applicable penalty statement in determining the level of any penalty and this will generally be based on the factors in the penalty statement – for example seriousness, impact, mitigating and aggravating factors. We do not intend to change this approach. Relevant information on Ofgem's determination of the penalty level is set out in appropriate detail in the documentation provided to the business prior to settlement. The penalty discount provides an incentive for the company to settle, reflective of the resource and time saving by both sides.

Statement of Case

2.29. *Point raised in consultation:* Some respondents commented on where the Statement of Case ("STOC") falls in the process of settlement.

2.30. *Ofgem response:* For the purpose of clarity, we are not proposing changes to the contest process. During settlement, the Summary Statement details the outcomes of the investigation and is issued to the company under investigation. The company will then have the opportunity to respond to the Summary Statement and may attend a CDM (if relevant) with the case team before the settlement window is opened. The STOC is only issued during contest, following the closure of the settlement window. The company under investigation is given the opportunity to respond to the STOC as part of the contest process and will be informed of the timeframe for providing a response.

2.31. The settlement process offers both The Authority and the company under investigation the resource saving of not having to draft and respond to the STOC, respectively. This

resource saving in part justifies the reduction in the penalty. If settlement fails and the case moves to contest, we may request further information from the company.

2.32. *Point raised in consultation:* A respondent also commented that the Authority should always inform a business in writing if a STOC is being drafted.

2.33. *Ofgem response:* The Authority's usual process is to inform a company of the process that is being followed. The Authority may divert from timelines or order of process without alerting the business in certain circumstances.

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2.34. We have carefully considered the responses that we received from our consultation. Having done so, we have decided to remove the middle and late settlement windows and the respective 20% and 10% discounts. This will mean we will have one settlement window, as follows:

- **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.
- **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.

2.35. The Authority considers that removal of the windows will encourage settling, but still gives companies enough time to deliberate and reach their decision. Further, the time and resource savings resulting from this change mitigates against any increased risk of cases reaching contest, whilst retaining our robust and high-quality decision making. The Authority considers that the introduction of a single settlement window will provide a more effective alternative to Alternative Action, better outcomes for consumers and other energy market participants and send out far more significant deterrence signal to other regulated parties.

3. Decision making in settlement cases

Section summary

This section summarises our decision to enable the Director responsible for Enforcement or a nominated alternative employee of Ofgem at Director level to be a sole decision maker in settlement.

What did we consult on?

3.1. The consultation proposed to add the Director responsible for Enforcement or a nominated alternative employee of Ofgem at Director level as an option for the decision maker in some settlement cases.

3.2. This amendment was proposed to streamline processes and allow more cases to be taken through settlement, rather than Alternative Action, which will result in stronger deterrent signals to the sector and create valuable precedents.

Stakeholder feedback from the consultation

3.3. We asked stakeholders for their views on the option of allowing the Director responsible for Enforcement or a nominated alternative employee of Ofgem at Director level to be the sole decision maker in settlement cases and if there are any other steps they think we could take to speed up the settlement process, without undermining the evidence-based nature of our decision making.

3.4. The responses we received can be split into the following themes:

Credibility, independence and robustness of decision making

3.5. *Point raised in consultation:* Whilst there was support for the option of having the Director responsible for Enforcement or a nominated alternative employee of Ofgem at Director level as a sole decision maker in settlement, a number of respondents noted concerns that this could result in a loss of credibility and independence in decision making.

3.6. *Ofgem response:* Decision making will remain evidence-based in accordance with the facts of the case. The Director responsible for Enforcement or a nominated alternative employee of Ofgem at Director level is not usually involved in the day to day running of

investigations and a Settlement Committee remains as an option for decision making in settlement. There is also the option for the Director responsible for Enforcement to nominate an alternate Director to be the settlement decision maker. The investigatory phase of an investigation, a stage to which no changes are being made, will continue to involve the rigorous examination of all evidence, thereby ensuring all decision makers are fully informed of the circumstances of each investigation.

3.7. Additionally, as previously mentioned, in all settled enforcement cases a penalty is imposed having regard to the Penalty Statement, which ensures transparency and robustness. In addition, Ofgem has previously achieved successful outcomes through Alternative Action which generally involves a senior Ofgem employee as a decision maker. This demonstrates that parties are willing to engage with a Director as a decision maker.

3.8. *Point raised in consultation:* A respondent also noted a concern that revising the decision making processes was contrary to revisions made in 2013, where Ofgem introduced the Enforcement Decision Panel ("EDP").

3.9. *Ofgem response:* Since the EDP was introduced, the energy market has evolved, and continues to evolve. For example, there are now a greater range of companies in the market, and it is therefore important for us to have greater flexibility in our processes. We believe introducing a new settlement decision making option to create more flexibility allows us to adapt to the ever-changing market. It is important to note that a Settlement Committee, made up of two EDP members and an Ofgem Senior Civil Servant, remains an option to be the decision maker in settlement.

3.10. *Point raised in consultation:* Another concern raised in respect of the option for the Director responsible for Enforcement or a nominated alternative employee of Ofgem at Director level to be the sole decision maker was that they may not have sufficient expertise for that case.

3.11. *Ofgem response:* Forming a Settlement Committee remains an option if we determine that this is more appropriate for the circumstances of the case. The Director with responsibility for Enforcement may also nominate another Director who may have a different area of expertise.

Speed of decision making

3.12. *Point raised in consultation:* There was some support for broadly speeding up the enforcement process so that redress could be secured closer to the breach period and a

deterrent signal would be sent out sooner, thereby encouraging others to put right any similar behaviours more quickly. However, a number of respondents noted concerns that Ofgem's perceived focus on the speed of decision making may sacrifice the quality of decision making.

3.13. *Ofgem response:* All decision making is evidence based and assessed on a case by case basis and focus will remain on quality and robust decision making. There is benefit from resolving cases faster as this ensures that deterrence signals are sent out sooner so other consumers do not experience detriment from similar breach behaviours. The Enforcement Guidelines have been revised with both quality of decision making and speed in mind, and we believe this change will speed up the process for appropriate cases, without sacrificing the quality of decision making.

Decision making audits

3.14. *Point raised in consultation:* A respondent noted that decisions made by a Director should be audited by a third party.

3.15. *Ofgem response:* The Authority does not intend to involve a third party to audit the decisions made by the Director, a Settlement Committee or the EDP outside of normal auditing processes. The Authority has a robust delegation process in place for decision making. We may also request feedback as part of an internal lessons learned evaluation process we usually hold following the closure of a case or enforcement action to assess what went well and what we could do to improve. If still dissatisfied, there are appeal mechanisms if the company under investigation identifies issues with the enforcement process which they believe impacted the outcome of an investigation. As set out above, the process will not impact the robustness or transparency of the investigation or analysis.

Alternative Action

3.16. *Point raised in consultation:* There was concern that the issue behind the increase in Alternative Action in recent years was because of a lack of resource in Ofgem.

3.17. *Ofgem response:* We can clarify that this is not the main driver for the changes. We are taking steps to streamline processes and consequently reduce resource burden for both Ofgem and parties under investigation. This will ensure we are able to focus our resources, increase the deterrent messages sent to industry and address consumer harm closer to the breach period. The consultation reflected feedback from parties under investigation which expressed the desire to resolve things efficiently, which will be more effective once the process is streamlined.

3.18. *Point raised in consultation:* A number of respondents raised concerns that the intention to move away from Alternative Action to more cases closed through settlement was based on Ofgem's perception that Alternative Action was a more lenient process.

3.19. *Ofgem response:* We have secured many successful outcomes through Alternative Action and this process will remain part of our enforcement toolkit. Enabling the Director responsible for Enforcement or a nominated alternative employee of Ofgem at Director level to be the decision maker will allow more cases to go through settlement and result in a finding of breach, which sends a stronger deterrent message and secures a stronger precedent for future breach behaviours.

3.20. In the consultation, we outlined that an Ofgem Director had acted as decision maker in cases resolved through Alternative action, and this has worked well. Some respondents believe that this is not a reason on its own to argue that having the Director responsible for Enforcement or a nominated alternative employee of Ofgem at Director level as sole decision maker in settlement cases will work well, as cases resolved through Alternative Action do not always result in a finding of breach.

3.21. From our experience and the lessons learnt from past investigations, companies under investigation are often keen to progress cases as quickly possible and introducing the changes to decision making will allow this, where appropriate. Resolving cases through Alternative Action with a Director as a decision maker demonstrates that companies are willing to engage with a Director as a decision maker. Alternative Action still remains an option but with the less resource burdensome option of Director as an option for decision maker in settlement, it will ensure that any cases resolved through Alternative Action went through that process because it was the most appropriate route for the case.

3.22. We acknowledge that, although in some cases a breach is identified, there is usually no published formal finding of breach in cases resolved through Alternative Action in the same way that there is through settlement – where we publish a consultation on the penalty notice which outlines findings of breach and the evidence we found as a part of closing the case - and that may be attractive to some businesses. As a regulator it is our role to enforce legal provisions falling within our remit and in some cases a finding of breach is important to secure a strong deterrent message and precedent. Allowing the Director responsible for Enforcement or a nominated alternative employee of Ofgem at Director level to be the sole decision maker in settlement will save time for both parties as we will not need to convene a Settlement Committee. We assert that the time saving will result in an increase in the number of cases going through settlement and therefore send out more and stronger signals of deterrence, as settlement will result in a formal finding of breach.

3.23. *Point raised in consultation:* A small number of respondents wanted evidence that this change would lead to more cases going through the settlement process.

3.24. *Ofgem response:* We have analysed recent cases that have been resolved through Alterative Action and identified cases that would have been suitable to be resolved through settlement with a Director, or their nominated alternate, as the sole decision maker. The move towards making a formal finding of breach in more cases will become more practical to achieve by reducing the time taken to resolve cases through the use of a Director as the decision maker. We are also seeing increased levels of continued non-compliance which needs to be met with stronger signals of deterrence and more robust decisions. A formal finding of a breach will provide a stronger deterrence message.

3.25. Alternative Action will remain part of our enforcement and compliance toolkit, however by streamlining settlement, making a formal finding of breach becomes a more viable option. All decisions on the appropriate course of action for enforcement cases, including whether to pursue settlement, are usually, and will continue to be, decided following the EOB members making a recommendation to the Chair of the EOB on a case by case basis[8]. Where appropriate, the EOB generally considers the circumstances of the case when it recommends whether Alternative Action is appropriate. Section 5.5 – 5.25 of the Enforcement Guidelines outlines how we prioritise enforcement cases.

3.26. *Point raised in consultation:* A respondent noted that the Director responsible for Enforcement is also the chair of the EOB, and therefore the respondent felt like it is essentially the Director appointing themselves as the decision maker.

3.27. *Ofgem response:* Decisions about the appropriate settlement decision maker will be carefully considered and will typically be made following a recommendation by the case team on the appropriate approach. The matter will usually also be discussed with the EOB, where this is appropriate, and the EOB members can provide insights and challenges in relation to a proposed approach, where this is appropriate. The Director may also be guided by a range of other factors and advice depending on the case in question.

[8] The EOB is made up of senior civil servants from around Ofgem chaired by the Director responsible for Enforcement. This Director is the final decision-maker.

3.28. *Point raised in consultation:* Some respondents argued that Alternative Action is not a weaker deterrence signal and that Ofgem should not move away from it.

3.29. *Ofgem response:* We believe a formal finding of breach sends a stronger deterrence signal and we make it clear when publishing that settled cases will have a penalty notice which notes the formal finding of breach. Whilst we accept the difference between Alternative Action and settlement may not always be obvious to consumers, there is an important difference and one that is broadly understood by the energy industry. This, we believe, does make a difference to the deterrence impact across the market and results in a reduction in non-compliance, which in turn is reflected in the confidence that consumers and businesses have in Ofgem as a regulator.

3.30. *Point raised in consultation:* There were further concerns that moving away from Alternative Action will result in an increase in length of time taken to resolve cases.

3.31. *Ofgem response:* Although a case may take longer to resolve, there is value gained in a formal finding of a breach through settlement and using a Director as the decision maker will ensure settled cases can be resolved more quickly.

Deciding who the decision maker is

3.32. *Point raised in consultation:* There were responses that supported having the Director responsible for Enforcement or a nominated alternative employee of Ofgem at Director level as an option for decision maker, but some suggested that they should not be the main option.

3.33. *Ofgem response:* The Director responsible for Enforcement or a nominated alternative employee of Ofgem at Director level is not the only option, the Settlement Committee also remains an option as a decision maker.

3.34. *Point raised in consultation:* One respondent suggested that a Director should be used as a decision maker for cases where there was a technical breach and limited consumer harm.

3.35. *Ofgem response:* All circumstances of a case will be taken into consideration when the EOB recommends who the decision maker should be in settlement.

3.36. *Point raised in consultation:* A small number of respondents suggested that it should be made clear from the outset of a case whether a Settlement Committee, the Director responsible for Enforcement or another Director will be the decision maker, should the case reach the settlement stage.

3.37. *Ofgem response:* The decision maker in settlement will be recommended by the EOB members to the chair of the EOB, when they make a recommendation on whether to proceed to settlement. The decision cannot be made earlier as during the initial stage of an investigation we cannot foresee whether the case will go to settlement and the nature of the case may have changed significantly between the initial stage and settlement stage. Both of these factors could change the decision maker deemed to be appropriate and subsequently recommended by the EOB.

3.38. *Point raised in consultation:* A number of respondents asked if they can appeal the decision for the Director responsible for Enforcement or a nominated alternative employee of Ofgem at Director level to be the settlement decision maker.

3.39. *Ofgem response:* The EOB will recommend who the decision maker in settlement should be based on the circumstances of the case. Our decision will generally be final. If a company does not wish to settle with a Director as a decision maker, they may contest the case, where the EDP is the decision maker.

3.40. *Point raised in consultation:* There were respondents that were supportive of the potential time savings of having the Director responsible for Enforcement or a nominated alternative employee of Ofgem at Director level as an option for decision maker but were concerned that the overall time savings would be lost due to more businesses choosing to contest their case for this reason.

3.41. *Ofgem response:* We do not foresee more cases reaching contest because of this change as we have previously secured successful outcomes through Alternative Action, where a Director is a decision maker, and received feedback from previous investigations that parties under investigation want to reach settlement in a timely manner. All decision making, regardless of the decision maker, is evidence-based and the penalty is determined in accordance with the Penalty Statement. We accept the risk that there could be more contested cases, however we consider the risk low. If cases do go to contest, this outcome should be reached quicker than through the current process, on account of the time saved through speedier decision making and the removal of mid and late settlement windows.

3.42. In order to clarify the position around the ability of the chosen decision maker to delegate authority, we would like to confirm that in the current process, which will continue following the introduction of these changes, the Settlement Committee is usually made up of two members of the EDP and an Ofgem Senior Civil Servant. Following the introduction of the changes from this consultation, the Director responsible for Enforcement or a nominated alternative Director may be the sole settlement decision maker, depending on the nature of

the case. Once a settlement decision maker has been decided, this will usually not change further down the line. If the proposed settlement arrangements are not agreeable to the company, it has the option of proceeding to contest.

Published findings

3.43. *Point raised in consultation:* A respondent was concerned that there could be occasions where Ofgem may decide not to publish findings through Alternative Action, or when outcomes are published but where the business/es under investigation are not named.

3.44. *Ofgem response:* Details of cases resolved via Alternative Action will normally be made public as we have set out in the Enforcement Guidelines. There may be some exceptional circumstances where it would be appropriate for the business not to be named, for example where legal restrictions apply. We will consider whether to exclude information or offer anonymity in line with the Enforcement Guidelines.

Decision

3.45. We have carefully considered the responses received from our 9 June 2021 consultation. After considering this feedback, the Authority has decided to allow the Director responsible for Enforcement or a nominated alternative Director to be able to make decisions for the purposes of achieving settlement, including, but not limited to, the decision:

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

3.46. The EOB will usually recommend who the decision maker in settlement should be to the Chair of the EOB.

3.47. 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 a formal finding of breach and strong deterrence messaging.

3.48. The option remains for a Settlement Committee, made up of two members of the EDP and an Ofgem Senior Civil Servant to be a decision maker.

3.49. The option for Alternative Action will remain.

3.50. The EDP will remain the decision makers in contested cases.

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

Section summary

We consulted on amendments to the wording included in the Enforcement Guidelines in respect of our processes for making final and provisional orders, particularly on imposing a penalty following an order. We have accepted these amendments.

What did we consult on?

4.1. The Authority has the power to impose provisional or final orders to bring energy companies into compliance with relevant conditions and requirements.

4.2. The consultation proposed providing more information on the order processes, most notably on imposing a penalty or redress order following an order, to provide greater clarity and to reflect our recent experiences.

Stakeholder feedback from the consultation

4.3. We asked stakeholders for their comments on the updated Enforcement Guidelines and if there was any other information on provisional or final orders that would be helpful to include. Generally, respondents were supportive of the further information being provided.

4.4. *Point raised in consultation:* There were concerns raised that the proposed revised guidelines mention that the final order consultation may be less than 21 days. Stakeholders requested that the criteria for the circumstances which could cause the timescales to change be shared.

4.5. *Ofgem response:* It is a legislative requirement to consult for a minimum of 21 days on all final orders. [9] Where appropriate, for example where there is more urgency, we may make a provisional order, which comes into effect the date it is made.

[9] 29(1)c of the Gas Act and 26(1)c of the Electricity Act.

4.6. *Point raised in consultation:* Another comment raised was the concern that under the proposed revised guidelines, Ofgem would not consistently apply provisional orders and final orders across energy companies of different sizes.

4.7. *Ofgem response:* The Gas Act 1986 and the Electricity Act 1989 outline the procedural and other requirements for orders. Ofgem seeks to apply these provisions, as appropriate, in a consistent and fair way in our use of provisional and final orders. Where appropriate, we will continue to follow this approach across the energy companies we regulate.

4.8. *Point raised in consultation:* Stakeholders also commented that Ofgem should be acting more quickly when using provisional and final orders, particularly when the regulated party is likely to go out of business.

4.9. *Ofgem response:* The Authority may make a provisional order, for example in cases where there is urgency and an immediate need to address consumer harm, which comes into effect on the date it is made.

4.10. *Point raised in consultation:* A respondent requested further guidance with examples of circumstances where a provisional order or final order would be made. Examples were noted in paragraph 7.2 – 7.3 of the consultation.

4.11. *Ofgem response:* Ofgem has considered this request, however we have decided not to include this in the Enforcement Guidelines. This decision has been made to reflect the changing nature of the energy market and to ensure that the Enforcement Guidelines do not become outdated through the inclusion of examples which may be superseded in the future. Details of orders are generally also published on the enforcement section of our website. Several respondents noted that the updated guidance on provisional and final orders within the revised guidelines was useful as a reference tool and provided clarity and transparency.

4.12. *Point raised in consultation:* In relation to provisional orders and paragraph 2.12 of the Enforcement Guidelines, it was suggested by a respondent that Ofgem should consider that it has a duty to consumers and licensees and that any impact on other non-licensees should be dealt with through appropriate legal channels.

4.13. *Ofgem response:* Ofgem cannot apply an interpretation of our enforcement powers which constrains our statutory powers. For example, our statutory powers in relation to provisional orders require us to have regard in particular:

*"(a) to the extent to which **any person** is likely to sustain loss or damage in consequence of anything which, in contravention of the relevant condition or requirement, is likely to be done, or omitted to be done, before a final order may be made; […]"*

4.14. *Point raised in consultation:* a respondent noted that an incorrect statutory reference was referenced in relation to appeals of orders in the Enforcement Guidelines.

4.15. *Ofgem response:* We have corrected this in the Enforcement Guidelines.

Decision

4.16. We will be adopting the proposed wording in the Enforcement Guidelines with the exception of minor drafting amendments.

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 the Authority has decided to revise the text, to improve clarity of the wording, and provide greater transparency around our enforcement processes and procedures.

What did we consult on?

5.1. The consultation proposed amendments to the Enforcement Guidelines which were deemed necessary, appropriate or helpful to provide greater clarity and transparency of legislative developments and changes to our processes where appropriate.

Stakeholder feedback from the consultation

5.2. We asked stakeholders for their comments on the revised Enforcement Guidelines and if there was any information that would be helpful to include.

5.3. Respondents were generally supportive of the changes made in the proposed guidelines. Some requested an itemised list of all changes made as certain amendments were not as clear as others. Some respondents who were supportive of the aims of the changes to the Enforcement Guidelines believed further amendments would still be needed to ensure there is transparency and clarity.

5.4. Respondents were broadly supportive of Ofgem's objective of speeding up the investigative and enforcement process, but others were interested in further clarification from Ofgem and felt further justification was required for the streamlining of enforcement processes.

5.5. *Point raised in consultation:* Respondents enquired about when the proposed revised Enforcement Guidelines would come into effect and whether the revisions would be applied to projects that are already ongoing.

5.6. *Ofgem response:* The revised Enforcement Guidelines will come into effect the date they are published and will be applied from that day forward. For existing cases, the removal of the middle and late settlement windows and the option for the Director responsible for

Enforcement, or a nominated alternative Director, to be a decision maker in settlement will apply to cases where a settlement mandate has not yet been issued.

5.7. *Points raised in consultation:* Paragraph 5.1 of the proposed revised guidelines states that *"This section describes what enforcement processes are available to us, how we will usually use them in practice and how we would identify and decide whether to investigate a potential breach or infringement"*. Respondents enquired why the word *usually* was used and what differences in the process would occur under these circumstances. Concern was also raised over the use of Ofgem's wording which mentioned that *"Ofgem may depart from guidelines"* (for example in paragraph 1.12). This wording raised concerns over the transparency of what departing from guidelines meant, potentially creating uncertainty and potential unfairness between cases if the process followed is not consistent. It was also raised that any departing from the defined process should be decided upon and agreed between Ofgem and relevant parties involved in the investigation.

5.8. *Ofgem response:* There may be a variety of circumstances where it would be appropriate to depart from the procedures set out in the Enforcement Guidelines and whilst we cannot be prescriptive about those circumstances, our Enforcement processes can flex to accommodate them. The wording used is to ensure flexibility in order to be able to react in a proportionate and appropriate manner, which may include new or evolving enforcement scenarios that may develop or are, at present, unforeseen. Examples of where we may depart from the general approach include, but are not limited to:

- circumstances where it is important to resolve enforcement action and/or the imposition of a penalty quickly (such as following the making of a final order or a provisional order) (see section 7 below); or

- where a breach behaviour is relatively straightforward and it would be disproportionate to follow the full process as set out in the Enforcement Guidelines (for example, following failure(s) to provide information to the Authority in the format requested in accordance with Standard Licence Condition (SLC) 5 of the Gas and Electricity Supply Licences)

5.9. *Point raised in consultation:* Respondents asked whether parties should not have to admit breaches publicly to settle a case.

5.10. *Ofgem response:* In order to achieve settlement, parties must admit breach as part of the settlement agreement. As part of the settlement process, the penalty notice, which outlines the breaches and proposed breaches, will be consulted on and any interested party

has the opportunity to make representations. However, prior to publication, there will be settlement discussions, the aim of which is to agree the terms of settlement and the wording of any penalty notice and/or consumer redress order, which will outline any findings of breach. The party under investigation will also have the opportunity to comment on the press notice. If the party under investigation does not admit breach, the case may proceed to contest on this basis if appropriate.

5.11. *Point raised in consultation:* It was enquired whether Ofgem could offer incentivisation for early, open, and transparent engagement from licensees.

5.12. *Ofgem response:* We encourage early and transparent engagement from licensees. It is vitally important that licensees engage with us as soon as they detect a potential breach, as this helps us to ensure that any harm is stopped as early as possible. For licenced electricity and gas suppliers, self-reporting is a licence condition and therefore failing to self-report is a breach in itself. For other licenced parties, we strongly encourage self-reporting and note that a failure to do so may be considered an aggravating factor in the Authority's consideration of penalty in respect of a contravention or failure. For licensees that aren't suppliers, self-reporting will be considered as a mitigating factor which would be looked upon more favourably in determination of penalty, in accordance with the Penalty Statement. In Competition Act cases, parties under investigation can apply for leniency on the grounds of self-reporting. Licensed gas and electricity suppliers are also required to be co-operative, and failing to do so can be a breach of its own.

5.13. *Point raised in consultation:* A respondent noted that all references to Citizen's Advice should also include reference to Advice Direct Scotland.

5.14. *Ofgem response:* We have updated the Enforcement Guidelines to also reference Advice Direct Scotland.

5.15. *Point raised in consultation:* It was asked whether the Authority had ever addressed a breach without financial redress or a penalty and, if so, what would be the criteria when this situation could occur.

5.16. *Ofgem response:* The Authority has a range of tools available in an enforcement context and will use these as appropriate depending on the case. For example, we have addressed breaches by making a final or provisional order, which are tools aimed at securing compliance, and these situations may not necessarily involve a penalty or redress payment. It may also be possible for a breach to be found and no financial redress or penalty imposed

in other situations. For instance, this might occur in compliance cases where there is zero or low detriment involved.

5.17. *Point raised in consultation:* A respondent noted that those who find themselves in non-compliance unintentionally or by accident through situations, such as over-ambition or by the actions of a third party, should be protected by Ofgem.

5.18. *Ofgem response:* Ofgem would like to confirm that each case is considered on a case-by-case basis and all circumstances are considered. Innovation will not be stifled by the proposed amendments and penalties will continue to be determined in accordance with the Penalty Statement. This takes into account factors including, but not limited to, detriment, impact and whether the breach happened accidentally or inadvertently. The proposed changes to the Penalty Statement will mean we are better able to consider the specific circumstances surrounding a breach when determining penalty. However, it is important licensees adhere to licence conditions and to their legal obligations, more generally.

5.19. With regard to the use of third parties and their relative input into breaching licence conditions or other relevant requirements, it is the responsibility of the licensee to ensure they are operating within any licence conditions and other relevant legal provisions applying to them. Licensees cannot outsource their responsibility for compliance with their licence conditions and must ensure appropriate oversight where they use third parties to assist them.

5.20. *Point raised in consultation:* A number of stakeholders wished to emphasise that Ofgem's proposed changes should not focus on speeding up investigations at the expense of accurate and consistent outcomes. This included a concern from a respondent that a change had been made to the overview of the Enforcement Guidelines changing the phrasing from 'we can act *quickly and satisfactorily*' to 'we can act *swiftly'*.

5.21. *Ofgem response:* The objective of the proposed changes to the Enforcement Guidelines is to improve the process that will continue to lead to fair and appropriate outcomes. Ofgem does not consider that the proposed reforms are sacrificing outcomes in the interest of speeding up individual investigations.

5.22. *Point raised in consultation:* There was clarification requested as to whether discussions between licensees and Ofgem would be without prejudice if requested.

5.23. *Ofgem response:* Without prejudice discussions are common in the settlement phase of an investigation. We consider requests for without prejudice discussions at any point throughout the investigation, or in relation to any enforcement action.

5.24. *Point raised in consultation:* Respondents asked if parties under investigation receive and comment on press releases before they are published.

5.25. *Ofgem response:* In settlement we will usually share the press release alongside the settlement mandate and draft penalty notice. The press release will also be shared in Alternative Action cases. In contested cases, the press release is drafted by the EDP and only shared with each party to check factual accuracy only. In competition cases, prior to making a public statement we will share with any relevant parties to check potential factual inaccuracies only.

5.26. *Point raised in consultation:* Some respondents raised concerns over Ofgem enforcing without engaging with parties adequately and concentrating on preparing cases for prosecution/enforcement, rather than working with parties to resolve the issues informally and quickly.

5.27. *Ofgem response:* We endeavour to work collaboratively with companies and always welcome and support open and transparent communication channels. For suppliers, we have an account management system in place which offers a space for regular communication and for issues to be raised. There are different communication channels for other regulated parties. Where appropriate, we will endeavour to resolve issues informally and promptly, however the option of formal enforcement action always remains. We will not always pursue informal action before formal action. The Enforcement Guidelines outline our case prioritisation criteria.

5.28. *Point raised in consultation:* Respondents wished for the EDP to be engaged early once a case became contested, this is to ensure that the EDP has enough time to understand the case and thus be able to make an educated and informed decision.

5.29. *Ofgem response:* The contest process is not changing as part of the consultation and the EDP will remain the decision maker in this process. The EDP are notified when a case is going to contest and are provided with the necessary information to make a decision, both from Ofgem and the party under investigation.

5.30. *Point raised in consultation:* Respondents requested that a tracked changes document be shared with Stakeholders showing Ofgem's process towards creating the proposed revised Enforcement Guidelines.

5.31. *Ofgem response:* We are unable to provide a tracked changes version. This is because there was a lot of shifting of text and changing text, so a tracked changes document is not practical and of limited use.

5.32. *Point raised in consultation:* A harm-based approach to enforcement was suggested by respondents, where enforcement action is concentrated on areas where consumer harm is at its greatest.

5.33. *Ofgem response:* As explained in the Enforcement Guidelines, enforcement action is prioritised in accordance with our case opening criteria and with regard to our vision and strategic objectives for enforcement. The case opening criteria includes considering our powers and whether we are best placed to act, seriousness, as well as an initial assessment of consumer harm.

5.34. *Point raised in consultation:* Some respondents noted that innovation and competition in the market should not be stifled by any proposed changes, highlighting that this is beneficial to consumers and creates a healthy market environment.

5.35. *Ofgem response:* Ensuring competition and innovation is an objective of Ofgem, and our enforcement work supports this by ensuring a level playing field. We consider that our changes have been made in accordance with this approach.

5.36. *Point raised in consultation:* A respondent noted that enforcement objectives should include or reference proportionality within the enforcement outcomes.

5.37. *Ofgem response:* The enforcement objectives are linked to Ofgem's organisation-wide objectives and were not under review as part of this consultation.

Competition Act cases

5.38. *Point raised in consultation:* Respondents raised concerns over the streamlining of the access to file process during competition investigations.

5.39. *Ofgem response:* Ofgem's rationale for the approach to access to file for each case is to ensure that the access to file process is as efficient as practicable, both for the addressees of the Statement of Objections (and any Draft Penalty Statement) as well as for Ofgem. There is an opportunity for the party or parties under investigation to discuss the access to file process. This can be done as part of a State of Play meeting or in writing. Our process is in line with the CA98 Rules which are followed by the CMA and other regulators.

5.40. On this basis, our Enforcement Guidelines state that we will consider the most appropriate process for allowing parties to have access to the case file in each case, while ensuring that parties are also able to exercise their rights of defence. We will provide each party with: a) copies of the documents that are directly referred to in the Statement of Objections and any Draft Penalty Statement sent to that party or parties; and b) a schedule containing a detailed list of all the documents on our file. Under this process, businesses will have a complete understanding of the content of the investigation file, and they will also have a reasonable opportunity to inspect additional documents listed in the schedule upon reasoned request, provided disclosure is allowed. We will set a reasonable deadline within which the business will be able to make any such requests; the case team will assess each request individually and, on a case-by-case basis and disclosure will be decided following the conditions of Part 9 Enterprise Act 2002.

5.41. *Point raised in consultation:* One respondent also asked why access to file rights are not also applicable to sectoral cases.

5.42. *Ofgem response:* The term 'access to file' is specific to the Competition Act 1998. In sectoral cases there are other mechanisms for sharing information where appropriate. Further details on disclosure arrangements can be found at paragraphs 6.82 to 6.86 of the Enforcement Guidelines.

5.43. *Point raised in consultation:* Respondents commented that Ofgem should issue an updated Statement of Objections to the relevant business that takes account of the relevant business' representations, and the relevant business should have a further opportunity to comment on the contents.

5.44. *Ofgem response:* Unless new information is received in response to the Statement of Objections that indicates that there is evidence of a different suspected infringement or there is a material change in the nature of the infringement described in the original Statement of Objections, in which case we will issue a Supplementary Statement of Objections and request for representations on this Supplementary Statement of Objections, the investigated party will be given reasonable time to make representations on the Statement of Objections in writing and in the oral hearing before a final decision will be issued. These representations will be carefully taken into consideration when the Authority issues its final decision. We consider this process and the time given to be sufficient for the parties' defence and in line with the legislation and other regulators' practices used when they are exercising their CA98 powers. The Authority's final decision is then subject to appeal at the Competition Appeal Tribunal.

5.45. The company under investigation has a right to address the EDP in an oral hearing.

5.46. *Point raised in consultation:* Stakeholders also raised concerns that Ofgem would not enter negotiations as set out within the revised Guidelines.

5.47. *Ofgem response:* Ofgem does not see that not entering into negotiations is a new policy or change, as per paragraph 5.63 in the 2017 Guidelines. The text of the guidelines is clear in situations of plea-bargaining and why Ofgem will not, for example, accept an admission in relation to a lesser infringement in return for dropping a more serious infringement, which is a matter of facts and of law and not of bargaining with regard to the amount of penalty. If the parties disagree with the Authority's findings of infringement, they have the opportunity to appeal the infringement decision to the Competition Appeal Tribunal, in an on the merits appeal; however, this would result in losing the benefit of a settlement discount during the administrative process.

5.48. *Point raised in consultation:* Stakeholders asked why the Statement of Objections is not confidential as it contains market sensitive information and that Ofgem should not be able to issue a non-confidential version to affected parties.

5.49. *Ofgem response:* Ofgem would like to highlight that this is not a new policy nor a newly proposed change to the 2017 Guidelines; within the original Guidelines this approach is set out in paragraph 5.70. If third parties with sufficient interest have established that it is necessary for their rights of defence to see a non-confidential version of the Statement of Objections or if Ofgem considers that a third party is likely materially to assist Ofgem in its investigation, then it may disclose a non-confidential version of the Statement of Objections under the strict assessment of Part 9 of the Enterprise Act 2002. Ofgem will not generally allow complainants and other third parties an opportunity to comment on the Addressees' written representations, however this may be appropriate in certain circumstances.

5.50. *Point raised in consultation:* Stakeholders also raised a concern that the twelve-week response period may be too short once all relevant documents are ready for review.

5.51. *Ofgem response:* Ofgem does allow for reasonable extensions, when taking the need of access to documents and transparency into account.

Concerns regarding licence conditions

5.52. *Point raised in consultation:* To ensure that further changes to SLCs are understood by licensees and also fit with the current SLCs, a respondent suggested that Ofgem

implement a consistency and clarity test that proposed changes would have to pass in order to be implemented.

5.53. Stakeholders also stated that the SLCs are too long and complex, which make them difficult for licensees to understand and in turn makes it harder to comply, leading to unintentional breaches. It was suggested that the SLCs should be reviewed under a clarity test to improve their accessibility.

5.54. *Ofgem response:* The Enforcement Guidelines describe how we may use our enforcement powers and tools in situations relating to breaches or infringements of licence conditions rather than how revisions to licence conditions are made. However, Ofgem reiterates that the energy sector is an essential, regulated service and we note that all revisions, removals or additions to SLCs are usually subject to a consultation which stakeholders have the opportunity to respond to before being introduced. It remains the licensees' central obligation to understand the legal requirements and their duties under the licence with the use of independent legal advice, where appropriate.

Decision

5.55. We will be adopting the proposed wording in the Enforcement Guidelines, with the below amendments:

- We have added clarity on the circumstances when we may depart from the Enforcement Guidelines.

- We have amended the Enforcement Guidelines to reference Advice Direct Scotland as well Citizens Advice appears within the Enforcement Guidelines.

- Other non-material drafting changes to the Enforcement Guidelines.

6. Sectoral Penalty Statement

Section summary

We consulted on changes to simplify and clarify Ofgem's Sectoral Penalty Statement. We have also updated the Sectoral Penalty Statement to reflect the new requirements introduced through the Supplier Licencing Review (SLR) in January 2021. We have adopted the changes set out in the consultation.

What did we consult on?

6.1. The consultation proposed amendments to 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;
- condense the large number of prescriptive factors currently listed into more concise paragraphs with higher level descriptions;
- amend gain and detriment considerations; and
- update the Penalty Statement to include details of the proposed amendments to the settlement process.

Stakeholder feedback from the consultation

6.2. We asked stakeholders for their views on the changes we proposed to make to the Sectoral Penalty Statement. Broadly, the main concerns surrounded the quality and transparency of decision-making. These concerns will be discussed in reference to each change:

Removal of lists of prescriptive factors (both for seriousness and for aggravating and mitigating factors)

6.3. *Point raised in consultation:* Whilst some respondents saw the attraction of taking a continued principles-based approach to account for the changing energy market, there have been concerns raised around the reduced accountability and risk to transparency of the

removal of the prescriptive lists of factors for seriousness and aggravating and mitigating factors.

6.4. *Ofgem response:* The reasoning behind any decision-making and the determination of the amount of the penalty will continue to be set out clearly in the Draft Penalty Notice, which the party under investigation will have the opportunity to review during the settlement window. Furthermore, by removing prescriptive lists of factors, we envisage that the process of determining an appropriate penalty will become more efficient and streamlined as only relevant factors will be considered in the Authority's assessment of penalty, rather than having to consider and exclude irrelevant factors.

6.5. *Point raised in consultation:* Other concerns were raised surrounding the fairness and consistency of the calculation of penalty, as well as the proportionality for penalties for similar behaviours.

6.6. *Ofgem response:* As is currently the case, the Authority will consider the individual circumstances of each case in its determination of penalty. The Authority will continue to determine penalties which are reasonable in all the circumstances of the case.

6.7. *Point raised in consultation:* Other responses highlighted that the prescriptive lists give an element of predictability and that losing this harms business confidence and therefore punishes innovation. One respondent was concerned that they would be punished for innovation.

6.8. *Ofgem response:* For clarity, all licensees are required to comply with their ongoing licence obligations, irrespective of the wording of Ofgem's Penalty Statement. Our Penalty Statement will only apply in circumstances where licensees have failed to comply with their licence obligations or other relevant obligations. As is currently the case, licensees should consider whether their behaviour, including innovation, impacts their ability to meet their obligations. Ofgem will not hesitate to take enforcement action against licensees which fail to meet their regulatory requirements. Through our continued use of principles-based regulation, we consider that businesses have the flexibility to innovate over and above the minimum standard stipulated in the licence conditions. This is in line with our strategic enforcement objectives which are intended to level the playing field without limiting innovation.

6.9. *Point raised in consultation:* In our drafting of the Penalty Statement, words like "may" and "usually" are used to allow scope for flexibility in projects. Some respondents were concerned about this flexibility and felt this led to uncertainty and less transparency.

6.10. *Ofgem response:* We have always had the flexibility to act in the most appropriate way, based on all the circumstances of a case, and this continues to be the case. The updated Penalty Statement drafting makes this approach more transparent. We make decisions on a case by case basis and as the energy market evolves, we need to allow for potential new circumstances which may arise. Further, licensees will continue to have the opportunity to review the Draft Penalty Notice and settlement documents, such as the settlement mandate, during the settlement window which will outline the particular factors which have been considered by the Authority when determining penalty.

6.11. The Authority notes that licensees should not judge their approach to complying with licence conditions against a prescriptive list of minimum standards listed in the Penalty Statement. The Penalty Statement is a document which Ofgem itself has to have regard to when imposing penalties for non-compliance with licence conditions, it is not a guidance document for licensees. Concerns that the removal of the prescriptive factors will reduce the value of the Penalty Statement as guidance are, therefore, not valid.

6.12. As outlined in our updated Enforcement Guidelines, licensees will continue to have an opportunity to review and respond to the case team's Summary Statement, which will outline the facts of the case and the evidence gathered. They will then be able to consider the Draft Penalty Notice and settlement documents, such as the settlement mandate, during the settlement window which will outline the particular factors that have been considered by the Authority when determining penalty. As is currently the case, should licensees have any questions or concerns in respect of the settlement process, the case team will provide guidance as necessary.

6.13. *Point raised in consultation:* Some licensees wanted to see consideration for cases where breach occurred outside of the licensee's control.

6.14. *Ofgem response:* We will continue to consider all the circumstances of a case when determining a penalty which is reasonable in all the circumstances of the case. Ofgem notes that suppliers are obligated to self-report breach behaviour, particularly actions or omissions that give rise to a likelihood of detriment to domestic customers, as soon as the circumstance arises, or the licensee becomes aware of it. For other licenced parties, we strongly encourage self-reporting.

Gain and Detriment

6.15. *Point raised in consultation:* Many respondents were concerned about what has been perceived as the removal of the calculation of gain and detriment (G&D) from the penalty statement.

6.16. *Ofgem response:* To clarify, as outlined in the consultation document, we are not proposing to remove the calculation of G&D in our assessment of penalty. Rather, we are proposing to: (i) only calculate detriment and gain where it is proportionate, reasonable and practicable to quantify it; and (ii) reflect unquantified detriment and gain through the Authority's assessment of seriousness. We will continue to calculate G&D where it is proportionate, reasonable and practicable to quantify it.

6.17. Previously we have found from experience that calculations which are largely based on estimations and/or assumptions may not be wholly reflective of the circumstances of a case. The flexibility introduced through the proposed G&D changes will mean that we will avoid lengthy and complicated calculations in cases where it is not proportionate, reasonable and practicable to quantify G&D. This will result in time and resource savings for both Ofgem and the company under investigation. In circumstances where it is not proportionate, reasonable and practicable to quantify G&D, this unquantifiable G&D will be considered in the Authority's consideration of seriousness. The case team's position on G&D will be outlined within the Summary Statement, including explanations of the calculations and/or an explanation as to why the calculation of G&D was deemed not to be proportionate, reasonable and practicable in the circumstances of the case. As per our standard procedures, licensees have the opportunity to respond to the Summary Statement, meaning that the new process will still provide fair and consistent outcomes. This process is outlined in the 'Summary Statement of Initial Findings' subsection of the proposed Enforcement Guidelines (paragraphs 6.16 to 6.19). G&D calculations will still be used in cases where calculating G&D is less complex or where calculations will rest on fewer assumptions needing to be made.

6.18. *Point raised in consultation:* A large number of respondents expressed concern regarding the removal of *"any financial penalty must be reasonable in all the circumstances of the case"* from the Penalty Statement.

6.19. *Ofgem response:* Paragraph 5.20 of the updated Penalty Statement states: "*The Authority may adjust the total financial liability to ensure that any financial penalty and/or redress payments are reasonable in all the circumstances of the case*." Therefore, the Authority will continue to determine penalties which are reasonable in the circumstances of the case.

6.20. *Point raised in consultation:* As has been highlighted before in Section 5, there have been concerns raised regarding the perceived decision to prioritise speed over quality of decision making, and that speed is not a justification for not following proper process in respect of G&D calculation.

6.21. *Ofgem response:* To clarify, we are still following proper process and will only refrain from calculating G&D in circumstances where it is not proportionate, reasonable and practicable to quantify it. It is in licensees' interest to avoid lengthy calculations and estimations that are based on many assumptions which may not accurately reflect the detriment or gain attributed to breach behaviour. Further, the removal of overly complex and assumption-based G&D calculations will speed up the investigative stage of an investigation and allow the case to progress to settlement more quickly.

6.22. *Point raised in consultation:* A respondent enquired whether industry codes would be acknowledged in the calculation of detriment as they are established under each respective licence and have their own liability regime between parties. Concern was raised over the possibility of a licensee facing double punishment if the calculated detriment did not take these code provisions into account.

6.23. *Ofgem response:* The Authority confirms that in circumstances where industry code provisions interact with a contravention or failure, we will take this into account and avoid 'double counting' of factors which influence penalty and/or gain and detriment calculation.

6.24. *Point raised in consultation:* A small number of responses suggested that where automatic funding mechanisms exist, this should be taken into account when calculating penalty, and this should be incorporated into the penalty statement.

6.25. *Ofgem response:* The Authority confirms that in circumstances where automatic funding mechanisms have resulted in an automatic penalty being applied in respect of a contravention or failure, we will take this into account when determining penalty and avoid 'double counting' of factors which influence penalty and/or gain and detriment calculation. This is separate from Ofgem's involvement in funding adjustment mechanisms.

General updates and clarifications of other misconceptions

6.26. *Point raised in consultation:* It was common among respondents to seek clarification of reference to 'other energy market participants' and 'other relevant businesses'.

6.27. *Ofgem response:* This term is generally used in our Enforcement Guidelines to describe energy market participants which are separate from the licensee under investigation, for example other licenced suppliers and regulated parties, as well as (in certain circumstances) businesses that are not necessarily regulated energy businesses, but where our powers could extend to them – for instance under consumer law, and in some cases under competition law.

6.28. *Point raised in consultation:* Some respondents asked whether the individual circumstances of technical breaches would be considered.

6.29. *Ofgem response:* Each breach and the circumstances surrounding it will be considered on a case by case basis when determining penalty, or other appropriate remedies or sanctions. This will include, but will not be limited to, seriousness of the contravention or failure, impact of licensees' behaviours and deterrence, as outlined in the Penalty Statement.

6.30. *Point raised in consultation:* Some respondents questioned the removal of *"The Authority will not normally require regulated persons to pay compensation for stress or anxiety caused to one or more consumers as a result of a contravention."*

6.31. *Ofgem response:* This paragraph has not been used in determining penalty in enforcement cases to date. Although this sentence has been removed, in accordance with the updated Penalty Statement, impact of breach behaviour, including stress and anxiety to consumers, may still be considered in the Authority's determination of penalty and consumer redress orders under seriousness and/or impact of licensees' behaviours.

6.32. *Point raised in consultation:* There were concerns raised regarding the insertion of *"particularly actions or omissions that give rise to a likelihood of detriment to Domestic Customers"* as there was the belief that this phrase implies it will treat harm to domestic consumers more severely than non-domestic consumers, which may encourage people to not self-report.

6.33. *Ofgem response:* Self-reporting is an obligation for licenced suppliers in respect of both domestic and non-domestic customers and should not need incentivising. Self-reporting, or lack thereof, will still be considered as a mitigating or aggravating factor, respectively in the calculation of penalty for other licensees. All circumstances of an enforcement case will be considered when determining an appropriate level of penalty in accordance with section 4 of the updated Penalty Statement.

6.34. *Point raised in consultation:* Generally, respondents sought justification for the move towards considering other energy market participants in the calculation of penalty, and away from purely considering consumers.

6.35. *Ofgem response:* The updated drafting reflects that we will continue to consider all relevant factors of a case or issue, including impact on both consumers and industry, if applicable, when determining amount of penalty. We consider the proposed changes will future-proof our Penalty Statement for use in an evolving energy market where we are expanding the range of cases/issues we enforce against.

6.36. As suggested by the use of 'and/or', impact on other market participants will only be considered in the determination of penalty in cases where the breach behaviour has negatively impacted other market participants, as opposed to just consumers of the company under investigation.

6.37. *Point raised in consultation:* There was an observation that the FCA's guidance was perhaps clearer than Ofgem's.

6.38. *Point raised in consultation:* This is our guidance and it is different to the FCA's guidance and requires different styles of drafting. The reasoning and rationale in this decision document should provide adequate justifications for the proposals where concerns were raised and adequate explanations of the misunderstandings that have been raised in the responses we received.

Decision

6.39. We have carefully considered the points raised in the consultation and, with the exception of the points outlined below, we will be adopting the proposed wording in the Penalty Statement.

6.40. Several minor non-material drafting changes have been made to the new Penalty Statement.

6.41. We have also made a correction to section 9 of the Penalty Statement. This change has been made to reflect the legislative requirements involved in the Authority's determination of consumer redress orders. As outlined in section 27J(2) of the Electricity Act 1989 and section 30J(2) of the Gas Act 1986, the Authority must have regard to its current statement of policy in deciding whether to make a consumer redress order in respect of a contravention and in determining the requirements to be imposed by any such an order.

7. Conclusion and next steps

Conclusion

7.1. Having taken into account the 15 responses received, the decision of the Authority is to proceed with the changes to the Enforcement Guidelines and Penalty Statement that we proposed in the 9 June 2021 consultation. Below are the main themes of the responses that, as well as the reasoning previously laid out, the Authority has taken into account in its decision.

7.2. The Authority envisages that:

- the settlement phase of cases will be streamlined whilst maintaining the rigorous evidence-based quality decision making;

- both Ofgem and companies under investigation benefit from time and resource savings made through the streamlining of processes; and

- Ofgem will achieve case closure, consumer redress and issue a stronger deterrent signal much closer to when the breach took place than in the current process.

7.3. The Authority continues to prioritise transparency and gives companies under investigation the opportunity to understand the full case against them, as well as the full explanation of the reasoning behind any proposed penalty imposed, through the issuing of a Summary Statement. They will then have the opportunity to make written representations and arrange further discussions with the case team.

7.4. The Authority continues to encourage competition and innovation by levelling the playing field and stamping out non-compliance. Updating our Enforcement Guidelines and Penalty Statement allows Ofgem to keep sending a strong deterrent signal so businesses can recognise poor behaviour and improve their own processes.

Next Steps

7.5. The Enforcement Guidelines were published on 23 March 2022 and will take effect from this date.

7.6. The Statement of Policy with Respect to Financial Penalties and Consumer Redress was published on 23 March 2022. The Authority will have regard to this statement in respect of any contravention or failure which occurred on or after 23 March 2022 when deciding whether to impose a financial penalty and in determining the amount of any financial penalty. The Authority will have regard to this statement when deciding whether to make a consumer redress order in respect of any contravention and in determining the requirements to be imposed by any such order.

7.7. If you have any questions about the Enforcement Guidelines or the consultation process, please contact enforcement@ofgem.gov.uk.