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## CO2 Transport and Storage Penalty Policy Statement

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Publication date:	02 September 2024
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## 1. Introduction

- 1.1 The Gas and Electricity Markets Authority (the Authority) regulates transport and storage networks for carbon dioxide in the United Kingdom. Ofgem is the Office of Gas and Electricity Markets. It carries out the day-to-day work of the Authority and investigates matters on the Authority's behalf.
- 1.2 Where the Authority is satisfied that a licence holder has contravened or is contravening any relevant condition or requirement prescribed under [Schedule 3, paragraph 4\(1\) of the Energy Act 2023](#) (referred to as the "Act") the Authority may impose a financial penalty.
- 1.3 This Statement of Policy with respect to penalties is required by the [Act](#) and sets out the factors that the Authority will normally consider when:
- deciding whether or not to impose a financial penalty; and
  - determining the amount of any financial penalty.
- 1.4 This Statement of Policy provides that the Authority may take account of factors which impact penalty, including but not limited to those included in this Statement of Policy, when determining the level of penalty to impose upon a licence holder where it is satisfied that that person has contravened a relevant condition or requirement.
- 1.5 The Act provides that the amount of any financial penalty must be reasonable in all the circumstances of the case.
- 1.6 Where the Authority imposes a financial penalty, the amount must not exceed 10 per cent of the turnover of the licence holder.<sup>1</sup>
- 1.7 Consistent with the Authority's vision that market participants should treat each other fairly and act in line with their obligations, the Authority expects licence holders will not seek to recover the costs of financial penalties from network users.
- 1.8 The Authority must not impose a financial penalty under the Act on a licence holder, where it is satisfied that it would be more appropriate to proceed under

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<sup>1</sup> [Schedule 3 paragraph 10 of the Act](#).

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the Competition Act 1998.<sup>2</sup> Ofgem will take this into account when considering whether or not to open an investigation under the Act. The Authority may impose a financial penalty even if it has already made a provisional or final order under the Act.<sup>3</sup>

## **2. Objectives and duties in relation to financial penalties**

2.1 The Authority's principal objectives for the purposes of the Act are to:

- protect the interests of current and future carbon dioxide transport and storage network users;
- protect the interests of any consumers whose interests the Authority considers may be impacted by the exercise of their functions;
- promote the efficient and economic development and operation of transport and storage networks, having regard to the need for licence holders to be able to finance their licensable activities.<sup>4</sup>

The Authority is required to carry out all of its functions under the Act, including taking any decisions in relation to imposing financial penalties in the manner that it considers is best calculated to further its principal objectives and vision.

2.2 The Authority is clear that licence holders should not benefit financially from any contravention. Indeed, the Authority considers that non-compliance should normally cost significantly more than compliance and that financial penalties should act as a significant deterrent to future non-compliance. The Authority will, therefore, normally seek to ensure that any financial penalty significantly exceeds, where this can reasonably be calculated or estimated,

- the gain to the licence holder; and
- the detriment caused to network user or other market participants (whether individually or as a group, affected by the contravention).

2.3 When determining the amount of a financial penalty, the Authority will consider any remedial measures that have been taken by a licence holder. However, the

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<sup>2</sup> Schedule 3, paragraph 4(3) of the Act.

<sup>3</sup> Schedule 3, paragraph 1 of the Act provides for final and provisional orders where a licence holder is contravening or is likely to contravene a relevant condition or requirement.

<sup>4</sup> Part 1, Section 1(1) of the Act.

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Authority may impose a financial penalty significantly in excess of the gain or detriment even where the gain or detriment has been mitigated in full. The Authority considers that this may be necessary in order to deter non-compliance and provide appropriate encouragement for all licence holders to comply with their obligations.

- 2.4 The Authority is also required to take into account its other statutory duties when considering the use of its penalty powers. In particular, the Authority will have regard to the principles of best regulatory practice.

### **3. Imposing a financial penalty**

- 3.1 In deciding whether it would be appropriate to impose a financial penalty the Authority will take account of the relevant facts and circumstances of the contravention under consideration.
- 3.2 If the Authority is satisfied that a contravention has occurred or is occurring, it will consider whether it is appropriate to impose a financial penalty.
- 3.3 If the Authority considers it appropriate to impose a financial penalty, it must determine what level of penalty is reasonable in all the circumstances of the case.
- 3.4 The Authority will consider any representations or objections that are duly made and are not withdrawn in line with statutory requirements.<sup>5</sup> The Authority will follow the procedural requirements set out in the Act in imposing any financial penalty.
- 3.5 The following paragraphs set out the various criteria and factors which the Authority may consider in deciding to impose a penalty. These criteria and factors are not exhaustive.

### **4. General criteria in relation to imposing a financial penalty**

- 4.1 The Authority will consider various factors in respect of the imposition of financial

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<sup>5</sup> Schedule 3, paragraph 4(4) of the Act.

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penalty including, but not limited to the:

- seriousness of the contravention;
- impact of licensees' behaviours, including the extent to which the contravention damaged the interests of other market participants; and
- deterrence, including whether a financial penalty is necessary to deter future contraventions by all market participants and encourage compliance.

- 4.2 The Authority regularly introduces and amends relevant conditions and requirements. Conduct which the Authority may, at one point, have taken into account in deciding whether to impose a penalty, and at what level, may, as a result of such changes, amount to a contravention in itself. Where the Authority considers that conduct may amount to a contravention in itself, it reserves the right not to take that conduct into account in deciding whether to impose a penalty and at what level. It may, instead, decide to investigate and impose a penalty in respect of that conduct. That decision will be made in line with Ofgem's Enforcement Guidelines.
- 4.3 The Authority cannot impose a financial penalty where its principal objectives and duties preclude it.

## **5. Process for determining the amount of a financial penalty**

### **Introduction**

- 5.1 This section sets out the process for determining the licence holder's overall financial liability as a result of the contravention.
- 5.2 Where network users or other market participants have suffered loss, damage, inconvenience or other adverse consequences as a result of the contravention the Authority will normally aim to impose a financial penalty. Further, the Authority will seek to deprive a licence holder of all the financial benefit derived from the contravention or where it is proportionate, reasonable and practicable to quantify it.
- 5.3 The Authority will seek to impose a financial penalty that:
- ensures that the licence holder does not benefit financially from the contravention;
  - reflects the seriousness of the contravention; and

- 
- deters future misconduct by the licence holder under investigation and other industry participants.

5.4 The total amount payable by a licence holder will normally be calculated in accordance with the following six step process.

### **Step 1 – Calculate the detriment and gain**

5.5 The Authority will seek to calculate detriment to network users and/or other market participants resulting from a contravention where it is proportionate, reasonable and practicable to quantify it.

5.6 The Authority will seek to calculate any gain to the licence holder resulting from the contravention where it is proportionate, reasonable and practicable to quantify it. Gain may come in the form of additional profits, avoided costs or some other undue advantage to the licence holder.

5.7 When calculating overall detriment and gain resulting from a contravention, the Authority will consider any overlap which may exist between quantified detriment and gain.

5.8 When the Authority has not quantified detriment or gain for the purposes of Step 1, the Authority may nevertheless take account of its view that the contravention may have resulted in gain and/or detriment in its assessment of seriousness at Step 2.

5.9 Where the Authority is satisfied that adequate redress has been or is being provided, the final penalty ordered to be paid by the licence holder will take this into consideration. In this context, the Authority will consider the interests of network users and/or other market participants, and accordingly will:

- consider the efforts that have been made by the licence holder to direct the redress to the affected network users and/or other market participants and whether the redress fully reflects the loss, damage or inconvenience caused; and
- take into account any payments to the affected network users and/or other market participants that may already have been made.

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## Step 2 - Assess seriousness

5.10 The Authority will assess the seriousness<sup>6</sup> of the contravention. This is a key factor in calculating the penal element of the final liability, irrespective of whether the Authority has identified and calculated detriment and/or gain. In assessing seriousness, the Authority will take into account various factors, including, but not limited to the:

- nature of the contravention including the frequency and/or duration of the contravention;
- behaviour of the licence holder, including the licence holder's awareness of the contravention and the extent to which the licence holders and its senior management had taken steps to secure compliance;
- impact of the contravention including any detrimental effect on the ability of Ofgem or the Authority to fulfil its statutory duties and whether there was any network user or market participant detriment or gain (financial or otherwise) made by the licence holder.

## Step 3 - Consider aggravating or mitigating factors

5.11 The Authority will consider aggravating and mitigating factors and adjust the penal element accordingly. Any reductions to the penal element will not affect the amount of any monies identified as detriment and/or gain.

5.12 The Authority will consider aggravating and mitigating factors related to the behaviour of the licensee, including, but not limited to:

- its compliance history;
- actions, or lack thereof, taken after becoming aware of the contravention prior to Ofgem's investigation; and
- actions, or lack thereof, taken after becoming aware of the contravention during Ofgem's investigation.

5.13 When considering factors that may mitigate the level of a penalty, the Authority attaches significant value to the self-reporting of breaches. However, licence holders should expect to receive less credit where self-reporting has not occurred promptly on first discovering that a breach has occurred. The Authority expects licence holders to be prompt in reporting when a potential breach is first

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<sup>6</sup> The seriousness of a contravention includes its potential seriousness.



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uncovered and to be prompt, accurate and comprehensive in reporting any further information that comes to light.

#### **Step 4 - Consider an adjustment for deterrence**

- 5.14 The Authority will consider whether a further adjustment to the penal element needs to be made to ensure that it will have a sufficient deterrent effect.
- 5.15 The Authority may make such an adjustment if it considers that the penal element would otherwise be insufficient to deter the licence holder, or others, from committing further or similar contraventions.

#### **Step 5 – Apply a discount in settled cases**

- 5.16 The Authority may offer the licence holder the opportunity to settle the case. Early settlement has many potential advantages. It can, for example, result in:
- network users and/or other market participants obtaining compensation earlier than would otherwise be the case;
  - the saving of Authority resources and those of the licence holder;
  - messages getting out to the market sooner; and
  - timely and effective action that improves network user confidence.
- 5.17 The Authority therefore considers that in many cases it is likely to be in the interests of network users for a licence holder to be offered the chance to resolve matters through settlement. In recognition of the benefits of such agreements, the Authority may offer to reduce the penal element of the overall financial liability to be imposed on the licence holder by 30 per cent during the settlement window. Such a discount will not apply to any gain and/or detriment that has been identified by the Authority.
- 5.18 Further detail of the Authority's settlement framework, including the beginning and end of the settlement window, is set out in paragraphs 6.5 to 6.35 of Ofgem's Enforcement Guidelines.

#### **Step 6 - Establish the total financial liability**

- 5.19 The Authority will determine the total financial liability of the licence holder by adding the final penal element (Step 4 or 5) to any gain and/or detriment that the Authority has identified as resulting from the contravention (Step 1).
- 5.20 The Authority may adjust the total financial liability to ensure that any financial penalty is reasonable in all the circumstances of the case.

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- 5.21 The Authority may at this stage consider the effect of a proposed penalty on the financial viability of a licence holder and may make adjustments accordingly in light of its principal objectives.<sup>7</sup>
- 5.22 Having considered all of the circumstances of the case, the Authority will determine an appropriate amount for any financial penalty.

## **6. Application, adoption and revision of the statement of policy**

- 6.1 The Authority, having undertaken such consultation as it considers appropriate, has prepared and published this Statement of Policy.<sup>8</sup>
- 6.2 The Authority will have regard to this statement in respect of any contravention which occurred on or after 02 September 2024:
- i. in deciding whether to impose a financial penalty; and
  - ii. in determining the amount of any financial penalty.<sup>9</sup>
- 6.3 The Authority may refer to further policies or statements as are relevant to the contraventions at issue and as the Authority may publish from time to time.
- 6.4 This statement has been adopted by the Authority. The Authority has not delegated to the Enforcement Decision Panel, or to any member or employee of the Authority, the power to vary this statement. The Authority may, from time to time, revise this statement, in accordance with the Act.<sup>10</sup> Any revised statement will be issued for consultation and published.

**Gas and Electricity Markets Authority**

**02 September 2024**

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<sup>7</sup> This includes cases where adjustments have been made for settlement.

<sup>8</sup> Schedule 3, paragraph 5 of the Act.

<sup>9</sup> Schedule 3, paragraph 5(2) of the Act.

<sup>10</sup> Schedule 3, paragraph 5(3) of the Act.