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Dear Andy

**Consultation on Ofgem's Statement of Policy in respect of Financial Penalties and Consumer Redress**

Thank you for the opportunity to respond to the above consultation. We agree that it is useful for Ofgem to publish its principles and policies for the penalties and consumer redress. This consultation raises a number of issues which should be carefully considered before finalising the policy.

The position that a financial penalty will contain two elements (one part is the recovery of the detriment to consumers, and the other element to reflect the seriousness of the contravention and the need for deterrence) is a sensible starting point for setting penalties.

However, the policy suggests a potential double count of the penal element included in consumer redress and the penal element in financial penalties. The policy document sets out that a consumer redress order may include an element "to prevent a recurrence of the same or similar contraventions". However, any penal element included in the redress order is explicitly not taken into account in calculating any financial penalty. This could result in companies being penalised twice for the same issue. It is essential that this potential double count is removed.

We also note that Ofgem's decision on level of penalty does not take into account the reputational damage caused by enforcement action – which is part of the whole penalty cost of contravention. In some instances (especially in minor technical breaches), the reputational damage – combined with an appropriate redress order if necessary - may represent a sufficient penalty for companies. This should be reflected in Ofgem's policy.

We disagree with the circumstances in which Ofgem proposes to apply further penalty to reflect an extra deterrent element. Penalties should generally only reflect a deterrent to the company under investigation for future breaches. Penalising one company as a deterrent to all potential future breaches by all companies is disproportionate and is unlikely to result in early settlements (which benefit customers and the regulator).

We have provided detailed responses to your questions in Appendix 1. Please feel free to contact me if you have any questions.

Yours sincerely

**Paul Bircham**  
**Regulation Director**

## Appendix 1 - Consultation Question Responses

- Q.1 Are these objectives appropriate?
  - We agree with the objectives to seek fair outcomes for consumers and aim to deter non-compliance.
  - We agree with the position that non-compliance should normally cost more than compliance.
- Q.2 Is the proposed process for determining the amount of penalties and/or redress appropriate?
  - We agree with the policy position that the amount payable should reflect both detriment to customers and any gain by the company as a result of contravention plus a penal element.
  - The policy suggests a potential double count of the penal element included in consumer redress and the penal element in financial penalties. The policy document sets out that a consumer redress order may include an element “to prevent a recurrence of the same or similar contraventions”. However, any penal element included in the redress order is explicitly not taken into account in calculating any financial penalty. This could result in companies being penalised twice for the same issue. It is essential that this potential double count is removed.
  - The policy fails to recognise that the reputational damage associated with being subjected to a redress order or financial penalty is a deterrent in itself. This should be reflected in Ofgem’s policy for calculating levels of any financial penalty. In some instances (especially in minor technical breaches), the reputational damage may represent a sufficient penalty for companies. This may also be sufficient to deter others and should be considered in determining quantum of financial penalty.
  - We disagree with the circumstances in which Ofgem proposes to apply further penalty to reflect an extra deterrent element. Penalties should generally only reflect a deterrent to the company under investigation for future breaches. Penalising one company as a deterrent to all potential future breaches by all companies is disproportionate and is unlikely to result in early settlements (which benefit customers and the regulator).
  - The policy document states its position “in normal circumstances”. Ofgem should set out what it would consider extraordinary circumstances and its approach under these conditions.
- Q.3 Do you agree with the proposed factors that may aggravate or mitigate the amount of a penalty or redress payment?
- Q.4 Do you agree with the proposed settlement percentage discounts in cases under the Gas Act or Electricity Act?
  - We agree with the aggravating and mitigating factors set out in the policy document. It is essential that Ofgem’s assessment processes recognise a company’s positive compliance history as well as any negative issues.
  - It is important to incentivise companies to behave responsibly and that the policy ensures that companies that inform Ofgem of any known compliance issues

receive less penal treatment than those that do not identify the issue or those that opt to not disclose it.

- We agree that the fixed discounts will encourage companies to settle early if proportionate penalties are proposed.
- Q.5 Do you agree with the proposed policy on determining who receives payments where consumer redress powers are used?
  - We agree with the principles for consumer redress and the circumstances where an appropriate proxy for the affected customers should be utilised.
- Q.6 Are there any other potential consumer redress requirements that we should specifically refer to in section 7 of the policy statement?
  - No
- Q.7 Do you agree with the proposed approach to the treatment of detriment?
  - We agree that wherever possible, affected consumers should be compensated unless it is wholly impracticable or inefficient to do so.
- Q.8 Should administrative costs be borne by the company in addition to any compensation or other payments that may be required?
  - - We agree that costs should be borne by the company.
    - It is important that appropriate consideration of the total administrative cost is considered as part of the overall penalty. We agree that it is appropriate to use a proxy customer group where administrative costs form a significant part of the overall penalty.