

Notice of decision to impose a financial penalty pursuant to section 30A (3) of the Gas Act 1986 and 27A(3) of the Electricity Act 1989

Decision of the Gas and Electricity Markets Authority to impose a financial penalty, following an investigation into E (Gas and Electricity) Ltd and its compliance with its obligations under the gas and electricity supply licences¹ (Standard Licence Conditions 13 and 25)

15 January 2018

1. Summary

1.1. The Gas and Electricity Markets Authority (“The Authority”) has decided to impose a financial penalty on E (Gas and Electricity) Ltd (“E”) following an investigation by the Authority into E’s compliance, in the context of its domestic supply business, with a number of relevant conditions and requirements set out in the Standard Licence Conditions (“SLCs”) of E’s gas and electricity supply licences. The SLCs set out the rules on how Licensees must operate within the terms of their gas and electricity supply licences.

1.2. The Authority found that E breached the following relevant conditions²:

- SLC 25.2 – this SLC relates to marketing energy to domestic customers. The Authority finds that this SLC was breached between August 2014 and February 2017³.
- SLC 13.1(b) – this SLC relates to the arrangements for site access, specifically that a Licensee ensures its Representatives⁴ are identifiable as acting on behalf of the Licensee when visiting customers. The Authority finds that this SLC was breached between August 2014 and February 2017.
- SLC 13.1(d) – this SLC also relates to arrangements for site access, specifically the fitness of Representatives to interact with customers at their homes. The Authority finds that this SLC was breached between August 2014 to May 2017.

1.3. E has admitted that it breached the relevant conditions set out above. It has acknowledged that its practices fell short of requirements in relation to how sales agents acting on its behalf identified themselves to customers. E has also

¹The SLCs considered within this Notice have similar wording in the Gas and Electricity Supply Licences and are interpreted by the Authority in a consistent manner. In this document, a reference to an SLC by number refers to the identical condition in both licences. All terms used in this Notice are deemed to have the same definitions as those in the Electricity and Gas Supply Licences, unless indicated otherwise.

² “Relevant condition” has the meanings set out in section 28(8) of and in Schedule 4B to the Gas Act 1986, and in section 25(8) of and in Schedule 6A to the Electricity Act 1989.

³ Under the version of SLC 25.2 in force at the time of the contravention.

⁴ Defined by SLC 1.3 where it is stated to mean “in relation to the licensee, means any person directly or indirectly authorised to represent the licensee in its dealings with Customers”.

acknowledged that the pre-employment checks conducted on representatives were insufficient. It has made improvements in respect of these areas since the investigation was opened, such that no ongoing breaches remain.

- 1.4. The Authority took into account that E offered to settle this investigation and make a voluntary redress payment into a fund approved by the Authority.
- 1.5. The Authority considers that the voluntary redress payments will be of greater benefit to energy consumers than if a significant financial penalty were to be imposed. Accordingly, the Authority considered it appropriate to impose a reduced financial penalty of £1 on E provided that E pays the sum of £260,000 (less £1) in voluntary redress. If E had not agreed to settle this investigation by making these payments, the Authority would have considered it appropriate to impose a larger penalty in view of the seriousness of the contraventions.
- 1.6. The Authority takes the breaches set out in paragraph 1.2 seriously. The version of SLC 25.2 in force at the time of the contravention required a Licensee to take all reasonable steps to achieve the sales and marketing objective and avoid doing anything that jeopardises the achievement of that objective⁵. The objective includes, among other things, conducting sales and marketing activities in a fair and transparent manner and not misleading customers. Failure to achieve this can reduce consumer confidence and trust in the sales and marketing of energy products overall⁶. To date, the Authority has concluded seven investigations into SLC 25 breaches resulting in penalties totalling £40,250,000.
- 1.7. SLC 13 requires a Licensee to have suitable arrangements in place for site access. SLC 13.1(b) requires that a Licensee's Representative can be readily identified as such by a member of the public when visiting a Customer's premises. SLC 13.1(d) requires those Representatives to be fit and proper persons to visit and enter a Customer's premises. The Licensee must take all reasonable steps to ensure that these requirements are met.
- 1.8. Between August 2014 and early 2017 E used two third-party sales Representatives – EnergyWatch UK⁷ ("EWUK") and K.C.A.P.S. Ltd ("KCAPS").
- 1.9. For the period August 2014 – February 2017 EWUK was used as a Representative to conduct face-to-face sales activities on E's behalf. During this period EWUK sales representatives did not identify themselves to customers as Representatives

⁵ The Objective, as defined by SLC 25.1 was: (a) all information which the licensee or any Representative provides (whether in Writing, by electronic display or orally) to Domestic Customers in the course of the licensee's Marketing Activities and/or its Telesales Activities is complete and accurate, is capable of being easily understood by Domestic Customers, does not relate to products which are inappropriate to the Domestic Customer to whom it is directed, does not mislead the Domestic Customer to whom it is directed and is otherwise fair both in terms of its content and in terms of how it is presented (with more important information being given appropriate prominence); and (b) the licensee's Marketing Activities and Telesales Activities and all contact by the licensee or a Representative with, and the behaviour of the licensee and any Representative towards, a Domestic Customer in the course of the licensee's Marketing Activities and/or Telesales Activities are conducted in a fair, transparent, appropriate and professional manner.

⁶ Ofgem's guidance on face to face marketing:

https://www.ofgem.gov.uk/sites/default/files/docs/2010/04/guidance_slc_25_final_0.pdf

⁷ A former trading name of Amblin Ltd.

of E and did not explain that they were conducting sales and marketing activities on behalf of E. The Authority considers that E took insufficient steps to ensure that EWUK's sales representatives could be readily identified as representing E. There was also evidence that E's management was aware of these issues but did not act to rectify them until the Authority's investigation into E's compliance focussed E's attention. The Authority considers this behaviour to be a breach of both SLC 25.2 and SLC 13.1(b).

- 1.10. For the period August 2014 – May 2017 the Authority also considered that E failed to take all reasonable steps to ensure both EWUK and KCAPS sales agents were fit and proper persons to visit customers at their homes in breach of SLC 13.1(d). As E's focus is on consumers with pre-payment meters (PPM), many of these site visits would have taken place with vulnerable customers⁸.
- 1.11. The Authority welcomes the steps E took during this investigation to address these issues when highlighted and recognises that there is no evidence that these breaches are ongoing. The Authority also recognised that the risk of financial detriment to customers as a result of these breaches was low because E offered a competitive tariff with no exit fees during the period. However, as E was in breach of its licence conditions, there is a likelihood of some gain which it is not possible to quantify.
- 1.12. Applying the criteria identified in section 4 of this Notice, the Authority considered it appropriate to impose a penalty for the contraventions. The penalty takes into account the fact that the Authority found that E breached SLC 25.2, 13.1(b) and 13.1(d) for the periods set out in paragraph 1.2. In determining the amount of the penalty, the Authority has had regard to the factors set out at section 4 of this Notice. The Authority considered the penalty to be reasonable in all the circumstances of this case.
- 1.13. In the circumstances, and mindful of its principal objective to protect the interests of existing and future consumers, the Authority hereby gives notice under section 27A(3) of the Electricity Act 1989 and section 30A(3) of the Gas Act 1986 of its decision to impose a penalty of £1 on E in respect of the contraventions set out above. This is subject to E paying £260,000 (less £1 penalty) into the Voluntary Redress Fund⁹. The payments are to be made by 27 February 2018.

⁸ Ensuring vulnerable customers receive the right protection is a key element of Ofgem's strategy and our Customer Vulnerability Strategy guides our work on identifying and tackling consumer vulnerability in the energy market and indicates our expectations of the energy companies.

https://www.ofgem.gov.uk/sites/default/files/docs/2013/07/consumer-vulnerability-strategy_0.pdf

⁹ The Authority's Voluntary Redress Fund was established on 24 August 2017. The Voluntary Redress Fund ingathers and distributes funding in the consumer interest. Further details are available at <https://www.ofgem.gov.uk/publications-and-updates/ofgem-appoints-energy-saving-trust-distribute-payments-rule-breaking-energy-companies-charities>

2. The Authority's decision on contraventions

2.1. The Authority considered the evidence gathered during the course of the investigation in the making of this decision. The Authority is satisfied that E breached SLC 25.2, SLC 13.1(b) and SLC 13.1(d).

- Breach 1 relates to sales and marketing activities and the obligation to take all reasonable steps to ensure activities are undertaken in a fair and transparent manner and do not mislead customers (SLC 25.2).
- Breach 2 relates to arrangements for site access and the obligation to take all reasonable steps to ensure Representatives are identifiable as acting on behalf of the Licensee when visiting customers at their homes (SLC 13.1(b)).
- Breach 3 also relates to arrangements for site access and the obligation to take all reasonable steps to ensure their Representatives are fit and proper persons to visit customers at their homes (SLC 13.1(d)).

Breach 1: SLC 25.2 - Obligation to meet the sales and marketing Objective (August 2014 to February 2017)

2.2. Under SLC 25.2, in relation to its sales and marketing activities, a Licensee must take all reasonable steps to secure achievement of, and avoid doing anything which jeopardises its ability to achieve, the Objective¹⁰ of ensuring, among other things, that:

- all information which the Licensee or any Representatives provides does not mislead the Domestic Customer to whom it is directed and is otherwise fair both in terms of its content and in terms of how it is presented; and
- such activities and all contact by the Licensee or a Representative with a Domestic Customer are conducted in a fair, transparent, appropriate and professional manner.

2.3. The Authority, having considered the evidence, found that E failed to comply with SLC 25.2 and breached this requirement from August 2014 until February 2017.

¹⁰ The Objective, as defined by SLC 25.1 was:

(a) all information which the licensee or any Representative provides (whether in Writing, by electronic display or orally) to Domestic Customers in the course of the licensee's Marketing Activities and/or its Telesales Activities is complete and accurate, is capable of being easily understood by Domestic Customers, does not relate to products which are inappropriate to the Domestic Customer to whom it is directed, does not mislead the Domestic Customer to whom it is directed and is otherwise fair both in terms of its content and in terms of how it is presented (with more important information being given appropriate prominence); and

(b) the licensee's Marketing Activities and Telesales Activities and all contact by the licensee or a Representative with, and the behaviour of the licensee and any Representative towards, a Domestic Customer in the course of the licensee's Marketing Activities and/or Telesales Activities are conducted in a fair, transparent, appropriate and professional manner.

- 2.4. The Authority found that E did not take all reasonable steps to ensure compliance with SLC 25.2. The Authority considered that there were further reasonable steps that E's senior management could have taken to secure compliance.
- 2.5. A review of the evidence revealed that, during the period, EWUK sales agents did not at any point in the sales presentation make it clear to customers (many of whom, as PPM customers, are likely to have been in vulnerable circumstances) that they represented E and that they were conducting sales and marketing activities solely on its behalf.
- 2.6. A contract between EWUK and E provided that EWUK sales agents were to make it clear that they represented E. EWUK did not make this clear to customers and E's management were aware that this was occurring. The Authority considered it would have been reasonable for E's senior management to ensure EWUK complied with this obligation. This would have ensured fairness and transparency in dealings with customers.
- 2.7. The Authority noted that E implemented a number of changes during the course of the investigation. This included changes to sales scripts, changes to uniform and branded materials, retraining and discontinuation of EWUK as a brand identity¹¹. As a result of these changes, the Authority considered that this breach ended in February 2017.

Breach 2: SLC 13.1(b) – Identification of Representatives (August 2014 to February 2017)

- 2.8. SLC 13.1(b) states:

The licensee must take all reasonable steps to ensure that each Representative who visits a Customer's premises on the licensee's behalf: ...

(b) can be readily identified as a Representative of the licensee by a member of the public; ...

- 2.9. The Authority found that from August 2014 until February 2017 E breached SLC 13.1(b). This finding is based on the same evidence and facts outlined in breach 1. Additionally, the use of the EWUK brand identity on uniforms, ID cards, sales applications and literature also meant these sales agents were not readily identifiable as E's representatives by members of the public. In summary, E did not ensure that EWUK sales agents were identifying themselves as its Representatives when visiting customers at their homes.
- 2.10. It is important that prospective customers, and other members of the public, are not misled about which supplier a sales agent represents and the purpose of the sales agent visiting a prospective customer's premises. This will ensure that customers are provided with fair and transparent information enabling them to

¹¹ EWUK was a trading name of Amblin Ltd.

make informed choices about the products offered and the manner in which they are presented to them.

- 2.11. The Authority noted that E made changes in February 2017 (as described in paragraph 3.7) which ended this breach.

Breach 3: SLC 13.1(d) – Fitness of Representatives (August 2014 to May 2017)

- 2.12. SLC 13.1(b) states:

The licensee must take all reasonable steps to ensure that each Representative who visits a Customer's premises on the licensee's behalf: ...

(d) is a fit and proper person to visit and enter the Customer's premises;

- 2.13. The Authority, having considered the evidence, found that E failed to comply with SLC 13.1(d) and breached this requirement from August 2014 until the end of May 2017.
- 2.14. A review of the evidence revealed that neither of the recruitment processes used by KCAPS¹² or EWUK included the use of Disclosure and Barring Service¹³ (DBS) checks, or any other character or conduct check, as a means of establishing whether or not a sales agent was a fit and proper person to interact with customers at their homes.
- 2.15. E's failure to ensure the fitness of its Representatives posed a risk to customers of both financial and non-financial harm.
- 2.16. The Authority noted that in late May 2017 E made alterations to its recruitment and employment practices and DBS checks were introduced for new and existing sales agents. Additionally E introduced an obligation for sales agents to notify E of any subsequent convictions. The Authority considered that this breach ended when these measures were introduced in late May 2017.
- 2.17. The Authority found no evidence that any customers suffered financial or non-financial detriment as a result of E's failure to conduct DBS checks.

3. The Authority's decision on whether to impose a financial penalty

General background to the Authority's decision to impose a financial penalty

- 3.1. In deciding whether it is appropriate to impose a financial penalty, and the amount of any penalty the Authority is to have regard to its statement of policy most recently published when the contraventions occurred. In October 2003 the Authority published its Statement of Policy in Respect of Financial Penalties ("the

¹² E were directly involved in the recruitment of KCAPS sales agents.

¹³ Formerly known as Criminal Records Bureau (CRB) checks.

2003 Penalty Statement¹⁴). In November 2014, the Authority published a new Statement of Policy with respect to Financial Penalties and Consumer Redress policy (“the 2014 Penalty Statement¹⁵”). The Authority must have regard to the 2014 Penalty Statement when deciding whether to impose a financial penalty, and determining the amount of any such penalty, in respect of any contravention which occurred on or after 6 November 2014. In such cases, the 2014 Penalty Statement applies instead of the 2003 Penalty Statement.

- 3.2. The misconduct in question occurred from August 2014 to the first half of 2017. The Authority assessed the appropriate penalty in respect of E’s contraventions from November 2014 – February / May 2017 under the 2014 Penalty Statement. Having established the appropriate penalty for the period November 2014 - February / May 2017, the Authority took the view that, because the gravamen of E’s misconduct occurred during the application of the 2014 Penalty Statement, it was reasonable to calculate the appropriate penalty by reference to the 2014 Penalty Statement alone. The Authority has had regard to the 2003 Penalty Statement and recognised that it, alongside the Chairman’s Letter¹⁶ was applicable to the period of breach from August 2014 to November 2014. However, the Authority considered that applying the criteria set out in the 2003 Penalty Statement, alongside the Chairman’s Letter, separately to this relatively short period of breach did not result in a materially different outcome.
- 3.3. The Authority is required to carry out all its functions, including the taking of any decision as to the imposition of a penalty, in the manner that it considers is best calculated to further its principal objective¹⁷, having regard to its other duties. In deciding whether it is appropriate to impose a financial penalty, the Authority has considered all the circumstances of the case including, but not limited to, the specific matters set out in the 2014 Penalty Statement and representations made by E.
- 3.4. We set out the approach using the 2014 Penalty Statement below.

2014 Penalty Statement - General Criteria in relation to imposing a financial penalty and/or consumer redress order

¹⁴ The Authority’s statement of policy with respect to financial penalties (October 2003): <https://www.ofgem.gov.uk/ofgem-publications/74207/utilities-act-statement-policy-respect-financial-penalties.pdf>

¹⁵ The Authority’s statement of policy with respect to financial penalties and consumer redress (6 November 2014): <https://www.ofgem.gov.uk/ofgem-publications/91201/financialpenaltiesandconsumerredresspolicystatement6november2014.pdf>

¹⁶The Chairman’s letter was published on 27 March 2014 and stated that enforcement should ‘deliver strong deterrence against future non-compliance, and ensure that regulatory compliance is given sufficient focus within businesses.’ As such, the Authority decided to incorporate a greater emphasis on deterrence when imposing subsequent financial penalties. Link to Chairman’s Letter: https://www.ofgem.gov.uk/sites/default/files/docs/2014/03/the_authoritys_position_on_future_financial_penalties_letter_27_march_2014.pdf

¹⁷ The Electricity Act 1989 (section 3A) and the Gas Act 1986 (section 4AA) set out the Authority’s principal objective for energy regulation, thereby defining the purpose of Ofgem’s activities as to protect the interests of existing and future consumers, wherever appropriate by promoting competition. The Energy Act 2010 amended the principal objective to clarify that the interests of consumers should be taken as a whole.

Factors tending to make (a) the imposition of a financial penalty and/or (b) the making of a consumer redress order more likely

Whether the contravention or failure has damaged, or could have damaged, the interests of consumers or other market participants

- 3.5. The Authority considered that the interests of consumers could have been damaged by E's failure to ensure its Representatives identified themselves correctly to customers when visiting them at their homes. Complaints evidence gathered during the investigation indicated that some consumers were misled or were unclear as to the purpose of their engagement with a EWUK sales agent. In some instances, consumers were unaware that the purpose of the EWUK visit was to switch customers to E. Such behaviour is misleading to consumers and can lead to distrust in the face-to-face energy sales process overall. In turn, consumer distrust in face-to-face energy sales could have a detrimental impact on other market participants who also conduct sales and marketing in this manner, and discourage consumers from engaging with the market more generally.
- 3.6. Additionally the Authority considered that the failure to conduct suitable background checks on sales agents created a risk to consumers of financial and non-financial harm.

Whether the contravention or failure has damaged, or could have damaged, the confidence that consumers and/or other market participants have in the market

- 3.7. The Authority considered that E's actions could have damaged the confidence consumers have in the market. It should be clear to consumers which Licensee a sales agent represents when visiting customers' homes and the exact purpose of the visit. Consumers should also be confident that persons visiting their homes have had suitable background checks carried out on them before being allowed to interact with the public. E's failure to ensure compliance in both these areas could lead to distrust in the face-to-face sales process overall.

A penalty and/or a consumer redress order is necessary to deter future contraventions or failures and to encourage compliance

- 3.8. The Authority considered that imposing a financial penalty in this case is necessary to create an incentive for compliance and deter future breaches generally. The Authority recognises that face-to-face sales is a means of acquiring customers and does not seek to discourage that. However, the imposition of a penalty in this case would create the right incentives around the need for Licensees to ensure that such activities are carried out in a manner that is fully compliant with the SLCs.

Whether the contravention or failure was deliberate or reckless

- 3.9. The Authority considered that E's actions were deliberate insofar as E's senior management were aware that EWUK sales agents were not identifying themselves as E's Representatives. There was a contractual arrangement between E and EWUK which E should have ensured that EWUK adhered to. The Authority recognised, however, that E did not deliberately set out to contravene its licence conditions.

Whether the circumstances from which the contravention or failure arose were or should have been within the control of the regulated person under investigation

- 3.10. The Authority considered that E was in full control of the sales process despite the outsourcing to other parties. E had oversight of the recruitment, training and sales processes and had contractual arrangements with its Representatives. The Authority does not consider any failings were as a result of external factors outside E's control; indeed, the SLCs are clear that suppliers are responsible for the actions of third-party sales agents.

Whether the contravention or failure (or possibility of it) would have been apparent to a regulated person acting diligently

- 3.11. The Authority considered that the breaches would have been apparent to a regulated person acting diligently. E should have been aware that EWUK's failure to identify themselves as E's Representatives would have been non-compliant with the SLCs.

Whether there was a lack of effective remedial action after the contravention or failure became apparent to the regulated person

- 3.12. The Authority noted that since the opening of the investigation, E has now remedied all of the breaches.

Whether the regulated person has a record of previous contraventions or failures, similar or otherwise

- 3.13. The Authority noted that this is the first time E has been the subject of an investigation.
- 3.14. After considering the above-mentioned factors into account, the Authority decided that it would be appropriate to impose a financial penalty in the circumstances.

4. Determining the amount of financial penalty and/or amounts payable under a consumer redress order

- 4.1. In accordance with section 270 of the Electricity Act 1989 and section 300 of the Gas Act 1986, the Authority may impose a financial penalty of up to ten per cent of the turnover of the relevant licence holder. Turnover is defined in an Order

made by the Secretary of State¹⁸. The Authority is satisfied that the penalty does not exceed ten per cent of the turnover of E.

2014 Penalty Statement

- 4.2. The 2014 Penalty Statement requires that a six step process is followed in order to determine the level of financial penalty¹⁹
1. Calculate the detriment to consumers and calculate the gain to the regulated person. Consider whether a consumer redress order is appropriate to remedy the consequences of the contravention identified or to prevent a contravention of the same or a similar kind from being repeated.
 2. Consider the seriousness of the contravention or failure to determine the appropriate penal element.
 3. Consider any aggravating and mitigating factors that may increase or decrease the penal element.
 4. Consider the need for a deterrence uplift to the penal element, having regard to the principle that non-compliance should be more costly than compliance and that enforcement should deliver strong deterrence against future non-compliance.
 5. Where a case is settled, apply a discount to the penal element.
 6. Establish the total financial liability.

1 Calculate the gain and detriment

- 4.3. The Authority considered that no customers suffered financial harm due to E's failure to ensure that its Representative's sales agents identified themselves as Representatives of E, or because of E's failure to carry out DBS checks on all sales agents. The Authority noted that E's energy prices were competitive during the period. However, the Authority considered that E may have caused distrust in the market and in face-to-face sales as a result of EWUK failing to identify themselves as selling only on behalf of E.
- 4.4. The Authority considered that a modest financial gain was made by E in the form of avoided costs. These avoided costs are the sum total of the DBS checks not undertaken by E or EWUK during the breach period.
- 4.5. The Authority considered that the financial gain to E by not completing DBS checks is approximately £15,000. This is the cost of completing a basic check on each sales agent recruited during the breach period²⁰.

¹⁸ The Electricity and Gas (Determination of Turnover for Penalties) Order 2002.

¹⁹ Please see section 5 of the 2014 Penalty Statement (pages 5-10).

²⁰ <https://www.gov.uk/disclosure-barring-service-check/overview>

- 4.6. The Authority did not consider that a consumer redress order was appropriate in these circumstances to remedy the consequences of the contraventions or prevent a similar contravention occurring in the future. The Authority did not consider that a consumer redress order was appropriate as there was no evidence that one or more consumers had suffered loss, damage or inconvenience as a result of the contravention. The Authority determined that a financial penalty was appropriate.

2 Assess seriousness

- 4.7. In assessing seriousness, the Authority considered the nature and the impact of the breaches.
- 4.8. With regards to E's failure to ensure its Representatives identified themselves correctly, the Authority considered this a serious failing on E's part. E was aware that EWUK sales agents were not identifying themselves correctly to customers or clearly stating the nature of the visit. There was a contractual arrangement to ensure that EWUK sales agents did identify themselves as Representatives of E but E did not ensure this was adhered to. The Authority considered that such behaviour could undermine consumer confidence in the energy market.
- 4.9. E's failure to carry out sufficient background checks on sales agents created the potential for unfit persons (such as those with a history of violent or dishonest behaviour) to gain entry to the homes of customers, including vulnerable customers. This in turn created the risk of financial or non-financial harm to these customers. Whilst the Authority noted there was no evidence of detriment occurring, the failure of E to adequately mitigate these risks via suitable background checks was concerning.

3 Consider aggravating or mitigating factors

Factors tending to increase the penal element

Repeated contravention or failure, including failure to comply with previous non-statutory undertakings or agreed action

- 4.10. The Authority considered that this is not a repeated contravention as E had not previously been the subject of a formal investigation. Therefore, this factor did not apply.

Continuation of the contravention or failure after becoming aware of it

- 4.11. E was aware throughout the breach period that EWUK sales agents were not identifying themselves correctly to customers. The Authority therefore considered that this factor applied.

Continuation of the contravention or failure after becoming aware of the start of Ofgem's investigation

- 4.12. Similarly, E did not take steps to ensure that EWUK's sales agents identified themselves correctly after the investigation was opened. Nor did E take steps to review its policies and procedures after the investigation was opened to ensure it was compliant. The Authority therefore considered that this factor applied.

The involvement of senior management in any contravention or failure

- 4.13. E's senior management were involved as they were aware that EWUK sales agents were not identifying themselves as their Representatives but they did not take steps to ensure that these contractual obligations were adhered to. The Authority therefore considered that this factor applied.

A lack of sufficient senior management involvement to prevent the contravention or failure

- 4.14. The Authority considered that the involvement of senior management was considered at paragraphs 4.11 to 4.13 above, and this factor did not apply.

The absence of any evidence of internal mechanisms or procedures intended to prevent contravention or failure

- 4.15. The Authority did not consider that there was an absence of any evidence of internal mechanisms or procedures intended to prevent the breaches of the SLCs, on the evidence produced. E did have some relevant internal mechanisms and procedures in place and therefore this factor did not apply.

Absence of any evidence that such internal mechanisms and procedures as exist within the regulated person have been properly applied and kept under appropriate review by senior management

- 4.16. The Authority considered that the internal mechanisms and procedures in place were properly applied and kept under review by senior management. Although the contractual arrangement with EWUK was not adhered to, senior management were aware of this. The fact that it was not acted on was dealt with under separate aggravating factors. Therefore, this factor did not apply.

The extent of any attempt to conceal the contravention or failure from Ofgem

- 4.17. The Authority considered that there was no evidence that E attempted to conceal the contraventions from Ofgem and this factor did not apply.

Failure to cooperate fully with reasonable requests from Ofgem's investigation team

- 4.18. The Authority considered that E cooperated fully with Ofgem during the course of the investigation and this factor did not apply.

Withholding relevant evidence and/or submitting it in a manner that hinders the investigation

- 4.19. The Authority did not consider that E withheld information or submitted it in a manner that hindered the investigation. Therefore, this factor did not apply.

Factors tending to decrease the penal element

The extent to which the regulated person had taken steps to secure compliance either specifically or by maintaining an appropriate compliance policy, with effective management supervision

- 4.20. E made adjustments to certain of its policies during the course of the investigation. Whilst the Authority welcomed the steps E have taken in this regard, those processes were not directly related to the breaches found. Therefore, this factor did not apply.

Evidence that the contravention or failure was genuinely accidental or inadvertent

- 4.21. The Authority considered that E was aware of its contractual agreement with EWUK and was also aware that EWUK were not complying with it. It was within E's control to ensure the terms of this contract were adhered to. The Authority therefore considered that this factor did not apply.

Promptly, accurately and comprehensively reporting the contravention or failure to Ofgem

- 4.22. E did not self-report the contraventions to Ofgem therefore the Authority considered that this factor did not apply.

Appropriate action by the regulated person to remedy the contravention or failure

- 4.23. The Authority considered that the steps taken by E to rectify the breaches were taken promptly after they were brought to the attention of senior management by Ofgem staff. However, the action was taken well into the investigation and was reactive. Therefore, the Authority considered that this factor only partially applied.

Evidence that the regulated person has taken steps to review its compliance activities and change them as appropriate in the light of the events that led to the investigation at hand

- 4.24. The Authority considered that although E made some changes to its compliance activities these were not directly related to the breaches found. Therefore, this factor did not apply.

Providing cooperation with Ofgem's investigation that is well beyond what would be expected of any regulated person facing enforcement action, and goes well beyond merely meeting prescribed timescales for responding to information requests or a Statement of Case

- 4.25. The Authority considered that E did fully cooperate with Ofgem's investigation but did not go beyond what would be expected of a regulated person in the circumstances. Therefore, this factor did not apply.

- 4.26. In conclusion, considering the three aggravating factors and the one partial mitigating factor, the Authority considered that an upward adjustment to the initial penal element was appropriate.

4 Consider an adjustment for deterrence

- 4.27. The Authority considered that an upward adjustment for deterrence to the penal element was appropriate in this case.
- 4.28. The Authority considered the levels of penalties imposed in other, similar investigations, whilst recognising that prior cases were determined prior to the Chairman's Letter. This letter indicated the Authority would place a greater emphasis on deterrence when imposing subsequent financial penalties. The Authority determined that, after the upward adjustment had been applied, £350,000 was an appropriate overall penal element under the 2014 Penalty Policy.

5 Apply a discount in settled cases

- 4.29. The Authority applied a discount of 30% to the penal element of the financial penalty amount, to reflect the early settlement of this investigation.
- 4.30. Applying this discount to the penal element of the penalty resulted in a total penal element of £245,000.

6 Establish the total financial liability

- 4.31. The Authority had established the total financial liability of E under the 2014 Penalty Statement by adding the final penal element of £245,000 to the gain and detriment of £15,000, resulting in a total financial liability of £260,000.
- 4.32. The Authority decided to impose a financial penalty of £1 on the condition that E paid the balance of the £260,000 to the Authority's Voluntary Redress Fund. The Authority considered the penalty was reasonable in all the circumstances of the case.

5. Representations on the proposed penalty notice and the Authority's decision

- 5.1. The Authority received one representation in response to the notice of intention to impose a financial penalty issued pursuant to 27A(3) of the Electricity Act 1989 and section 30A(3) of the Gas Act 1986²¹ (the Notice of Intention). The respondent submitted that:
- (i) there was little quantifiable detriment and that detriment highlighted was 'potential';
 - (ii) as E offered a competitive tariff some customers would have benefitted from switching to E;

²¹ Issued on 23 November 2017.

- (iii) there should have been no uplift to penalty as E's management took steps to rectify the problems when brought to their attention; and
 - (iv) there wasn't sufficient clarity in how the overall penalty had been determined. The respondent therefore questioned if the penalty had been set at an appropriate level.
- 5.2. In response to (i), the Authority was clear in the proposed penalty notice that the detriment was potential and that there was no evidence of actual detriment suffered. It is not possible to quantify what impact E's behaviour had on the interests of consumers or on confidence in the market as consumers may have been unaware that there were issues with E's compliance with SLCs 13 and 25. The Authority also notes that the lack of DBS checks in this instance did not lead to any customers suffering detriment, and that was fortunate. However, the Authority is satisfied that there was a level of risk²² to consumers (past, present and future) of financial and non-financial harm associated with E's non-compliance with these SLCs and that level of risk was unacceptable.
- 5.3. In response to point (ii), the Authority notes that E offered a competitive tariff during the period and some consumers may have benefitted financially from the switch. However, E's behaviour was misleading to consumers and non-compliant with SLC 13 and 25. These (and other) SLCs are designed to protect the interests of consumers. As a matter of policy, and in the interests of deterrence, the Authority does not consider it appropriate to reduce a penalty levied following evidence of poor sales practices because an energy company happened to be competitive during the breach period.
- 5.4. In response to point (iii), the Authority welcomed the steps that E took to address non-compliance issues when brought to its attention. However, E had been non-compliant with SLCs 13 and 25 for a considerable period of time and had not detected and rectified the breaches outwith this investigation. It is for licensees to ensure they are at all times compliant with the requirement of SLCs. The Authority considered that it remained appropriate to impose an upwards adjustment to the penal element to take account of E's behaviour.
- 5.5. In response to point (iv), the Authority has determined the level of penalty following the steps set out in the 2014 Penalty Statement. In determining the level of penalty in this case (Step 2 above) the Authority had regard to the levels of penalties imposed in other, similar investigations, whilst recognising that prior cases were determined prior to the Chairman's Letter in which the Authority indicated it would place a greater emphasis on deterrence when imposing subsequent financial penalties (Step 4 above).
- 5.6. The submission also pointed out that the Notice of Intention referred to four aggravating factors, but in fact only identified three such factors. This was an

²² The 2014 Penalty Statement makes provision for potential detriment, in particular at section 4.1 (the factors tending to make the imposition of a financial penalty more likely include that the contravention or failure damaged, or could have damaged, the interests of consumers) and 5.12 (the factors relating to the impact of a contravention or failure may include the financial or risk of financial harm caused to consumers).

internal error in the drafting process and does not impact on the final penalty figure. For the avoidance of doubt, in determining the appropriate penalty the Authority had regard to the three aggravating factors, and one (partial) mitigating factor, outlined at paragraphs 4.10 – 4.26 above. The respondent also made a number of wider points about the Authority's approach and policy regarding enforcement which will be considered by Ofgem's Enforcement function.

- 5.7. Therefore, the Authority is satisfied that in determining the level of the financial penalty it has applied the 2014 Penalty Statement appropriately. The Authority is satisfied that the level of penalty is commensurate with the seriousness of the contraventions.

The Authority's Decision

- 5.8. The Authority has found that E breached SLC 25.2 and SLC 13.1(b) and (d) during the periods set out in paragraph 1.2. The Authority has imposed a financial penalty on E of £1 which it considers to be reasonable in all the circumstances of the case.
- 5.9. The penalty takes into account the fact that E will pay £260,000 (less £1) into the Voluntary Redress Fund. Both payments will be made by 27 February 2018.
- 5.10. In reaching its decision the Authority took the relevant factors under the 2014 Penalty Statement into account including:
- E's failure to ensure EWUK sales agents identified themselves as its Representatives is a contravention of SLCs 25.2 and 13.1(b)
 - E's failure to adequately ensure its Representatives were fit and proper persons to visit customers at their homes is a contravention of SLC 13.1(d)
 - The serious nature of the breaches of SLC 25.2, 13.1 (b) and 13.1 (d)
 - The potential for financial and non-financial harm to consumers created by the contraventions
 - The modest gain made by E through the avoided costs of not carrying out background checks on potential sales agents
 - The three aggravating factors and one partial mitigating factor which apply to the case (paras 4.10 to 4.26)
- 5.11. The Authority hereby gives notice under section 27A(3) of the Electricity Act 1989 and section 30A(3) of the Gas Act 1986 of its decision to impose a penalty of £1 on E in respect of the contraventions set out above. This penalty payment is to be made by 27 February 2018.

- 5.12. E has agreed to settle the investigation on the basis of paying a financial penalty of £1 and to pay the sum of £260,000 (less £1) by way of voluntary redress. This voluntary redress payment is to be made by 27 February 2018.

Gas and Electricity Markets Authority

15 January 2018