

Annex 1: Response to Representations

Response to Representations

1. Introduction

1.1. The Authority issued a notice of [proposal to impose a financial penalty on Symbio dated 27 January 2021](#) ("**Proposal Notice**").

1.2. In response to this, the Authority received:

1.2.1. a number of representations, and certain information, from Symbio Energy Limited ("**Symbio**") including written submissions prepared by counsel acting for Symbio dated 14 March 2021 ("**Written Submissions**") and oral representations made by counsel acting for Symbio at a meeting with the Authority on 22 March 2021 ("**Oral Submissions**"); and follow-up submissions dated 19 April 2021 ("**Follow-up Submissions**");

1.2.2. third party representations from a member of the public and from Centrica Plc.

1.2.3. representations and information from the Ofgem case team.

1.3. The Authority carefully considered all relevant representations and information in reaching its decision to impose a financial penalty and in deciding that the level of that penalty should be £100,000. It has also had regard to the [Statement of Policy with respect to Financial Penalties and Consumer Redress | Ofgem 2014](#) ("**Penalty Statement**").

1.4. In the foregoing Notice of Decision to Impose a Financial Penalty dated 5 May 2021 ("**Decision Notice**"), the Authority confirms that it is satisfied that Symbio has contravened its obligations as follows:

1.4.1. Symbio was required to make its Feed-In-Tariff ("**FIT**"), Year 11, Quarter 1 levelisation payment of £300,883.80 by 11 August 2020. Symbio failed to pay the sum due by this date. It made the payment on 10 September 2020 ("**FIT 1 Payment**").

1.4.2. Symbio was required to make its FIT, Year 11, Quarter 2 levelisation payment of £345,087.64 by 10 November 2020. Symbio failed to pay the sum due by this date.

Ofgem issued a statutory demand for the outstanding sum of £174,087.64 on 18 November 2020. Symbio made the payment on 10 December 2020, following a partial payment of £171,000 on 17 November 2020 ("**FIT 2 Payment**").

1.4.3. Symbio was required to present Renewable Obligation ("**RO**") certificates by 1 September 2020 or make a payment in lieu by 31 August 2020. Regulated persons who fail to discharge their obligations by 1 September 2020 had until 31 October 2020 to make late payment(s). By 1 September, Symbio paid its RO Scotland ("**ROS**") in full and partial payment towards its RO. On 1 September 2020, Symbio owed a total of £1,200,000. On 2 October 2020, Ofgem published a Notice of Proposal of Final Order because the EDP was satisfied that (a) Symbio was likely to contravene the requirement to pay the outstanding sum of £927,870.57, plus accrued interest, by 31 October 2020; and (b) an Order was required for the purpose of securing compliance with that requirement. The Authority made a Final Order on 28 October 2020 requiring Symbio to pay the outstanding sum of £506,308.40, plus accrued interest, by 31 October 2020¹. Symbio failed to pay the sum due by 31 October 2020. On 10 November, Symbio paid its RO in full and the Final Order was revoked on 14 December 2020 ("**RO Payment**").

1.4.4. Symbio was required to pay £55.80 in RO and ROS mutualisation payments by 31 August 2020. Symbio failed to pay the sum due by this date. It made the payment on 19 October 2020 ("**RO Mutualisation Payment**").

1.5. Otherwise, the Authority's response in respect of the representations it received are set out below, as follows:

1.5.1. At section 2 below, the Authority sets out general submissions made by Symbio.

1.5.2. At section 3 below, the Authority considers Symbio's representations with regard to its decision to impose a financial penalty.

1.5.3. At section 4 below, the Authority considers Symbio's representations and the representations from Centrica Plc and a member of the public with regard to the level of penalty.

¹ Regulated persons who failed to discharge their RO obligations by 1 September 2020 had until 31 October 2020 to make a late payment.

- 1.5.4. At section 5 below, the Authority considers whether there should be any adjustment for deterrence and notes that it has not received any specific submissions from Symbio in this regard.
- 1.5.5. At section 6 below, the Authority considers whether it should apply any settlement discount and refers to Symbio's representations regarding this.
- 1.5.6. At section 7 below, the Authority considers whether there is any basis to adjust the total financial liability and Symbio's representations on this.
- 1.5.7. Its overall conclusions are set out at section 8.
- 1.6. In the remainder of the document text in yellow highlighted text repeats representations received.

2. General Submissions

- 2.1. Symbio makes general submissions on the following:
 - 2.1.1. The impact of the Covid-19 pandemic on its cashflow and therefore ability to meet its financial obligations as described at paragraph 1.4 above;
 - 2.1.2. Proportionality, transparency and consistency with regard to the Authority's proposal to impose a penalty.

The impact of Covid-19

- 2.2. The following section of text repeats Oral Submissions, made by Symbio:

The breaches occurred primarily because of the impact of Covid 19 on the ability of consumers to pay their bills. The UK government and Ofgem's policy was, (quite rightly), one of forbearance by suppliers in respect of customers in default as a result of the pandemic and consequent lockdown. As a new entrant to the market in April 2019, Symbio had been actively trading for less than a calendar year when the first national lockdown was imposed in March 2020.

The pandemic created wholly exceptional circumstances, the effect of which on a challenger company cannot be underestimated. Such a company, it may be

inferred, has: a) Less cash reserves than larger more established competitors b) Less ability to raise funds by borrowing.

- 2.3. The following section of text repeats further Oral Submissions made by counsel for Symbio:

COVID has impacted the lives of everybody in different ways. It certainly impacted, and Ofgem recognises this, that it is COVID behind the failure to make timely payments in this case. It presented the company with exceptional challenges which are unlikely ever to be repeated. We submit on behalf of Symbio that Ofgem has failed to make sufficient allowance for the particular challenges posed by COVID, given the sensible, if I may say so, policy of forbearance that it was asked to adopt and given its inability to access other forms of finance.

...

Ofgem knows that the policy of forbearance would impact the financial position of companies and in particular, I may submit to you, the position of a small challenger company. I say, for the avoidance of doubt, that the market and consumers are best served by challenger companies not being crushed by action by the Regulator because competition is inherently of benefit to them.

...

So Symbio is a company whose FIT payments increased, the debt levels have gone through the roof, it can't access the schemes, for example, the Coronavirus business interruption loan scheme, because it hadn't been trading for long enough. It applied for a loan to its bank at HSBC. You can see that application at page 205 of that bundle. It was refused. It has got to abide by the forbearance policy. It is between a rock and a hard place, in my respectful submission. The Coronavirus Business Interruption loan wasn't available to it and in those circumstances, recognising the difficulties it might face, it engaged with the Regulator at the earliest opportunity and consistently throughout.

- 2.4. The Authority has carefully considered the impact of the Covid-19 pandemic and its disruption to Symbio's business model. The Authority appreciates the efforts that energy suppliers have gone to which have been critical to keeping essential energy supplies flowing to customers. This has required suppliers to make difficult judgments in a fluid situation as the Covid-19 pandemic has made business and payment conditions very

challenging for all participants in the energy market from consumers, to suppliers to network operators. These circumstances have made it particularly difficult to make the necessary payments under the Government's environmental schemes this year. However, it is the responsibility of all suppliers to ensure they can meet their obligations, and other suppliers, struggling with similar financial pressures, have done so including small or new suppliers. The Authority repeatedly reminded suppliers of these upcoming obligations during the summer of 2020 and Ofgem engaged in extensive correspondence with Symbio reminding it of its obligations². In his open letter to supply companies and other interested stakeholders on *"Managing the impact of COVID-19 on the energy market – introducing the option of relaxing network charge payment terms for suppliers and shippers"*, dated 2 June 2020, Ofgem's CEO, Jonathan Brearley stated:

"As a consequence of the impacts on the energy supply chain, suppliers (and in turn shippers) may find themselves experiencing cash flow issues, which could have negative impacts on consumers. We would expect suppliers and shippers with cash flow issues to seek to access commercial or the government's and Bank of England financial support facilities."

- 2.5. Therefore, as is made clear in Mr Brearley's letter, despite the challenging financial conditions, suppliers were expected to meet their obligations under the environmental schemes and to make payments on time. In the Annex to his letter dated 16 June 2020 entitled *"Impact of Covid-19 on retail energy supply companies – regulatory expectations from 1 July 2020"*, Mr Brearley states *"We have been clear that suppliers must comply with their scheme payments e.g. Feed-in-tariff (FIT), Renewables Obligations (RO) and Warm Home Discount (WHD), for the current financial year. As always, we will take appropriate enforcement action where suppliers do not comply."* The Authority acknowledges that Symbio had difficulty accessing commercial finance and the government loan schemes. Mr Brearley noted in his letter dated 2 June 2020 that *"we are aware that the eligibility criteria and loan value caps on the schemes may prevent some suppliers and shippers from being able to meet all their liquidity needs through them alone"*, he then notes *"We therefore asked the energy network companies, through the Energy Networks Association (ENA), to develop schemes to provide relief to cash-flow constrained suppliers..."*. The Authority notes that Symbio

² See Annex 2

was late to apply to the relevant scheme and that it entered into a payment plan with National Grid.

- 2.6. The Authority takes the view that it is necessary for suppliers to organise their financial affairs so that they meet their obligations under the environmental schemes on time. It therefore remains of the view that it is appropriate to impose a penalty of £100,000.
- 2.7. As set out at paragraphs 4.61 and 4.63 below, the Authority has taken account of the impact of Covid-19 as a mitigating factor.
- 2.8. The following section of text repeats Written Submissions made by Symbio with regard to the impact of the pandemic:

Symbio acted responsibly [sic] in engaging with Ofgem about the difficulties posed [sic] it was facing as a result of the pandemic.

- 2.9. The Authority accepts that Symbio engaged with Ofgem. The content of that engagement often contained a lack of clarity over Symbio's ability to pay on time. For example, the following section of text repeats what Symbio stated in its email dated 10 September 2020:

This leaves a residual liability of £1.2m.

£500,000 of this will be cleared in September 2020, from the aforementioned arrears collection which has begun in earnest.

A further £350,000 will be cleared by the end of October 2020 with a possibility that 100% of the RO will be cleared by this period. In any event, the full remainder will be repaid by the 15th October 2020.

We would like to bring to your kind attention, that Symbio Energy had flagged up in calls with Ofgem that Covid 19 and the resultant moratorium on debt collection would have an adverse impact on RO payment by the 31st August 2020. We are happy to have Ofgem auditor's review of our accounts and indeed balance sheet.

The following section of text repeats what Symbio stated in its email dated 11 September 2020, after Ofgem sought clarification:

"In summary, we will meet the following;

1) Network Grid TNUous (last two instalments of £190,000) for 2019 -2020. This will be fully discharged in Sept and Oct in line with our agreement with Network Grid.

2) The additional FIT levelisation payment due on 21st September for £81,000 received late last week (but also disputed on presumed market share of Symbio Energy)

3) RO payment of £300,000 will be made in the next 7 days bringing the net liability to £900,000 and a further £100,000 - £200,000 before the end of the month based on collections.

4) By 15th October a further £400,000 - £500,000 will be cleared and depending upon collection, we may be able to discharge the remaining £400,000 by end of October but depending on the collection rate this may be paid by the 10th November, thereby discharging the liability in full including accrued interest. There is a fixed deposit in Redbook bank that can only be removed after the 31st October 2020 and we are happy to assign this if required. We expect this to be received from the bank by the 10th November 2020. We have tried removing it early but the bank is being intransigent."

- 2.10. There is a lack of clarity evident in these emails as to whether Symbio will be in a position to make the RO Payment by 15 October, the end of October 2020 or by 10 November. In its first email Symbio states that "*the full remainder will be paid by 15 October 2020*" but in its subsequent email states that "*this may be paid by 10 November*". The Authority notes that much of Symbio's engagement is confused in this way. Its engagement was not, therefore, of particular assistance to Ofgem.

Proportionality, transparency, and proportionality

- 2.11. The following section of text sets out what Symbio also stated in its Written Submissions:

It is submitted that the foregoing all are fundamental in determining a just and proportionate penalty.

A penalty imposed in respect of a breach is unlikely to be either just or proportionate, unless it is applied with transparent even-handed consistency to all those guilty of the same or similar breach. The extent to which the same outcome is required is accepted to be, at least to some degree, fact sensitive, but

it is submitted that in order to be seen to adhere to these principles, the penalty for similar transgressions ought to be similar in respect of each transgressor.

In the year preceding the Covid crisis

"4 companies were in a similar situation and in some cases by the end of the consultation had made payments so the FO was not issued."

Symbio repeats the request that it has already made in a Freedom of Information request that the outcome in respect of those companies who had not done so is disclosed.

...

Indeed, Symbio understands that it is the first and only supplier to be dealt by way of a financial penalty for making late payments and whilst fully recognizing the importance of compliance with the payments timetable, Symbio contends, in the absence of the provision of information which might justify a distinction, that it appears that has been unfairly singled out for unduly punitive sanction.

Whilst in the same conference call it was asserted

"that Symbio are not the only company in this situation and that Ofgem are treating companies consistently"

no evidence in support of this proposition has been provided. Symbio understands that no other late paying or otherwise defaulting company has been dealt with in like fashion for similar (or more serious) transgressions. Symbio therefore requests that the factual basis underlying this assertion is provided in advance of the hearing.

As an illustration of the disproportionate approach taken by Ofgem towards Symbio, it issued a statutory demand for the balance of the FIT Year 11, Quarter 2 Levelisation payment for the outstanding sum of £174,087.64 at a time when half of payment has already been made and confirmation provided as to when next payment will be made. Such a course of conduct is outside the scope of the guidelines. Symbio has requested whether such a course of action has been taken in respect of similar breaches by other suppliers but received no response.

2.12. The following section of text repeats what Symbio stated in the Follow-up Submissions:

"...we would like to point to the EDP that the only company that paid a fine for missed deadline was:

	Fine	Redress	
		Payment	Total
2015 March		Drax	
Missed Deadlines	5,000,000	23,000,000	28,000,000

<https://www.ofgem.gov.uk/investigations/investigations-and-enforcement-data>

'The Authority found that Drax breached Article 14(1) of the CESP Order having failed to achieve its carbon emissions reduction obligations by promoting qualifying actions to domestic energy users by 31 December 2012. Drax delivered 37.1% of its obligation and had a significant shortfall of 562,826 tCO₂ or 62.9% of its obligation.'

Please also note all others that missed a deadline paid a redress payment (which is usually where consumers are harmed) and that happened only in 2015 for the breached that took place in 2012.

Furthermore, the SPR (supplier performance report as attached) published by Ofgem yearly confirms further breach for FIT/RO and for the past 4 years Symbio was only reported for one breach (being only an administrative breach)

...

Furthermore, the 2018/2019 report shows significant breaches by suppliers:

Table 1 - Total non- compliance score by scheme in 2018 and 2019 Scheme	2018	2019	Change
FIT	528	555	27
RO	6	152	146
ECO	2	6	4
WHD	7	8	1
Total		543	

We are aware of the penalties imposed by Ofgem...

The list given by Ofgem only points out two penalties which was imposed as a result of the suppliers knowingly giving wrong information and as a result financially benefitting.

2011 Opus Energy

Investigation - RO

misreporting £125,000 penalty imposed

Investigation into Opus' compliance with reporting requirements under

the Renewables Obligation Order 2009 and the Renewables Obligation

(Scotland) Order 2009 with respect to the reporting of electricity supply

data | Ofgem

2013 Npower

Investigation - RO and FIT

misreporting £125,000 penalty imposed

Investigation into the reporting by Npower Limited of electricity supply

data under the Renewables Obligation and Feed-in Tariff scheme -

Notice of Decision | Ofgem

In the case of Symbio there was no financial benefit and no harm to any other third parties in the industry.”

- 2.13. The Authority has considered all the evidence put before it. It is satisfied that Symbio has been treated appropriately similarly to other suppliers. The Authority notes that no other supplier made a series of late payments similar to Symbio. The Authority is satisfied that Symbio’s conduct was such that it is appropriate to impose a penalty. In particular, with regard to that conduct, the Authority notes the following:
- 2.13.1. in its communications with Symbio, the Authority made clear what its expectations were with regard to it meeting its RO and FIT obligations on time³. The Authority made clear that while it acknowledged that cashflow difficulties may result from the request for forbearance with customer debt collection, it nevertheless expected Symbio to make its RO and FIT payment on time. It highlighted to suppliers generally, and to Symbio directly, the availability of Covid-19 business support mechanisms and the need to secure commercial credit⁴. It frequently and repeatedly advised suppliers generally and Symbio directly that they must pay on time and explained to Symbio and other suppliers the nature of the financial assurances needed to avoid enforcement action.
- 2.13.2. the terms of the legislation for the relevant environmental schemes do not permit payment deferral arrangements (with the very limited late payment window until 31 October for the RO⁵). No legislation has been brought forward to create such deferment arrangements in response to the Covid-19 pandemic.
- 2.14. The Authority notes Symbio’s position and notes final orders were proposed in relation to other suppliers. As a result of those orders, those other suppliers either made payment, went out of business or are facing enforcement action. Therefore, having considered all the all of the evidence before it, the Authority is not satisfied that Symbio has been unfairly singled out, or treated unfairly in any other way relative to other suppliers. The Authority considers that it has treated Symbio fairly and proportionately.

³ Please see Annex 2.

⁴ Letter from Jonathan Brearley dated 2 June 2020, quoted at paragraphs 2.4 and 2.5.

⁵ See paragraph 1.4.3.

2.15. The Authority also notes Symbio's position in its Follow-up Submissions. The Authority does not consider the cases referred to in those as comparable to the circumstances of this case. Also, the examples Symbio gives are cases where the regulated person has reached settlement with the Authority and has therefore agreed to make a redress payment. The Authority's view is that it has treated Symbio in an appropriately similar way to other suppliers.

3. The decision to impose a financial penalty on Symbio

3.1. Symbio made representations on this point in its Written Submissions and Oral Submissions. The relevant representations are set out below. In summary, Symbio's position is that a penalty should not be imposed because:

- 3.1.1. imposing a penalty for this nature of breach disproportionately affects smaller, newer market entrants. This restricts consumer choice, damages competition and therefore has an adverse impact on consumers;
- 3.1.2. late payment did not and could not have damaged the interests of consumers or other market participants; and
- 3.1.3. the Authority has not treated Symbio fairly / proportionately compared with other suppliers.

Adverse impact on smaller suppliers and consumers

3.2. The following section of text repeats what Symbio stated in its Written Submissions:

It is first to be observed that such a decision will of necessity disproportionately affects smaller, newer entrants to the market, making it harder to raise finance and compete in the market. Such an outcome is inherently detrimental to the consumer, restricting choice and damaging competition. Whilst it is conceded that it might nonetheless be appropriate in respect of the most serious breaches, the impact on both the supplier and the consumer should nonetheless be fully taken into account before a penalty is imposed.

3.3. All suppliers are equally required to meet their obligations, including new entrants to the market. There are 45 suppliers in the market, many of those are newer entrants to

the market than Symbio, and many are smaller than Symbio, and they were able to make their payments on time.

3.4. The Authority does not accept that the imposition of a penalty would create a market that is detrimental to the consumer. On the contrary, late payment can have a detrimental impact on consumers because:

3.4.1. Failure to make timely payment under the **RO** scheme triggers a mutualisation⁶ process. Failure to make timely payment under the Feed-In-Tariff schemes triggers a levelisation⁷ process. In both processes additional cost resulting from late payment is apportioned among other market participants. Those participants may pass that cost to their customers.

3.4.2. Late payment imposes administrative cost on the Authority.

3.5. Therefore, the imposition of a penalty is appropriate to deter future contraventions of this nature and therefore additional cost to market participants. Given that that cost may be passed on to consumers, the imposition of the penalty is also appropriate to prevent potential detriment to consumers.

3.6. The Authority further does not accept that imposition of a penalty creates conditions which restrict choice or damage competition. Late payment in fact enables those regulated persons who breach their obligations to gain an unfair financial advantage against other compliant suppliers by avoiding the costs of commercial credit. While the Authority notes that commercial credit may not have been available to Symbio, it nevertheless avoided this cost. Other suppliers may have to bear it in order to meet their obligations. Compliant suppliers are also required to bear the cost of mutualisation and levelisation as described at paragraph 3.4.1 above. Therefore, the imposition of a penalty is needed in order to prevent contravening suppliers gaining an unfair financial advantage. This safeguards competition, prevents compliant suppliers going out of

⁶ Mutualisation is the mechanism whereby a shortfall in the RO Scotland and/or RO England & Wales buy-out funds which meets a certain threshold (“relevant shortfall”) requires all compliant and partially compliant suppliers who have an obligation under the RO (Scotland) or RO (England & Wales) to make additional payments to make up the shortfall. A “relevant shortfall” is £15.4m in England & Wales and £1.54m in Scotland. Mutualisation does not apply to the RO (Northern Ireland).

⁷ The levelisation process is the mechanism by which the cost of the FIT scheme is apportioned across Licensed Electricity Suppliers. The cost is apportioned based on each supplier’s share of the Great Britain electricity market, whilst taking into account any FIT contribution they have already made.

business due to said unfair financial advantage and therefore, ultimately, ensures that consumers' choice is not restricted.

Damage to market participants and consumers

3.7. The following section of text repeats what Symbio states in its Written Submissions:

Symbio fully recognises the importance of suppliers meeting their obligations in a timely fashion. However the late payment in respect of 3 of the 4 the breaches in this case no more than a period of approximately 1 month later. The fourth breach in respect of the sum of £55.80 was made approximately 6 weeks late. Symbio submits that payment of the sums in question made within weeks of the dates upon which they fell due did not and could not have damaged the interests of consumers or other market participants. Moreover, if it is correct that similar enforcement measures against other transgressors, (including those 4 companies who failed to make payments in 2019), have not been taken, then the failure to do so tends to undermine this ground as a reason to take enforcement measure.

3.8. The following section of text repeats what counsel for Symbio stated in Oral Submissions:

Nothing in the statutory scheme which my friend has taken you through requires a breach of a requirement necessarily to result in a penalty. The fact that there is no discretion to accept a late payment does not mean there is an inevitable late payment penalty to be imposed. Those are two completely distinct matters. The fact that negative impacts can occur on other suppliers and, indeed, fall on the shoulders of consumers in a particular case does not mean that they have done in a given case. Given the amounts involved here and the period of delay, there is no evidence, either express or to be inferred, of any harm to others.

... the Regulator has failed to distinguish between the severity of the breaches, so it makes no attempt to distinguish on the one hand a failure to make a payment in excess of £300,000 and on the other hand a late payment of £55.80. They are all treated, according to the Regulator, as of moderate gravity. With respect, that is not a correct approach, in my respectful submission, and is not conducive to a

fair and proportionate outcome. Late payment can cause harm, depending on the nature and extent of it, but it is unlikely to have done so in this case and extremely unlikely to have done so in respect of that sum.

The decision to impose a financial penalty, we repeat, there is no evidence of actual loss or damage, so the harm caused by this late payment is likely, in our submission, to be negligible. If a reasonable member of the public, with full knowledge of all the facts, including the policy of forbearance, the fact that Symbio couldn't get a loan anywhere else and the fact that it had engaged throughout akin to a type of self-reporting, flagging up that it is going to have difficulty making its payments, knowing all those facts, would a reasonable member of the public, a consumer, think that the penalty was just and proportionate? In our submission, not.

...

As for damage to others, Ofgem have not provided detail of that to enable Symbio to make sensible submissions about it. It is within their knowledge and gift. It isn't something that we are able to investigate on our own part and so we submit to you that it is really a matter for you whether Ofgem have proved that to you in the circumstances, given the amounts involved and given the period over which the penalties or the payments were late.

- 3.9. The Authority accepts Symbio's submission that Symbio having contravened its obligations does not necessitate the automatic imposition of a financial penalty. However, on the facts of this case, the Authority considers that imposition of a penalty is appropriate. In terms of paragraph 4.1 of the Penalty Statement that "*the contravention or failure damaged, **or could have damaged**, the interests of consumers and/or other market participants*" (emphasis added) is a factor tending to make the imposition of a penalty more likely. To take account of this factor, the Authority therefore only needs to conclude that the contravention could have damaged the interests of consumers and/or other market participants – not that it did in fact damage those interests.
- 3.10. Here, the Authority finds that Symbio's conduct **could have** damaged the interests of other market participants and of consumers because:

- 3.10.1. Late payment imposes additional administrative cost on the Authority as described at paragraph 3.4.2 above;
- 3.10.2. Late payment of the RO triggers mutualisation and late payment under the FIT scheme triggers levelisation as described at paragraph 3.4.1 above. This results in additional costs being levied on compliant licensees and delayed receipt of payments. Therefore, this cost is borne by market participants and that cost could be passed to consumers. Symbio's late payment triggered both mutualisation and levelisation.
- 3.10.3. Symbio could have gained an unfair financial advantage as described at paragraph 3.6 above.
- 3.11. Paragraph 4.1 of the Penalty Statement states that "*a penalty ... is necessary to deter future contraventions or failures and to encourage compliance*" is a factor tending to make the imposition of a penalty more likely. Given that there could have been damage to the interests of consumers and market participants, the Authority considers that imposition of a penalty is necessary to deter future contraventions on the part of Symbio and on the part of other market participants because the extensive engagement by Ofgem about the likelihood of bringing enforcement action did not result in prompt payment on these occasions.
- 3.12. It is therefore sufficient that damage to the interests of market participants and consumers could have occurred. This highlights the need to deter Symbio and others from contravening their obligations with regard to environmental scheme payments in the future.
- 3.13. Symbio argues further that a reasonable member of the public would not consider the penalty just and proportionate given: the reasons behind Symbio's failure to pay (its inability to get a loan, the government policy of forbearance with regard to debt collection); and that it highlighted its difficulty in paying in advance to the Authority. These matters are discussed further below at paragraphs 4.18 to 4.21, 4.55, 4.56 and 4.57 below.
- 3.14. Separately, the Authority notes Symbio's position in its Written Submissions. The following section of text repeats what Symbio stated in those Written Submissions:

"the Regulator has failed to distinguish between the severity of the breaches, so it makes no attempt to distinguish on the one hand a failure to make a payment in excess of £300,000 and on the other hand a late payment of £55.80. They are all treated, according to the Regulator, as of moderate gravity." and "In terms of totality, my learned friend's sentence, as it were, my learned friend says "Well, of course, we have looked at the matters separately and collectively we have decided that the totality of the offending is such that it warrants the proper appellation as moderate gravity" but, again, there is no transparency of reasoning available. If one were to look at the written and indeed the oral submissions, nowhere is there any attempt to make a distinction between them. Ofgem have simply failed to engage with the point that I made in my written argument that the effect of the £55.80,..."

- 3.15. The Authority accepts that the late payment of £55.80 is not as serious as the others and might better be characterised as an oversight. However, taken together, in the round, the Authority considers the contraventions to be of moderate gravity. This is discussed further at paragraph 4.11.
- 3.16. The Authority therefore considers that it is appropriate to impose a penalty whether or not there is evidence that actual damage has occurred to the interests of market participants and consumers.

Treatment of Symbio

- 3.17. The following section of text repeats what Symbio stated in its Oral Submissions:

It is far from clear why it [sic] the Authority appears to have selected Symbio as the only company to dealt with by way of financial penalty. It is respectfully submitted that if a reasonable member of the public, having full knowledge of the facts as currently disclosed in this case, would fail to understand why only Symbio had been dealt with by way a financial penalty , the penalty is neither just, proportionate nor transparent.

- 3.18. The following section of text sets out what Symbio stated in its Oral Submissions:

... The fact of the matter is no other company has been issued with a statutory demand, as far as we can tell. That is an extreme step out with the guidelines and Symbio feels that it has been unfairly singled out for unduly punitive action.

3.19. The Authority has considered all the evidence put before it. It is satisfied that Symbio has been treated appropriately similarly to other suppliers. Its reasoning is set out in more detail at paragraphs 2.13 to 2.15 above.

4. Determining the amount of financial penalty

Gain & Loss

4.1. The following section of text repeats what Symbio stated in its Written Submissions:

There is no evidence of any gain accruing to Symbio as a result of the late payments. At most, there might be a highly notional pecuniary advantage in deferring the said payments but to the extent that the same might be inferred, it is marginal in the extreme and in any event extinguished by the fact that Symbio paid interest on the late payments at a judgment debt rate of 8%. As to loss, the payments were made within weeks of falling due and in those circumstances there is no basis for concluding that there was a loss to either the consumer or a prompt paying competitor. Notwithstanding the foregoing it is nonetheless accepted that if the breach is sufficiently serious it may be appropriate to impose a financial penalty. In that regard, the assessment of seriousness of the Notice of Intention in effect acknowledges there is no evidence of actual gain or loss.

4.2. The following section of text sets out what Symbio stated in its Oral Submissions:

There is no gain to Symbio by this. It paid a late payment penalty at a judgment rate of 8 per cent. The idea that it set out to make some sort of gain by making a late payment does not accord with the reality of these circumstances, in our submission.

4.3. The Authority does not accept that there is no evidence of gain to Symbio nor does it accept that there is no evidence of loss to consumers and other market participants. As set out at paragraph 3.6 above, late payment likely resulted in a financial advantage and therefore gain to Symbio. As set out at paragraph 3.10 above, late payment also could have resulted in cost to other market participants that may have been or be passed on to consumers. The Authority notes, in particular, that levelisation and mutualisation were triggered as a result of Symbio's late payment.

- 4.4. The Authority does however accept that it is not able to quantify the amounts of gain and detriment with any accuracy. This is because it is not possible for the Authority to obtain precise information as to these costs and how they are borne. Some of the cost may not have, yet, been passed by the Authority to market participants and from market participants to consumers. Therefore, the Authority has not attributed any portion of the penalty to gain and detriment.
- 4.5. The Authority notes, and the following section of text repeats, Symbio's assertion in its Oral Submissions that it has paid:

"a late penalty at a judgement rate of 8 per cent"

- 4.6. This is not the case. As already set out at paragraph 2.13.2 above, there is no provision for payment deferral for payments due under the environment scheme except in relation to the RO Payment. With regard to that payment, Symbio was required to present RO certificates by 1 September 2020 or make a payment in lieu by 31 August 2020. Regulated persons who fail to discharge their obligations by 1 September 2020 had until 31 October 2020 to make late payment(s). Late payments are subject to statutory daily interest on top of the amount owed. This is calculated on a daily basis at a rate of 5% plus the Bank of England base rate per annum but interest did not run beyond 31 October 2020.

Seriousness

- 4.7. In terms of paragraph 5.10 of the Penalty Statement, the Authority must assess the seriousness of the contraventions. In doing so, it will take account of various factors which will **usually** relate to the nature and impact of the contravention and whether it was deliberate or reckless. The factors that it **may** have regard to are set out at paragraphs 5.11 to 5.14 of the Penalty Statement.
- 4.8. With regard to seriousness, Symbio makes seven key points:
- 4.8.1. That the Authority has failed to distinguish the breaches with regard to the gravity attributed to each of them.
- 4.8.2. That Symbio's failure to pay related to a narrow time period – therefore this is not indicative of a systematic failure.

- 4.8.3. Symbio engaged extensively with Ofgem and made it clear that it was having difficulty raising the funds needed to make payment. This is akin to self-reporting and allowance should be made for it.
- 4.8.4. There is no rational or fair basis on which to conclude that Symbio's actions were deliberate.
- 4.8.5. Given Symbio's operating profit for 2020, the penalty is excessive.
- 4.8.6. That the Authority having noted that the penalty equates to approximately 8.7% of the sums that Symbio paid late is not fair or logical
- 4.8.7. That if the Authority has regard to the penalty structure employed by HMRC, it should also take into account how it is employed in practice during the Covid-19 pandemic.

Gravity of the Contraventions

- 4.9. The following section of text repeats what Symbio stated in its Written Submissions that:

The Notice of Intention to impose a financial penalty makes no attempt to distinguish the gravity of the breaches. Nor does it provide any analysis of how they are collectively assessed. It appears therefore to proceed on the basis that each of the breaches are of equal gravity and ascribes "moderate" seriousness to each such breach. Symbio submits that given the amount involved, (and given that the failure to pay it was the result of an oversight or error), the failure to pay the sum of £55.80 on time cannot properly be characterised as a breach of moderate gravity.

- 4.10. The following section of text repeats what Symbio stated in its Oral Submissions:

I made the submission that there is a failure to distinguish between the gravity of the respective late payments.

...

We say there is no evidence here of any leniency; quite the reverse. We say that, looked at in the round, it is for the Regulator who seeks to persuade you that this is a just and proportionate penalty, reasonable in all the circumstances as

required by the guidelines, to show it is so and they do that by setting out their workings, providing some calculations, looking at separate penalties for each of the breaches and then aggregating them and coming to an overall just and proportionate response. It wouldn't be appropriate to take four penalties and to aggregate them all up into one payment, for example, if each was worth £100,000, to say to the offender "You have got to pay £400,000". That might end up being a disproportionate outcome because it wouldn't have regard to the totality of the offending and it wouldn't have regard to the totality of the offending on the individual who is subject to the penalty.

- 4.11. As set out at paragraph 3.15 above, the Authority considers that the contraventions are of moderate seriousness when considered together. The Authority accepts that the failure to pay the RO Mutualisation payment on time is less severe than the others when considered separately. However, taken together, it considers that the contraventions are of moderate severity because:
- 4.11.1. The amount of the late payment was £1,152,335.64 in total, which is a significant sum.
 - 4.11.2. The degree of delay in payment was, in each instance, sufficient to contribute to the mutualisation mechanisms which means that detriment is likely to have been caused to other market participants in the form of delayed receipt of payments, and that detriment may have been passed on to consumers. This delay is considered to be more significant in the circumstances of the Covid-19 pandemic when other suppliers may also be facing financial difficulties.
 - 4.11.3. Although it is the responsibility of each supplier to arrange to meet its regulatory responsibilities without prompting, the Authority has been vigorous in its efforts to alert suppliers to their obligations, to encourage early action to ensure that suppliers can meet them, and to avert contravention.

Period of Contraventions

- 4.12. The following section of text repeats what Symbio states in its Written Submissions:

It is to be observed that the time period of the respective time failures is a narrow one. This is not indicative of a systematic failure, but more consistent with difficulties over a particular and limited period of time (and moreover due to a global pandemic).

4.13. The following section of text repeats what Symbio stated in its Oral Submissions:

We note that there are four but submit this: that it is not four over different years or over an extended period of time. It is all compressed into one narrow timeframe indicative of a company who for a short period of time, as a result of the Coronavirus, was really hit hard in its ability to make the payments it was required to.

4.14. Ofgem made very clear to Symbio that it must meet its payment obligations under the environmental schemes on time⁸. The Authority accepts that Symbio attempted to bridge the gap between income and expenditure by seeking credit on the commercial market and by entering a payment plan to manage cashflow with National Grid. Those efforts were too late to enable it to make its payments on time. Symbio was eventually able to make the payments required through its efforts to collect customer debt, to acquire new customers and due investment becoming accessible. It was for Symbio to ensure that it could meet its obligations in a timely manner. That it failed to do so over a 5-month period despite clear warnings from Ofgem that it must do so is indicative of a serious and systematic failure in its ability to run its business in that it had not organised itself and its financial affairs so as to make payments on time.

4.15. Therefore, the Authority considers that the significant sum of money paid late, the degree of lateness which triggered the mutualisation and levelisation processes and the vigorous efforts by Ofgem to make the expectations clear supports its conclusion that the Contraventions, taken together are of moderate seriousness. This supports its decision to impose a penalty of £100,000.

Engagement with Ofgem

4.16. The following section of text repeats what Symbio stated in its Written Submissions:

⁸ Please see the schedule of correspondence annexed.

To the extent that the above suggests that Symbio has failed to engage with Ofgem and only showed a willingness to make payment after enforcement action was threatened it is inaccurate and indeed contradicted by paragraph 3.17 which acknowledges that "Symbio engaged extensively" in Summer 2020. Thus, Symbio engaged with Ofgem many months in advance of the obligations becoming due to inform Ofgem the particular difficulties it was encountering due to the advent of Covid 19 and the associated policy of forbearance which it was, (quite rightly), asked to adopt in relation to its defaulting customers. In the spirit of discounting for self-reporting some allowance ought to be made for this see the Penalty Policy.

Symbio then copied emails between it and Ofgem regarding payment in 2020.

4.17. The following section of text repeats what Symbio stated in its Oral Submissions:

We set out at some length certain emails dealing with the extent of the engagement provided by Symbio. I don't propose to rehearse those with you. They are there for you to consider.

...

With great respect, it's impossible to characterise the response of Symbio as lacking engagement with the Regulator. There were monthly calls which stopped in around July and August. Symbio's expectations – like many people, they have been caught out by the extent of the COVID impact. They didn't expect to go further into debt as they did in the autumn. They didn't expect to have debts consistently rising starting from £681,000 in March, going up a lot in July and August, but then rising even further thereafter. They were caught out by it. That is freely acknowledged. We are not arguing about that.

...

We say that there is clear evidence throughout of engagement. We don't accept and we invite you to reject the submission that there wasn't proper engagement by Symbio.

4.18. The Authority accepts that Symbio engaged with Ofgem with regard to its payment obligations under the environmental schemes. The Authority does not however accept that that engagement was tantamount to self-reporting and notes that the engagement lacked clarity.

- 4.19. In any event, the reason the Authority might reduce a penalty where a regulated person has self-reported is because:
- 4.19.1. that person having done so has brought a contravention to the Authority's attention that it may not otherwise have been aware of;
 - 4.19.2. self-reporting will often save the Authority time and resource because it does not require to investigate the circumstances of that contravention because they have been reported to it.
- 4.20. Symbio's engagement has not assisted the Authority in these ways or otherwise. The Authority would have been aware of the contraventions whether or not Symbio had engaged with it. Further, its engagement has not resulted in any time or resource saving to the Authority. On the contrary, the lack of clarity in that engagement has likely resulted in additional time and resource requirements on the part of the Authority.
- 4.21. The Authority does not therefore accept that any discount should be made in respect of this engagement and it does not consider that it reduces the gravity of the contraventions.

Nature of conduct: deliberate or reckless

- 4.22. The following section of text repeats what Symbio stated in its Written Submissions, in relation to the Authority's conclusion in the Proposal Notice that Symbio's contraventions were deliberate in that Symbio knowingly failed to meet its obligations on time:

The correspondence between Ofgem and Symbio with regard to its payment obligations is as follows:

With great respect this reasoning is specious as it elides knowledge with intention. (Similar reasoning also appears at 3.12 as to why a penalty is appropriate in this case). An act is properly described as deliberate only if it is intended; something unintended is not deliberate. Foresight that something might happen is not to be equated with an intention that it should happen. It is submitted that on the facts of this case there is no rational or fair basis on which it could be concluded that Symbio deliberately committed the contraventions.

The assessment of seriousness being in part determined by whether it was deliberate and/or reckless an erroneous characterisation of the breaches as deliberate has serious implications for both the decision to impose a penalty and the size of the penalty. see 5.10 Penalty Policy.

4.23. The following section of text repeats what Symbio stated in its Oral Submissions:

The other thing that is still noticeably lacking in the response of the submissions of my learned friend is any real analysis of whether this was a deliberate or reckless failure. They say it was deliberate but they haven't dealt with the point that I've made, and which arises of necessity on a proper construction of the English language, that something can only happen deliberately if it's done with a degree of intentionality. They haven't distinguished a deliberate failure on the one hand from a reckless failure. Taking their submissions at their highest, the proper submission ought to be by Ofgem that Symbio acted recklessly, i.e. having foresight that something might happen and failing to take proper steps to ensure that it wouldn't happen. That, of course, is a critical feature within the guidelines at 5.10.

...

In my respectful submission, their arguments really ought to fall into the latter category but they insist on saying this is deliberate, thereby they fall into grave error and thereby the penalty that they propose can be seen not to be just and proportionate because it is built on a fallacy of reasoning, with great respect. To the extent that the breaches have happened and are acknowledged, this was not deliberate. At worst, it was reckless.

...

Symbio's contraventions, according to the Regulator, were deliberate. Here, I submit that the Regulator has fallen into a grave error because it is eliding the fact that Symbio recognised that it might not be able to make its obligations and knew that it couldn't do it with a deliberate intent to do so. An act is properly described as deliberate only if it is intended. Something unintended is not deliberate. Foresight that something might happen doesn't amount to an intention that it should happen. The decision to impose a penalty in the first place is largely informed by seriousness, including whether the act was deliberate or

intentional. We submit that, on any fair or rational appraisal of the circumstances here, it can't be concluded that Symbio deliberately committed the contraventions.

I note that at 5.10 of the penalty policy, seriousness, to which this is a relevant factor, is a key factor in calculating the penal element of the final liability.

- 4.24. Although the Authority accepts that Symbio's failure to make the RO Mutualisation payment appears to have been due to oversight, it has considered the contraventions collectively and in the round rather than on an individual basis. The Authority accepts that Symbio did not set out to fail to make the payments on time. Ultimately, Symbio was able to secure funds to make payment and so the Authority concludes that the failure to make payment on time was the result of it not having organised itself and its financial affairs so as to make payments on time. The Authority considers that Ofgem had done all that it reasonably could to alert Symbio to the consequences of late or non-payment as there had been extensive engagement⁹, warnings about enforcement action and commencement of enforcement action.
- 4.25. The RO payment is an annual payment, and levelisation payments are made on an annual and quarterly basis. During the Covid-19 pandemic, Jonathan Brearley, CEO, Ofgem made clear in his open letter of 16 June 2020 that suppliers must comply with their scheme payments. This message was reiterated in further letters sent to suppliers on 06 May, 17 July and 28 August 2020.
- 4.26. The Authority acknowledges that Symbio (and other suppliers) have suffered financial difficulties due to the impact of the Covid-19 pandemic. The Authority appreciates that the Government asked domestic energy suppliers to support customers who are financially impacted as a direct or indirect result of Covid-19 and that this could include reassessing, reducing or pausing debt repayment and bill payments for domestic customers in financial distress¹⁰. On 16 June 2020 Ofgem's CEO wrote to all energy supply companies to set out the regulatory expectations of them. The letter stated "*we expect suppliers to continue to provide strong support for those customers struggling to manage their energy costs, including continuing to honour the voluntary agreement with BEIS.*" In relation to customer debt management the letter went on to say "*we*

⁹ See Annex 2

¹⁰ Voluntary agreement between the Department for Business, Energy & Industrial Strategy and domestic energy suppliers dated 19 March 2020

recognise that suppliers cannot extend unlimited credit to customers – nor is this in customers’ interests overall – and we anticipate suppliers will begin to restart debt management activities that may have been paused during the immediate crisis.” In relation to payments which are relevant to this case, the same letter stated “*We have been clear that suppliers must comply with their scheme payments, eg Feed-in-tariff (FIT), Renewables Obligation (RO) and Warm Homes Discount (WHD) for the current financial year. As always, we will take appropriate enforcement action where suppliers do not comply.”*

- 4.27. In a separate letter to industry dated 2 June 2020 the Authority set out arrangements designed to assist suppliers so far as possible¹¹. In addition to the well-publicised schemes for businesses announced by the Government, the Authority arranged relief for energy suppliers in the form of a deferral scheme for certain network charges incurred by suppliers.
- 4.28. Despite the Covid 19 related pressures on suppliers, the Authority has made it clear¹² that RO and FIT payments need to be made in full and on time for the following reasons (a) the legislation does not confer any discretion on the Authority to waive or defer payments due under the schemes; and (b) if the Authority were able to waive or defer payments due from a supplier, the cost would be imposed on other suppliers. The Authority also notes that the majority of other suppliers have been able to put financial arrangements in place to make their RO and FIT payments on time, despite the impact of the Covid-19 pandemic.
- 4.29. The Authority notes that Symbio’s business model, with no share capital or available credit facilities in place, exposed it to suffering cashflow difficulties in circumstances when customers pay late. The circumstances presented by the Covid-19 pandemic are unprecedented and very difficult. Had Symbio taken action sooner to rise to these challenges, it may have been possible to pay on time as is demonstrated by the fact that it did end up finding the funds to pay. Ofgem was vigorous in its attempts to underline the need to Symbio for it to take action to enable it to pay the sums it owed¹³. Before taking the steps it took to improve cashflow, and in the absence of Ofgem having powers to offer deferment, Symbio resorted to paying late. In this sense, Symbio’s

¹¹ See paragraphs 2.4 and 2.5 above.

¹² See Annex 2.

¹³ See Annex 2.

inaction, in failing to secure a means of making timely payment, resulted in it breaching its obligations. Symbio was aware that this inaction would result in it breaching its obligations.

- 4.30. Therefore, while the Authority recognises that Symbio's actions may not have been deliberate in the sense that it did not set out with an intention to contravene its obligations, its conscious decision making in very difficult circumstances, made with a clear understanding of the nature of its obligations, led directly to the breaches occurring. For this reason, the Authority considers that the nature of Symbio's conduct was such that it justifies the imposition of a penalty of £100,000.

Symbio's Operating Profit and penalty as a percentage of the sums paid late

- 4.31. For the reasons given above and in the Decision Notice, the Authority considers that a penalty of £100,000 is appropriate for this magnitude of breach. However, the Authority also considered the level of penalty against Symbio's turnover and profit and as a percentage of the total sums paid late to check that it remained fair and proportionate when considered against these measures.

- 4.32. The following section of text repeats what Symbio set out in its Written Submissions:

The 2020 operating profit of Symbio was £280,700.... Accordingly, it is submitted that the penalty is manifestly excessive, wholly unreasonable and disproportionate. To impose a penalty of this size on a relatively new entrant to the market is oppressive.

- 4.33. The following section of text repeats what Symbio stated in its Oral Submissions:

In terms of the amount of fine, well, yes, you can go up to 10 per cent of turnover. In fact, the operating profit was £280,000 so £100,000 is an awful lot of money for this small company.

- 4.34. The Authority considers that £100,000 nevertheless remains a fair and proportionate penalty given the nature of the contraventions and in, in particular, the need to ensure that it acts a deterrent to Symbio and others. The Authority notes that Symbio's turnover in 2019-20 was £10.7m. For 2020-21, its draft profit and loss accounts show an expected gross turnover of £34.3m and profits before interest and tax of £1.6m. The Authority also notes that the penalty is 8.7% of the sums paid late.

- 4.35. In its Written Submissions, with regard to the Authority's conclusion that the penalty is fair and proportionate at approximately 8.7% of the sums paid late, the following section repeats what Symbio stated:

It is submitted here is logical or fair basis at which this figure is arrived at. [sic]

- 4.36. The Authority understands that Symbio means here that it does not consider that this is a logical or fair way for the Authority to arrive at the level of penalty. However, as above, the Authority considers that the penalty is appropriate in light of the magnitude of Symbio's contraventions. The Authority notes that Symbio's turnover in 2019-20 was £10.7m. For 2020-21, its draft profit and loss accounts show an expected gross turnover of £34.3m and profits before interest and tax of £1.6m. It notes that it is 8.7% of the sums paid late and that measure further confirms its view that the level of penalty is fair and proportionate.

HMRC as a comparator

- 4.37. In paragraph 17(b)(vi) of the Short Form Statement of Case dated 7 January 2021, the Ofgem case team states "*Ofgem considers this to be a reasonable and proportionate sanction, which it notes is of a comparable magnitude to the penalties imposed by other public authorities such as HMRC for comparable breaches*". In considering matters prior to issuing the Proposal Notice, the Authority therefore sought further detail from the Ofgem case team with regard the circumstances in which HMRC would impose a penalty of 10% for late payment of VAT. The case team provided this additional information:

VAT Return to HM Revenue and Customs

If a VAT return is not received by the deadline or if full payment for the VAT has not reached HMRC's account by the deadline, HMRC will record this as a default. A default can lead to a surcharge. The surcharge is a percentage of the VAT outstanding on the due date for the accounting period that is in default and increases for every default in a surcharge period.

There is no surcharge for the first default. For a company with an annual turnover of more than £150,000, subsequent defaults incur the below surcharges:

Defaults within 12 months	Surcharge if annual turnover is £150,000 or more
2nd	2% (no surcharge if this is less than £400)
3rd	5% (no surcharge if this is less than £400)
4th	10% or £30 (whichever is more)
5th	15% or £30 (whichever is more)
6 or more	15% or £30 (whichever is more)

- 4.38. With regard to this, the following section of text repeats what in its Written Submissions, Symbio stated:

The following points arise;

Firstly, noting the difference in penalty between the 3rd and 4th default, the effect of decision to take enforcement action in respect of the sum of £55.80 is to elevate the what the Authority contend is the appropriate fine from £50,000 to £100,000. In other words, had no penalty been imposed in respect of the late payment of £55.80, the penalty would have been £50,000. Such an outcome is manifestly unreasonable and disproportionate.

Secondly, the penalties above have not been applied during the pandemic as HMRC have recognised the impact of it. If it is appropriate to have regard to the penalty structure employed by HMRC, it is also appropriate to take into account how it is applied in practice in the light of the pandemic.

- 4.39. The following section of text repeats what Symbio stated in its Oral Submissions:

The Regulator has provided, by way of response to a query I think from the EDP [Enforcement Decision Panel – acting on behalf of the Authority], how HMRC might have approached this and there is a really important point that arises here. It is set out at pages 14 and 15 of my written arguments. There is no surcharge for the first default

but if you look at the columns set out there, and this is replicated from the response by [REDACTED] who emailed the EDP, there is a sequential rise in the percentage of surcharge applied by HMRC depending on the number of breaches. So if there have been two defaults within 12 months, it is 2 per cent, three defaults within 12 months, it is 5 per cent and, over the page, 10 per cent for the fourth. The fourth in this case was the late payment of £55.80, and one couldn't get a more classic illustration of a wholly disproportionate outcome. If £100,000 is the correct starting point, as Ofgem contend it is, the late payment of £55.80 has elevated what is otherwise appropriate by £50,000. That simply can't be right as a matter of logic or elementary fairness. Of course, the other point to observe is that certainly, as we understand it, HMRC have not imposed penalties on late paying VAT returns.

...

...applying that as some kind of rubric or guide as it might have been if this matter was before Her Majesty's Revenue and Customs, the effect of that late payment has been to catapult what Ofgem say is an appropriate, just and proportionate payment from £50,000 to £100,000.

- 4.40. The Authority confirms that it did not, ultimately, have regard to the penalty structure employed by HMRC. This structure is therefore not referred to in the Proposal Notice nor the Decision Notice. The Authority, however, for the other reasons given in the Decision Notice and in this Annex remains of the view that £100,000 is an appropriate level of penalty.

Aggravating and Mitigating Factors

- 4.41. In terms of paragraph 5.15 of the Penalty Statement, the Authority will consider the aggravating or mitigating factors and adjust the penal element of the penalty accordingly. The factors which the Authority may consider in this regard are set out at paragraphs 5.16 to 5.20 of the Penalty Statement.

Aggravating Factors

- 4.42. Symbio's Representations include comments on the following factors:

- 4.42.1. Repeated Contravention or Failure

- 4.42.2. Continuation of the Contravention
- 4.42.3. Involvement of Senior Management

Repeated Contravention or Failure

- 4.43. In the Proposal Notice, while the Authority noted that there had been repeated contraventions and that had informed its view that a penalty was appropriate, it was not minded to uplift the penalty further on that ground alone. The following section of text repeats what Symbio stated in response to this:

All the breaches occurred in a short time frame and all are attributable to the impact of Covid 19. There is no prior, (nor post), history of late payment. The reference to not uplifting the penalty is oblique and not understood.

- 4.44. The following section of text repeats what, in its Oral Submissions, counsel for Symbio stated:

...repeated and multiple contraventions are relied upon. I have addressed that: all in a short timeframe and all caused by COVID.

- 4.45. The Authority notes Symbio's position that its failure to pay was caused by Covid-19. However, Ofgem engaged extensively with Symbio and made very clear that Symbio must meet its payment obligations. The Authority therefore remains of the view that it is relevant to consider that Symbio breached its payment obligations repeatedly over a 5-month period as an aggravating factor.

Continuation of the Contravention

- 4.46. In relation to this, the following section of text repeats what Symbio stated in its Written Submissions:

It is respectfully submitted that this factor is misconceived; the awareness referred to is evidenced Symbio by engaging with Ofgem in advance of the breach, something which ought properly be construed as mitigating and not an aggravating factor. Moreover by treating this as an aggravating feature there is an element of "double counting" in that this factor has already been taken into account as a reason why it is

appropriate to take enforcement action . Taking it into account again as an aggravating feature so it operates twice is simply wrong.

4.47. In deciding that it was appropriate to impose a penalty on Symbio, the Authority took account of the following factors:

- Whether the contravention or failure has damaged, or could have damaged, the interests of consumers or other market participants
- Whether the contravention or failure has damaged, or could have damaged, the confidence that consumers and/or other market participants have in the market
- A penalty and/or a consumer redress order is necessary to deter future contraventions or failures and to encourage compliance
- Whether the contravention or failure was deliberate or reckless
- Whether the circumstances from which the contravention or failure arose were or should have been within the control of the regulated person under investigation
- Whether the contravention or failure (or possibility of it) would have been apparent to a regulated person acting diligently
- Whether there was a lack of effective remedial action after the contravention or failure became apparent to the regulated person
- Whether the regulated person has a record of previous contraventions or failures, similar or otherwise

4.48. The Authority does not accept that there is any “double counting” with regard to its consideration of the continuation of the contravention. The continuation, or repeated nature, of the contravention has been considered in relation to two entirely separate questions in accordance with the penalty policy. These are firstly **whether** to impose a penalty, and secondly, having decided to impose a penalty, **how much** that penalty should be. Considering the same issue in relation to both of these questions is not double counting because there is no cumulative element to the first question on **whether** to impose a penalty. In deciding whether to impose a penalty, the Authority has taken account of the enforcement action that it required to take / threaten in order

to secure payment. Here, it is taking account of Symbio's continuing failure to meet its payment obligations over a 5-month period despite extensive engagement by Ofgem.

4.49. Also, as set out at paragraph 4.54 below the Authority no longer considers involvement of senior management as an aggravating factor, nor has it taken it into account with regard to the seriousness of the contraventions.

4.50. The following section of text repeats what Symbio, in its Oral Submissions, stated:

Symbio was aware of its contraventions and of the Authority's efforts to pursue payment and secure compliance. Of course, it was. It initiated the discussion with the Regulator, repeatedly engaging with them, trying to offer assurances. Yes, it failed in the end, we've admitted that, and it's regrettable, but of course it was aware of the contraventions. That is a mischaracterisation, in my submission, to treat that as an aggravated characteristic. It is not really what the authors of the guidelines would have had in mind. They would have had in mind something very different from an active engagement on behalf of the company seeking to make the Regulator aware of its difficulties.

4.51. In its [Proposal to Impose a Financial Penalty on Symbio](#) the Authority considered an aggravating factor to be "Continuation of the contravention: Symbio was aware of the contraventions and of the Authority's efforts to pursue payment and secure compliance". The Authority has re-assessed the aggravating factors to be those set out in paragraph 4.10 of the decision notice which no longer includes reference to Symbio's awareness of the contraventions.

Involvement of Senior Management

4.52. The following section of text repeats what Symbio, in its Written Submissions, stated:

The involvement of senior management was in an attempt to resolve the problems caused by CoVid 19. Given that Ofgem recognise that the company size is such that senior management are involved in the day to day running of the company it is hard to see why such involvement is fairly treated as an aggravating feature.

...

This has been taken into account in assessing seriousness and is again an example of double counting.

4.53. The following section of text repeats what Symbio, in its Oral Submissions, stated:

Similar observations I make in relation to the fact that senior management are involved. That is not an aggravating feature and it shouldn't be regarded as such in this case. That applies to quite different circumstances where senior management actively pursue a course of conduct which is detrimental to the interests of others in sharp practice or something similar.

4.54. The Authority has noted and accepts Symbio's Representations in that it is not appropriate to consider senior management involvement as an aggravating factor. It agrees that it is not appropriate nor fair to do so given the size of the company and the consequent necessary involvement of senior management in relation to the contraventions.

Mitigating Factors

4.55. One of the mitigating factors that the Authority may consider is self-reporting of breaches. In this regard, the following section of text repeats what Symbio stated:

Symbio engaged with the Authority in advance of the breach and of its own volition; it was not the compliance engagement or enforcement action which led it to do so. Responsible engagement prior to the breach occurring such as has been shown by Symbio is akin to self-reporting and ought to be treated as a mitigating feature.

4.56. In this regard, the Authority notes that Symbio did engage with Ofgem. However, it does not accept that this is akin to self-reporting for the reasons set out at paragraph 4.18 to 4.21. Despite that engagement, Symbio still failed to pay on time.

4.57. The Authority has also considered whether Symbio's engagement should be regarded as a mitigating factor which amounted to 'taking appropriate action to remedy the contravention'. The Authority does not accept that Symbio took appropriate action to remedy the contravention because late payment cannot be remedied. Symbio made payment late and after the Authority threatened or took enforcement action.

4.58. In its Written Submissions, Symbio also sets out further mitigating factors that it considers the Authority should consider, though not attributed to the factors set out at paragraph 5.17 of the Penalty Statement. These, and the Authority's position in response, are set out at paragraphs 4.59 to 4.74 below.

4.59. The following section of text repeats what Symbio firstly stated:

Moreover in respect of one of the late payments a partial payment was made before the balance, this being evidence of good faith a genuine endeavour by Symbio to discharge its responsibilities at the soonest possible time.

4.60. The Authority does not consider this to be relevant mitigating factor. The penalty only relates to the portions of payments which were made late. Symbio was obliged to make the required payments on time. The Authority would expect any regulated person, where it could not access funds to make full payment, to make partial payment using the funds it could access. That Symbio made partial payment is not therefore something for which the Authority accepts it should give credit.

4.61. The following section of text repeats what Symbio secondly stated:

With great respect, it is not clear how the impact of the pandemic has been taken into account as the Authority has not delineated what the penalty would have been had the breaches occurred otherwise at a time of national emergency and

lockdown. It is also not clear whether the Authority has applied its mind to the fact that the pandemic was likely to disproportionately affect newer entrants to the market than their larger competitors since the latter are likely to have more

substantial cash reserves and /or access to credit facilities. Lastly, no allowance has been made for the fact that in the case of Symbio Energy it could not access the CBILS government facility until it had published its accounts. Symbio Energy has effectively started trading from April 2019. Although, Ofgem states that small companies that cannot obtain other type of financial support would have certain facilities to defer payments until March 2021.

4.62. The following section of text repeats what Symbio, in its Oral Submissions, stated:

Mitigating features, Ofgem says "We paid due regard to COVID". There is no transparency in their reasoning whatsoever to say "The appropriate penalty would have been X but because of COVID we mitigated it down to Y". Their own enforcement

guidelines, quite rightly, place at the outset between paragraphs 1.9 and 1.11, I think, the absolute requirement for transparency. It is important people can see how the penalty is arrived at step by step and that is lacking here. So, whilst they say "We have taken into account the advent of COVID and the impact on Symbio", in fact, their reasoning doesn't support that contention. It is wholly absent from any of the reasons that they have supplied. They haven't delineated what the otherwise appropriate penalty would have been. Whilst they have given the nod to the fact that companies such as Symbio might find it difficult to access the Coronavirus business interruption loan scheme, that again doesn't find any express reflection in the reasoning that they have provided.

...

My friend says it is the responsibility of all suppliers to discharge their statutory obligations and, of course, that's right, but these are exceptional circumstances. My friend says "If it wasn't for COVID, we may well have proposed a higher penalty". That's all well and good to talk in hypotheticals and notions. We're at the stage now where a consistent, transparent, proportionate judgement can only be seen to take place if the Regulator is able to say "If it wasn't for COVID the penalty would have been X but because of COVID we are going to reduce it to Y" otherwise, with great respect to Ofgem, it is just a meaningless assertion. The principles of sentencing and imposing punitive sanctions on individuals and companies apply across the board. There has got to be some workings out that people can look at. With respect, it is what a schoolboy or schoolgirl would do with their homework but it's also a vital principle, in my submission, of sentencing. Indeed, Ofgem's own enforcement guidelines recognise the need for transparency. Transparency means you've got to be able to calculate with some precision what the starting point would have been and what it has ended up as, as a result of mitigating factors. With great respect, it is entirely meaningless just to say it would have been worse but for COVID. It doesn't mean a thing.

Throughout their oral and written submissions, they have not attempted to quantify the level of applicable discount.

- 4.63. The Authority has carefully considered the impact of the Covid-19 pandemic and its disruption to Symbio's business model. This is set out in more detail at paragraphs 2.4 to 2.6 above. It has taken account of this as a mitigating factor.
- 4.64. The following section of text repeats what Symbio then stated:

It would appear that no credit has been given to reflect the fact that the breaches have been admitted by Symbio. It is submitted that the approach of only allowing a 15% in the amount to be paid ... if no representations are made is not fair or reasonable; admissions amount to mitigation in their own right and ought to attract a discount.

4.65. The following section of text repeats what Symbio, in its Oral Submissions, stated:

Lastly, we submit that there doesn't appear to be any credit for the fact that Symbio has admitted the breaches. It did query one of the FIT payments because it couldn't understand how the money that the BEIS said was due had doubled when the amount of money it was actually receiving had decreased but it has admitted all penalties and, again, there is no transparency of reasoning in Ofgem's penalty. They do not say, for example, "We have given you 20 per cent credit", or anything of that nature,...

4.66. The Authority notes Symbio's position. As set out at paragraph 6.1 below, Symbio having admitted the contraventions has not particularly assisted the Authority. However, it has noted this as a mitigating factor.

4.67. The following section of text repeats what in its Written Submissions, Symbio stated:

Furthermore Symbio has paid interest at a judgment debt rate of 8%, something to which no regard has been paid.

4.68. The following section of text repeats what Symbio, in its Oral Submissions, stated:

... and they haven't recognised as well that Symbio has not benefited from this but has paid 8 per cent judgment debt commercial rate penalty.

4.69. As set out at paragraph 4.6, the Authority does not accept that Symbio has paid interest at a judgement debt rate 8%. Therefore, it does not consider that it should reduce the penalty on this basis.

4.70. Generally, with regard to mitigating factors, in its Written Submissions, Symbio states the following:

It is to be observed that it is wholly unclear to what extent (if any) the otherwise appropriate penalty has been reduced to take account of mitigating features. As a result there is no transparency of reasoning and the penalty is unlikely there to be seen as just and proportionate.

4.71. The following section of text repeats what Symbio, in its Oral Submissions, further stated:

We submit that, in all the circumstances, Symbio deserves a more lenient outcome. It is in the interests of consumers and competition generally that companies such as this are not subject to Draconian outcomes where they are guilty of breaches which they accept they are. It doesn't have a poor compliance history. There is one incident as contended for by Ofgem in March 2020 when it had difficulties meeting its responsibilities in relation to Smart metering, but that is nothing to do with seeking to procure a pecuniary advantage or financial advantage. That was a compliance issue which was dealt with, in my submission, in a more sensible and collegiate way than perhaps the outcome here.

4.72. The Authority has set out the aggravating and mitigating factors it has considered at paragraphs 4.10 and 4.11 of the Decision Notice. It considers that the relevant factors balance each other so that they do not merit any adjustment to the level of penalty from £100,000. The Authority has in particular considered Symbio's representations with the regard to the Covid-19 pandemic and the points made on the effect on newer market entrants. It has taken account of the impact of the pandemic as a mitigating factor. However, it does not consider that its impact together with the other mitigating factors is sufficient to occasion a reduction in the level of penalty. The reasons for this include:

4.72.1. Symbio was ultimately able to secure funds to make payment. The Authority considers that, despite the pandemic, Symbio may have been able to take those steps at an earlier stage.

4.72.2. Although the Authority is mindful of the impact the pandemic has had on Symbio's finances, it has also had an adverse impact of the finances of other new market entrants who made arrangements to make payment on time and who received delayed payments under the mutualisation and levelisation mechanisms as a result of the late payments.

4.73. The Authority has not therefore attributed any additional weight to the impact of Covid-19 insofar as the level of the penalty is concerned. It has considered this as a mitigating factor, but, as above, it considers that its mitigating effect is balanced by the aggravating factors of which the Authority has taken account.

4.74. The Authority does not accept that a more collegiate approach would have been appropriate. As set out at paragraphs 3.5, 3.11 and 3.12, the Authority considers that the imposition of a penalty is necessary to deter future contraventions by Symbio or others and therefore to protect the interests of consumers.

5. Adjustment for deterrence

5.1. Symbio has not made any specific representation in relation to this. The Authority does not propose a further adjustment for deterrence.

6. Settlement Discount

6.1. The Authority does not consider that it is appropriate to apply any settlement discount. The Authority offered a settlement discount in the Proposal Notice had Symbio accepted the proposed level of penalty in recognition of the time and resource that acceptance would have saved the Authority. Symbio did not accept the proposed level of penalty. There has therefore been no such saving the Authority. Accordingly, a discount for settlement is not appropriate.

7. Total Financial Liability

7.1. The Authority is required to determine the total financial liability of Symbio as set out at paragraphs 5.27 to 5.30 of the Penalty Statement.

7.2. In this regard, the following section of text repeats what Symbio set out in its Written Submissions:

To cater for the possibility that it would be unable to make the requisite payments on time, Symbio approached HSBC for a loan in September 2019. Through no fault of Symbio application was unsuccessful. One of the consequences of the penalties proposed in this case is that attempts by Symbio to raise finance in the aftermath of Ofgem's enforcement action are now even less likely to succeed as a result of the ensuing reputational damage.

7.3. The Authority notes that in terms of paragraph 5.29 of the Penalty Statement, it may consider the effect of the proposed penalty on the financial viability of the regulated

person. While the Authority notes what Symbio says with regard to being unable to raise finance, it does not consider that the impact of this penalty is such that it will have an effect on Symbio's financial viability sufficient to cause the Authority to adjust its total financial liability.

7.4. The Authority does not consider that it is appropriate to make any adjustment to the level of penalty.

8. Third Party Representations

8.1. As per paragraph 1.22 above, the Authority also received representations from Centrica Plc and a member of the public.

8.2. The Authority notes and has considered the content of these but remains of the view that it is appropriate to impose a penalty of £100,000.

9. Conclusion

9.1. For all the reasons set out above, and as provided for in the Decision Notice, the Authority remains of the view that it is appropriate to impose a penalty of £100,000 on Symbio in respect of its contraventions.