

Notice of intention to impose a financial penalty pursuant to section 27A(3) of the Electricity Act 1989

Proposal of the Gas and Electricity Markets Authority to impose a financial penalty, following an investigation into compliance by E.ON with Standard Licence Condition 12 of the Electricity Supply Licence

9th November 2015

1 Summary

- 1.1 The Gas and Electricity Markets Authority (“the Authority”) proposes to impose a financial penalty on E.ON UK Plc and E.ON Energy Solutions Ltd (together referred to as “E.ON”) following an investigation by Ofgem into their failure to comply with Standard Licence Condition 12 of the Electricity Supply Licence (SLC 12), in relation to advanced meters for non-domestic premises.
- 1.2 Under SLC 12.21 licensees must not, from 6 April 2014, supply electricity to any relevant premises¹ other than through an advanced meter². SLC 12.22 states that this prohibition does not apply where the licensee is unable to install or arrange for the installation of any advanced meter at the relevant premises in question, despite taking *all reasonable steps* to do so.
- 1.3 The Authority finds that, as at 6 April 2014, E.ON was supplying electricity to relevant premises, through 7,011 meter points, other than through an advanced meter and that it has not been able to demonstrate that it was unable to install, or arrange for the installation of, an advanced meter at those premises despite taking all reasonable steps to do so, in breach of SLC 12.21. The investigation focussed on the extent to which E.ON took, or failed to take, all reasonable steps.
- 1.4 The Authority considers it appropriate to impose a penalty for this contravention. The proposed penalty takes into account the fact that E.ON has been unable to demonstrate that it had taken all reasonable steps to install or arrange for the installation of advanced meters at those 7,011 relevant meter points. The investigation invited E.ON to demonstrate that it had taken all reasonable steps to install advanced meters at all outstanding premises as at 6 April 2014. It was unable to do so. The Authority concluded that E.ON’s inability to demonstrate that it had, for example, effectively planned for and monitored its advanced meter roll-out, ownership within the business for compliance with the obligation, and sufficient management oversight meant that it did not take all reasonable steps to meet the obligation.

¹ “Relevant Premises” are defined by SLC 12.17, which provides that “This paragraph has effect on and after 6 April 2009 and applies where the licensee installs or arranges for the installation of an Electricity Meter at Non-Domestic Premises where the metering point falls within profile class 5, 6, 7 or 8 as defined in the Balancing and Settlement Code (for this condition only, “relevant premises”)”.

² “Advanced meter” is defined by SLC 12.19.

- 1.5 In the circumstances, the Authority hereby gives notice under section 27A(3) of the Electricity Act 1989 ("Electricity Act") of its proposal to impose a penalty of £2 on E.ON³ in respect of the contravention set out above provided that at a date, to be notified by the Authority in the Final Penalty Notice, issued pursuant to section 27A(5) of the Electricity Act, E.ON has paid £7 million (minus the £2 financial penalty) by way of consumer redress as set out below. Furthermore, E.ON has agreed to pay an additional £7 million if it has not achieved an installation target for its outstanding meter points by 2 November 2016.
- 1.6 The Authority has taken into account that E.ON has offered to settle this investigation and to make a payment as set out above in consumer redress. This payment will be made to the Carbon Trust to fund delivery of energy saving audits, energy savings advice, and installation of energy efficiency measures to help small and medium sized businesses across Great Britain save energy.
- 1.7 Having considered all the circumstances of the case, the Authority considers this redress payment will be of greater benefit to business consumers than if a significant financial penalty were to be imposed.
- 1.8 The Authority considers the penalty to be reasonable in all the circumstances of the case. If E.ON had not agreed to settle this investigation on the terms set out above, the Authority would have considered it appropriate to impose a much larger penalty in view of the seriousness of the contraventions.
- 1.9 Any written representations on the proposed penalty must be received by Steve McBurney at Ofgem (steve.mcburney@ofgem.gov.uk) or Ofgem, 9 Millbank, London, SW1P 3GE by 5pm on 1 December 2015.
- 1.10 Any representations received that are not marked as confidential may be published on the Ofgem website. Should you wish your response or part of your response to remain confidential, please indicate this clearly. Any such requests will be considered by Ofgem on a case by case basis.

2. Background

Advanced Meters for Non-Domestic Premises – SLC 12.17 to SLC 12.22

- 2.1 In April 2009, the Government modified SLC 12⁴ of the Electricity Supply Licence, requiring licensees not to supply electricity to their larger non-domestic consumers other than through advanced meters from 6 April 2014. Licensees had a five year "roll-out" period in which to ensure that relevant premises were supplied with electricity through an advanced meter. From 6 April 2014, the prohibition against supplying electricity other than through an advanced meter did not apply if the licensee was unable to install or arrange for the installation of an advanced meter at the relevant premises despite taking all reasonable steps to do so. This obligation required 155,000 electricity meters to be upgraded or replaced throughout the market (at that time).

³ £1 on E.ON UK plc and £1 on E.ON Energy Solutions Ltd.

⁴ Using powers under section 88 of the Energy Act 2008.

- 2.2 On 24 May 2012 (about 60% of the way through the roll-out period) Ofgem issued an Information Request (IR) to all licensed non-domestic suppliers asking them to provide an update on progress with the advanced meter obligation (i.e. the obligations set out in 12.17 to 12.22 of SLC 12). Responses indicated that, in aggregate, 63% of electricity meters and 46% of gas meters had been made advanced at relevant premises.
- 2.3 On 28 February 2013, Ofgem wrote an 'open letter'⁵ informing all licensed non-domestic suppliers, and others, of the (aggregate) progress that had been made, based on the data provided. The letter reminded licensees of the importance of ensuring that licence obligations are complied with and set out a non-exhaustive list of factors⁶ that might be considered when deciding whether a licensee had complied with its obligation to take all reasonable steps under SLC 12.22. It also stated that Ofgem considered 'all reasonable steps' to be a high threshold for compliance. From May 2012 through to 6 April 2014 Ofgem also encouraged compliance through regular monitoring, bilateral correspondence and meetings with licensees, including E.ON.

The Investigation

- 2.4 At the end of the roll-out period the worst performing licensees in the electricity market (those with the highest numbers of non-advanced meters) were identified. At this point E.ON reported it had only completed 67.5%⁷ of its advanced electricity meter roll-out.
- 2.5 On 14 October 2014 an investigation was opened into E.ON's suspected breach of SLC 12.21 of the Electricity Supply Licence⁸.
- 2.6 The investigation invited E.ON to demonstrate that it took all reasonable steps to install or arrange to install advanced meters at its outstanding relevant premises by 6 April 2014. E.ON could have demonstrated this by a variety of means, including but not limited to⁹:
- beginning its advanced meter roll-out programme early enough;
 - having a comprehensive and adequate strategy for its advanced meter roll-out programme (agreed by the Board);
 - giving itself enough time to make use of lessons learned when things went wrong;
 - implementing appropriate technical solutions; and
 - having an appropriate consumer engagement strategy.

⁵ <https://www.ofgem.gov.uk/ofgem-publications/41832/20130228the-roll-out-advanced-meters-larger-non-domestic-consumers.pdf>

⁶ i) The licensee's strategy for engaging with the consumer to attempt to gain access to the relevant premises; ii) the technical solution(s) the licensee utilised in order to ensure a high probability of success when installing advanced meters; iii) the information and options presented to the consumer when seeking their agreement to install an advanced meter.

⁷ This was the percentage of relevant meter points with an advanced meter as notified by E.ON in its May 2014 response to an Information Request from Ofgem's Markets Division. This percentage was subsequently revised (to 64%) by E.ON in response to the investigation.

⁸ Investigations were also opened into British Gas and npower.

⁹ The factors listed below are not an exhaustive list. The obligation requires "all" reasonable steps to be taken to install or arrange for the installation of advanced meters and, as Ofgem stated in its 'open' letter of February 2013, the all reasonable steps threshold is high.

The Contravention

- 2.7 After considering the relevant information of the case, the Authority finds E.ON in breach of SLC 12.21.
- 2.8 SLC 12.21 provides that licensees must not supply electricity to any relevant premises other than through advanced meters. The meaning of an “advanced meter” is set out in SLC 12.19 which provides, in summary, that an advanced meter is an electricity meter that:
- (a) provides measured electricity consumption data for multiple time periods, and is able to provide such data for at least half-hourly time periods; and
 - (b) is able to provide the licensee with remote access to such data.
- 2.9 This means that any licensee which provides electricity from 6 April 2014 to any relevant premises through a meter which is unable to provide the functionality set out in SLC 12.19 is in potential breach of SLC 12.21. However, SLC 12.22 provides that the prohibition imposed by SLC 12.21 does not apply where the licensee is unable to install or arrange for the installation of any advanced meter at the relevant premises in question despite taking all reasonable steps to do so.
- 2.10 The Authority finds that E.ON was supplying electricity to 7,011 relevant meter points other than through an advanced meter on 6 April 2014. E.ON has not been able to provide sufficient evidence that it had taken all reasonable steps to install, or arrange to install, an advanced meter at any or all of those relevant premises.
- 2.11 The Authority considers that an essential part of taking all reasonable steps to install or arrange to install those outstanding advanced meters would have been to effectively plan and monitor performance of the roll-out. E.ON submitted some documents that it considered to be plans but was unable to submit comprehensive plans for its advanced meter roll-out programme and, as a result, it has not demonstrated that it took all reasonable steps to meet the obligation. Furthermore, E.ON did not react satisfactorily to the issues it faced in meeting the obligation.
- 2.12 The assessment of whether E.ON took all reasonable steps in relation to those relevant premises where it was supplying electricity other than through an advanced meter as at 6 April 2014 found failings in five areas and are set out below. Whilst the areas examined below do not represent an exhaustive list of the “all reasonable steps” which a licensee may take in order to successfully discharge its SLC 12.21 obligation, the Authority found that E.ON failed to demonstrate that it had taken all reasonable steps in these specific areas:
- E.ON’s general treatment of the requirement to take all reasonable steps
 - Planning
 - Monitoring and resource allocation
 - Management oversight/escalation
 - Board oversight

E.ON's general treatment of the requirement to take all reasonable steps

- 2.13 E.ON has failed to demonstrate that it took all reasonable steps to install or arrange for the installation of advanced meters at relevant premises. The investigation looked at the extent to which E.ON considered its obligation to take all reasonable steps to deal with any anticipated shortfall.

- 2.14 The Authority considers that one of the reasonable steps that E.ON could have taken would have been to give earlier consideration to what its obligation to take all reasonable steps entailed. E.ON was unable to provide documentary evidence of this. It is therefore the Authority's view that E.ON did not take all reasonable steps to install or arrange for the installation of advanced meters at all relevant premises, resulting in a breach of SLC 12.21 as from 6 April 2014.

Planning

- 2.15 E.ON was unable to evidence or demonstrate that it planned sufficiently for the roll-out of advanced meters to electricity consumers at relevant premises. Rather, E.ON adopted a 'Business as Usual' (BAU) model i.e. one where advanced meter installations were undertaken as routine and without a dedicated team in place. E.ON was unable to demonstrate that the BAU model would fulfil the requirements of SLC 12.21. In addition, E.ON failed to monitor progress regularly and take appropriate actions to resolve problems and issues that arose.
- 2.16 The Authority considers that a well prepared and executed plan, including ongoing risk assessment and the taking of remedial actions as necessary would have been more likely to ensure compliance with SLC 12.21. It is the Authority's view that E.ON did not adequately prepare and plan for the roll-out of advanced meters and, as such, that it did not take all reasonable steps to install or arrange for the installation of advanced meters at relevant premises.

Monitoring and resource allocation

- 2.17 E.ON was unable to provide satisfactory evidence to demonstrate that its advanced meter roll-out was appropriately monitored, or that appropriate management oversight and escalation procedures were in place.
- 2.18 It is the Authority's view that this poor monitoring activity meant that E.ON only realised late in the roll-out period that it had developed a backlog of installations which would prevent it from complying with the obligation in SLC 12.21 as from 6 April 2014. The Authority therefore considers that E.ON did not adequately monitor the roll-out of advanced meters to relevant premises and therefore did not take all reasonable steps to achieve compliance with SLC 12.21.
- 2.19 The Authority also considers it important that companies have an informed estimate of how long, on average, meter installations take (traditional or advanced). This information is considered a necessary component of any plans or targets, and essential in determining whether or not the available workforce could deliver the requirements of SLC 12.21 in the time available. E.ON was unable to provide satisfactory evidence of their plans for rolling out advanced meters, including meter installation times.
- 2.20 It is the Authority's view that E.ON were not sufficiently aware of the resourcing requirements of the roll-out of advanced meters to relevant premises in order to comply with SLC 12.21 and that it did not fully understand these requirements and resource its roll-out appropriately. As a result, it did not take all reasonable steps to install or arrange for the installation of advanced meters at relevant premises in accordance with SLC 12.21.

Management oversight/escalation

- 2.21 E.ON was unable to provide satisfactory evidence to demonstrate that appropriate management oversight and/or escalation processes were in place.

- 2.22 It is the Authority's view that this lack of senior level ownership would have had a significant impact on the way issues were escalated. The lack of reporting arrangements, in conjunction with a lack of supervision from E.ON's senior management team, meant that E.ON failed to identify and resolve issues early on. Whilst the Authority observed an improvement in management oversight after November 2013, prior to this, the Authority considers that E.ON did not provide adequate management oversight and escalation processes for the roll-out of advanced meters to relevant premises and consequently did not take all reasonable steps to install or arrange for the installation of advanced meters at relevant premises in accordance with SLC 12.21.

Board oversight

- 2.23 E.ON was unable to provide satisfactory evidence to demonstrate that appropriate oversight arrangements were in place with its Board to ensure compliance with its obligation under SLC 12.21.
- 2.24 It is therefore the Authority's view that, by not taking regular progress reports to its Board, E.ON did not take all reasonable steps to install or arrange for the installation of advanced meters at relevant premises.

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 The Authority has considered whether a financial penalty is appropriate in accordance with the requirements of the Electricity Act, and its published Statement of Policy with respect to Financial Penalties (October 2003) ("the 2003 Penalty Statement")¹⁰.
- 3.2 In deciding whether to impose a penalty, and in determining the amount of any penalty, the Authority is to have regard to its statement of policy most recently published at the time when the contravention or failure occurred¹¹. The 2003 Penalty Statement was introduced in October 2003. In November 2014, the Authority introduced a new policy ("the 2014 Penalty Statement") which the Authority must have regard to 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.
- 3.3 In this case the contravention first occurred on 6 April 2014 and is likely to continue to the present day because E.ON appears to still be in breach of SLC 12.21. To the extent that the contravention is ongoing, it is likely to fall within the scope of both the 2003 Penalty Statement and the 2014 Penalty Statement. However, the nature of the obligation contained in SLC 12.21 was to ensure licensees complied with a deadline for compliance which fell within the 2003 Penalty Statement. The scope of this investigation into E.ON's conduct fell within the period before 6 November 2014 and the Authority has therefore applied the Penalty regime which was in place before that date – the 2003 Penalty Statement.

¹⁰ <https://www.ofgem.gov.uk/ofgem-publications/74207/utilities-act-statement-policy-respect-financial-penalties.pdf>

¹¹ Section 27B(2) of the Electricity Act 1989.

- 3.4 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 which it considers is best calculated to further its principal objective¹², having regard to its other duties.
- 3.5 In deciding whether it is appropriate to impose a financial penalty, the Authority has considered all the circumstances of the case including the following specific matters set out in the 2003 Penalty Statement. These matters are examined in more detail below.

General Criteria for the imposition of a penalty

- 3.6 The Authority is required to take into consideration the particular facts and circumstances of the contravention or failure that were outside the control of the licensee. 7,011 of E.ON's relevant meter points were supplied other than through an advanced meter as from 6 April 2014, out of a total of 19,698 meters in E.ON's relevant premises (i.e. only 64% of its relevant premises were installed with advanced meters). On the basis of the latest information from E.ON¹³, E.ON has increased the percentage of compliant meters by around three percentage points¹⁴. However, E.ON's progress was affected by the fact that it gained a large portion of non-advanced meters when businesses switched to E.ON and lost a large portion of advanced meters when business customers left. The Authority accepts that this "churn" can affect the overall numbers of advanced meters at any point, particularly where a supplier may experience difficulties in a) being able to operate advanced meters churning in to its portfolio, and/or b) inheriting a disproportionate number of traditional meters, and/or c) losing (to churn) a high number of advanced meters.
- 3.7 It is however for each supplier concerned to ensure that these difficulties are minimised and to put in place reasonable steps to ensure that relevant premises in their portfolio have advanced meters installed at the earliest opportunity. It is therefore the Authority's view that making effective arrangements to deal with churn is within E.ON's control and E.ON failed to fully anticipate the impact of churn.

Factors tending to make the imposition of a financial penalty more likely than not

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

- 3.8 The Authority considers that there are immediate benefits arising from an advanced meter which include access to up to date information on consumption, more accurate billing and time saving (associated with reduced time spent on queries and having meters read remotely). Furthermore, advanced meters provide businesses with control over their energy forecasting and budgeting. In addition, these businesses would have the opportunity through the information provided by an advanced meter to enable them to plan the implementation of any reductions in their consumption. The Authority recognises there are also likely future benefits, such as time of use tariffs¹⁵ enabled through half hourly

¹²The 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, including their interests in the reduction of greenhouse gas emissions and ensuring security of supply.

¹³ Letter from E.ON dated 31st July 2015.

¹⁴ This % increase is in part due to a reduction in the total number of meters in Profile class 5-8 and despite installing circa 3,700 meters.

¹⁵ Where consumers are charged different prices according to when the electricity is used.

settlement, which require an advanced meter. By not installing advanced meters at relevant premises by the 6 April 2014 deadline, E.ON has not provided those businesses with the enabling technology to take advantage of these benefits.

- 3.9 DECC's Advanced Metering Impact Assessment¹⁶ (IA) assumes a 2.5% per annum decrease in energy consumption post installation of an advanced electricity meter (2008) modelled over a 15-year timespan. The Authority recognises that advanced meters are an important enabling technology which provide businesses with the opportunity to plan for consumption reduction. The Authority considers that by not meeting its obligations as set out in SLC 12.21, E.ON is likely to have caused harm to business consumers because of the lost opportunity to plan for consumption reduction.
- 3.10 Should the shortfall of advanced meters not be remedied, the Authority considers there may be future damage to the interests of business consumers due to network and generation benefits that are enabled by advanced meters¹⁷. These include reduced losses, avoided investment from demand side flexibility (network and generation) and short run marginal costs savings from demand side flexibility.
- 3.11 Finally the Authority considers that, again, should the shortfall of advanced meters not be remedied, there is likely to be future harm due to environmental benefits not being realised. These include reducing carbon emissions; improving air quality and a reduction in EU Emissions Trading System (ETS) credits purchased.

Whether imposing a financial penalty is likely to create an incentive to compliance and deter future breaches

- 3.12 The Authority considers compliance with mandatory deadlines to be very important and to that end, the Authority considers that imposing a financial penalty is likely to create an incentive for compliance and deter future breaches generally. Imposing a penalty in this case would create the right incentives around the need for regulated parties to comply with deadlines, which are particularly important for future mandatory programmes such as, for example, the Smart Meter roll-out.

Factors tending to make the imposition of a financial penalty less likely than not

If the contravention is trivial in nature

- 3.13 The Authority considers that E.ON's breach of SLC 12.21 is not trivial due to the importance of complying with mandatory deadlines. Furthermore, SLC 12.21 is an important obligation that benefits business consumers and the environment. E.ON's contravention affects over 7,000 relevant meter points and is likely to be ongoing until such time as E.ON installs advanced meters at the relevant premises or takes "all reasonable" steps to do so.

¹⁶<http://webarchive.nationalarchives.gov.uk/20100216092443/http://www.berr.gov.uk/files/file47192.pdf>

¹⁷ Some of these benefits are due to half hourly settlement which will be implemented in April 2017 via P 272 (a mandatory industry-wide change instigated by Ofgem for the half-hourly (HH) settlement of profile class 5-8 meters that have capable metering in place). An advanced meter is therefore required for this.

That the principal objective and duties of the Authority preclude the imposition of a penalty

- 3.14 The Authority considers that its principal objective and duties, as set out in section 3A of the Electricity Act, do not preclude the imposition of a financial penalty in this case.

That the breach or possibility of a breach would not have been apparent to a diligent licensee

- 3.15 The Authority considers that the breach would have been apparent to a diligent licensee. Licensees were given over five years to prepare for compliance with the obligation. Furthermore, on several occasions, Ofgem communicated with licensees about the requirements of the advanced meter obligation by way of open letters and direct requests for information. The Authority believes that a diligent licensee would have considered putting appropriate internal procedures in place to plan, monitor and resolve issues and avoid breaching SLC 12.21.

Conclusion

- 3.16 After consideration of the above factors, the Authority considers that it is appropriate to impose a financial penalty in this case.

4. Criteria relevant to the level of financial penalty

- 4.1 In accordance with section 270 of the Electricity Act, the Authority may impose a financial penalty of up to 10 per cent of the turnover of the relevant licence holder. Turnover is defined in an Order made by the Secretary of State.¹⁸ The relevant figure is the turnover shown in published or prepared accounts for the business year preceding the date of this notice. For the financial year ending 31 December 2014, E.ON Energy Solutions Ltd had a total turnover of £7.489bn and E.ON UK plc £1.497bn.
- 4.2 In deciding the appropriate level of financial penalty, the Authority has considered all the circumstances of the case, including the following specific matters set out in the 2003 Penalty Statement.

Factors which are first considered when determining the level of penalty

The seriousness of the contravention and failure

- 4.3 The roll-out of advanced meters is part of a national infrastructure project to modernise the energy sector and provide a better service to customers, it is therefore very important that these meters are installed on time.
- 4.4 The Authority considers that E.ON's failure to comply with SLC 12.21 is serious and this has been taken into account in deciding the level of penalty. The Authority considers compliance with mandatory deadlines, such as those relating to the installation of advanced meters under SLC 12.17 to SLC 12.22, to be very important¹⁹. Licensees had over five years to prepare for compliance with SLC 12.21 together with regular engagement from Ofgem. This included an open

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

¹⁹ Meeting mandatory deadlines is one of the Authority's annual enforcement priorities in both 2014/15 and 2015/16.

letter²⁰ from Ofgem's Markets' Division issued in February 2013 which provided a non-exhaustive list of what might be considered reasonable steps together with a warning that Ofgem considered "all reasonable steps" to be a high threshold for compliance. Licensees were encouraged to consider a variety of technical solutions in order to ensure a high probability of success when installing advanced meters. E.ON's failure to deliver its regulatory obligations within the legally required timescales is a serious matter. E.ON's failure to meet its regulatory obligations indicates that it did not take compliance with those obligations seriously.

4.5 E.ON's failure to deliver this obligation by the statutory deadline may impede the positive change that advanced meters can bring about, as advanced meters are a key enabling technology that underpins important government policies. This includes, amongst other things, the delivery of Ofgem's Smarter Markets Programme – the goal of which is to make energy markets more dynamic and competitive. E.ON's poor advanced meter roll-out performance may therefore slow down the realisation of the benefits envisaged by the Smarter Markets Programme, in particular:

- Accurate and timely billing - enabled by direct access to relevant information (e.g. consumption) on request and remote meter reads. These aims are impacted by E.ON's failure to fulfil its advanced meter obligations because traditional meters limit billing accuracy performance, which increases reliance on estimated bills and the potential for back-billing.
- Easier switching – facilitated through accurate and timely bills which are enabled by remote meter reads. These aims are impacted by E.ON's failure to fulfil its advanced meter obligations because unreliable switching undermines consumer confidence in the market.

4.6 The advanced meter roll-out is an important obligation which we expect all relevant licensees to comply with. The obligation in SLC 12.21 benefits business consumers and has wider environmental benefits. One of Ofgem's 2014/15 annual enforcement priorities was to "send a strong signal that non-compliance with deadlines is not acceptable." By not meeting its obligation, E.ON has fallen short on delivering these benefits.

4.7 The Authority also notes that this is not the first time that E.ON's internal mechanisms and procedures, and the actions of management have been called into question. Inadequate management oversight, poor monitoring procedures and poor auditing have played a part in two previous, albeit recent, E.ON investigations²¹. The Authority is concerned by this and expects E.ON to take steps to improve its monitoring, management and compliance procedures.

The degree of harm or increased cost incurred by customers or other market participants after taking into account any compensation paid

4.8 The Authority considers that there may have been harm to business consumers (see para 3.8 to 3.11 and 4.5 above for details).

²⁰ Dated 28 February 2013.

²¹ [SLC 23 investigation](#) November 2012 (informal investigation) and [Compact Fluorescent Lamps investigation](#) August 2013

The duration of the contravention or failure

- 4.9 The breach of the obligation in SLC 12.21, which is the subject of this investigation, occurred on 6 April 2014. However because this is an ongoing obligation, the breach is likely to be ongoing until E.ON is no longer supplying electricity to any relevant premises other than through an advanced meter, except where it has been unable to install or arrange for the installation of an advanced meter at the relevant premises in question despite taking all reasonable steps to do so.

Any gain (financial or otherwise) made by the licensee

- 4.10 The Authority considers that E.ON has made a financial gain by avoiding the costs associated with installing and operating advanced meters. Furthermore E.ON avoided costs by not appropriately resourcing the roll-out of advanced meters and by not having sufficient management systems and controls in place which might have prevented the breach of SLC 12.21 happening in the first place. For example, a dedicated project manager and project team managing and monitoring delivery on a regular basis, providing timely and accurate management information, together with senior management oversight, could have assisted in the delivery of the advanced meter obligation under SLC 12.17 to SLC 12.22. It is the Authority's view that E.ON avoided such costs. In addition E.ON failed to resolve installation problems and failed to react to issues as they occurred. This failure to recognise and undertake remedial actions meant that, in the Authority's view, E.ON avoided costs.
- 4.11 The Authority also notes that, by not installing advanced meters, E.ON may not have been able to benefit from the following:
- a. Avoided site visits (for meter reads and reduced other site visits);
 - b. Reduced contact centre time (due to a reduction in billing enquiries and complaints);
 - c. Better debt handling (due to better debt management including disconnection);
 - d. Accurate Switching (due to having timely and accurate final bills).

Factors tending to increase the level of penalty

Repeated contravention or failure

- 4.12 E.ON has not been found to be in breach of SLC 12.21 before. This factor therefore does not apply.

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

- 4.13 The breach of the obligation in SLC 12.21 occurred on 6 April 2014. However because this is an ongoing obligation, the breach is likely to be ongoing until such time as E.ON installs advanced meters at all relevant premises and/or takes all reasonable steps to do so.
- 4.14 The number of outstanding relevant meter points for E.ON remains high, even considering the impact of churn as outlined in paragraph 3.6. The Authority considers that E.ON is likely to still be in contravention of SLC 12.21 because

progress has been slow to date. This means that any harm to business consumers is ongoing. This factor therefore applies.

The involvement of senior management in any contravention or failure

- 4.15 The Authority considers that senior management at E.ON did not deliberately act to contravene SLC 12.21. However, the Authority considers that senior management did not put in place satisfactory arrangements that would have allowed it to plan, monitor and assess the status/risk of non-compliance with its obligations. The failure of E.ON's senior management to provide adequate oversight is a significant contributing factor to E.ON's failure to comply with its obligations. This factor therefore applies to a significant extent.

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

- 4.16 The Authority considers that E.ON had a marked absence of procedures or internal mechanisms in place to ensure compliance with the "all reasonable steps" requirement of SLC 12.22. E.ON failed to provide evidence of any strategy to resolve installation or interoperability issues until the last few months of the advanced meter roll-out period. Despite the open letter²² from Ofgem (see paragraph 4.4) E.ON was unable to produce an adequately documented all reasonable steps process and failed to provide sufficient evidence that it had taken all reasonable steps. The lack of internal mechanisms to monitor its installation performance meant that E.ON was unaware that it was developing a backlog of installations and that it was likely to fail to meet the obligation until it was too late. This factor therefore applies.

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

- 4.17 E.ON did not attempt to conceal the contravention or failure from Ofgem. This factor therefore does not apply.

Factors tending to decrease the level of penalty

- 4.18 The Authority considers there are limited factors in this investigation which would tend to decrease the level of any penalty.

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

- 4.19 The Authority considers that E.ON took steps to secure compliance with SLC 12.21 by installing almost 13,000 advanced meters, in a BAU context. However there was a significant absence of planning, monitoring and issue escalation/resolution in place which demonstrates E.ON did not take all reasonable steps to secure compliance. This factor therefore applies to a limited extent.

Appropriate action by the licensee to remedy the contravention or failure

- 4.20 E.ON had an internal regulatory / compliance review in May 2014 that considered compliance with SLC 12.17 to SLC 12.22, amongst other things. Since April 2014 E.ON has increased the percentage of compliant meters by around three

²² Dated 28 February 2013.

percentage points and, whilst installing c.a. 3,700 compliant meters over the period since 6 April 2014, has failed to fully anticipate the impact of churn. This factor therefore does not apply.

Evidence that the contravention or failure was genuinely accidental or inadvertent

- 4.21 The Authority considers that the breach was not genuinely accidental or inadvertent because of the marked absence of planning, monitoring, issue escalation/resolution that would have ensured the success of the roll-out. The Authority considers that the breach or possibility of a breach would have been apparent to a diligent licensee. There was also a failure to allocate adequate resources to the roll-out. Furthermore, E.ON did not identify what steps were required of it in order to meet the all reasonable steps requirement in SLC 12.22. This factor therefore does not apply.

Reporting the contravention or failure to Ofgem

- 4.22 E.ON did not self-report the contravention to Ofgem. The contravention was discovered through an Information Request from Ofgem's Markets Division. The Authority therefore considers that this factor does not apply.

Co-operation with Ofgem's investigation

- 4.23 The Authority notes E.ON has responded to all requests for information that have been sent. However, the Authority considers that at present no behaviours have been identified that go beyond what would be expected of any regulated party facing enforcement action.
- 4.24 However, E.ON has in response to the Summary Statement of Initial Findings issued, accepted its breach and agreed to settle the case at the earliest opportunity. This has achieved a speedier resolution and avoided additional spending of resource by Ofgem. Accordingly, the Authority considers that a discount can be applied and the aggregate of the financial penalty and any amount of consumer redress is a lower figure than would have been the case if E.ON had not agreed to settle.

5. The Authority's decision

- 5.1 Taking account of all these factors and also mindful of its principal objective to protect the interests of existing and future energy consumers, the Authority hereby proposes to impose a financial penalty of £2 on E.ON in respect of the breach it finds of SLC 12.21, which it considers to be reasonable in all the circumstances of the case. In reaching its decision the Authority has taken the following factors into account:

- E.ON's failure to install advanced meters / take all reasonable steps to do so by 6 April 2014 was a serious contravention.
- There is likely to be harm to business consumers and the environment.
- E.ON has made a financial gain by avoiding the costs associated with installing and operating advanced meters.
- There are several factors tending to increase the level of any penalty (see para 4.12 to para 4.17).
- There are two factors tending to decrease the level of any penalty (See para 4.19 and 4.23 to 4.24).

- 5.2 E.ON has agreed to settle the investigation on the basis that it has agreed to pay a £2 financial penalty and consumer redress payments to the Carbon Trust as follows:
- A payment of £7 million (minus the £2 financial penalty) to be paid to the Carbon Trust within 30 days of the publication of the final Penalty Notice.
- 5.3 In addition to the above, E.ON has also agreed to pay a further £7 million if it has not achieved an installation target, specified by the Authority, for its outstanding meter points by 2 November 2016.
- 5.4 E.ON has agreed to settle the investigation early and the aggregate of the financial penalty and the amount of consumer redress is a lower figure than the Authority would have sought if E.ON had not taken such action.
- 5.5 Any written representations on the proposed penalty must be received by Steve McBurney at Ofgem (steve.mcburney@ofgem.gov.uk) or Ofgem, 9 Millbank, London, SW1P 3GE by **5 pm on 1 December 2015**.
- 5.6 Any representations received that are not marked as confidential may be published on the Ofgem website. Should you wish your response or part of your response to remain confidential, please indicate this clearly. Any such requests will be considered by Ofgem on a case by case basis.

Gas and Electricity Markets Authority
9th November 2015