

April 2001

Utilities Act

**Statement of policy with respect
to financial penalties**



THE GAS AND ELECTRICITY MARKETS AUTHORITY

THE AUTHORITY'S STATEMENT OF POLICY WITH RESPECT TO FINANCIAL PENALTIES

PURSUANT TO SECTION 27B OF THE ELECTRICITY ACT 1989
AND SECTION 30B OF THE GAS ACT 1986

BACKGROUND

- 1.1 The Gas Act 1986 ('the 1986 Act') and the Electricity Act 1989 ('the 1989 Act')¹ (together "the Acts") provide that the Gas and Electricity Markets Authority ("the Authority") may impose a financial penalty on a licence holder.
- 1.2 The Acts further provide that the amount of such a penalty must be reasonable in all the circumstances of the case², and that it must not exceed ten percent of the turnover of the licensee (as determined in accordance with an order made by the Secretary of State)³.
- 1.3 The Acts require the Authority, having undertaken such consultation as it considers appropriate, to prepare and publish a statement of policy with respect to the imposition of a penalty, and to its amount⁴. This statement has been prepared in accordance with those requirements.
- 1.4 The Authority may not impose a penalty on a licence holder where it is satisfied that the most appropriate way of proceeding is under the Competition Act 1998⁵. The Authority will take this into account throughout its procedures and deliberations.
- 1.5 In considering any case in which a financial penalty might be imposed, the Authority will need to address three questions:
 - Is it satisfied that that the licence holder has contravened or is contravening any relevant condition or requirement, or has failed to achieve any standard of performance set in accordance with specified provisions of the respective Acts?

¹ Section 30A(1) of the 1986 Act and section 27A(1) of the 1989 Act.

² Section 30A(1) of the 1986 Act and section 27A(1) of the 1989 Act.

³ Section 30A(8) of the 1986 Act and section 27A(8) of the 1989 Act.

⁴ Section 30B of the 1986 Act and section 27B of the 1989 Act.

⁵ Section 30A(2) of the 1986 Act and section 27A(2) of the 1989 Act.

- If so is it appropriate to impose a financial penalty?
- If so, what amount is reasonable in all the circumstances of the case?

STATEMENT OF POLICY WITH RESPECT TO PENALTIES

2.1 This statement has been adopted by way of a resolution of the full Authority. The Authority has not delegated to any member or employee of the Authority power to vary this statement.

PROCEDURAL REQUIREMENTS AND STATUTORY OBJECTIVES AND DUTIES

3.1 The principal objective and general duties of the Authority are set out in Sections 4AA, 4AB, 4A and 4B of the 1986 Act and Sections 3A, 3B, 3C and 3D of the 1989 Act. The Authority is required to carry out all of its functions, including the taking of decisions in relation to financial penalties, in the manner which it considers is best calculated to further the principal objective and to take into account its other duties.

3.2 The principal objectives⁶ are to protect the interests of consumers in relation to:

- gas conveyed through pipes, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the shipping, transportation or supply of gas so conveyed: and
- electricity conveyed by distribution systems, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the generation, transmission distribution of supply of electricity.

3.3 In imposing any penalty, the Authority will follow the procedural requirements set out in the 1986 and 1989 Acts⁷.

CRITERIA FOR THE IMPOSITION OF A PENALTY

4.1 Before deciding to impose a financial penalty, the Authority must be satisfied that the licence holder has contravened or is contravening any relevant condition or requirement, or has failed to achieve any standard of performance set in accordance with specified provisions of the respective Acts. The Acts make it clear that a financial penalty may be imposed for the first such contravention.

⁶ Section 4AA of the 1986 Act and section 3A of the 1989 Act.

⁷ Sections 30A to F of the 1896 Act and sections 27A to F of the 1989 Act.

General criteria

- 4.2 In deciding whether it would be appropriate to impose a penalty, the Authority will take full account of the particular facts and circumstances of the contravention under consideration, including the extent to which the circumstances from which the contravention or failure arose were outside the control of the licensee. It will also take full account of any representations made to it by interested parties.
- 4.3 Factors tending to make the imposition of a financial penalty more likely than not include:
- the contravention or failure has damaged the interests of consumers or other market participants;
 - to do so would be likely to create an incentive to compliance and deter future breaches.
- 4.4 Factors tending to make the imposition of a financial penalty less likely than not include:
- if the contraventions were of a trivial nature;
 - that the principal objective and duties of the Authority preclude the imposition of a penalty;
 - that the breach or possibility of a breach would not have been apparent to a diligent licensee;

CRITERIA FOR FIXING THE QUANTUM OF A PENALTY

General criteria

- 5.1 The quantum of any penalty must be reasonable in all the circumstances of the case. Accordingly, the Authority, in setting the level of any penalty will consider all the circumstances.
- 5.2 In general, the Authority is likely first to consider the following factors in determining the general level of any penalty:
- the seriousness of the contravention or failure;
 - the degree of harm or increased cost incurred by consumers or other market participants;
 - the duration of the contravention or failure; and
 - any gain (financial or otherwise) made by the licensee.

5.3 Factors tending to lead to an increase in the level of any penalty may include, but would not necessarily be limited to:

- repeated contravention or failure;
- continuation of contravention or failure after either becoming aware of the contravention or failure or becoming aware of the start of Ofgem's investigation;
- the involvement of senior management in any contravention or failure;
- the absence of any evidence of internal mechanisms or procedures intended to prevent contravention or failure; and
- the extent of any attempt to conceal the contravention or failure from Ofgem.

5.4 Factors tending to decrease the level of any penalty would include, but would not necessarily be limited to:

- 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;
- appropriate action by the licensee to remedy the contravention or failure;
- evidence that the contravention or failure was genuinely accidental or inadvertent;
- reporting the contravention or failure to Ofgem; and
- co-operation with Ofgem's investigation.

5.5 Having considered, to the extent appropriate, the factors listed above and all of the circumstances of the matter under consideration, the Authority will determine an appropriate amount for a financial penalty. In doing so it will ensure that the amount it determines is not more than 10 per cent of the turnover of the licensee.

REVISION OF THE STATEMENT OF POLICY

6.1 The Authority approved this statement on 10 April 2001. The Authority may, from time to time, revise this statement, in accordance with the 1986 and 1989 Acts⁸. Any revised statement will be published.

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⁸ Section 30B(3) of the 1986 Act and section 27B(3) of the 1989 Act.