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## Terms of Reference of the Enforcement Decision Panel (EDP) March 2023.

### 1. Purpose

The Enforcement Decision Panel ('EDP') consists of employees of Ofgem specifically employed for EDP duties, as set out at Section 2 below. Any one of the EDP members may also be appointed to form a Settlement Committee with a member of Ofgem's Senior Civil Service.

### 2. Duties

The duty of a decision-making Panel (or, where appropriate, the relevant decision-maker) is to consider relevant matters referred to it and to take decisions concerning the following, set out in detail in the Ordinary Resolution dated June 2014<sup>1</sup>:

- a) Decisions whether there is or is likely to be a contravention of any relevant condition or requirement as defined in the Gas Act 1986 and/or Electricity Act 1989 and to:

- i. confirm a provisional order (including the decision to issue a notice of proposal to confirm a provisional order);
- ii. make a final order (including the decision to issue a notice of proposal to make a final order); and/or
- iii. revoke a final order or a confirmed provisional order (including the decision to issue a notice of proposal to revoke a final order or a confirmed provisional order)<sup>2</sup>.

(In each case, where appropriate, whether with or without modifications or in whole or in part) under sections 25/26 Electricity Act 1989 and/or sections 28/29 Gas Act 1986.

- b) Decisions whether the conditions for imposing a penalty are made out and whether to impose a penalty and its amount (including the decision to issue a notice of proposal to impose a penalty) under section 30A Gas Act 1986 and/or section 27A Electricity Act 1989.

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<sup>1</sup> As amended/supplemented by Ordinary Resolutions of the Authority dated 14 May 2015, 24 April 2019, 9 March 2022 and 8 March 2023.

<sup>2</sup> In accordance with the Ordinary Resolution of the Authority dated 24 April 2019, the following decisions do not require EDP involvement: a) not to make a final order (unless the EDP has been previously engaged in respect of a decision to issue a notice of proposal to make a final order); b) not to confirm a provisional order; and c) to revoke an unconfirmed provisional order.

- c) Decisions whether the conditions for making a consumer redress order are made out and whether to make such an order and its form (including the decision to issue a notice of proposal to make a consumer redress order) under section 30G/30I Gas Act 1986 and/or section 27G/27I Electricity Act 1989.
- d) Decisions whether there has been a breach of Chapter I / Chapter II Competition Act 1998 / Article 101 and 102 the Treaty on the Functioning of the European Union and where appropriate to impose directions under s32/s33 and/or to impose penalties under s36, and where appropriate 40A<sup>3</sup> Competition Act 1998.
- e) Decisions whether the conditions for imposing a penalty or issuing a statement of non-compliance under regulation 26 Electricity and Gas (Market Integrity and Transparency) (Enforcement etc) Regulations 2013 are made out and whether to impose a penalty and its amount or issue a statement of non-compliance.
- f) Decisions whether the conditions for requiring restitution under regulation 23 Electricity and Gas (Market Integrity and Transparency) (Enforcement etc) Regulations 2013 are made out and whether to require restitution and its amount.
- g) Decisions whether the conditions for issuing or publishing a notice under regulations 24-25, 30-31, and 37-39 Electricity and Gas (Market Integrity and Transparency) (Enforcement etc) Regulations 2013 are made out and whether to issue or publish a notice.
- h) Decisions whether the conditions for serving an enforcement notice under Regulation 17 of the Network and Information Systems Regulations 2018 ('NIS Regulations') have been met and whether to serve such a notice and its contents<sup>4</sup>.
- i) Decisions whether the conditions for serving a penalty notice under Regulation 18 of the NIS Regulations have been met and whether to serve such a notice and, if so, the amount of any penalty set out therein.
- j) Decisions whether the conditions for serving an anticipated default notice under Regulation 52 of the Green Gas Support Scheme Regulations 2021 ('GGSS Regulations') have been met, whether to serve such a notice and whether to vary or revoke such a notice.

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<sup>3</sup> The EDP may exercise the power under Section 40A CA 98 where the failure to comply with a requirement has occurred after the issue of a Statement of Objections.

<sup>4</sup> Penalty and Enforcement Notice decisions may include any such decisions which need to be re-considered following an appeal to the First-Tier Tribunal under Regulations 19A and 19B of the NIS Regulations where those decisions are referred to the EDP.

- k) Decisions whether the conditions for serving an enforcement notice under Regulation 53 of the GGSS Regulations have been met, whether to serve such a notice and whether to vary or revoke such a notice; and
- l) Decisions whether the conditions for serving a penalty notice under Regulation 57 of the GGSS Regulations have been met, whether to serve such a notice, and, if so, the amount of any penalty set out therein and whether to withdraw or modify such a notice.

As provided for in Ordinary Resolutions of the Authority dated 9 March 2022 and 8 March 2023, the Director responsible for Enforcement (the "Director") or a nominated alternate (being an employee of Ofgem at Director level or equivalent) may make decisions in any of the matters set out above at paragraph (a), paragraph (b) (where a penalty must be imposed within the statutory time limits set out at section 27C(2) of the Electricity Act 1989 or section 30C(2) of the Gas Act 1986) and paragraphs (h) – (l) where they consider this would be appropriate. The Director (or their nominated alternate) shall determine whether any such matters would be appropriate for them to decide having consulted with such parties as they consider appropriate and having regard to such matters as may be relevant depending on the facts and circumstances of the case, and if they consider that it would not be appropriate for them to decide, they shall refer the matter to the EDP.

These decisions are to be taken having regard to such guidance as is required to make the relevant decision.

### **3. EDP Chair, Panel selection, and meetings**

A member of the EDP will be appointed as EDP Chair.

Subject to the provisions of Section 4 below each case referred to the EDP will be heard by a decision-making Panel ('Panel') of usually three<sup>5</sup> EDP members. The EDP Chair will select the Panel members to hear a contested case, considering member availability, skills, and experience, and any actual or perceived conflicts of interest in accordance with Section 8 (below). Each Panel will have a Panel Chair<sup>6</sup>, appointed by the EDP Chair. Each Panel will, in its make-up, comply with the requirements of any relevant legislation.

Subject to the following provisions of this Section and of Sections 4 and 5 below, decisions may only be taken when a Panel is in quorum. Quorum shall be a Panel of three (the Panel Chair plus two additional EDP members). In exceptional circumstances two Panel members may be deemed quorate by the EDP Chair, in

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<sup>5</sup> In exceptional circumstances, and at the EDP Chair's discretion, a panel of two may be considered quorate.

<sup>6</sup> The EDP Chair may appoint themselves to a Panel as Panel Chair or as an ordinary member.

order to allow decisions to be progressed (e.g., where a Conflict of Interest exists)<sup>7</sup>. Where an EDP member steps down from a Panel ahead of the opportunity to make oral representations, they may be replaced by another EDP member selected by, and at the discretion of, the EDP Chair.

Meetings of the Panel may either be held in person or by conference call.

With the agreement of the Panel Chair, decisions of the Panel may be taken on paper (e.g., by email exchange) in appropriate circumstances. Such circumstances may include, for example, dealing with ancillary matters, where there is an urgent operational requirement.

EDP members also chair Settlement Committees. Any involvement in settlement discussions on a particular case preclude that EDP member taking part in the same case should it then be contested. An EDP member appointed to a Settlement Committee may not therefore subsequently sit on a Panel considering the same case.

The EDP as a whole shall meet, for training and knowledge sharing, as and when required.

#### **4. Decisions by a single EDP member or a Panel of two EDP members**

In respect of decisions to be taken under paragraphs a), b) (where the decision to be taken follows a decision under paragraph a) by a single EDP member or a Panel of two EDP members), h), i), j), k) and l) of Section 2 above, the EDP Chair may decide that they are suitable for determination by a single EDP member or a Panel of two EDP members. In such a case, the EDP Chair may appoint a single EDP member or a Panel of two EDP members to take the decision.

The Authority delegated such decisions by way of Ordinary Resolutions dated 24 April 2019 and 9 March 2022 and 8 March 2023.

#### **5. Criminal prosecutions**

The powers set out above are civil powers. In addition, the EDP Chair acting alone or any legally qualified member of the EDP acting alone has the power to decide whether the Authority should proceed with a criminal prosecution. The Authority delegated this decision by way of an ordinary resolution dated 14 May 2015.

#### **6. Authority oversight**

The EDP Chair will meet with the Chair of the Authority at least once every six months.

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<sup>7</sup> Decisions of the EDP shall be subject to the provisions on decision-making set out in the Enforcement Guidelines. These set out that the Panel Chair shall have a casting vote in the event of deadlock.

## **7. Delegated authority**

Each EDP member is authorised by the Authority through delegated authority. An Ordinary Resolution of the Authority, passed for that purpose in accordance with the Rules of Procedure, was agreed by the Authority on 12 June 2014. Subject to the provisions of Section 4 above, EDP members may only take decisions under that delegated authority when the Panel is quorate (see Section 3).

For the purpose of Section 5, the EDP Chair and EDP member are individually authorised by the Authority through delegated authority. An Ordinary Resolution of the Authority, passed for that purpose in accordance with the Rules of Procedure, was agreed by the Authority on 14 May 2015. The EDP Chair or EDP member(s) exercises that delegated power acting alone.

An Ordinary Resolution of the Authority was passed on 24 April 2019 relating to decisions on final orders and provisional orders as summarised at Section 4 above.

An Ordinary Resolution of the Authority was passed on 9 March 2022 relating to decisions in cases under the NIS Regulations and certain other matters.

An Ordinary Resolution of the Authority was passed on 8 March 2023 relating to decisions on penalties and decisions in cases under the GGSS Regulations.

## **8. Conflicts of Interest**

On appointment, EDP members must disclose any relevant interests in order to fully comply with Ofgem policies and procedures on conflicts of interest. EDP members also have an ongoing duty to keep the EDP Chair, and Ofgem, informed of any further interests that they acquire or conflicts that they identify after their appointment to the EDP. Additionally, prior to selection to a Panel or Settlement Committee, EDP members will be asked to confirm that there is no conflict of interest.

## **9. Annual Report**

The EDP Chair will provide the Authority with a report on an annual basis (see Section 6) giving a commentary on cases considered in the previous year.

## **10. Revisions**

These Terms of Reference of the EDP may be reviewed and altered from time to time in accordance with the Authority's Rules of Procedure.