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STATUTORY INSTRUMENTS

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**2023 No. 453**

**The Energy Bills Discount Scheme Regulations 2023**

**PART 5**

Further provisions

**CHAPTER 1**

Duties of suppliers in connection with the scheme

**Increases in charges and other changes in relation to supply contracts**

**60.**—(1) A supplier must not, in respect of energy supplied under a supply contract, unreasonably—

- (a) increase the rates at which it charges any amounts payable by the customer under the supply contract,
- (b) expose a customer to any additional risk, or
- (c) change any of the following so they are less favourable to the customer—
  - (i) the terms of the supply contract;
  - (ii) the terms on which the supplier offers to enter into supply contracts;
  - (iii) the process by which prices or charges payable under supply contracts are set;
  - (iv) the way in which the supplier exercises its rights under its supply contracts.

(2) For the purposes of determining whether a supplier has behaved unreasonably in doing any of the things referred to in paragraph (1)(a) to (c)—

- (a) a supplier's conduct is, in particular, unreasonable if, and to the extent that, the conduct, or the supplier's ability to retain the customer as a customer while engaging in it, is facilitated by the existence or operation of the scheme;
- (b) it is, in particular, reasonable for a supplier to increase its charges—
  - (i) to its customers collectively, by an amount that in aggregate does not exceed the efficiently incurred costs of complying with these Regulations;
  - (ii) to any customer, by an amount that does not exceed its fair and reasonable share of such efficiently incurred costs.

**CHAPTER 2**

Deemed terms of supply contracts

**Deemed terms of supply contracts**

**61.**—(1) Subject to paragraphs (3) and (4), terms to the following effect are implied into a supply contract—

- (a) that in respect of energy supplied under the contract during a scheme period, the supply price is reduced by the discount as required under Part 2 and Part 4;
  - (b) that where the application of the Regulations changes the discount or a quantity of energy to which the discount applies, the rights and obligations of the supplier and customer in respect of payment for energy supplied are determined, or as necessary redetermined, so as to reflect such change in discount or quantity;
  - (c) that no term of the contract, and no act or omission on the part of the customer, is to be construed as entitling the supplier to require the customer—
    - (i) to pay a greater amount than the supplier would have been entitled to require it to pay if acting in accordance with the Regulations, or
    - (ii) to be otherwise subject to terms that it would not have been lawful under the Regulations for the supplier to have included in a supply contract,in respect of any energy supplied by the supplier in a scheme period;
  - (d) that nothing done by the supplier or the customer in order to comply with these Regulations or rules made under them, or in following guidance issued by the Secretary of State in relation to the scheme, is a breach of any provision of the contract;
  - (e) that the coming into force of the Act, the making of these Regulations or rules under them, and the issuing of guidance by the Secretary of State in relation to the scheme, do not constitute—
    - (i) a change in the law for the purposes of any provision (however expressed) of the contract which permits the supplier to increase its prices or charges or take any other action in consequence of a change in the law;
    - (ii) an event or circumstance which under any provision of the contract (however expressed) excuses the supplier or the customer from performance of its obligations, or from liability for failure to perform its obligations, under the contract.
- (2) In paragraph (1)(b), the reference to—
- (a) the application of the Regulations includes the making or revision of any determination or other decision under the Regulations;
  - (b) changes include a change applying in respect of energy already supplied to the customer;
  - (c) rights and obligations include rights and obligations for adjustment of charges already made or paid.
- (3) Paragraph (1) does not apply to an excluded fixed price contract or a supply contract for which an opt-out notice has been given under regulation 4(3), and has not been withdrawn under regulation 4(4).
- (4) None of the terms listed in paragraph (1) is to be construed as preventing a supplier from increasing its charges to a customer in order to recover the costs of complying with Parts 2 and 3 if and to the extent it is permitted to do so under the terms of—
- (a) its supply contract,
  - (b) its electricity supply licence or gas supply licence, and
  - (c) regulation 60(2)(b).

## CHAPTER 3

### Reporting, information requests and audit

#### **Regular reporting by suppliers**

**62.**—(1) The Secretary of State may by notice require suppliers to provide to the Secretary of State at specified intervals a report about the operation of the scheme as respects the supplier and its customers.

(2) The notice must specify—

- (a) the matters which are to be included in the report;
- (b) the dates when the report is to be provided.

(3) The Secretary of State may by further notice modify, revoke or replace a notice given under paragraph (1).

(4) A supplier must provide reports as required by the notice.

#### **Information requests**

**63.**—(1) Where the Secretary of State considers it necessary or expedient to do so for any of the purposes set out in regulation 65, the Secretary of State may give notice to any supplier, customer, provider or certified ETII operator requiring it, by a time specified in the notice—

- (a) to produce to the Secretary of State or a person nominated by the Secretary of State any document specified, or of a description specified, in the notice that is held by that supplier or customer, or
- (b) to provide to the Secretary of State or a person nominated by the Secretary of State, such information as may be specified or described in the notice.

(2) A person that receives a notice under paragraph (1) must respond to it, within the period specified in the notice, by producing the document or providing in writing the information as required by the notice.

(3) A person's duty under paragraph (2) is owed to the Secretary of State, and enforceable in civil proceedings—

- (a) for an injunction,
- (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988, or
- (c) for any other appropriate remedy or relief.

(4) No person is to be compelled under this regulation to produce any document which they could not be compelled to produce in civil proceedings in the court or to provide any information which they could not be compelled to give in evidence in any such proceedings.

#### **Audit**

**64.**—(1) Where the Secretary of State considers it appropriate to do so for the purposes set out in regulation 65(a), (b) or (d), the Secretary of State may by notice to a supplier require that an audit of the books, records, systems, processes and methodologies of the supplier is performed by a suitably qualified person appointed by the Secretary of State.

(2) Where the Secretary of State requires an audit to be performed under paragraph (1)—

- (a) the supplier must procure for the person appointed by the Secretary of State access to its personnel, books, records, systems, processes and methodologies sufficient for performance of the audit;

- (b) the audit must be performed so far as practicable without causing disruption to the supplier in carrying on its business;
- (c) the costs of the person appointed by the Secretary of State are to be borne by the Secretary of State.

### **Purposes for which powers under this Chapter may be exercised**

**65.** The purposes are—

- (a) ascertaining whether any provision of the Regulations is being or has been complied with;
- (b) ascertaining whether pursuant to any provision of Part 3 or Part 4, any significant amount—
  - (i) is payable to, or
  - (ii) upon that provision being complied with, would become payable to, or would not be payable by,
 the Secretary of State;
- (c) ascertaining whether any person is in Chapter 3 default, and if so the default benefit amount;
- (d) otherwise ensuring the proper accounting for, tracing or control of public money in discount recovery;
- (e) obtaining information in connection with any review, including a review under section 9(5) of the Act, by the Secretary of State of the operation and effects of the scheme;
- (f) otherwise obtaining information in connection with the exercise of any of the functions of the Secretary of State in or under these Regulations.

### **Application of data protection legislation**

**66.—(1)** Nothing in these Regulations authorises or requires a disclosure of information if the disclosure would contravene the data protection legislation, as defined in section 3 of the Data Protection Act 2018<sup>(1)</sup>.

(2) In determining whether a disclosure would contravene that legislation, the powers conferred and duties imposed by these Regulations are to be taken into account.

## CHAPTER 4

### Certain determinations made under the Regulations

### **Interpretation of this Chapter**

**67.—(1)** In this Chapter—

“affected person” in relation to a regulation 22 matter means—

- (a) the provider who determines that matter, and
- (b) the certified ETII operator or (if it is not that provider) certified heat supplier, as the case may be;

“applicant” in relation to a review request, means the person making the request;

“Part 2 or Part 4 matter” means any matter other than a regulation 22 matter which is to be determined or declared in relation to a supply contract by a supplier or customer under Part 2 or Part 4;

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(1) 2018 c. 12; relevant provisions of section 3 were amended by S.I. 2019/419.

“Part 3 decision” means a decision by the Secretary of State—

- (a) under regulation 37, to withhold payment to a supplier of any amount in respect of a recovery claim amount;
- (b) under regulation 38, as to the release of an amount withheld under regulation 37;
- (c) under regulation 39, as to the reconciliation cut-off date in relation to any supplier;
- (d) under regulation 41(1), to decline to make payment (in whole or part) in respect of a discount recovery claim on the grounds of invalidity;
- (e) under regulation 41(2), to adjust the amount of a discount recovery claim;
- (f) under regulation 41(3), to give a notice that is to be treated as a discount recovery claim;

“other party” in relation to a review request under regulation 70(1), means the contract party which is not the applicant;

“reconsidered decision” has the meaning given in regulation 70(6)(e)(i);

“regulation 22 matter” means the ETII proportion or QHS proportion to be determined by a provider in respect of a benefit calculation period under regulation 22;

“relevant decision” in relation to a review request, means the determination or decision in respect of which the request is made;

“review request” means a request made to the Secretary of State under regulation 70(1), (2), (3) or (4).

(2) In this Chapter, reference to a “determination” includes a redetermination.

(3) For the purposes of this Chapter a referral under regulation 68 or a review request does not meet the applicable threshold if—

- (a) it is vexatious or frivolous,
- (b) the financial consequences—
  - (i) for the applicant or (where applicable) the other party of a determination under regulation 68(3)(c), or
  - (ii) for the applicant or (where applicable) the other party or any affected person of a reconsidered decision,would not be material, or
- (c) the referral or review request is not made within a period which is reasonable in all the circumstances after—
  - (i) the customer was notified or otherwise informed of the supplier’s determination referred to in regulation 68(1)(a), or
  - (ii) the relevant decision was made.

### **Referrals in respect of disagreement between contract parties**

**68.**—(1) Where, in relation to a supply contract, the customer disagrees with a determination made by the supplier in respect of a Part 2 or Part 4 matter—

- (a) the customer may, within a reasonable time after the supplier gave notice to or otherwise informed the customer of the determination, give notice to the supplier setting out what it disagrees with and explaining the reasons for its disagreement;
- (b) following such notice the customer and the supplier must endeavour to resolve the disagreement, but this does not require or entitle the supplier to make any determination which is not consistent with these Regulations.

(2) If the disagreement is resolved, the supplier must, if such resolution so requires, redetermine the matter in question and give a revised notice to or otherwise inform the customer of such redetermination accordingly.

(3) If the disagreement is not resolved within a reasonable time after the notice was given—

- (a) the supplier's determination remains effective, and the relevant matter is determined on the basis of what is said in the notice, pending any determination pursuant to a reference under sub-paragraph (b);
- (b) the supplier or the customer may refer the matter for determination by the Secretary of State;
- (c) subject to paragraph (4), the Secretary of State must determine the matter and give notice of the determination to the contract parties;
- (d) the Regulations apply in relation to the supply contract on the basis of the determination made by the Secretary of State and the contract parties must comply with that determination.

(4) The Secretary of State may decline to determine a matter referred under this regulation where the Secretary of State considers that the referral does not meet the applicable threshold, by giving notice to that effect to the contract parties setting out the reasons for so considering.

#### **Power of the Secretary of State to make determinations**

**69.**—(1) This regulation applies if the Secretary of State considers that, in relation to a supply contract—

- (a) a determination by the supplier of, or declaration by the customer in respect of, any Part 2 or Part 4 matter, is not in conformity with the Regulations or is otherwise incorrect;
- (b) a determination by the supplier or declaration by the customer which should have been made in respect of a Part 2 or Part 4 matter has not been made, or
- (c) a determination by a provider of a regulation 22 matter is not in conformity with regulation 22 or the requirements of the applicable pass-through regulations.

(2) Where this regulation applies the Secretary of State may determine—

- (a) the Part 2 or Part 4 matter in question by giving notice of such determination to the contract parties, or
- (b) the regulation 22 matter in question by giving notice of such determination to each affected person.

(3) Before making a determination under this regulation the Secretary of State must—

- (a) give notice to the contract parties or (as the case may be) each affected person—
  - (i) setting out the matter in question;
  - (ii) setting out the reasons for which the Secretary of State proposes to make a determination;
  - (iii) setting out the determination which the Secretary of State proposes to make;
  - (iv) inviting the contract parties or (as the case may be) any affected person to make representations in respect of the proposal by a time specified in the notice;
- (b) consider any representations made by either contract party or (as the case may be) any affected person by that time.

(4) The Regulations apply, in relation to the supply contract, on the basis of the determination made by the Secretary of State and the contract parties, or (as the case may be) the provider, must comply with that determination.

### **Review of decisions of the Secretary of State**

**70.**—(1) A supplier or a customer may request the Secretary of State to review a determination made by the Secretary of State under regulation 68 or 69 in respect of a Part 2 or Part 4 matter.

(2) A supplier may request the Secretary of State to review a Part 3 decision.

(3) An ETII applicant or QHS applicant may request the Secretary of State to review a decision—

(a) not to issue to it an ETII certificate or (as the case may be) a QHS certificate;

(b) to revoke an ETII certificate or (as the case may be) a QHS certificate issued to it.

(4) An affected person may request the Secretary of State to review a determination made by the Secretary of State under regulation 69 in respect of a regulation 22 matter.

(5) The Secretary of State may decline to review a relevant decision where the Secretary of State considers that the request does not meet the applicable threshold, by giving notice to that effect to the applicant setting out the Secretary of State's reasons for so considering.

(6) Except as provided in paragraph (5), upon receiving a review request, the Secretary of State must—

(a) where the request relates to the determination of a Part 2 or Part 4 matter, give the other party a reasonable opportunity to make representations in respect of the determination;

(b) where the request relates to the determination of a regulation 22 matter, give each other affected person a reasonable opportunity to make representations in respect of the determination;

(c) consider any representations so made;

(d) reconsider the relevant decision;

(e) give notice to the applicant and (where applicable) the other party or each affected person of—

(i) the outcome of the reconsideration (the “reconsidered decision”), and

(ii) the reasons for the reconsidered decision.

(7) The reconsidered decision is final and binding on the applicant and (where applicable) the other party or (as the case may be) each other affected person, and a court may entertain proceedings for questioning the decision only if the proceedings are brought by a claim for judicial review.

(8) The Regulations apply, in relation to the supply contract, on the basis of the reconsidered decision and each affected person must comply with it.

### **Rules in relation to this Chapter**

**71.**—(1) The Secretary of State must, no later than the scheme introduction date, make rules setting out procedures for—

(a) a supplier or customer to make a referral under regulation 68;

(b) the Secretary of State to determine a matter referred under regulation 68;

(c) the Secretary of State to determine a matter under regulation 69;

(d) a supplier or customer to request a review under regulation 70(1);

(e) a supplier to request a review under regulation 70(2);

(f) an ETII applicant or QHS applicant to request a review under regulation 70(3);

(g) an affected person to request a review under regulation 70(4);

(h) the Secretary of State to reconsider a relevant decision under regulation 70.

(2) The rules may specify—

- (a) time periods within which any step to be taken in respect of a referral or review request must be taken;
- (b) thresholds of materiality for the purposes of regulation 67(3)(b).

## CHAPTER 5

### Enforcement

#### **Supplier obligations enforceable as relevant requirements**

**72.**—(1) The obligations of suppliers under the following provisions are enforceable by GEMA as if they were relevant requirements on a regulated person for the purposes of section 25 of the Electricity Act 1989(2) or section 28 of the Gas Act 1986(3)—

- (a) Part 2;
- (b) Part 4;
- (c) Chapter 1 and Chapter 3 of this Part, but not regulation 63.

(2) Paragraph (1) applies in respect of a person which has been a supplier during a scheme period but has ceased to hold an electricity supply licence or gas supply licence.

(3) For the purposes of considering whether a supplier has contravened any obligation enforceable under paragraph (1), GEMA may not call into question—

- (a) a determination of the Secretary of State under regulation 68 or 69;
- (b) a reconsidered decision of the Secretary of State under regulation 70.

(4) Where it appears to the Secretary of State that a supplier may be contravening, or may have contravened, any of the requirements referred to in paragraph (1) the Secretary of State may inform GEMA.

#### **Requirement to apply for a QHS certificate**

**73.**—(1) A qualifying heat supplier is subject to civil enforcement action—

- (a) of the kind, described in Schedule 4 to the Heat Network (Metering and Billing) Regulations 2014(4);
- (b) in the circumstances described in that Schedule.

(2) For the purposes of paragraph (1), that Schedule applies with the modifications set out in Schedule 1.

#### **Civil penalties for customers**

**74.**—(1) A customer is liable to the civil penalty referred to in paragraph (4) where the customer fails to make a relevant declaration by the required time.

(2) But the customer is not liable to that civil penalty, if the customer demonstrates to the satisfaction of the Secretary of State that it had a reasonable excuse for failing to make the relevant declaration by the required time or (in the case of paragraphs (4)(b) and (c)) within the specified period after the required time.

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(2) [1989 c. 29](#). The definitions of “regulated person” and “relevant requirement” in section 25(8) were amended by [S.I. 2011/2704](#), [S.I. 2019/530](#), [S.I. 2020/96](#) and [S.I. 2020/2016](#).

(3) [1986 c. 44](#). The definitions of “regulated person” and “relevant requirement” in section 28(8) were amended by the Gas Act 1995, section 10(1) and [S.I. 2011/2704](#).

(4) [S.I. 2014/3120](#), amended by [S.I. 2015/855](#) and [2020/1221](#).



(3) For the purposes of paragraph (2) it is not a reasonable excuse that a supplier did not inform the customer of a determination under regulation 48(2)(b) or 53(2)(b), or send a declaration under regulation 57(2).

(4) For the purposes of paragraph (1) the civil penalty is—

- (a) £1,000 for failure to make a relevant declaration by the required time;
- (b) an additional £1,000 for failure to make a relevant declaration within the period of 28 days beginning with the required time;
- (c) an additional civil penalty equal to 10% of the default amount, for failure to make a relevant declaration within a further 30 days after that 28 days.

(5) A customer is liable to the civil penalty referred to in paragraph (7) where the information in a relevant declaration made by the customer is defective.

(6) But the customer is not liable to that civil penalty if the customer demonstrates to the satisfaction of the Secretary of State that it took reasonable care to ensure that the information in the relevant declaration was not defective.

(7) For the purposes of paragraph (5) the civil penalty is 10% of the default amount.

(8) If the Secretary of State considers that a customer is liable to the civil penalty referred to in paragraph (4) or (7) the Secretary of State must impose the civil penalty on the person by giving a notice to the customer.

(9) The penalty notice must set out—

- (a) the grounds for liability;
- (b) the amount of the penalty;
- (c) the date by which the penalty must be paid (the “due date”), which must not be less than 28 days after the day on which the notice is given;
- (d) how payment may be made;
- (e) information about rights of appeal.

(10) The customer to whom a penalty notice is given must pay the civil penalty set out in the notice on or before the due date.

(11) A civil penalty imposed by a penalty notice is recoverable by the Secretary of State as a civil debt.

(12) A customer may appeal to the court against the imposition of a civil penalty.

(13) An appeal under paragraph (12) must be brought within the period of 28 days beginning with the date on which the penalty notice was given that imposed the civil penalty appealed against.

(14) On an appeal under paragraph (12), the court may—

- (a) allow the appeal and cancel the penalty,
- (b) if it determines that the Secretary of State has erred in calculating the default amount, allow the appeal and vary the amount of the penalty, or
- (c) dismiss the appeal.

(15) An appeal under paragraph (12)—

- (a) suspends the effect of paragraphs (10) and (11) in respect of the penalty to which it relates until it is determined,
- (b) is to be a re-hearing of the Secretary of State’s decision to impose a penalty, and
- (c) may be determined having regard to matters of which the Secretary of State was unaware.

(16) In this regulation—

“default amount” means the amount by which the charges for energy supplied to the customer in the specified period are increased as a result of the application of Part 4 following the making of the relevant declaration or the correction of the defective declaration;

“defective” in relation to a declaration means that the declaration is false, materially misleading or incomplete;

“penalty notice” means a notice given under paragraph (8);

“relevant declaration” means a declaration required to be made by a customer—

- (a) under Part 4;
- (b) under rules made under regulation 11(6)(c), if those rules—
  - (i) entitle the customer to elect the treatment of a supply contract that is referred to in that regulation, and
  - (ii) require the declaration to be made by a customer that makes that election;

“required time” means the time by which, under the relevant provision of Part 4, a customer was required to make a relevant declaration;

the “specified period” is the period which—

- (a) begins at the required time or (as the case may be) when a defective declaration is made, and
- (b) ends at the time when the declaration was made or (as the case may be) a declaration which is not defective was made, or (if earlier) the end of the second scheme period.

### **Civil penalties for defaulting persons**

75.—(1) A defaulting person is liable to the civil penalty referred to in paragraph (3) in respect of the Chapter 3 default.

(2) But the defaulting person is not liable to that civil penalty if, in the case of a Chapter 3 default within regulation 26(1)(a), the defaulting person demonstrates to the satisfaction of the Secretary of State that it took reasonable care to ensure that no statement in its ETII application or QHS application was materially incorrect or misleading.

(3) The civil penalty is the greater of—

- (a) £2,000, and
- (b) 50% of the default benefit amount.

(4) If the Secretary of State considers that a defaulting person is liable to the civil penalty referred to in paragraph (3) the Secretary of State must impose the civil penalty on the person by giving a notice to the person.

(5) The penalty notice must set out—

- (a) the grounds for liability;
- (b) the amount of the penalty;
- (c) the date by which the penalty must be paid (the “due date”), which must not be less than 28 days after the day on which the notice is given;
- (d) how payment may be made;
- (e) information about rights of appeal.

(6) The defaulting person to whom a penalty notice is given must pay the civil penalty set out in the notice on or before the due date.

(7) A civil penalty imposed by a penalty notice is recoverable by the Secretary of State as a civil debt.

- (8) A defaulting person may appeal to the court against the imposition of a civil penalty.
- (9) An appeal under paragraph (8) must be brought within the period of 28 days beginning with the date on which the penalty notice was given that imposed the civil penalty appealed against.
- (10) On an appeal under paragraph (8), the court may—
- (a) allow the appeal and cancel the penalty,
  - (b) if it determines that the Secretary of State has erred in calculating the default benefit amount, allow the appeal and vary the amount of the penalty, or
  - (c) dismiss the appeal.
- (11) An appeal under paragraph (8)—
- (a) suspends the effect of paragraphs (6) and (7) in respect of the penalty to which it relates until it is determined,
  - (b) is to be a re-hearing of the Secretary of State’s decision to impose a penalty, and
  - (c) may be determined having regard to matters of which the Secretary of State was unaware.
- (12) In this regulation “penalty notice” means a notice given under paragraph (4).

## CHAPTER 6

### Notices, EBRs actions, amendment of EBRs Regulations

#### Notices

**76.**—(1) Any notice or other communication to be given by the Secretary of State, a supplier or a customer under these Regulations must be given in writing.

(2) Any notice to be given by the Secretary of State under the Regulations (unless it is to be given to a particular supplier or customer) may be given by the Secretary of State publishing the notice in such manner as the Secretary of State considers appropriate.

#### EBRS actions

**77.** Any decision, communication or other action made, given or taken, before the scheme start date, for the purposes of EBRs, by the Secretary of State, a supplier or a customer, under any of the provisions of the EBRs Regulations set out in the first column of the table in the Schedule shall be treated as if it had been made, given or taken for the purposes of the scheme under the corresponding provision of these Regulations set out in the second column.

#### Amendment of EBRs Regulations

**78.** In regulation 34 of the EBRs Regulations, for paragraphs (2) and (3) substitute—

“(2) In respect of the period after 14th April 2023—

- (a) the discount recovery rules may provide—
  - (i) for the dates of claim windows to be determined and published by the Secretary of State at intervals determined by the Secretary of State, and
  - (ii) that after the Secretary of State has given notice under regulation 29(5) of the last reconciliation run-off date in respect of any supplier, the Secretary of State need not determine and publish the dates of any claim window that starts after that date;
- (b) in determining the dates of claim windows under paragraph (a)(i), the Secretary of State may allow up to 6 months to elapse between the dates on which successive claims windows start;

- (c) the requirement in paragraph (1)(b) does not apply, but each claim window must be a period of at least 8 business days.
- (3) The dates of claim windows determined in accordance with a rule made under paragraph (2)(a)(i) must be published at least 15 days in advance of the end of each such claim window.”