

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

PURSUANT TO REGULATION (EU) NO 1227/2011 AND THE ELECTRICITY AND GAS (MARKET INTEGRITY AND TRANSPARENCY) (ENFORCEMENT ETC.) REGULATIONS 2013

Background

- 1.1 The EU Regulation on wholesale energy market integrity and transparency ('REMIT') prohibits insider trading and attempted or actual market manipulation in wholesale energy markets. REMIT also imposes obligations on market participants to:
- register with a National Regulatory Authority ('NRA') in the EU, which for Great Britain is the Gas and Electricity Markets Authority ('the Authority')
 - provide the Agency for the Cooperation of Energy Regulators ('ACER') and the Authority with information for the purpose of monitoring trading in wholesale energy markets
 - notify the Authority without delay if they reasonably suspect that a wholesale energy market transaction might breach the prohibitions on insider trading or market manipulation¹
 - publicly disclose inside information in an effective and timely manner.
- 1.2 The REMIT Regulation came into force in December 2011. It obliges each Member State to provide its NRA with the powers necessary to investigate and enforce the prohibitions against insider dealing and market manipulation and the obligation to disclose inside information.
- 1.3 The Member State must also lay down the rules on the penalties applicable to infringements of the REMIT Regulation. The penalties provided for must be effective, dissuasive and proportionate, reflecting the nature, duration and seriousness of the infringement, the damage caused to consumers and the potential gains from trading on the basis of inside information and market manipulation.
- 1.4 The Government has set out in regulations the investigatory and enforcement powers available to the Authority in relation to failures to comply with a REMIT requirement. These include a

¹ This obligation applies to those professionally arranging transactions.

power to impose financial penalties. The regulations came into force on [29 June 2013].²

- 1.5 The regulations require the Authority, having undertaken such consultation as it considers appropriate, to publish a statement of its policy on the imposition of penalties and the determination of their amount. This statement has been prepared according to those requirements.³
- 1.6 In considering any case in which a financial penalty might be imposed, the Authority will need to determine:
- whether a person⁴ has failed to comply with a REMIT requirement
 - if the Authority is satisfied that a compliance failure has occurred, whether it is appropriate to impose a financial penalty and/or to issue a statement to the effect that a person has failed to comply with a REMIT requirement
 - if the Authority is satisfied that it is appropriate to impose a financial penalty, the amount that would be reasonable in all the circumstances of the case.

Objectives of the Authority under REMIT

- 2.1 The principal purpose of imposing a financial penalty or issuing a statement of non-compliance is to promote any or all of the objectives set out below. The Authority, in the exercise of its powers under REMIT to impose a financial penalty, will act in the manner it considers is best calculated to promote the following regulatory objectives:

² The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013. These regulations do not provide for a penalty for a failure to comply with the obligations in Articles 8 and 9 of the REMIT Regulation (which oblige market participants to register with a NRA and provide information on certain transactions in wholesale energy products to assist wholesale market monitoring). The obligations in these Articles of the REMIT Regulation will be triggered by the adoption of implementing acts by the European Commission in the future. It is our understanding that the Government intends to bring forward further secondary legislation to provide for a penalty for a failure to comply with these Articles. Until then, the 'REMIT requirements' for the purposes of this statement of policy on penalties are the prohibitions on insider trading and actual or attempted market manipulation and the obligations to publish inside information and to report suspicious transactions.

³ The Authority has powers to seek restitution on behalf of those who have incurred a loss as a result of a breach of a REMIT requirement and may use these powers instead of, or in addition to, imposing a financial penalty. The circumstances in which the Authority might use these restitution powers (and the other sanctions available to it under REMIT) are set out in separate REMIT procedural guidelines.

⁴ Throughout this statement the term 'person' refers to both firms and individuals.

- maintaining confidence in the integrity of wholesale energy markets
- ensuring that wholesale energy market prices are set in an efficient manner
- discouraging failures to comply with REMIT requirements
- ensuring that no profits can be drawn from market abuse
- fostering competition in wholesale energy markets for the benefit of final consumers of energy and
- protecting the interests of consumers in wholesale energy markets and of final consumers of energy, including vulnerable consumers.

2.2 In exercising its powers to impose a financial penalty, the Authority will have regard to

- the principles of best regulatory practice, including the need to ensure that any financial penalties imposed are effective, dissuasive and proportionate
- any non-binding guidance that may be published by ACER.

Criteria for the imposition of a financial penalty

- 3.1 Before deciding to impose a financial penalty or to issue a statement to the effect that a person has failed to comply with a REMIT requirement, the Authority must be satisfied that an infringement of a REMIT requirement has taken place.
- 3.2 The Authority will take full account of the particular facts and circumstances of each case when determining whether to impose a financial penalty and/or issue a statement of non-compliance. The Authority will also consider any representations made to it by interested parties.

General criteria

- 3.3 Factors tending to make the imposition of a financial penalty more likely include:
- the breach was of the prohibitions on insider trading or actual or attempted market manipulation

- the breach damaged, or could have damaged, the interests of consumers or other market participants
- the breach had, or could have had, an impact on the orderliness of and confidence in wholesale energy markets
- a penalty is necessary to deter future breaches and encourage compliance
- the breach was deliberate or reckless
- the circumstances from which the breach arose were within the control of the person
- the breach or possibility of a breach would have been apparent to a diligent person
- the person gave false or inaccurate information to the Authority and it appears that this was an attempt knowingly to mislead the Authority.

3.4 Factors tending to make the imposition of a financial penalty less likely include whether:

- the person believed, on reasonable grounds, that his conduct did not amount to a breach of a REMIT requirement
- the person took all reasonable precautions and exercised all due diligence to avoid behaving in a way that breached a REMIT requirement
- the breach or possibility of a breach would not have been apparent to a diligent person
- the breach was trivial in nature
- other domestic or international regulatory bodies are taking or are likely to take action in respect of the breach that is under consideration by the Authority.

3.5 Where other regulatory bodies propose to take action in respect of the breach which is under consideration by the Authority, or one similar to it, the Authority will consider whether the other regulatory body's action would be adequate to address the Authority's concerns, or whether it would be appropriate for the Authority to take its own action.

3.6 The Authority may take into account various factors in deciding whether the person believed, on reasonable grounds, that his

conduct did not amount to a breach of REMIT or whether the person took all reasonable precautions and exercised all due diligence to avoid behaving in a way that breached REMIT. These include (but are not limited to) the level of skill and knowledge to be expected of the person concerned and the extent to which

- the person's conduct was analogous to behaviour described in the REMIT Regulation as amounting to market abuse
- the person can demonstrate that the behaviour was engaged in for a legitimate purpose and in a proper way
- the person followed internal consultation and escalation procedures in relation to the behaviour (such as discussing it with internal line management and/or legal or compliance departments)
- the person sought any appropriate expert legal or other expert professional advice and followed that advice and
- the person sought advice from the market authorities of any relevant market and followed the advice received.

3.7 The Authority nevertheless reserves the right to impose a penalty in such circumstances.

3.8 The Authority will also consider whether its objectives under REMIT, as set out in section 2 above, in any way suggest that the imposition of a penalty would be inappropriate.

Determining the appropriate level of financial penalty

4.1 The amount 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.

4.2 In general, the Authority is likely first to consider the following factors in determining the general level of the penalty:

- whether the person believed, on reasonable grounds, that the conduct did not amount to a breach of a REMIT requirement
- whether the person took all reasonable precautions and exercised all due diligence to avoid behaving in a way that breached a REMIT requirement

- whether the breach had an adverse effect on the market in question and, if it did, how serious that effect was
- the extent to which the conduct was deliberate or reckless
- whether the person on whom the penalty is to be imposed is an individual
- the seriousness of the failure in relation to the nature of the requirement not complied with
- the amount of any benefit gained or loss avoided as a result of the breach (financial or otherwise, potential or actual)
- the degree of harm or increased cost incurred or potentially incurred by consumers or other market participants after taking account of any restitution paid to those affected

Aggravating and mitigating factors

4.3 The Authority may then increase or decrease the amount of the financial penalty by taking into account factors that aggravate or mitigate the breach. Aggravating factors may include but are not necessarily limited to:

- repeated breaches
- continuation of the breach after becoming aware of it or becoming aware of the start of the Authority's investigation
- senior management involvement in any breach
- the absence of any evidence of internal mechanisms or procedures intended to prevent a breach
- failing to report the breach, once identified, quickly, effectively and completely to the Authority (or to other regulatory authorities, where relevant)
- any attempt to conceal the breach from the Authority
- the breach was deliberate or reckless
- the person has arranged its resources in such a way as to allow or avoid giving up the financial benefits it has made and/or to avoid payment of a financial penalty.

4.4 Mitigating factors may include but are not necessarily limited to:

- the person was aware of the breach or of the potential for a breach and took steps to stop it (either specifically or by maintaining and following an appropriate compliance policy, with suitable management supervision)
- the person took appropriate action to remedy the breach
- the person cooperated fully with the Authority's investigation (or with an investigation by another regulatory body allowed to share information with the Authority)
- the breach was genuinely accidental or inadvertent
- the person has reached a settlement with the Authority.

Settlement discount

- 4.5 The Authority and the person on whom a penalty is to be imposed may seek to agree the amount of any financial penalty (and other terms such as proposals for restitution). Such agreements offer the potential for securing earlier redress or protection for consumers and savings in costs for the Authority and the person contesting the financial penalty.
- 4.6 In recognition of these benefits, the Authority may reduce the amount of the financial penalty that might otherwise have been payable. The sooner the settlement is reached the more significant any reduction in penalty is likely to be. The final notice will indicate that a settlement has been reached.

Taking action against individuals

- 4.7 The primary responsibility for ensuring compliance with a firm's regulatory obligations rests with the firm itself. However, the Authority may take action against individuals where there is evidence of personal culpability on the part of that individual. Personal culpability arises where the behaviour was deliberate or reckless or where the individual's standard of behaviour was below that which would be reasonable in all of the circumstances at the time of the conduct concerned.
- 4.8 In some cases it may not be appropriate to take action against a firm for the conduct of an individual (for instance, where a firm can show that it took all reasonable steps to prevent the breach). In other cases, it may be appropriate for the Authority to take action against both the firm and the individual. For example, a firm may have failed to establish an appropriate monitoring and compliance system and an

individual may have taken advantage of these deficiencies to manipulate the market or conduct insider trading.

- 4.9 In addition to the factors applicable to all persons (corporate or individual) that are listed above, the Authority may have regard to a further non-exhaustive set of factors in deciding whether to impose a penalty against an individual. The factors include the individual's position and responsibilities and whether taking action against an individual would be a proportionate response, given the nature and seriousness of the breach. Not all factors may be relevant to every case and there may be other considerations, not listed, that are relevant.
- 4.10 The Authority will not take action against individuals on the basis of vicarious liability (that is, holding them responsible for the conduct of others), provided that appropriate delegation and supervision have taken place. In particular, action will not necessarily be taken against an individual only because a regulatory failure has taken place in an area of business for which the individual is responsible. The Authority may, however, take action if it considers that an individual's conduct was below the standard that would be reasonable in all the circumstances at the time of the conduct concerned.
- 4.11 The Authority recognises that a penalty must be proportionate to the breach. For cases against firms, the Authority will have regard to whether the firm is also an individual (for example, a sole trader), in determining whether the amount of a financial penalty is disproportionate. Having considered, to the extent appropriate, the factors listed above and all of the circumstances of the matter, the Authority will determine an appropriate amount for a penalty.
- 4.12 The Authority notes that the impact of any penalty is dependent in part on the circumstances of the person paying it. Other things being equal, a relatively small penalty may have a significant impact on an individual while a larger penalty may be justified in the case of a large firm. In any event, the Authority will seek to impose a financial penalty at a level that ensures that the person has not benefited financially from the breach and that adequately deters against future misconduct.

Revision of the statement of policy

- 5.1 The Authority may at any time revise this statement in accordance with the Electricity and Gas (Market Integrity and Transparency (Enforcement etc.) Regulations 2013. Any revised statement will, following appropriate consultation, be published.