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Ofgem
9 Millbank
London

29 August 2013

Consultation on the proposed REMIT penalties statement and procedural guidelines

EDF Energy is one of the UK's largest energy companies with activities throughout the energy chain. Our interests include nuclear, coal and gas-fired electricity generation, renewables, and energy supply to end users. We have over five million electricity and gas customer accounts in the UK, including residential and business users.

EDF Energy generally supports Ofgem's approach. We suggest that the guidance document could be strengthened in four areas:

1. Make a distinction between a technical breach of REMIT (for example, IT failure) and an attempt to deliberately mislead the market.
2. Strengthen the objectives of REMIT investigation and enforcement with reference to predefined success criteria.
3. Acknowledge that information stored by energy companies will not necessarily correspond to their information request. This would allow for companies to discuss with Ofgem how to collate the required information.
4. Be explicit that Ofgem need to consider the general market conditions which set the trading strategy at the time of the investigation.

Our detailed responses are set out in the attachment to this letter. Should you wish to discuss any of the issues raised in our response or have any queries, please contact Sebastian Eyre on 020 7752 2167, or myself.

I confirm that this letter and its attachment may be published on Ofgem's website.

Yours sincerely,

A handwritten signature in blue ink, reading "Paul Delamare".

Paul Delamare
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Attachment

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EDF Energy's response to your questions

Q1. Do stakeholders agree that taking this approach to the REMIT procedures and penalties documents is desirable?

We agree with the general approach Ofgem has taken. We would note that using whistleblowers as a means to gather information is no substitute for the systematic and robust monitoring of trading data. The cost of the IT infrastructure necessary to collect and store data has been justified on the basis that it provides the regulators the information they need.

REMIT can be breached by failure to report specified information to the market (i.e. information that market significant). As the market significance of any information cannot be truly known until after the event the test must be regarded as an ex post one. Ofgem's enforcement approach should avoid perfect hindsight. The guidance should also recognise this.

It is a fundamentally different situation for an asset owner who could be in technical breach if the IT reporting infrastructure fails or plant comes back on faster than anticipated compared with the deliberate and cynical manipulation of the market. We would like Ofgem priorities, as set out in the guidelines (p4.4) to appropriately discriminate between the two types of breach.

Regarding information collection (ch.5), we note that the information the regulator requires may not necessarily available in the form it requires from the investigated party. It seems sensible for Ofgem to have these conversations as early as possible to understand what is readily available.

A breach of REMIT could also mean that financial regulation and/or other industry codes, have also been broken and/or there has been an abuse of market power (breach of competition legislation). Breaches could also occur in a number of jurisdictions. Para 3.5 of the draft penalty guidelines should reflect all of the possibilities, not just action taken by other "regulatory bodies" to ensure the risk of multiple jeopardy is minimised.

The procedural guidelines document does not mention how Ofgem will coordinate with other regulators when they will be carrying out investigations on behalf of another regulator. We assume that this will be under the Ofgem's procedure? The guidelines should make this clear.

The statement of case and the response to it is critical to the investigative process. We want to see more detail in the guidelines on the contents of the statement. Such information should provide all the details needed for the accused party to be able to fully construct their defence. As a minimum, details of the specific trades in question should be fully set out in the SoC.

By their very nature, investigations into suspected breaches of the REMIT prohibitions are likely to be complex. Therefore, we believe more time should be afforded to persons under investigation to respond to any statement of case (at least 28 days).

Q2. Are the regulatory objectives that the Authority proposes to promote in the exercise of its REMIT powers appropriate? Should any other objectives be included?

We agree with the high level objectives stated in 2.1 of the Guidance. However, it might be difficult to understand how success criteria can be derived from the list. For example, it may be difficult to create a success metric that reflects something as ethereal as "confidence in the market".

Q3. Are the factors that we propose to consider in deciding whether to launch REMIT investigations appropriate? Should any other factors be included?

Ofgem need to consider the general market conditions which set the trading strategy at the time of the investigation.

Q4. Does the proposed process for REMIT investigations strike an appropriate balance between fairness to those being investigated and ensuring the effectiveness of the Authority's investigations (bearing in mind particularly the requirements of DECC's regulations in relation to warning and decision notices)?

We broadly support the proposals as stated in the document. The key to the policy will be in the quality of the monitoring of the market.

Q5. Are the criteria that the Authority proposes to consider in deciding whether to impose a financial penalty appropriate? Should any other criteria be included?

As question 4, Ofgem need to consider the general market conditions which set the trading strategy at the time of the investigation.

Q6. Are the factors that the Authority proposes to consider in determining the amount of a financial penalty appropriate? Should any other factors be included?

We agree with the factors.

Q7. Does the statement provide sufficient clarity about the factors that the Authority will take into account in relation to imposing financial penalties on individuals?

The difficulties relate to how theoretical concerns are translated into investigation at the level of the individual case. The proposed statement of policy on financial penalties indicates that the Authority may take action against an individual where there is evidence of personal culpability on the part of the individual. The draft statement of policy states that personal culpability arises where the behaviour was deliberate or reckless or where the behaviour in question was below that which would be reasonable in all the circumstances at the time of the conduct concerned. The standard of behaviour here should be framed by reference to the prohibitions themselves (i.e. whether the behaviour was analogous to that described in the REMIT Regulation or ACER guidance as behaviour amounting to market abuse), to relevant market code or exchange rules.

**EDF Energy
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