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3 September 2013

Dear Joanna,

PROPOSED REMIT PENALTIES STATEMENT AND PROCEDURAL GUIDELINES

Thank you for the opportunity to comment on your proposed REMIT penalties statement and procedural guidelines as published on 6 June 2013.

We fully support REMIT's objectives to increase integrity and transparency in wholesale energy markets with the aim of promoting open and fair competition. We recognise that it is necessary to have in place robust enforcement mechanisms, as envisaged by REMIT, to deter and address market abuse. Whilst it is important that regulators have the powers to conduct effective investigations and impose appropriate penalties where findings of market abuse are established, it is equally vital that those powers are applied in a proportionate, reasonable and equitable manner.

Our main observations are as follows:

- We are comfortable with the proposal to model the approach to enforcement on Ofgem's existing guidance for licence breaches, for the sake of consistency. However, we believe the similarities between REMIT and other financial regulations such as EMIR and MiFID should also be recognised, and we welcome your intention to consider closer alignment with FCA's methods within your ongoing Enforcement Review.
- In order to avoid the possibility of regime shopping and any detriment to trading operations located within particular Member States (especially for our purposes those established within the UK), it is important that REMIT is interpreted and applied consistently across the EU and that this consistency is reflected in the enforcement regimes enacted by individual Member States. We would encourage Ofgem, perhaps through ACER, to seek to promote such uniformity of application throughout the EU.
- ACER's non-binding guidance on REMIT's substantive provisions, whilst helpful, has been focussed on NRAs and has largely been proscriptive in approach. We believe that industry would benefit from more directly targeted guidance from Ofgem as the GB enforcement authority, to help develop our understanding of what types of behaviour would be regarded as legitimate and acceptable. In this context we welcome Ofgem's engagement with the industry to date and its willingness to explore other avenues to disseminate information such as newsletters and internet updates.

We have provided responses to your consultation questions in the attached annex. Should you wish to discuss any aspect of this response, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read "R. Steele". The signature is written in a cursive, slightly stylized font.

Rupert Steele
Director of Regulation

PROPOSED REMIT PENALTIES STATEMENT AND PROCEDURAL GUIDELINES

SCOTTISHPOWER RESPONSE

Question 1: Do stakeholders agree that taking this approach to the REMIT procedures and penalties documents is desirable?

Ofgem is proposing to model its approach to REMIT procedures and penalties on its guidance for licence breaches, except where a different approach is necessary to comply with the REMIT Regulation or the Government's regulations. It is not proposing at this stage to adopt the FCA's approach to imposing a penalty and calculating its amount, but will consider these and other issues as a part of its ongoing Enforcement Review.

We welcome this approach and believe that this provides a transparency and consistency that is beneficial for both consumers and market players alike. However, we believe that the close similarities between the Competition Act, REMIT and other financial regulations should also be recognised and that closer alignment with the FCA's methods may be desirable. We welcome Ofgem's intention to consider this further within the ongoing Enforcement Review.

Question 2: 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 see value in the transparency that the stated objectives provide in assisting a wider understanding of what Ofgem is attempting to achieve and we are reasonably comfortable with their substance.

Question3: Are the factors that we propose to consider in deciding whether to launch REMIT investigations appropriate? Should any other factors be included?

We are generally comfortable with the criteria to be applied when considering whether to open an investigation. They appear sensible particularly when allied to the requirement that complaints should be specific, well reasoned, clear and supported by all available evidence.

However, we would encourage Ofgem to consider incorporating a pre-enquiry process or initial investigation phase, whereby a party would be provided with an opportunity to respond to an allegation on a preliminary basis. This would provide an opportunity to respond to any allegations and perhaps establish to Ofgem's satisfaction that there was "no case to answer". Potentially this may avoid the need for a full blown investigation and may also assist Ofgem's understanding of the issues involved, the priority to be attached to the investigation and the resource commitment that may be required if such an investigation was still to proceed.

Question 4: 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 investigation (bearing in mind particularly the requirements of DECC's regulations in relation to warning and decision notices)?

We agree that an appropriate balance has to be struck between fairness and effectiveness. However, fairness must be the greater priority and must not suffer as a result of a drive for more speedy resolution of investigations.

The processes proposed are fairly prescriptive in nature, which provides valuable certainty but at the cost of flexibility that may be worthwhile, particularly as some investigations may be complex and far reaching, perhaps potentially crossing national boundaries or involving other regulators for instance.

We have some concerns over the proposals for publicising investigations, in view of the reputational damage that could result. For that reason we would favour the FCA's approach where they do not normally comment on whether they are investigating an issue. However, in the absence of the adoption of a policy to that effect, we would again urge consideration of a preliminary phase to an investigation as outlined in our response to Question 3.

We also believe it will be helpful for there to be a sharing of lessons learned with the wider industry following the conclusion of an investigation. It is commonly accepted that the understanding of REMIT's requirements will develop significantly not just from general experience but also as a result of such investigations or legal precedents established via court decisions. There may well also be procedural improvements that may be identified with experience of such investigations and that could be incorporated to ensure that processes are made more robust and equitable.

Question 5: Are the criteria that the Authority proposes to consider in deciding whether to impose a financial penalty appropriate? Should any other criteria be included?

We are generally comfortable with the criteria that the Authority proposes to consider in deciding whether to impose a financial penalty.

We believe that the context and interaction with other regulatory bodies should be reinforced as without that the risk of double jeopardy would remain, with the potential prospect of parties being exposed to investigation and sanctions from multiple sources, which can only increase regulatory uncertainty.

In order to avoid the possibility of regime shopping and any detriment to trading operations located within particular Member States (especially for our purposes those established within the UK), it is important that REMIT is interpreted and applied consistently across the EU and that this consistency is reflected in the enforcement regimes enacted by individual Member States. We would encourage Ofgem, perhaps through ACER, to seek to promote such uniformity of application throughout the EU, and to take account of decisions of other National Regulatory Authorities where appropriate.

Question 6: Are the factors that the Authority proposes to consider in determining the amount of a financial penalty appropriate? Should any other factors be included?

The factors narrated appear sensible. However whilst we accept that it is appropriate to consider the extent of any adverse impact that may have resulted from a REMIT breach, we

think this would have to be tempered by careful consideration of the culpability of the party concerned and the nature of the conduct itself. It may be the case that a comparatively minor transgression may result in significant adverse impact such that it would be inequitable for that to be the sole yardstick in determining the level of penalty.

Question 7: Does the statement provide sufficient clarity about the factors that the Authority will take into account in relation to imposing financial penalties on individuals?

We welcome Ofgem's recognition that there may be circumstances where the conduct of an individual may have been so "rogue" as to justify no action being taken against a firm or business, even though in some instances there may still be a case for the firm or business to answer as regards any processes or controls that were so wanting as to have been easily exploited.

However, we would be happy to accept that not taking action against individuals should be the default position that would only be departed from in exceptional circumstances and on the basis of manifest, personal culpability.

ScottishPower
3 September 2013