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### **Consultation on Ofgem's proposed REMIT penalties statement and procedural guidelines**

Dear Andrew,

SmartestEnergy welcomes the opportunity to comment on Ofgem's Consultation on their proposed REMIT penalties statement and procedural guidelines.

SmartestEnergy is a supplier in the half hourly electricity market and an aggregator of embedded generation.

It is clearly important to discourage inappropriate trading behaviour through the threat of financial penalties. We are, however, slightly concerned by the implications of an ability to impose unlimited fines and believe Ofgem should be more explicit linking the level of any financial penalties to the influence of the traded volume so that there is, in effect, a cap.

We would suggest that any request for information provision pursuant to regulation 9 should be considered carefully to determine whether the requested information is indeed reasonably required by Ofgem in connection with its market monitoring and cannot be ascertained more easily and independently through central systems.

We understand that a failure to comply with an Ofgem request for information under the Regulations is a criminal offence punishable by fines or imprisonment. This is reasonable where the information being requested relates directly to a suspected breach of the regulations, but not where it is part of a wider data gathering exercise.

Since Ofgem is to have powers to impose unlimited fines, it concerns us that the scope for appeal is limited to technicalities: issues of fact or law, matters to be taken into account in Ofgem's decision or procedural matters. At the very least proportionality of any fines should be included.

We answer Ofgem's questions below in the order in which they appear in the document:

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

We agree that it makes sense for Ofgem to model its approach to REMIT on its guidance for licence breaches, except where a different approach is necessary to comply with the REMIT Regulation or the Government's regulations.

**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?

Yes, the objectives are appropriate. We cannot think of any other appropriate objectives.

**Question 3:** Are the factors that we propose to consider in deciding whether to launch REMIT investigations appropriate? Should any other factors be included?

Yes, the factors are appropriate. We cannot think of any other appropriate factors.

**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 investigations (bearing in mind particularly the requirements of DECC's regulations in relation to warning and decision notices)?

Yes, the proposed arrangements appear reasonable.

**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 believe that the following criteria are more relevant to determining the amount rather (i.e. mitigating or aggravating factors) rather than whether to impose a penalty in the first place:

- 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

**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?

Firstly, please see answer to Q5.

Taken together, the factors we quote above should ensure that any penalties are proportionate to the size of the organisation in breach and the influence that they have on the market. These are clearly the most important factors and we wonder whether it would be simpler (and more explicit) to link the fine to the influence of the traded volume.

**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?

Yes.

If you have any questions, please do not hesitate to contact me.

Please note that our response is not confidential.

Yours sincerely,

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