

PROCEDURAL GUIDELINES ON THE AUTHORITY'S USE OF ITS INVESTIGATORY AND ENFORCEMENT POWERS UNDER REMIT

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

Introduction

- 1.1 The EU Regulation on wholesale energy market integrity and transparency ('REMIT')¹ prohibits insider trading and actual or attempted market manipulation in wholesale energy markets.
- 1.2 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 manipulation²
 - publicly disclose inside information in an effective and timely manner.
- 1.3 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.
- 1.4 Each Member State must also lay down 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.
- 1.5 The Government has set out, in The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 ('the Regulations'), the investigatory and enforcement powers available to the Authority for failure to comply with a REMIT requirement. The Regulations took effect on 29 June 2013.³

¹ The REMIT Regulation (OJ L 326/1, 8.12.2011) is available [here](#).

² This obligation applies to persons professionally arranging transactions.

³ The Regulations do not yet 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 an NRA and provide information on certain transactions in wholesale energy products to assist wholesale market monitoring). These obligations will take effect after the adoption of Implementing Acts. The Authority expects to receive powers to enforce these obligations. Until it does, the 'REMIT requirements' for the purposes of these guidelines are the prohibitions on insider trading and actual or attempted market manipulation and the obligations to publish inside information and to report suspicious transactions.

- 1.6 These guidelines set out the market monitoring, investigatory and enforcement powers that the Authority has been given and outline the procedures that it expects to follow in exercising them. In particular, the guidelines set out the factors that the Authority may consider in assessing whether to launch an investigation. They also explain the investigation process, from issuing information requests and inspecting premises to considering the response to a statement of case.
- 1.7 The guidelines outline the decision-making processes in both contested cases and in those where it may be possible to reach a settlement. As required by the Regulations, the guidelines set out the processes by which the Authority will decide to issue Warning and Decision Notices and to publish information about Warning Notices. All such decisions will be taken by individuals unconnected, respectively, with the investigation and with issuing Warning and Decision Notices.
- 1.8 The guidelines also set out that we will coordinate our REMIT market monitoring, investigation and enforcement activities with other regulatory authorities in the UK and other EU Member States.
- 1.9 The guidelines will be kept under review and amended as appropriate in the light of further experience and developing law and practice.
- 1.10 The Office of Gas and Electricity Markets ('Ofgem') supports the work of the Authority by carrying out its day-to-day work. Any investigations that Ofgem conducts are therefore carried out on behalf of the Authority. The Authority also decides whether or not a breach has occurred and whether or not to impose sanctions. These guidelines reflect this division of activities by referring to
- the Authority when setting out the Authority's objectives in respect of its REMIT enforcement work
 - Ofgem when describing the investigatory process
 - the Authority when outlining the sanctions available and the process in relation to Warning and other Notices.
- 1.11 The Authority has issued a separate statement of its policy on imposing financial penalties and determining their amount.

The Authority's regulatory objectives in respect of its investigatory and enforcement powers under REMIT

- 2.1 The Authority, in the exercise of its investigatory and enforcement powers under REMIT, will act in the manner that it considers is best calculated to promote the following regulatory objectives:
- maintaining confidence in the integrity of wholesale energy markets
 - ensuring that wholesale energy market prices are set in an efficient manner
 - deterring failures to comply with REMIT requirements
 - ensuring that no profits can be drawn from breaches of REMIT

- 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 discharging functions in respect of REMIT, the Authority and/or Ofgem will have regard to
- the need to use its resources in the most efficient way
 - the principles of best regulatory practice, including the need to exercise its powers in a proportionate manner and to ensure that any sanctions that it imposes are effective, dissuasive and proportionate
 - any non-binding guidance that may be published by ACER.

Sources of information about possible REMIT breaches

- 3.1 Ofgem may be alerted to possible breaches of the REMIT requirements
- through its own market monitoring or the use of its other information-gathering powers
 - through the receipt of a suspicious transaction report
 - by complaints from the public or firms alleging a REMIT breach
 - by firms or individuals reporting their own conduct
 - by whistleblowers, which we will handle in accordance with our published policy on whistleblowing
 - following the receipt of information and/or a request to investigate from ACER or
 - following a referral from another regulator, such as the Financial Conduct Authority ('FCA') or an NRA in another EU Member State.

Monitoring of wholesale energy markets

- 3.2 Ofgem may monitor wholesale energy markets for the purposes of maintaining market integrity and transparency. In order to do this effectively, Ofgem has the power to request information or documents from a 'Regulated Person' (as defined in the Regulations)⁴ or a person who has at any time been connected with a Regulated Person.⁵
- 3.3 Ofgem will only request information and documents that it reasonably requires in connection with monitoring the integrity and transparency of the wholesale energy market. For those persons who are also licensees or are otherwise regulated by Ofgem under the Gas Act 1986 and Electricity Act

⁴ Regulation 3 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 defines a Regulated Person as a market participant (as defined in the REMIT Regulation) or a person subject to Article 15 of the REMIT Regulation, being a "person professionally arranging transactions."

⁵ As defined in Article 2(7) of REMIT.

1989, Ofgem may use its powers to request information for the purposes of monitoring under that legislation.

- 3.4 If, as a result of using these powers, it appears to Ofgem that there are circumstances suggesting that a breach of a REMIT requirement may be occurring or may have occurred, Ofgem may open an investigation. Alternatively, we may ask another regulatory authority to open an investigation if we consider that it is better placed to do so. The factors that Ofgem will consider in deciding whether to open an investigation are set out later in these guidelines.
- 3.5 The Regulations oblige Regulated Persons to take reasonable steps to ensure that
- all telephone conversations made for the direct or indirect purpose of entering into transactions in wholesale energy products are recorded and that
 - a copy is kept of all electronic communication made for the direct or indirect purpose of entering into transactions in wholesale energy products. This includes communications made by email, fax and instant messaging devices.
- 3.6 This obligation does not apply to Regulated Persons who are individuals acting in the course of their employment with another person who is a Regulated Person (the employer). In such a case, it will be for the employer to fulfill the obligation.
- 3.7 All such records and copies should be retained for at least six months from the date they were created⁶ in a medium that facilitates future access by Ofgem, should that prove to be necessary. The Authority may impose a financial penalty for a failure to comply with this obligation.⁷
- 3.8 Ofgem may also issue a notice to the Regulated Person requiring it to ensure that a relevant communication is retained for a period longer than six months and until a specified date. Ofgem may impose a penalty for a failure to comply with this obligation.
- 3.9 This obligation applies from the date on which the Regulations come into force and Ofgem expects Regulated Persons to comply with it from that date. However, in respect of Regulated Persons who did not already have systems to record and store telephone calls when the Regulations came into force, Ofgem will take into account the time required to put in place such systems.

Notification of a Suspicious Transaction Report (STR)

- 3.10 Any person professionally arranging transactions in wholesale energy products who reasonably suspects that a transaction might breach a REMIT requirement must notify ACER or Ofgem without delay. The template for doing so is available [here](#).⁸

⁶ Or longer if the Authority specifically deems it necessary.

⁷ See, respectively, regulations 8 and 26 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

⁸ Also available on the ACER website at <http://www.acer.europa.eu/remit/Pages/Important-information-for-market-participants.aspx>.

- 3.11 Ofgem considers that STRs should include as much of the following information as possible:
- a description of the transaction(s) and/or order(s) concerned
 - the reasons for suspecting that the transaction(s) and/or order(s) might constitute market abuse
 - in which Member State the suspected breach is being, or has been, carried out
 - identities of persons carrying out or otherwise known to be involved in the transaction(s) and/or order(s)
 - identities of any other persons otherwise known to be involved in the transaction(s) and/or order(s)
 - capacity in which the person performing the transaction(s) and/or order(s) acts
 - identity of the person making the STR
 - any further information that may be of significance.
- 3.12 Ofgem is aware that there may be occasions when not all this information will be available at the time of notification. Ofgem emphasises the importance of submitting a STR without delay even if some information is not available. Where not all the relevant information is available, the notification should at least set out the reasons why a transaction might constitute insider dealing or actual or attempted market manipulation. Ofgem strongly encourages parties to provide any remaining information to Ofgem as soon as it becomes available.
- 3.13 Ofgem will consider whether the information contained in an STR suggests that a breach of REMIT may have occurred. In order to reach such a view it may be necessary to use our market monitoring powers. Where Ofgem considers that there are reasonable grounds to suspect that a breach may have occurred, it will notify ACER without delay.

Whistleblowers

- 3.14 In order that Ofgem can enforce the REMIT Regulation, it invites information from all parties with information regarding potential breaches of the REMIT Regulation. This includes any information that any person might wish to provide as a whistleblower.
- 3.15 The types of concerns that a whistleblower might wish to disclose to Ofgem might include information about potential or actual breaches of REMIT requirements. To facilitate this, Ofgem has a whistleblowing policy which sets out:
- the circumstances in which a disclosure made to Ofgem would entitle a person to benefit from the legal protections (against victimisation or unfair dismissal by their employer) offered to whistleblowers and

- details the process Ofgem expects to follow in dealing with whistleblowers.

3.16 Those considering making such a disclosure to Ofgem should consult Ofgem's whistleblowing policy and guidance.

Alleging a breach of a REMIT requirement

3.17 Ofgem seeks to ensure that persons operating within the wholesale energy markets comply with REMIT requirements. It therefore assesses complaints about practices that would appear to be contrary to those requirements in order to decide whether to open an investigation.

3.18 The type and level of information required will depend on the nature of a particular complaint and the resources available to the complainant. However, the more relevant information that is provided at the outset, the more likely it is that Ofgem will be able to deal with the complaint efficiently. If all the information needed to make a proper assessment of the complaint is not provided, Ofgem may need to seek further information. This will ensure that any decision on whether to open an investigation will be fully informed.

3.19 As far as possible complaints should be specific, well reasoned, clear and evidence-based, including

- an explanation of the allegation, including a summary of events and dates relating to the alleged breach, details of any interaction with the subject of the complaint and any action taken by either the subject of the complaint or the complainant
- all available relevant evidence to support the alleged breach and the events which gave rise to it, such as copies of any letters, emails, faxes, meeting notes (including Board minutes), notes of telephone calls or any other documents and other forms of communication that support the allegation
- an explanation of the harm that has been caused or may be caused, including for example documents showing increased costs or higher prices as a result of the conduct in question
- an indication of the REMIT requirement or requirements that the complainant considers may have been breached
- details about the person being complained about, including the nature of its business and its relationship with the complainant
- details of the complainant's own business or interests, including contact details, or those of a representative with whom Ofgem can speak in relation to the complaint.

3.20 Ofgem recognises that some complainants, such as smaller companies or individuals, may not have access to all the information that might be relevant. Ofgem will, where appropriate, work with a complainant to help where necessary, though this could take time and may impact on Ofgem's ability to progress the complaint within its usual timescales.

- 3.21 If you wish to make a complaint alleging a breach of a REMIT requirement or would like to ask about any information in these guidelines, you can contact Ofgem's REMIT team on remit@ofgem.gov.uk.
- 3.22 Ofgem will acknowledge receipt of all REMIT complaints within 20 working days. In 90 per cent of cases, within 20 working days of receiving a complaint, Ofgem will inform the complainant of whether or not Ofgem intends to look into the matter further. However, there may be circumstances in which Ofgem will not do so, for example where Ofgem considers it necessary to preserve the confidentiality of an investigation.

Confidential information

- 3.23 Complainants should be aware that it may be necessary for Ofgem to disclose information provided to the person complained about or to other parties connected to the subject matter complained about. Where information is confidential or the complainant does not wish it to be disclosed, this should be made clear.
- 3.24 Even where information is marked as confidential or the complainant does not wish it to be disclosed, there may still be circumstances in which its disclosure is required. Information provided, including personal information, may be subject to publication or disclosure in accordance with the Freedom of Information Act (FOIA) 2000. In its handling of information, Ofgem will act in accordance with its obligations under the Data Protection Act (DPA) 1998.
- 3.25 If you consider that information you provide should be treated in confidence, please provide the reasons when submitting the information to Ofgem. Ofgem will consider your request in accordance with the FOIA and DPA legislation and will consult with the complainant before making a decision on disclosure.

Information received from ACER and other authorities

- 3.26 ACER, in the course of its own market monitoring activities, may receive information that leads it to suspect that a REMIT prohibition or obligation has been breached. If so, ACER will pass the information to Ofgem and may in addition request that Ofgem supply it with further information related to the suspected breach or that Ofgem commence an investigation.
- 3.27 Ofgem may also receive information about potential abuse of wholesale energy markets in Britain from the Financial Conduct Authority, other financial authorities and other NRAs.

Criteria for opening an investigation

- 4.1 Investigations involve time and resources, not only for Ofgem and the firms and individuals subject to them but for other interested parties as well. It is, therefore, important to ensure that resources are allocated efficiently. This section contains a non-exhaustive list of the factors that Ofgem will generally take into account in deciding whether to proceed with an investigation.
- 4.2 Before it proceeds with an investigation, Ofgem will first satisfy itself that there are circumstances suggesting that a person may

- have failed to comply with a REMIT requirement
- have failed to comply with a requirement in relation to recording documents and keeping copies of electronic communications
- be guilty of an offence relating to the provision of documents or information required by Ofgem.⁹

4.3 There are two main criteria that determine whether or not Ofgem decides to open an investigation in relation to potential breaches of the REMIT requirements where the legal test described in paragraph 4.2 is met. First, Ofgem will consider whether the matter is a priority. Second, Ofgem will consider whether it is the regulatory body best placed to take action.

Priority matters for Ofgem

4.4 Ofgem will consider a range of factors in order to decide whether an issue is a priority matter. The factors include (but are not limited to)

- the seriousness of the alleged breach, including
 - whether it damaged or could have damaged the interests of market participants or consumers, including final consumers of energy
 - the harm or potential harm to competition in wholesale energy markets, the orderliness of those markets and confidence in those markets
 - whether the alleged breach is ongoing and within the control of the person committing it
 - whether the person has committed repeat offences
 - the extent of any financial gain potentially made (or loss avoided) by the person committing the breach
 - whether the type of breach allegedly committed may be widespread across the wholesale energy market
- the strength of the available evidence
- the effect, including the deterrent effect, of enforcement action and whether action would be likely to discourage similar behaviour in future, either by the person that may have committed the breach or others
- the resources required to investigate the matter and the resources available. Ofgem's resources are finite and the most serious potential breaches will be given priority
- whether action has already been taken, or is to be taken by another body, to remedy the situation

⁹ The offences are set out in regulation 20 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

- whether Ofgem is under an obligation to take action on behalf of, or provide assistance to, ACER or another NRA.
- 4.5 This list is not exhaustive; not all of these factors may be applicable in a particular case and there may be other factors, not listed, that are relevant.

Enforcement and industry code compliance

- 4.6 Where a potential breach of a REMIT requirement is also potentially a breach of a relevant industry code, Ofgem will take account of any sanctions already being proposed or imposed by code owners when considering whether to investigate or take enforcement action. This may lead to Ofgem deciding not to use its powers under REMIT. However, in appropriate cases, including cases of serious damage to markets or consumers, Ofgem may nonetheless investigate and ultimately the Authority may take some form of enforcement action, including imposing a financial penalty.

The investigation process

Notifying the person under investigation

- 5.1 Should Ofgem decide to proceed to a formal investigation, it will write to the person being investigated providing as full details as possible of the allegations and of the focus of the investigation. However, Ofgem will not do so if it considers that providing written notice would be likely to result in the investigation being frustrated. Where Ofgem does provide written notice, it will provide a contact point, whose details will be provided, for further details or updates on the progress of the investigation.
- 5.2 In investigations into possible breaches of REMIT requirements, Ofgem may not know the identity of the perpetrator or may be looking into market circumstances at the outset of the investigation rather than investigating a particular person. In those circumstances, Ofgem will give an indication of the nature and subject matter of its investigation to those who are required to provide information to assist with the investigation.
- 5.3 Where appropriate, Ofgem will update the person under investigation on the progress of the investigation on a quarterly basis. Additional updates can be provided by the Ofgem contact on request.
- 5.4 In all cases Ofgem will update a party under investigation of the action that we propose to take, which may include issuing a Statement of Case. Where Ofgem has provided written notice of an investigation to a person and later decides to discontinue the investigation without any intention to take further action, it will confirm this to the person concerned as soon as it considers that it is appropriate to do so, bearing in mind the circumstances of the case.

Publicising an investigation

- 5.5 When Ofgem commences a formal REMIT investigation, this will not normally be announced. In some circumstances, Ofgem may make public the opening of a REMIT investigation. Ofgem may do so, for example, where this may assist the investigation by enabling Ofgem to collect evidence from third parties. Ofgem will only decide to publicise the opening of an investigation if it considers that an announcement is in the interests of consumers or would avoid damage to market confidence.

Information gathering

Information requests and interviews

- 5.6 Where Ofgem has opened an investigation, it may issue written notices requiring any person to provide specified information or specified documents (unless legally privileged) that appear to Ofgem to relate to any matter relevant to the investigation.¹⁰ This may include but is not limited to written documents, emails, computer hardware and telephone and data traffic records.
- 5.7 Ofgem will set out in any such written notice a reasonable period within which the information or documents must be provided. In setting what it considers to be a reasonable period for responding to an information request, Ofgem will take account of the volume and/or complexity of the information requested and any bank or other public holidays that may fall within this period.
- 5.8 Ofgem may also specify the form in which the information or documents is to be provided and may require it to be verified or authenticated. Ofgem may require explanations of the documents and may take copies of or extracts from them. If a person who is required to provide a document fails to do so, Ofgem may require that person to state, to the best of his knowledge and belief, where the document is.
- 5.9 In conducting any investigation, Ofgem will comply with applicable requirements governing the admissibility of evidence.
- 5.10 Ofgem will uphold its obligations regarding confidential information, and will only disclose such information where:
- we have permission to disclose
 - we are required to by law (eg under court order) or
 - where disclosure is sanctioned by law.
- 5.11 Ofgem may also require any person that may be able to give information relevant to the investigation to attend an interview at a specified time and to answer such questions as Ofgem may reasonably have in relation to the investigation. Ofgem may also specifically require that person to give Ofgem all assistance in connection with the investigation that the person is reasonably able to give.
- 5.12 Ofgem may require a market participant or a person professionally arranging transactions (or fellow members of their group or partnership) to prepare a report for Ofgem or may itself appoint a particular skilled person to prepare such a report. Where Ofgem does not directly appoint the individual preparing the report, it will approve the appointment. The person appointed to prepare the report must be given such assistance as he or she may reasonably require. If necessary Ofgem may seek an injunction to ensure that a person compiling such a report is given reasonable assistance.

¹⁰ See regulations 11 and 52 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

- 5.13 Ofgem may need to issue several information requests in the course of an investigation. However, it will avoid requesting the same information more than once without good reason (for example, we may repeat a request if the person fails to provide in full the information that we originally requested).
- 5.14 Ofgem will generally use its information gathering powers under the Regulations to require the production of documents, the provision of information or the answering of questions in interview. We may also request information on a voluntary basis. Overseas regulators such as ACER or another NRA may ask Ofgem to obtain documents or conduct interviews on their behalf.
- 5.15 Ofgem will seek to be as clear as possible in its information requests and will seek to inform the recipient of how such information should be submitted. The recipient may ask questions and seek clarification about the information request from the relevant Ofgem contact.
- 5.16 Ofgem will take very seriously any failure to provide documents or information that it has required to be provided. Where Ofgem considers that a person has failed to comply with such a requirement, it may certify that fact in writing to the court. If the court is satisfied that the person failed without reasonable excuse to comply, it may deal with the person as if he were in contempt.
- 5.17 It is therefore especially important that, for example, where recipients of information requests have good reason to believe that they will be unable to supply the requested information at the specified time, they should contact Ofgem in writing at the earliest possible opportunity. Ofgem may extend the specified time and will consider on a case-by-case basis and in a timely manner whether this would be reasonable.
- 5.18 A person who knows or suspects that Ofgem is or is likely to conduct an investigation using its REMIT powers is committing a serious offence if he falsifies, conceals, destroys or otherwise disposes of information in any form that he suspects is or would be relevant to an investigation (or causes or permits others to behave in this way). A person who - recklessly or otherwise - provides information to Ofgem that he knows to be materially false or misleading is also committing a serious offence. In each case the person is potentially liable to fines and/or imprisonment.¹¹
- 5.19 Where Ofgem has the power to require a person to provide information, but it appears that that information is in the possession of a third person, we may require the third person to provide that information.

Inspecting premises

- 5.20 Ofgem has the power to enter and inspect premises and to remove documents and other forms of information¹². If Ofgem wishes to use this power, it will seek a warrant from a Justice of the Peace (JP). If granted a warrant, Ofgem must use it within one month.

¹¹ See regulation 20 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

¹² See regulation 16 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

- 5.21 A JP may issue a warrant if satisfied that there are reasonable grounds for believing that a person has failed to comply with an information request or that any document or information, which Ofgem could require in an information request, would be removed, tampered with, concealed or destroyed.
- 5.22 The warrant will authorise Ofgem to
- enter and inspect the premises specified in it
 - take such other persons as Ofgem considers are needed to assist it in doing anything the warrant authorises it to do (for instance, police constables or forensic imaging specialists)
 - take possession of any relevant documents or information (or to take any steps that appear necessary to preserve or prevent interference with such documents or information)
 - to take copies of, or extracts from, any relevant documents or information
 - to require any person on the premises to provide an explanation of such documents or information or to state where such documents or information might be found
 - to use such force as may be reasonably necessary.
- 5.23 On arrival at the premises Ofgem will produce the warrant, which shall specify as far as possible the documents and/or information to be sought, and documentary evidence that the officials who are conducting the inspection have been properly authorised to conduct the inspection.
- 5.24 Before commencing the search, Ofgem will allow a reasonable period of time for a legal representative of the person under investigation to be present. During this period, we may take necessary measures to prevent tampering with evidence or warning other companies about our investigation. The search will commence after that time whether or not a legal representative is present.
- 5.25 Ofgem will make a written record of
- the date and time of entry onto the premises
 - the number and name of all the officials involved in the inspection
 - the period for which the officials remained on the premises and
 - all documents (including information recorded in any form) taken into possession by Ofgem officials while there.
- 5.26 If there is a dispute during an inspection as to whether communications, or parts of communications, are privileged, our officer may request that the communications are placed in a sealed envelope or package. The officer will then discuss the arrangements for safe-keeping of these items by Ofgem pending satisfactory resolution of the dispute.

- 5.27 Ofgem will provide a copy of the written record to the occupier of the premises (or someone acting on the occupier's behalf). We will do so before we leave the premises unless it is not reasonably practicable to do so, in which case we will do so as soon as possible afterwards.
- 5.28 Ofgem will retain any items taken away from the premises for so long as it is necessary to retain them for the purposes of the investigation. When this is no longer necessary, Ofgem will arrange for items to be returned as soon as reasonably practicable.
- 5.29 Ofgem may wish to visit multiple sites at one time or to visit a particular site on more than one occasion. Ofgem may wish to inspect business and domestic premises. It is entirely possible that evidence may be located in domestic premises (for example if someone under suspicion has been working at home or concealing documents there).
- 5.30 Inspections will occur during reasonable hours unless it appears to Ofgem that the purpose of a search may be frustrated on an entry at a reasonable hour. Ofgem will seek to minimise disruption to business while on the premises and will take reasonable steps to ensure that the premises are left in the same state as they were found.
- 5.31 Any person who intentionally obstructs the exercise of Ofgem's rights under a warrant is guilty of an offence liable on summary conviction to imprisonment or a fine.¹³

Statement of Case

- 5.32 Ofgem aims to conduct its investigations in an efficient and timely manner but not at the expense of procedural fairness. Taking this into account, where Ofgem has notified a person that an investigation has begun, Ofgem will within 9 months of opening the case
- give a Statement of Case to the person being investigated
 - close the investigation explaining why no breach of the REMIT requirements has occurred
 - close the case for reasons of administrative priorities or
 - where appropriate, update the person being investigated of the expected timescale for one of the above.
- 5.33 Where Ofgem's investigating team considers that there is or has been a breach, it will prepare a Statement of Case explaining its initial findings. The purpose of this is to set out the relevant facts and the case against the person and to seek the person's views.
- 5.34 The person will have an opportunity to respond in writing. The period of time allowed will depend on the facts and the complexity of the case but Ofgem generally expects to allow 21 days. Ofgem may grant an extension to the specified time and will consider in a timely manner whether this would be reasonable on a case-by-case basis.

¹³ See regulation 20 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

- 5.35 Ofgem may decide not to issue or to delay issuing a Statement of Case if settlement discussions are taking place. Before or at the point of issuing a Statement of Case, Ofgem will set out to the person being investigated the process that it intends to follow. Ofgem will update the person if changes to the process are subsequently deemed appropriate.
- 5.36 After considering any written representations, the investigating team may decide that there is insufficient evidence of a breach and may close the case. Alternatively, it may retain a reasonable suspicion that a breach has occurred but consider that it is necessary to amend its initial findings and prepare a Supplementary Statement of Case. In these circumstances, Ofgem will provide it to the person and offer a further opportunity to make written representations.

Oral representations

- 5.37 After the final written representations on the Statement of Case, the person under investigation will have an opportunity to make oral representations to the decision-maker at a hearing. The person will be asked to indicate in the written response to the Statement of Case whether they wish to exercise this option.
- 5.38 There is no obligation to make oral representations and a person might decide not to do so (in the interests of expediency or to save costs). If the person does wish to make oral representations a hearing with the decision-maker will be arranged. Where a firm is under investigation, Ofgem would normally expect representatives to include senior members of its management team. The person under investigation may have legal representation at oral hearings.
- 5.39 Save in exceptional circumstances, neither Ofgem nor the person should introduce any new material during oral representations. The agreement of the decision-maker(s) acting on behalf of the Authority will be required before new material is introduced.
- 5.40 The form and duration of the oral hearing will be determined by the decision-maker(s) acting on behalf of the Authority taking account of all the circumstances of the case.
- 5.41 Where a person has exercised the option to make oral representations, only those members of the Enforcement Committee who were present at the hearing will be involved in the Authority's final decision in relation to the case.
- 5.42 Following any representations on the Statement of Case, the Authority will consider whether the person being investigated has failed to comply with a REMIT requirement. If the Authority finds that there has been no failure (and no likelihood of failure) to comply, the person will be informed that the case has been closed. If the Authority finds that there has been, is or is likely to be a failure to comply with a REMIT requirement, the Authority may seek an injunction or propose a financial penalty and/or restitution.

Seeking injunctions

- 6.1 The Authority has the power, at any stage after becoming aware of a possible breach, to seek a court order (or interdict in Scotland) requiring a person to stop doing something.¹⁴ If a court is satisfied that
- there is a reasonable likelihood that any person will fail to comply with a REMIT requirement, or that any person is failing or has failed to comply with a REMIT requirement and there is a reasonable likelihood that the failure to comply will continue or be repeated, or
 - there is a reasonable likelihood that any person will fail to comply with the requirement to record conversations and keep a copy of electronic communications, or that any person is failing or has failed to comply with such a requirement and there is a reasonable likelihood that the failure to comply will continue or be repeated,

the court may make an order restraining (or interdict prohibiting) the failure to comply. The court may also direct the person to take steps to remedy an actual or potential breach.

Temporary prohibition of professional activity

- 6.2 The Authority may seek a court order to prohibit, temporarily, professional activity. The Authority may consider seeking such an order where it has serious concerns about the honesty, integrity or competence of an individual or group of individuals¹⁵. In doing so, the Authority will consider whether
- the individual or group of individuals has engaged in market abuse
 - the previous disciplinary record and compliance history of the individual or group of individuals
 - the severity of the risk which the individual or group of individuals poses to consumers and confidence in the stability of the wholesale energy markets
 - its regulatory objectives can be achieved adequately by imposing sanctions such as a financial penalty or censure.

- 6.3 An order temporarily prohibiting professional activity may be issued if the court is satisfied that there is a reasonable likelihood that any person will fail to comply with a REMIT requirement, or that any person is failing or has failed to comply with a REMIT requirement and there is a reasonable likelihood that the failure to comply will continue or be repeated.

Freezing of assets

- 6.4 The Authority may seek a court order restraining a person from disposing of, or otherwise dealing with, any of its assets. The Authority may seek such an injunction where it has reasonable evidence that a person may be failing or may have failed to comply with a REMIT requirement and that the person is reasonably likely to dispose of assets.

¹⁴ See regulation 21 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

¹⁵ For example, by providing the Authority with false or misleading information.

- 6.5 Where the Authority applies to the court to make an order preventing the disposal of assets, the Authority will not have to show that a failure to comply with REMIT has definitely occurred. Rather, an asset-freezing order may be made if the court is satisfied that a person may be failing or may have failed to comply with a REMIT requirement and that the person is reasonably likely to attempt to dispose of assets.

Deciding whether to seek an injunction

- 6.6 The Authority will seek an injunction where it believes that an injunction would be the most effective way to promote its regulatory objectives (as set out at paragraph 2.1). In deciding whether this is the case, the Authority may consider a range of factors, including

- the nature and seriousness of a breach or expected breach
- the extent of loss, risk of loss or other adverse effects on consumers
- the impact or potential impact on wholesale energy markets
- the likelihood that a failure to comply may continue or be repeated
- whether there are steps a person could take to remedy a breach or provide redress
- the costs that would be incurred by the Authority in applying for and enforcing an injunction and the benefits that would result
- whether there is a danger that assets might be dissipated
- the extent to which another regulatory body can adequately address the matter and
- whether the conduct in question can be adequately addressed by other means, for example a statement of non-compliance or financial penalty.

- 6.7 The Authority may also, on an application to the court for an injunction, request that the court consider whether a financial penalty should be imposed on the person to whom the application relates. The court may make an order requiring the person concerned to pay to the Authority a penalty of such an amount as it considers appropriate. The Authority will not use its own powers to impose a financial penalty if the court has already imposed a financial penalty in respect of the same matter.

Sanctions available to the Authority

Financial penalty or statement of failure to comply

- 7.1 The Authority may impose a financial penalty in the event that it finds that a person has breached a REMIT requirement. The Authority may also impose a financial penalty for a breach of the obligation to record conversations and keep a copy of electronic communications. A financial penalty will be of such amount as the Authority considers appropriate.

- 7.2 Alternatively, the Authority may, instead of imposing a financial penalty, issue the person with a statement to the effect that the person has failed to comply with one or more of these requirements.¹⁶
- 7.3 As noted above, the Authority's policy on imposing financial penalties is set out in a separate statement. The Authority will have regard to that statement in exercising, or deciding whether to exercise, its power to impose a financial penalty.
- 7.4 The procedural steps that the Authority must follow before it may impose a penalty are set out later in these guidelines.

Restitution orders

- 7.5 Instead of (or in addition to) imposing a financial penalty, the Authority may make a restitution order or apply to a court for one¹⁷. The Authority or court will need to be satisfied that
- a person has breached a REMIT requirement (or has required or encouraged another person or persons to engage in behaviour that would have amounted to a breach if the person had done it himself) and
 - the person has accrued profits from the breach or that one or more persons have suffered loss or been otherwise adversely affected by the breach.
- 7.6 The court may order the person concerned to pay to the Authority such a sum as appears to the court to be just having regard to the profits accrued and/or the loss or other adverse effects suffered. Any amount paid to the Authority must be paid by the Authority to, or distributed among, such persons as the court may direct. If issuing its own restitution order, the Authority may require the person concerned to pay or distribute to the affected person or persons, an amount that appears just having regard to the same considerations.
- 7.7 The court may require the person to supply it with accounting and other information to enable the court to establish the profits accrued and the losses or other adverse effects suffered as a result of the breach, and to determine how any amounts are to be paid or distributed to those who have been adversely affected. The court may require such information to be independently verified. The Authority may, if issuing its own restitution order, order the person to provide similar information to it via a report from a skilled person.
- 7.8 When deciding whether to exercise these powers, the Authority will consider all the circumstances of the case. The factors that the Authority will consider may include but are not limited to
- whether this would be the best use of its limited resources, taking into account, for example, whether the profits are quantifiable, the likely amount of any recovery and the costs of identifying and distributing such sums

¹⁶ See regulation 26 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

¹⁷ See, respectively, regulations 23 and 22 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

- whether redress might be achieved more efficiently or cost-effectively through other means (for instance via private court actions¹⁸, an ombudsman service, corporate compensation schemes or another regulatory authority)
- the adequacy of any proposals by the person concerned to offer redress
- the extent to which the person had reasonable grounds for believing that his or her conduct did not amount to a failure to comply or had taken reasonable precautions and exercised due diligence to prevent the breach from occurring.

7.9 The Authority expects, therefore, to exercise its formal restitution powers on rare occasions only. In cases where the Authority considers it appropriate to obtain restitution, the Authority will first consider using its own powers before considering taking court action. However, there may be circumstances in which the Authority will choose to apply to the court for a restitution order. For example, the Authority may wish to combine an application for a restitution order with other court action against the person (such as seeking an injunction to prevent or to end a breach of a REMIT prohibition or obligation or to freeze assets where there is a danger that they may be dissipated).

7.10 The Authority will not use its own powers to make a restitution order if the court has already issued a restitution order in respect of the same matter.

7.11 The Authority also has the power, on an application to the court for restitution, to request the court to consider whether a financial penalty should be imposed on the person to whom the application relates. The court may make an order requiring the person concerned to pay to the Authority a penalty of such an amount as it considers appropriate.

The decision-making process

The decision-maker

7.12 Decisions on whether a breach of a REMIT requirement has occurred and, if so, whether to impose a sanction directly on the person (or to seek to impose sanctions via the courts) are matters reserved for the Authority.

7.13 Decisions may be taken by the full Authority but are usually delegated to a Committee of the Authority, known as an Enforcement Committee. Any delegation of decision-making will be made in accordance with the Regulations and with the Authority's rules of procedure.¹⁹

7.14 Enforcement Committees are constituted as and when required. They currently comprise three people: two non-executives and an executive or other permitted senior employee of Ofgem. In all cases they form an independent view of the recommendations of Ofgem staff that have carried

¹⁸ Private actions to recover losses are available irrespective of whether the Authority applies for or issues a restitution order.

¹⁹ The Authority's rules of procedure are available [here](#).

out the investigation and that have established the evidence on which the decision is based.²⁰

- 7.15 Ofgem will confirm in writing with the person subject to the investigation if delegation of any decision-making powers is to occur. Ofgem will also explain in writing any relevant terms of delegation that have been granted by the Authority.

Warning Notices

- 7.16 The Authority²¹ will hear the Ofgem investigation team's recommendations on whether to issue a Warning Notice and whether to publicise any matters that relate to it. The Authority will have access to any written and oral representations made in response to the Statement of Case. The Authority will then decide whether or not to issue a Warning Notice and whether or not to publish any matters that relate to it.
- 7.17 The Authority will issue a Warning Notice if it proposes to impose a financial penalty and/or to make a restitution order or to publish a statement of non-compliance. A Warning Notice will state the proposed action, the reasons for it and the extent of any rights of access to Authority material.
- 7.18 If any of the reasons relate to a matter that identifies a person other than the person to whom the notice was given ('the third party') and, in the opinion of the Authority, is prejudicial to the third party, the Authority will, where practicable, give the third party a copy of the notice (unless the Authority is separately giving the third party a Warning Notice in relation to the same matter).
- 7.19 The Authority's notices giving warning of a proposed
- financial penalty will specify the amount of the proposed penalty
 - restitution order will specify the proposed amount that the person is required to pay or distribute to those adversely affected
 - statement of non-compliance will set out the terms of the statement.
- 7.20 The Authority must allow at least 14 days for the person to make representations about the proposals. In setting what it considers to be a reasonable period for responding to a Warning Notice, the Authority will take account of any bank or other public holidays that may fall within this period.
- 7.21 The Authority may extend the period specified in the Warning Notice for making representations. The Authority must then decide, within a reasonable period, whether to impose a financial penalty, and/or or make a restitution order or issue a statement of non-compliance. If the Authority decides to do so, it must give the person concerned a Decision Notice.

²⁰ As such they comply fully with the requirement in regulation 42 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 for the separation of the investigation team from those deciding whether a breach has occurred and, if so, what sanctions to propose. Ofgem, as part of its Enforcement Review, has consulted on changes to these procedures.

²¹ Usually via an Enforcement Committee as explained above but possibly also via a Settlement Committee as explained in more detail at paragraphs 8.8 and 8.9.

- 7.22 Neither the Authority nor those to whom Warning Notices have been given or copied may publish them. However, in respect of notices warning that the Authority proposes to impose a financial penalty or to issue a statement of non-compliance (but not to impose restitution) the Authority may publish such information relating to the matters contained in the Warning Notice as it considers appropriate. If the Authority does so, a person to whom the Warning Notice has been given or copied may publish the same details.²²
- 7.23 If the Authority wishes to publish information about a Warning Notice in respect of a proposed decision to impose a financial penalty or to issue a statement of non-compliance, it will first consult those to whom the notice was given or copied. The Authority may not publish information about a Warning Notice if, in its opinion, publication would be
- unfair to the person against whom action is proposed
 - prejudicial to the interests of consumers or
 - detrimental to the stability of the wholesale energy markets in Great Britain.²³
- 7.24 The Authority will consider any response. However, a person seeking to demonstrate potential unfairness from publication must provide clear and convincing evidence of how that unfairness may arise and how they could suffer a disproportionate level of damage. They would need to demonstrate, for example, that publication could materially affect their health, result in a disproportionate loss of income or livelihood, prejudice criminal proceedings to which they are a party or give rise to some other equal degree of harm. It will not normally be sufficient to claim that publishing information about a Warning Notice is unfair solely because it could have a negative impact on a person's reputation (given that this is an inevitable consequence of publication).
- 7.25 Decisions on behalf of the Authority to issue a Warning Notice will be taken by persons who have had no direct involvement in establishing the evidence on which the decision is based. Decisions on behalf of the Authority to publish information about the matter to which a Warning Notice relates will not be taken by the persons who have proposed publication.²⁴
- 7.26 This is in line with the role of the Authority to form an independent view of the recommendations of Ofgem staff that have carried out the investigation. The Authority will inform ACER before publishing information about the matter to which a Warning Notice relates.

²² Regulation 39 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 precludes the Authority from publishing Warning Notices proposing restitution or any information relating to them. Any person given or copied such a Warning Notice is similarly precluded from publishing any details.

²³ See regulation 39 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

²⁴ See regulation 42 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013. A similar requirement for operational separation has been imposed in respect of publishing material about Decision Notices (see below).

Decision Notices

- 7.27 The Authority²⁵ will hear the Ofgem investigation team's recommendation on whether to issue a Decision Notice. The Authority will also have access to any representations made in response to the Warning Notice. The Authority will then decide whether or not to issue a Decision Notice.
- 7.28 If, after considering any representations that have been made, the Authority decides to exercise its powers to impose a financial penalty, to make a restitution order, or to publish a statement of non-compliance, the Authority must give a written Decision Notice to the person in relation to whom the powers are being exercised. The Authority will give a copy of the Decision Notice to any third party to whom the Warning Notice was copied.
- 7.29 All Decision Notices issued by the Authority will set out the reasons for the decision, the extent of any rights of access to Authority material and outline any right to have the matter referred to the Tribunal and associated procedures (see paragraphs 7.37-7.42).
- 7.30 A Decision Notice confirming the imposition of a financial penalty will also set out
- the amount of the penalty
 - the manner in which and the date by which the penalty must be paid,
 - how the penalty will be recovered if it is not paid by that date, including any interest charges that may be payable.
- 7.31 A Decision Notice confirming the making of a restitution order must also set out
- the amount that the person is to pay or distribute
 - identify the persons to whom that amount is to be paid or among whom that amount is to be distributed and
 - state how the payment or distribution is to be made and the time period for doing so.
- 7.32 A Decision Notice issuing a non-compliance statement must also set out the terms of the statement.
- 7.33 The Authority may, before it takes the action set out in a Decision Notice, give the person concerned a further Decision Notice setting out different action in respect of the same matter. However, the Authority may do so only with the consent of the person to whom the original Decision Notice was sent. The right of appeal against any further Decision Notice will be the same as for the original Decision Notice.
- 7.34 The Authority must publish such information as it considers appropriate about the matters contained in a Decision Notice. However, the Authority may not publish such information if, in its opinion, publication would be

²⁵ As with Warning Notices, decisions on whether to issue a Decision Notice are usually taken by an Enforcement Committee or by a Settlement Committee.

- unfair to the person against whom action is to be taken
- prejudicial to the interests of consumers or
- detrimental to the stability of wholesale energy markets.

7.35 If the Authority wishes to publish information relating to a Decision Notice, it shall first consult the person against whom the action is to be taken. The Authority will take the same approach to considering any representations that it receives as it would in deciding whether to publish information relating to a Warning Notice (see paragraphs 7.23 and 7.24).

7.36 Decisions on behalf of the Authority to issue a Decision Notice will be taken by persons who have had no direct involvement in establishing the evidence on which the decision is based. Decisions on behalf of the Authority to publish information about the matter to which a Decision Notice relates will not be taken by the persons who have proposed publication. The Authority will inform ACER before publishing such information.

Appeals

7.37 If the Authority decides to impose a financial penalty, to make a restitution order, or to issue a statement of non-compliance against a person, that person may appeal the decision to the Upper Tribunal (Tax and Chancery Division).

7.38 A third party to whom a copy of a Decision Notice has been given may refer to the Tribunal the decision in question, so far as that decision is based on a reason that relates to a matter that is prejudicial to the third party. The third party may also refer to the Tribunal any opinion expressed by the Authority in relation to him.

7.39 The Tribunal may take account of any relevant evidence whether or not it was available to the Authority when it made the decision that is the subject of the appeal.

7.40 If a financial penalty decision is being appealed, the Tribunal must determine what (if any) is the appropriate action for the Authority to take and remit the matter to the Authority with such directions (if any) as the Tribunal considers appropriate for giving effect to the determination. However, the Tribunal may not direct the Authority to do anything that the Authority did not have the power to do when making its decision.

7.41 If a person is appealing a decision to issue a restitution order, the Tribunal must either dismiss the appeal or remit the matter to the Authority with a direction to reconsider it and reach a decision in accordance with the Tribunal's findings. The Tribunal's findings in such cases may relate to

- issues of fact or law
- the matters to be, or not to be, taken into account by the Authority in making the decision and
- the procedural or other steps to be taken by the Authority in connection with making the decision.

- 7.42 The Authority must comply with any directions given to it by the Tribunal. An order of the Tribunal may be enforced as if it were an order of a county court (or, in Scotland, as if it were an order of the Court of Session).

Discontinuance Notices

- 7.43 If the Authority decides not to take the action proposed in a Warning Notice or the action to which a Decision Notice relates, it will give a notice of discontinuance to the person to whom the Warning or Decision Notice was given (and send a copy to any third parties to whom the Warning or Decision Notice was copied).
- 7.44 A Discontinuance Notice will identify the proceedings that are being discontinued and will state that, if the person to whom the notice is given consents, the Authority may publish such information as it considers appropriate about the matter. Consent for publication will also be required in respect of any third parties to whom the notice is copied if the material to be published is relevant to those persons.

Final Notices

- 7.45 If the Authority has given a person a Decision Notice and the matter is not referred to the Upper Tribunal within the time period required by the Tribunal rules, the Authority must, on taking the action to which the Decision Notice relates, give the person concerned (and any person to whom the Decision Notice was copied) a Final Notice.
- 7.46 If the matter is referred to the Upper Tribunal and the Tribunal upholds the Authority's decision, the Authority must issue a Final Notice. If, upon referral, the Tribunal (or the court following an appeal of a Tribunal decision) directs the Authority to take different action to that set out in the Decision Notice, the Authority will issue a further Decision Notice. All such notices will be given to the person concerned (and to any person to whom the Decision Notice was copied).
- 7.47 A Final Notice about a financial penalty will state the amount of the penalty and the manner in which and period within which it must be paid. It will also set out how the penalty will be recovered if it is not paid by the specified date (including any interest charges that may be payable).
- 7.48 A Final Notice about restitution will set out the amount to be paid to, or distributed among, those who have suffered loss as a result of the breach. It will also set out the manner in which and date by which restitution must be given.
- 7.49 The specified date for payment of a penalty or of restitution must be at least 14 days from the date of the Final Notice.²⁶ In setting what it considers to be a reasonable period for responding, the Authority will take account of any bank or other public holidays that may fall within this period.
- 7.50 If all or any of the amount of a financial penalty payable under a Final Notice is outstanding at the end of the period that was allowed for payment, the Authority may recover the outstanding amount as a debt due to it.

²⁶ See regulation 38 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

- 7.51 If all or any of a required payment or distribution has not been made at the end of the period stated in a Final Notice, the obligation to make the payment is enforceable on the application of the Authority by injunction or, in Scotland, by an order of the Court of Session.
- 7.52 A Final Notice about a statement of non-compliance must set out the terms of the statement and give details of when and how it will be published.
- 7.53 The Authority must publish such information about the matter to which a Final Notice relates as it considers appropriate. However, the Authority may not publish information relating to a Final Notice if, in its opinion, publication would be
- unfair to the person against whom action is proposed
 - prejudicial to the interests of consumers or
 - detrimental to the stability of the wholesale energy markets in Great Britain.
- 7.54 The Authority will inform ACER before publishing such information.

Access to Authority material

- 7.55 Any Warning or Decision Notice must set out the extent to which the person receiving it may access the material on which the Authority has relied in deciding to propose or take its decision and any other material it considers might undermine that decision. Any third party to whom a notice is copied must at the same time be told whether it may access Authority material that identifies the third party.²⁷
- 7.56 The Authority is not required to grant access to material if the material relates to a case involving another person and the Authority took it into account only for comparative purposes.
- 7.57 The Authority may refuse the person access to material where it considers that allowing access
- would not be in the public interest, or
 - would not be fair, having regard to the likely significance of the material to the person to whom the Warning or Decision Notice is addressed, and the potential prejudice to the commercial interests of persons other than those to whom the Warning or Decision Notice is addressed.
- 7.58 If the Authority refuses to allow access to such material, it will notify the person in writing, giving reasons for the refusal.
- 7.59 The requirement to grant access to Authority material does not extend to material that is legally privileged.

²⁷ See regulation 41 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

Settlement procedure

- 8.1 The settlement procedure enables Ofgem to work with the person subject to the investigation to bring the case to an early resolution by agreement. Settlement may take place at any stage of the investigation (potentially removing the need for a Statement of Case) and is likely to result in a lower penalty than would be imposed by an Enforcement Committee.
- 8.2 Ofgem is less likely to engage in settlement in the final stages of the investigation, when the focus is on presenting its conclusions to the Enforcement Committee. The sooner settlement is reached the more significant any reduction in penalty is likely to be.
- 8.3 Ofgem is open to requests to enter into settlement negotiations. However, it will decide whether it is appropriate for the case to proceed through the settlement procedure. It is important to remember that it may not be desirable to reach an early resolution in all cases and that Ofgem may decide that a case is not suitable for settlement. In each case, Ofgem must be satisfied that its decision is the right one not only in terms of the immediate impact on the subject of the enforcement action but also in respect of any broader message conveyed by the action taken.
- 8.4 Cases that may be suitable for early settlement will be considered against a range of factors. Before starting discussions, Ofgem will
- need to be satisfied that it has sufficient information to enable it to assess the nature and extent of the breaches, the likely detriment caused and the level of penalty that might be appropriate
 - share with the person under investigation a summary of its views on suspected breaches
 - provide details of the terms on which settlement could proceed, including any publication of material that might take place where a penalty or restitution is proposed and rights of appeal following settlement.
- 8.5 Settlement discussions will usually be held by the Ofgem investigation team, which will have a good understanding of the issues involved and will be able to direct the discussions accordingly.
- 8.6 The aim of settlement is to reach agreement on the nature and extent of breaches, an appropriate level of penalty and, where appropriate, proposals for restitution. Ofgem may agree other terms with the person as part of settlement. Where agreement is reached on the breaches, Ofgem will seek to agree the amount of the financial penalty and/or restitution to those adversely affected. Ofgem will have regard to its statement of policy in respect to financial penalties under REMIT when agreeing the level of the penalty.
- 8.7 Settlement discussions will be conducted on a 'without prejudice' basis. This means that if negotiations break down, neither party can rely on admissions or statements made during the settlement discussions in any subsequent Enforcement Committee hearing or before a court.
- 8.8 Where agreement is reached, the investigating team will make a recommendation for early resolution to a Settlement Committee of the

Authority. In all cases, such a recommendation will mean that the case is considered 'on the papers' by a Settlement Committee. As the Committee is considering whether to accept the terms of an agreement reached with the person, which include acceptance of certain breaches, rather than hearing contested views about the allegations against the person, there is no opportunity for the person to make oral representations to the Committee. The Committee will consider the terms proposed to bring the case to an early resolution. The Committee may accept or reject the terms or require changes as a condition of agreement.

- 8.9 The Settlement Committee comprises one non-executive member of the Authority and one executive member or other permitted senior employee. This is not a standing committee but is constituted as and when required. Members of the Settlement Committee in a particular case may not later sit as members of the Enforcement Committee for the same case. This means that, if settlement discussions break down, the case will be considered by Enforcement Committee members who have had no previous involvement in early resolution and who will not know the content of the settlement discussions.
- 8.10 Members of the Settlement Committee will, like members of the Enforcement Committee, form an independent view of the recommendations of Ofgem staff that have carried out the investigation and established the evidence on which the recommended decision to settle is based.
- 8.11 Where, as part of settlement, the Authority decides to issue a Warning Notice or Decision Notice, those persons taking the decision on behalf of the Authority will have had no direct involvement in establishing the evidence on which the decision is based. In respect of a decision to publish information about the matter to which a Warning Notice relates, those persons taking the decision on behalf of the Authority will exclude any person who has first proposed the decision to publish. The Authority will inform ACER before publishing such information.

Cooperating with ACER and other regulators

- 9.1 The REMIT Regulation states that ACER, NRAs (including the Authority), the European Securities and Markets Authority (ESMA), competent financial authorities of Member States (such as the FCA) and, where appropriate, national competition authorities may establish appropriate forms of cooperation in order to ensure that a consistent approach is taken to enforcing the REMIT requirements.
- 9.2 Ofgem is committed to using its REMIT powers efficiently and fairly. Effective cooperation with other regulators is an essential part of this. Cooperation may take a number of forms.

Cooperation on investigations

- 9.3 ACER will promote cooperation at EU and national level by publishing non-binding guidance on the application of the definitions of, for example, inside information, market manipulation and attempted market manipulation. The Authority will have regard to any such guidance that may be published.
- 9.4 Where, on the basis of initial assessment or analysis, ACER suspects that a REMIT requirement has been breached, it may

- request that one or more NRAs, potentially including the Authority, supply ACER with any information related to the suspected breach
 - request that one or more NRAs, potentially including the Authority, look into the matter further and take appropriate action to remedy any breach found (such action will be for the NRA or NRAs to determine). Where the Authority undertakes such an investigation, it will keep ACER informed about the proceedings and outcome of the investigation
 - if it considers that the possible breach has, or has had, a cross-border impact, establish and coordinate an investigatory group consisting of representatives of the concerned NRAs (and potentially other regulatory bodies) to investigate whether a breach has taken place and in which Member State it occurred. Such a group will render all necessary assistance to ACER.
- 9.5 In the event that ACER submits a request for information or a request to look into a matter, the Authority shall immediately take the necessary measures to comply. If the Authority is unable to supply the required information immediately, it shall without delay notify ACER of the reasons for this.
- 9.6 The Authority may refuse to act on a request from ACER to provide information or look into a matter further where
- compliance might adversely affect the UK's sovereignty or security
 - judicial proceedings have already been initiated in respect of the same actions and against the same persons
 - a final judgment has already been delivered in relation to such persons for the same actions in Great Britain.
- 9.7 In any such case, the Authority shall notify ACER immediately.
- 9.8 NRAs, including the Authority, shall without delay inform ACER in as specific a manner as possible where they have reasonable grounds to suspect that acts in breach of REMIT are being, or have been, carried out either in that Member State or in another Member State. NRAs shall also inform the competent financial and competition authorities where they suspect breaches of competition and financial services legislation (in the Authority's case, the OFT, the FCA and, from April 2014, the Competition and Markets Authority).
- 9.9 Where a National Regulatory Authority suspects that acts that affect wholesale energy markets or the price of wholesale energy products in that Member State are being carried out in another Member State, the NRA may request that ACER take action (which, as noted above, may be to request that one or more NRAs supply it with information, commence an investigation or, in cross-border cases, form an investigatory group under ACER's chairmanship).

Information sharing and maintaining confidentiality

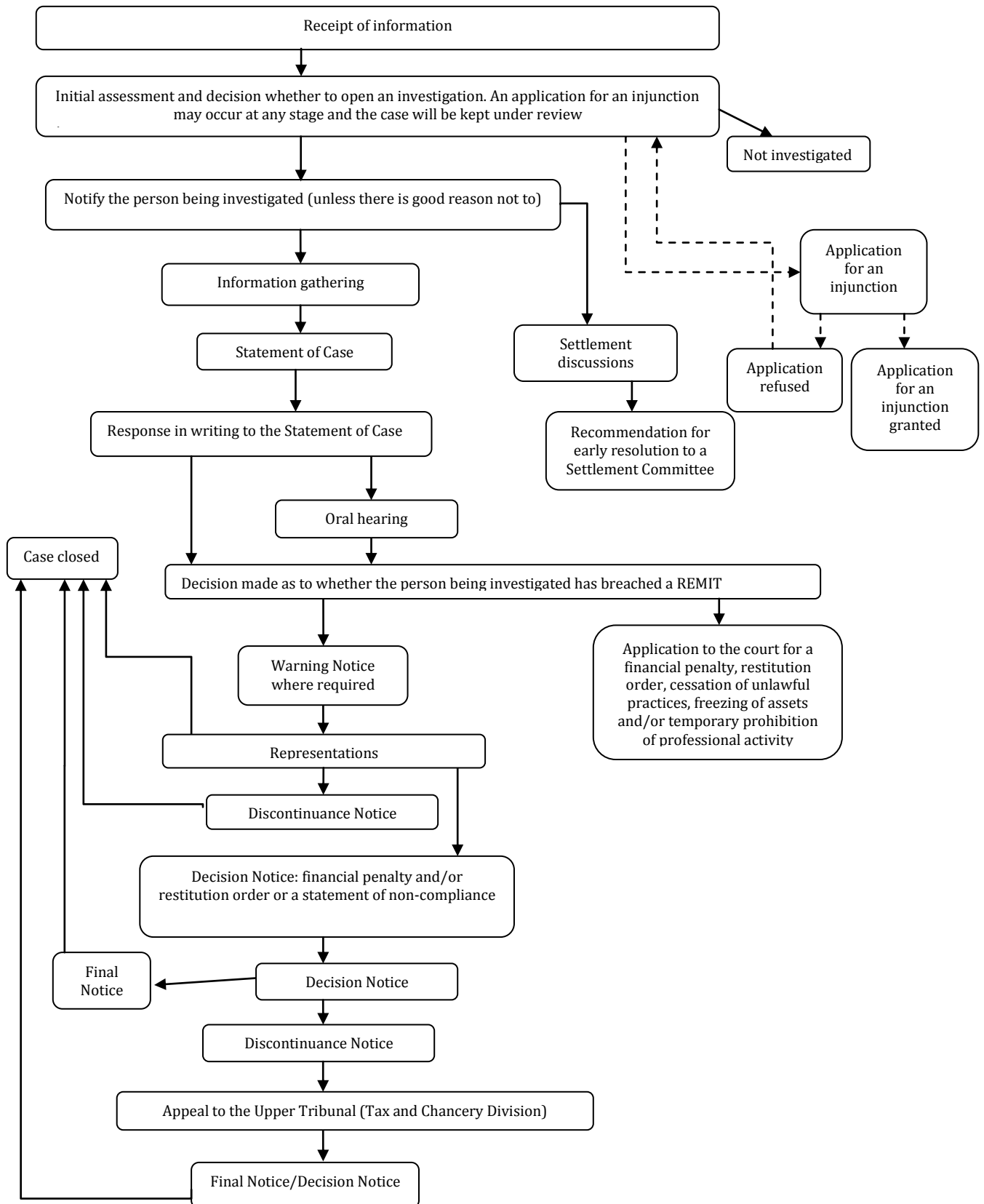
- 9.10 The Authority and other NRAs will cooperate at regional level and with ACER in monitoring wholesale energy markets. Market participants must provide ACER and the NRAs with the information they need to monitor those

markets effectively. ACER will share the information that it receives with NRAs and with the other regulatory bodies listed above. All those bodies, including the Authority, shall ensure the confidentiality, integrity and protection of the information that they receive.

- 9.11 Any confidential information received, exchanged or transmitted pursuant to the REMIT Regulation is subject to certain conditions of professional secrecy. This obligation of professional secrecy applies to people who work or who have worked for ACER, for the NRAs including the Authority, and for other relevant authorities that receive confidential information in accordance with the REMIT Regulation. It also applies to auditors and experts instructed by those bodies.
- 9.12 Confidential information received by these people in the course of their duties may not be divulged to any other person or authority, except in summary or aggregate form such that an individual market participant or market place cannot be identified, without prejudice to cases covered by criminal law, the other provisions of the REMIT Regulation or other relevant EU legislation.
- 9.13 Without prejudice to cases covered by criminal law, ACER, NRAs (including the Authority), ESMA, competent financial authorities of Member States and, where appropriate, national competition authorities and other persons which receive confidential information pursuant to the REMIT Regulation may use it only in the performance of their duties and for the exercise of their functions (which includes REMIT functions and those under the Gas Act and the Electricity Act).
- 9.14 Other authorities, bodies or persons may use that information for the purpose for which it was provided to them or in the context of administrative or judicial proceedings specifically related to the exercise of those functions. The authority receiving that information may use it for other purposes only if the provider of the information gives consent.
- 9.15 These requirements do not prevent the Authority from exchanging or transmitting, in accordance with national law, confidential information provided that it has not been received from ACER or from an authority of another Member State under the REMIT Regulation.

REMIT – investigation, enforcement and appeals processes

10.1 The flowchart below summarises the processes that the Authority may adopt in pursuing REMIT enforcement cases.



8 November 2013