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REMIT Procedural Guidelines

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Contact: Lewis Hodgart
Senior Economist

Nathan Macwhinnie
Head of Market Intelligence and Oversight

Team: Market Intelligence and Oversight

Tel: 020 7901 7000

Email: REMITconsultation@ofgem.gov.uk

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

PURSUANT TO REGULATION (EU) NO 1227/2011 AS INCORPORTATED INTO UK LAW[1] AND THE ELECTRICITY AND GAS (MARKET INTEGRITY AND TRANSPARENCY) (ENFORCEMENT ETC.) REGULATIONS 2013

Ofgem, 10 South Colonnade, Canary Wharf, London, E14 4PU www.ofgem.gov.uk

[1] Regulation (EU) No. 1227/2011 as incorporated into UK law by the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020 on 1 January 2021.

Contents

Changes to these guidelines:

Change number	Date	Summary of change
2	DD-MM-2021	
1	14-09 - 2016	Document updated to reflect changes to the composition of a Settlement Committee

Executive Summary

The Gas and Electricity Markets Authority (the Authority) regulates the gas and electricity markets in Great Britain. The Office of Gas and Electricity Markets (Ofgem) carries out the Authority's day-to-day work and investigates matters on its behalf. It also has concurrent powers with the Competition and Markets Authority (CMA) to investigate suspected infringements of competition law.

REMIT is Regulation (EU) no. 1227/2011 on wholesale energy market integrity and transparency, as incorporated into UK law by the European Union (Withdrawal) Act 2018 as amended by the European Union (Withdrawal Agreement) Act 2020 on 1 January 2021. REMIT imposes obligations and prohibitions on wholesale energy market participants regards market conduct.

Under the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013, the Authority has the power to investigate a suspected breach of REMIT, and to take enforcement action where it finds that a breach has occurred. Enforcement action may include seeking an injunction, making a restitution order, or imposing a penalty.

Under the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) the Authority can take enforcement action against a Regulated Person. A Regulated Person is any person who is a Market Participant or who is subject to Article 15 REMIT (a Person Professionally Arranging Transactions). As such REMIT enforcement action can be taken against a company or an individual.

Formal enforcement action is not the only tool available to Ofgem in addressing failures to comply with REMIT requirements. Alternative Action may be agreed with businesses as an alternative to concluding matters via formal enforcement. Alternative Action remedies may include, but are not limited to: non-statutory undertakings or assurances to ensure future compliance; independent audits of conduct and/or voluntary action to remedy any concerns; or an admission of a breach of REMIT, publicised through a Press Notice and if appropriate a more detailed Compliance Notice. Any one of these remedies could also include redress payments to affected parties and/or payments to the voluntary redress fund.

By ensuring that we have a robust framework in place to address failures to comply with REMIT requirements, we aim to create an effective deterrent against wholesale energy market abuse in GB.

These guidelines set out our general approach to enforcing REMIT and cover the following:

- Section 1: Explains how REMIT applies in GB, what the REMIT requirements are, and what legal powers we have to enforce them.
- Section 2: Sets out our objectives and regulatory principles in exercising our REMIT enforcement functions.
- Section 3: Sets out the types of information we use to monitor for possible REMIT breaches
- Section 4: Sets out the criteria we use for opening an investigation into a failure to comply with REMIT requirements
- Section 5: Sets out how a REMIT investigation can be expected to proceed
- Section 6: Explains how our powers to seek an injunction operate

- Section 7: Explains how we can bring an investigation to a close via Settlement
- Section 8: Explains how we can bring an investigation to a close via Contest
- Section 9: Explains the sanctions available to the Authority where it finds a person has breached REMIT
- Section 10: Explains how we will cooperate with the EU Agency for the Cooperation of Energy Regulators (ACER) and other regulators following the UK's departure from the EU

1. Introduction

What do these guidelines cover?

1.1. These guidelines cover the Authority's policy in respect of REMIT enforcement. The Authority's policy on imposing financial penalties and seeking restitution for affected parties under REMIT is set out in a separate document[2].

1.2. REMIT is Regulation (EU) no. 1227/2011 on wholesale energy market integrity and transparency[3], as incorporated into UK law by the European Union (Withdrawal) Act 2018 as amended by the European Union (Withdrawal Agreement) Act 2020[4] on 1 January 2021.

1.3. REMIT includes the following prohibitions and obligations on market participants:

- Prohibition on market manipulation or attempted market manipulation
- Prohibition on insider trading
- Obligation to publicly disclose inside information in an effective and timely manner
- Obligation on market participants trading GB wholesale energy products to register with Ofgem[5]
- Obligation, to the extent required by Chapter II of the REMIT Implementing Regulation[6], to report wholesale energy market transactions, including orders to trade to Ofgem[7].

1.4. REMIT also requires persons professionally arranging transactions (PPATs) to notify the Authority without delay if they reasonably suspect that a wholesale energy market transaction might breach the prohibitions on insider trading or market manipulation. PPATs are also required to establish and maintain effective arrangements and procedures to identify breaches of these prohibitions.

1.5. Under the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 ("the 2013 Regulations"), the Authority has the power to investigate and enforce failures to comply with REMIT, including failures by PPATs to report suspicious transactions. The 2013 Regulations also give the Authority powers

[2] REMIT Penalties Statement - https://www.ofgem.gov.uk/sites/default/files/docs/remit_penalties_statement_23_june_2015_1.pdf
[3] The REMIT Regulation (EU No 1227/2011) is available here http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:326:0001:0016:en:PDF
[4] https://www.legislation.gov.uk/uksi/2019/534/made
[5] In a direction published on 4 January 2021, Ofgem has determined that, until further notice, this requirement does not apply to MPs who are registered with the NRA for Northern Ireland, or the NRA of an EU Member State. https://www.ofgem.gov.uk/publications-and-updates/direction-exempting-market-participants-obligation-register-ofgem-under-remit
[6] as incorporated into UK law by the European Union (Withdrawal) Act 2018 as amended by the European Union (Withdrawal Agreement) Act 2020 on 1 January 2021
[7] Chapter II of the REMIT Implementing Regulation (as amended) provides that the data reporting obligation shall commence in GB from the start date of any data reporting system established by Ofgem.

to impose a financial penalty, make a restitution order or issue a statement of non-compliance.[8] With effect from 1 July 2015, the Authority's investigation and enforcement powers were extended to cover the obligations to register with an NRA and to report transaction data.[9]

Status of these guidelines

1.6. The 2013 Regulations require the Authority to consult on and issue guidance on the processes it will follow when deciding whether to issue a Warning or Decision Notice in relation to a failure to comply with REMIT requirements, and when deciding whether to publicise matters to which a Warning Notice refers.

1.7. These Procedural Guidelines have been written in line with that requirement and, with effect from the date of publication, replace those previously issued on 23 June 2015. In principle, the guidelines will apply to all current and future investigations. However, if the circumstances of a particular case justify it, or our strategic objectives (set out in Chapter Two) are better met by adopting a different approach, we may depart from the general approach to enforcement set out in these guidelines.

1.8. The guidelines set out the market monitoring, investigatory and enforcement powers that the Authority has been given. They also outline the procedures that we expect to follow in exercising them. In particular, they cover:

- our regulatory objectives
- the factors that we normally consider when deciding whether to launch an investigation and what we might investigate
- the investigation process
- the decision-making processes
- the processes for deciding to issue Warning and Decision Notices and to publish information about Warning Notices, and
- how we will coordinate our REMIT market monitoring, investigation and enforcement activities with other regulatory authorities in the UK and with regulatory authorities in the European Union.

1.9. The guidelines are not a substitute for any regulation or law and should not be taken as legal advice. Persons concerned about a complaint that has been made against them should consider seeking independent legal advice. These guidelines will be kept under review and amended in the light of further experience and developing law and practice.

Governance

[8] See Regulation 26(1) of the 2013 Regulations.
[9] See Regulation 8 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) (Amendment) Regulations 2015.

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.

1.11. Decisions over whether to open an investigation are taken by the Director with responsibility for enforcement advised by the Enforcement Oversight Board[10] ('EOB').

1.12. The Authority decides whether or not a failure to comply with REMIT has occurred and whether or not to impose sanctions. However these decisions are taken with delegated authority, in settled cases, by the Settlement Committee[11] or by the Director with responsibility for enforcement, and in contested cases, by members of the Enforcement Decision Panel ('EDP') whose Chair will appoint a Panel to take decisions in individual investigations.[12]

1.13. The Authority will not seek to influence the outcome of particular matters or change any decision of the EDP or Settlement Committee. The Authority will retain oversight through its annual review of the decisions taken by EDP members. It may, if appropriate, issue further guidance to the EDP to inform future decisions.

1.14. These guidelines reflect this division of activities by referring to:

- Ofgem or 'we' when describing the monitoring and investigatory process
- the Enforcement Oversight Board or 'EOB' where decisions are taken by this body[13]
- the EDP when outlining decisions that its members take on behalf of the Authority, and
- the Authority where a particular sanction or decision has been reserved to the Authority.

[10] The EOB advises the Director with responsibility for enforcement. It provides strategic oversight and governance across our enforcement work. The members of the EOB are usually senior civil servants from across Ofgem. It is chaired by the senior civil servant with responsibility for enforcement.
[11] The Settlement Committee Terms of Reference can be found at the following location on Ofgem's website: https://www.ofgem.gov.uk/publications-and-updates/committees-authority-terms-reference-and-non-executive-membership
[12] See section 9 below for details of the EDP, as well as here https://www.ofgem.gov.uk/publications-and-updates/enforcement-decision-panel-terms-reference.
[13] The EOB provides strategic oversight and governance to our enforcement work and oversees the portfolio of cases and investigations. The members of the EOB are usually senior civil servants from across Ofgem. It is chaired by the senior partner with responsibility for enforcement.

2. Our regulatory objectives under REMIT

2.1. Our vision for our enforcement work is to achieve a culture where businesses put energy consumers first and act in line with their obligations.

2.2. Our strategic enforcement objectives, as applied to REMIT, are to:

- deliver credible deterrence across the range of our functions
- ensure visible and meaningful consequences for businesses and individuals who fail consumers and who do not comply, and
- achieve the greatest positive impact by targeting enforcement resources and powers.

2.3. Under the 2013 Regulations, the Authority can take action against individuals as well as companies or other businesses, therefore under REMIT, our enforcement vision and strategic objectives apply to each. In this document we refer to the business or individual the Authority is taking enforcement action against (or considering taking enforcement action against) as "person" or "regulated person". Failures to comply in REMIT cases refers to a failure to comply with REMIT requirements and/or other requirements imposed by the 2013 Regulations and any amendments thereof.

2.4. The Authority has other regulatory objectives that it will seek to promote when using its REMIT powers. When exercising our REMIT powers we, the members of the EDP and the Authority, will act in a manner that we consider is best calculated to:

- maintain confidence in the integrity of wholesale energy markets
- help ensure that wholesale energy market prices are set in an efficient manner
- deter failures to comply with REMIT requirements
- ensure that no profits can be drawn from REMIT breaches
- foster competition in wholesale energy markets for the benefit of final consumers of energy
- protect the interests of consumers in wholesale energy markets and of final consumers of energy, including vulnerable consumers, and
- obtain fair outcomes for those that have suffered loss or have been otherwise adversely affected by a REMIT breach.

2.5. In exercising REMIT powers we, the members of the EDP and the Authority will have regard to:

- the need to use resources in the most efficient way
- the principles of best regulatory practice, including the need to be proportionate and to ensure that any sanctions we impose are effective, dissuasive and proportionate, and

- until further notice, any non-binding guidance that may be published by ACER[14]

[14] Since the key REMIT Article 2 definitions, including the definition of 'Inside Information', 'Market Manipulation', and 'Attempt to Manipulate the Market', remain the same in REMIT as it applies in Great Britain following the UK's withdrawal from the European Union, until further notice, in carrying out its monitoring and enforcement responsibilities, Ofgem intends to continue to interpret REMIT with regard to ACER's non-binding 'Guidance on the application of REMIT'. Any departure from this position, or any additional or replacement guidance that Ofgem may publish in due course, will be clearly publicised on our website.

3. Sources of information about possible REMIT breaches

3.1. We may be alerted to possible failures to comply with the REMIT requirements in a number of ways, including:

a. through our market monitoring or our other information-gathering powers

b. through a suspicious transaction report (STR)

c. by whistleblowers

d. by complaints from the public or companies

e. by companies or individuals reporting their own conduct, or

f. following a referral from another regulator, such as the Financial Conduct Authority ('FCA'), a National Regulatory Authority (NRA) of an EU Member State, or by ACER[15]

Monitoring of wholesale energy markets

3.2. We monitor wholesale energy markets in Great Britain. Where that monitoring is for the purpose of maintaining market integrity and transparency, we can require relevant information or documents from a 'Regulated Person' (a market participant or PPAT) or a person who has at any time been connected with a Regulated Person.[16]

3.3. We also have powers to request information for market monitoring purposes under the Gas Act 1986 and Electricity Act 1989.

3.4. The Regulations oblige Regulated Persons to take reasonable steps to:

a. record all telephone conversations made for the direct or indirect purpose of entering into transactions in wholesale energy products, and

b. keep a copy of all electronic communication (email, fax, instant messaging etc) made for the direct or indirect purpose of entering into transactions in wholesale energy products.[17]

3.5. 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 that case, it will be for the employer to fulfil the obligation.

3.6. These records and copies must be retained for at least six months from the date they were created. They have to be kept in a medium that allows us to access

[15] In line with the EU-UK Trade and Cooperation Agreement (TCA), ACER, Ofgem and the Northern Irish Authority for Utility Regulation (NIAUR) has developed an Administrative Agreement (AA) that provides for, among other things, an agreement to alert each other to any suspected market abuse on each other's respective wholesale energy markets. The AA has been submitted to the EU Commission and to the UK Government for approval.

[16] Regulation 9 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

[17] Regulation 8 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement Etc.) Regulations 2013.

them in the future, should that prove to be necessary. We may impose a financial penalty for a failure to comply with this obligation.[18]

3.7. We may issue a notice to a Regulated Person requiring it to ensure that any specified relevant communications are retained for longer than six months. We will always specify a date until which it must be retained. If, during that time, we no longer require the Regulated Person to retain the communications, we will let them know and discharge the obligation to retain them. We may impose a penalty for a failure to comply with this obligation.[19]

Notification of a Suspicious Transaction Report (STR)

3.8. Any PPAT in wholesale energy products who reasonably suspects that a transaction might breach Articles 3 (prohibition of insider trading) or 5 (prohibition of market manipulation) of REMIT in Great Britain must notify us without delay. They can do so by emailing market.conduct@ofgem.gov.uk. PPATs must establish and maintain effective arrangements and procedures to help identify potential breaches. We may impose a financial penalty for a failure to comply with these obligations.[20]

3.9. STRs should include as much of the following information as possible:

a. a description of the transaction(s) and/or order(s) concerned

b. the reasons for suspecting that the transaction(s) and/or order(s) might constitute market abuse

c. the market in which the suspected breach is being or has been carried out

d. identities and roles of persons carrying out or otherwise known to be involved in the transaction(s) and/or order(s)

e. identities and roles of any other relevant persons

f. the identity of the person making the STR, and

g. any further information that may be of significance.

3.10. We know that there will be occasions when not all this information is available at the time of notification. Nonetheless a PPAT must submit an STR without delay, with as much information as they have available at the time. As a minimum the notification should explain why the PPAT reasonably suspects a transaction might constitute insider dealing or actual or attempted market manipulation. PPATs should provide any remaining information to us if it becomes available later.

Whistleblowers

[18] See regulations 8 and 26 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement Etc.) Regulations 2013.

[19] See regulations 8 and 26 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement Etc.) Regulations 2013.

[20] Regulations 4(d) and 26 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement Etc.) Regulations 2013.

3.11. We invite contact from all parties with information regarding potential breaches of REMIT, including whistleblowers. [21] Our whistleblowing policy explains what whistleblowing is and how the law protects whistleblowers. It also gives details of how to report concerns to Ofgem. The whistleblowing policy can be found here: https://www.ofgem.gov.uk/publications-and-updates/guidance-whistleblowing-ofgem.

Complaints and self-reporting

3.12. We will assess complaints from the public or companies about practices that appear to breach REMIT. We also welcome reports from individuals or companies about their own conduct.

3.13. We appreciate that the level of detail in complaints or reports will depend on the issue and who is contacting us. However, the more relevant information that is provided at the outset, the more likely it is that we will be able to deal with the complaint or report efficiently. If not all the information we need to properly assess the issue is provided, we may need to seek further information before deciding whether to open an investigation. It is therefore helpful to us for complaints or reports to be specific, well-reasoned, clear and supported by evidence.

3.14. Due to resource constraints we will not be able to enter into individual correspondence with all complainants, although we will confirm receipt of a complaint in writing.

3.15. We will analyse material provided and keep it under review to help us decide if we need to take action. If we need any further information from a complainant or reporter, we will contact them and tell them what we require. We will not usually inform the complainant or reporter of whether or not we intend to look into the matter further, especially where we consider it necessary to preserve the confidentiality of an investigation.

3.16. If you wish to make a complaint about or report a potential breach of a REMIT requirement, please contact us on market.conduct@ofgem.gov.uk.

Information received from ACER and other authorities

3.17. Following the UK's withdrawal from the EU, REMIT data concerning Great Britain wholesale energy markets is no longer reported to ACER. Nevertheless, in line with the EU-UK Trade and Cooperation Agreement (TCA), Ofgem, ACER and the Northern Irish Authority for Utility Regulation (NIAUR) have developed an Administrative Arrangement (AA) that reflects the requirements under the TCA to ensure that protections are in place to preserve market integrity and provides for, among other things, an agreement to alert each other of any suspected market abuse on each other's respective wholesale energy markets which may come to light in the course of respective monitoring and information gathering activities. The AA has been submitted for approval to the European Commission and UK Government.

[21] Our Whistleblowing Policy explains that you blow the whistle when you raise a concern about a wrongdoing, risk or malpractice that you are aware of through your work. This can be raised within your workplace as well as externally, such as to a regulator.

3.18. We may also receive information about potential abuse of wholesale energy markets in GB from the FCA, other regulators, or EU NRAs with whom we also intend to develop cooperation and information sharing agreements.

Confidential information

3.19. At times we may need to disclose information provided to us about a potential REMIT breach to the person concerned or to other parties connected to issues. Where information is confidential or the source does not wish it to be disclosed, this should be made clear and the reasons given in writing.

3.20. If a person or company thinks that any information they are giving us or that we have acquired is commercially sensitive or contains details of an individual's private affairs, and that disclosing it might significantly harm their business interests, they should submit a separate non-confidential version of the information in which any confidential parts are removed. They should also, in an annex clearly marked as confidential, set out why the information that has been removed should be considered confidential. Non-confidential versions of documents should be provided at the same time as the original document or at an alternative time as required by us. If such a version is not provided within the timescale set by us we will presume that the provider of that information does not wish to continue to claim confidentiality.

3.21. We will make our own assessment of whether material should be treated as confidential. We may not agree that the information in question is confidential. This will depend on the circumstances and will be assessed on a case-by-case basis. Any request that information is treated as confidential will be considered in accordance with the appropriate legislation.[22]

3.22. Even where information is marked as confidential or the source does not wish it to be disclosed, there may still be circumstances in which its disclosure is required. Information, including personal information, may be subject to publication or disclosure in accordance with the Freedom of Information Act (FOIA) 2000. In our handling of information, we will act in accordance with our obligations under the Data Protection Act (DPA) 1998.

[22] We will comply with section 105 of the Utilities Act 2000 and Art 9 of the Enterprise Act when deciding whether information is confidential and/or whether it should be disclosed.

4. Criteria for opening an investigation

4.1. Decisions over whether to open or to close an investigation are taken by the Director with responsibility for enforcement advised by the EOB.

4.2. 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. We will therefore first of all establish if it is a matter that we can investigate. We will then consider our prioritisation criteria for deciding whether to open (or continue) an investigation.[23]

Initial enquiry phase

4.3. Before a decision is taken to open a case, we may seek further information from a complainant or from third parties, such as other stakeholders or competitors and complaints bodies, to inform the decision.

4.4. We may also contact the person in question to seek clarification or information to help us assess whether there is sufficient evidence to pursue enforcement action. We can request this information via informal processes or via a formal request for information.[24] Prompt and appropriate responses may speed up the resolution of the issue and may, in some cases, avoid the need to take enforcement action.

4.5. In relevant cases, we will first consider whether the use of our competition law powers is more appropriate.

Prioritisation criteria for deciding whether to open (or continue) a case

4.6. This section includes non-exhaustive factors that we will normally consider in deciding whether to open (or continue) a case or issue an enforcement order.

4.7. We will make decisions on a case-by-case basis, taking account of factors such as the specific facts of the matter, the complexity of the issues, our priorities, the legal context, and our available resources.[25]

Case opening decisions

4.8. In determining whether an enforcement case is appropriate, we will have regard to our vision and strategic objectives for enforcement (see Chapter Two).

4.9. When making our assessment we will consider in each case the following criteria:

a. Do we have the power to take enforcement action, and are we best placed to act?

[23] Sectoral and Competition Act cases are covered in separate guidelines. However, when assessing the resource requirements of a potential investigation, consideration is given to other current and potential cases under all of our enforcement powers.
[24] Regulation 9 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.
[25] This is case dependant and the factors listed are those usually considered. Sometimes we may take other considerations into account.

b. Is it a priority matter for us, due to the apparent seriousness of the potential breach?

c. Is it a priority matter for us, due to the apparent behaviours or conduct of the business in question?

Do we have the power to take enforcement action and are we best placed to act?

4.10. In order to open an investigation, we must be satisfied that there are circumstances suggesting that a person may:[26]

a. have failed to comply with a REMIT requirement[27]

b. have failed to comply with a requirement in relation to recording documents and keeping copies of electronic communications

c. have disclosed information in relation to a Warning or Decision Notice without our prior consent

d. be guilty of an offence relating to the provision of documents or information required by Ofgem.[28]

4.11. Where there is a concurrent power to take enforcement action with another regulator, a decision will be made about who is best placed to act.[29] This may result in the case being referred to another regulator for investigation. Equally, sometimes other regulators will refer cases to us.

Is it a priority matter for us due to the apparent seriousness of the potential breach?

4.12. This means assessing a range of factors including the degree to which the suspected breach has caused, is causing or is likely to cause, harm to other wholesale energy market participants or consumers (financial or non-financial), to competition, or to our ability to regulate effectively. The latter is important for breaches that, if confirmed, would harm our ability to regulate or could lead to a loss of confidence in the regulator if businesses or individuals do not face meaningful consequences in respect of conduct in breach of REMIT. We will also consider the risks involved in pursuing the case and the potential resources required.

4.13. We will also take account of the extent to which the person may have benefitted (financially or otherwise) from the suspected breach/es and the need to deter future poor behaviours or conduct, both by the person in question and others across the market.

Is it a priority matter for us, due to the apparent behaviour or conduct of the business in question?

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[26] One investigation may cover multiple potential breaches, of the same or different types.
[27] REMIT Requirements are defined in Regulation 4 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013
[28] The offences are set out in regulation 20 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013. They are not within the scope of these Procedural Guidelines. When dealing with criminal cases we will follow, where applicable, the 'Code for Crown Prosecutors' issued by the Crown Prosecution Service.
[29] See further at paragraphs 2.31-2.35.

4.14. Our assessment will include whether the alleged breach appears to be deliberate, reckless, or might constitute a repeat offence. We will also consider whether the behaviour or conduct is something we want to discourage across the market and hence the deterrent signal that opening a case will provide. In making this assessment we will consider the compliance record of the business and any history of similar breaches, including any that in isolation may not have been considered serious enough at the time to justify opening a new case.[30]

4.15. We will also consider whether the person self-reported the alleged breach, and if so whether it did so promptly, accurately, and comprehensively, whether it is taking timely action (or has already acted) to put matters right and to avoid repeat breaches.[31] We are more likely to open an investigation if the breach is ongoing but may also take enforcement action if the person is no longer in breach.

Alternative action

4.16. In certain circumstances, rather than open a formal investigation, Alternative Action may be used as an alternative to formal enforcement action. Alternative Action can be used in lieu of opening an investigation into a potential breach, but also as part of closing a formal investigation or during an investigation to address ongoing concerns.

4.17. For certain cases, Alternative Action has the potential to rectify malpractice and secure voluntary redress payments and/or compensation for affected parties more swiftly than formal enforcement action. This can bring benefits to Ofgem, Market Participants and consumers. In deciding whether Alternative Action is appropriate we will have regard to our prioritisation criteria for opening an investigation, where appropriate (see paragraphs above). As with any decision to open an investigation, a decision to pursue Alternative Action would be taken by the Director with responsibility for enforcement, advised by the EOB.

4.18. Alternative Action remedies may include, but are not limited to: non-statutory undertakings or assurances to ensure future compliance; independent audits of conduct and/or voluntary action to remedy any concerns; or an admission of a breach of REMIT, publicised through a Press Notice and, if appropriate, more detail in a Compliance Notice. Any one of these remedies could also include redress payments to affected parties and/or payments to the Consolidated Fund[32] or the voluntary redress fund[33].

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[30] For energy supply licensees this could include an assessment of complaints registered with them, Citizens Advice Consumer Service, the Citizens Advice Extra Help Unit (EHU) (which has a remit to support vulnerable consumers or the Energy Ombudsman.

[31] Suppliers are obligated under the SLC 5A of the gas and electricity supply licences to report actions or omissions that give rise to a likelihood of detriment to Domestic Customers. A failure to do so may constitute a contravention of the supply licence.

[32] In terms of regulation 34 of the Regulations, any sums received by way of penalty under the Regulations, shall be paid to the Consolidated Fund. Where we proceed by way of Alternative Action, we may agree that any sums paid to the Authority under the terms of that Alternative Action will be paid to the Consolidated Fund.

[33] We have appointed an expert independent third party to manage the allocation of voluntary redress payments [from licensees] to charitable organisations. Authority guidance on the allocation of redress funds | Ofgem.

5. Investigation Process

5.1. This section describes how the investigation process works, following the decision that an investigation should be opened.

Notifying the person under investigation

5.2. When we decide to open an investigation, we will generally write to the person being investigated. However, we will not notify the person under investigation if we consider that providing written notice would be likely to adversely affect the investigation, or if there is any other reason that we consider that it would be inappropriate to do so.

5.3. Where we notify the person under investigation, we will give as full details as possible of the focus of the investigation. We will provide contact details of the person who will be the main point of contact at Ofgem during the investigation. Any specific queries should be addressed to the Ofgem contact. The name of the Senior Responsible Officer (SRO) in the case will also be provided to the company. If a person wishes to raise any procedural issues during the course of the investigation, these should be taken up with the SRO.

5.4. The initial subject of the investigation may not be the perpetrator of the breach. When an investigation is first opened, we may not know the identity of the potential perpetrator. In these cases, when we ask people for information or documents to assist us, we will give an indication of the nature and subject matter of the investigation. Where we gave written notice of an investigation to a person but we later decide to discontinue the investigation without any intention to take further action, we will tell the person concerned as soon as it is appropriate to do so, bearing in mind the circumstances of the case.

Timescale for carrying out an investigation

5.5. We aim to carry out investigations as quickly as possible. Our investigations vary enormously in type, complexity and size. Where possible, we will provide the person under investigation with updates as the investigation progresses.

Making an investigation public

5.6. We will not normally make a public announcement when we open a REMIT investigation. However, a public announcement may be appropriate in cases where (but not limited to) we consider that we need to:

- Inform Market Participants, consumers and / or the market more generally about the investigation and the work we are doing.
- Maximise the deterrent effect of enforcement action by encouraging industry compliance.
- Identify additional evidence.

Information gathering

5.7. Where we have opened an investigation, we can gather information through different means. When appropriate, we may ask for information or documents voluntarily, but we also have powers to compel their provision. We may issue

notices requiring the production of information or documents, or requiring a person to attend an interview and answer questions. We may also require a report to be produced. Further details on each of these are given below.

5.8. We will take very seriously any failure to provide documents or information that we require to be provided. Where we consider that a person has failed to comply with such a requirement, we may certify that fact in writing to the court. If the court is satisfied that the person failed to comply without reasonable excuse, it may deal with the person as if they were in contempt.

5.9. Delays in the provision of information can have an impact on overall timescales for the investigation. We expect stakeholders to respond within deadlines to the notices served upon them. It is therefore important that recipients of information notices tell us as soon as possible if they have good reason to believe that they will be unable to supply the required information or documents at the specified time. If the reasons justify it, we may extend the deadline.

5.10. In conducting any investigation, we will comply with applicable requirements governing the admissibility of evidence.

5.11. We will uphold our obligations regarding confidential information, and will only disclose such information where:

a. we have permission to disclose

b. we are required to by law (e.g. under court order), or

c. where disclosure is sanctioned by law.[34]

5.12. The Regulations created a number of criminal offences related to our information gathering powers. A person who knows or suspects that we are or are likely to conduct an investigation using our REMIT powers is committing a criminal 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 us in response to a notice that he knows to be materially false or misleading is also committing a criminal offence. In each case the person is potentially liable to fines and/or imprisonment.[35]

Requiring the production of information or documents

5.13. Where we have opened an investigation, we may issue a written notice requiring any person to provide relevant specified information or specified documents.[36] This may include written documents, emails, computer hardware and telephone and data traffic records. We will not and cannot ask for protected items such as documents that are legally privileged.[37]

5.14. When we issue such a notice we will set out a reasonable deadline for the information or documents to be provided. In setting this deadline, we will take account of the volume and complexity of the information or documents requested and any public holidays that may fall within this period.

[34] See paragraphs 3.19-3.22 on confidential information.
[35] See regulation 20 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.
[36] See regulations 11 and 52 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.
[37] See regulation 52 for the full definition of a protected item.

5.15. The recipient of the notice must at a minimum comply with the terms set out in the notice, but may also provide us with further information that they believe is relevant to our investigation.

5.16. We may also specify the form in which the information or documents is to be provided and may require it to be verified or authenticated. Further, we 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, we may require that person to state, to the best of his knowledge and belief, where the document is. Where we have 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.

5.17. Finally, we will always be as clear as possible in setting out the information and documents that we require. But we will always provide a contact name so that the recipient can ask questions. We may issue more than one notice during an investigation. However, we will aim to avoid requesting the same information more than once without good reason.

Interviews

5.18. Where an investigation is open, we can require any person who may be able to give information relevant to the investigation to attend an interview at a specified time. We can then require them to answer questions related to the investigation. If it is necessary, we can specifically require that a person gives us all assistance in connection with the investigation that the person is reasonably able to give.

Reports

5.19. Where an investigation is open, we may require a market participant or a PPAT (or fellow members of their group or partnership) to prepare a report for us. We will need to approve the person appointed to do this, who will need to have the appropriate skills. We could also appoint a suitably skilled person ourselves to prepare such a report. The person appointed to prepare the report must be given such assistance as he may reasonably require. If necessary, we may seek an injunction to ensure that this happens.

Entering and searching premises

5.20. We have the power to enter and search premises under a warrant, and to remove documents and other forms of information.[38] In order to use this power, we must first seek a warrant from a Justice of the Peace ('JP').[39] If granted a warrant, we must use it within one month.

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 notice or that any document or information which we could require in an information notice would be removed, tampered with, concealed or destroyed.

5.22. The warrant will authorise us to:

[38] See regulation 16 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.
[39] References to JP in this document include a sheriff in Scotland.

a. enter and search the premises specified in it

b. take such other persons as we consider are needed to assist us in doing anything the warrant authorises us to do (for instance, police constables)

c. 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)

d. take copies of, or extracts from, any relevant documents or information

e. 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, and

f. use such force as may be reasonably necessary.

5.23. On arrival at the premises we will produce the warrant. This will specify as far as possible the documents and/or information we are looking for. We will also provide documentary evidence that the officials who are conducting the inspection have been properly authorised to do so.

5.24. Before starting the search, we will allow a reasonable period of time for a legal representative of the owner or occupier of the premises 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. We will make a written record of:

a. the date and time of entry onto the premises

b. the number and name of all the officials involved in the inspection

c. the period for which the officials remained on the premises, and

d. all documents (including information recorded in any form) that we take possession of while there.

5.26. If there is a dispute during a search as to whether communications, or parts of communications, are privileged, we may request that the communications are placed in a sealed envelope or package. We will then arrange for safe-keeping of these items by us pending satisfactory resolution of the dispute.

5.27. We 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. We 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, we will arrange for items to be returned as soon as reasonably practicable.

5.29. We may wish to visit multiple sites at one time or to visit a particular site on more than one occasion. We may wish to search persons 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 we suspect they have been concealing documents there).

5.30. Searches will occur during reasonable hours unless we think that that the purpose of a search may be frustrated on an entry at a reasonable hour. We will seek to minimise disruption to persons whilst 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 our rights under a warrant is guilty of an offence liable on summary conviction to imprisonment or a fine.[40]

The Summary Statement of Issues Letter

5.32. In most cases where an investigation has been opened, when we have concluded our assessment of the evidence, and we continue to consider that a breach of REMIT has occurred, we will serve the person under investigation with a Summary Statement of Issues Letter (the SSIL).

5.33. The SSIL will set out the breach or breaches that we consider have been committed and/or that may be ongoing, our conclusions about the detriment and/or gain, and other appropriate matters.

5.34. We will allow a reasonable period (normally 28 days) for written representations in response to the SSIL. We may grant an extension to this deadline and will consider in a timely manner whether this would be reasonable on a case-by-case basis.

5.35. The purpose of these steps is not to negotiate, but for us to understand the person's position on the SSIL. After considering any written or oral representations, we may decide that there is insufficient evidence of a breach and may close the case. Alternatively, we may retain a reasonable suspicion that a breach has occurred but consider that it is necessary to amend our initial findings and prepare a Supplementary SSIL. In these circumstances, we will provide it to the person and offer a further opportunity to make written representations.

5.36. Following receipt of the person's response to SSIL, or any Supplementary SSIL, we will decide how to progress the case. More information on how we conclude cases is set out in Chapter 7 'Concluding a Case – Settlement' and Chapter 8 'Concluding a Case – Contest'.

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

6. Seeking Injunctions

6.1. We may, at any stage after becoming aware of a possible breach of REMIT, seek a court order (or interdict in Scotland) either restraining a person from doing something or directing them to take certain action.[41] When deciding whether to make an application to the court, we will always consider the circumstances of the case. We will also look at any relevant factors, such as:

a. the strength of evidence to suggest that the individual or group of individuals has engaged in market abuse

b. the previous disciplinary record and compliance history of the individual or group of individuals, and

c. 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.

6.2. We will seek an injunction where we believe it is the most effective way to promote our regulatory objectives. In deciding whether this is the case, we may consider factors, such as

a. the nature and seriousness of a breach or expected breach

b. the extent of loss, risk of loss or other adverse effects on consumers

c. the impact or potential impact on wholesale energy markets

d. the likelihood that a failure to comply may continue or be repeated

e. whether there are steps a person could take to remedy a breach or provide redress

f. the costs that we would incur in applying for and enforcing an injunction and the benefits that would result

g. whether there is a danger that assets might be dissipated

h. the extent to which another regulatory body can adequately address the matter, and

i. whether the conduct in question can be adequately addressed by other means, for example a statement of non-compliance or financial penalty.

6.3. We 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 us a penalty of such an amount as it considers appropriate. We will not use our own powers to impose a financial penalty if the court has already imposed a financial penalty in respect of the same matter.

6.4. The sections below set out the four types of injunction that we may ask the court to make.

Restraining a failure to comply

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

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

6.6. This power may be used where a court is satisfied that:

a. 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

b. 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,

Temporary prohibition of professional activity

6.7. The court may issue an order to prohibit, temporarily, professional activity, such as prohibiting a PPAT from arranging transactions. We may consider seeking such an order where we have serious concerns about the honesty, integrity or competence of an individual or group of individuals in respect of their compliance with REMIT.[42]

6.8. This power may be used where 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

6.9. The court may issue an order restraining a person from disposing of, or otherwise dealing with, any of its assets. We may seek such an injunction where we have 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.

6.10. In these cases, we 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.

[42] For example, but not restricted to, providing the Authority with false or misleading information.

7. Concluding a case - Settlement

7.1. This section explains how we conclude an investigation via our settlement procedure.

7.2. Following the information gathering and analysis period of the investigation (as set out in Chapter 5), we will decide how to conclude the investigation. At this stage, we may decide: not to take any action; to conclude the case by way of Alternative Action (as described in Chapter 4); and / or to seek an injunction (as described in Chapter 6). However, for the Authority to make a formal finding of a REMIT breach there are two routes:

a) Settlement – where this is appropriate; or

b) Contest – where settlement is not appropriate, or where we have not been able to agree settlement with the person under investigation.

7.3. The settlement procedure is described in the sections below. The contested procedure is described in Chapter 8.

What is Settlement?

7.4. The settlement procedure enables us to work with the person subject to the investigation to bring the case to an early resolution by agreement. To settle a case, the person under investigation must be prepared to admit to the breach(es) that have occurred. The settlement will lead to a finding of breach. The person will be expected to agree with this finding and to any penalty, statement of non-compliance and/or restitution order.

7.5. The person will also be expected to agree not to refer to the Upper Tribunal (Tax and Chancery Division) any finding of breach, penalty, statement or restitution order that is agreed to as part of the settlement.

7.6. It is important to appreciate that settlement in the regulatory context is not the same as settlement of a commercial dispute. An Ofgem settlement is a regulatory decision taken by the Authority the terms of which are accepted by the person under investigation. We will have regard to our regulatory objectives when agreeing the terms. Some investigations we will not think appropriate to settle.

7.7. Settling does not reduce the seriousness of any breach. It may, however, result in a lower penalty than would likely be imposed if the matters were contested, and the case will be dealt with more quickly.

7.8. Settlement is a voluntary process. There is no obligation on persons to enter into settlement discussions or to settle. Any decision to settle should be based on a full awareness of the requirements of settlement and the consequences of settling, including that a finding of breach will occur. Persons considering settlement should consider whether to obtain legal or other advice before settling a case.

7.9. The fact that we have settled a case with a person does not prevent us from taking future action if further breaches occur, or if the actions agreed with the person to reach settlement are not carried out.

7.10. Persons under investigation may ask to enter settlement discussions at any stage (including prior to the SSIL), and whilst we will engage positively with a person that indicates a willingness to enter into early settlement discussions, in many cases it may not be possible to start such discussions until we have sufficient information to assess the nature and extent of the breaches and the loss or harm caused. To speed up our investigations, we may ask persons to cooperate with us by providing information in the meantime.

7.11. We expect persons to take appropriate steps to secure compliance irrespective of the stage at which an investigation is at. We also expect persons to take a proactive approach to restitution, where restitution is possible and appropriate. The fact that a person has not completed such steps will not be a bar to settlement discussions taking place, so long as the person has shown a commitment to resolve the outstanding issues. If actions are agreed and not carried out, enforcement action may be undertaken.

Deciding whether a case is suitable for settlement

7.12. When we have considered the person's response to the SSIL, and any supplementary SSIL (described in Chapter 5), we will consider whether the case is suitable for settlement. Our view of whether a case is suitable for settlement will be informed in part by the attitude to settlement of the person under investigation. To inform this view, we may require that the person under investigation indicates in writing its willingness to enter into settlement discussions with a view to seeking a settlement mandate. We would normally expect the person to provide this indication within four weeks of the date of its written response to the SSIL. According to the circumstances of the case, by exception, we may agree to extend this timeline.

7.13. There may be cases where we do not consider that settlement is appropriate even where the firm or individual indicates that they wish to enter into settlement discussions. In those cases, we reserve the right to depart from the procedures set out in this section. A firm or individual has no "right" to the processes set out in this section and we may decide to take enforcement action in a different manner depending on the circumstances of a case or behaviour at issue. If our strategic enforcement objectives are better met by adopting a different approach, we may depart from the general approach to settlement and contest set out in these guidelines.

7.14. If we consider that the case is suitable for settlement and it would be appropriate to seek a settlement mandate from the Settlement Committee or the Director with responsibility for Enforcement (see section on Settlement Decisions below), the Ofgem case team may engage in settlement discussions with the person, in advance of seeking the mandate, to explore what terms of settlement could be reached. However, it is for Settlement Committee or the Director with responsibility for Enforcement to consider and decide whether they consider that the person has breached REMIT and on the terms of settlement that the Authority will offer.

7.15. Settlement discussions will be conducted through a method which is suitable for both parties. We will often suggest that a Case Direction Meeting would be an appropriate forum for this but settlement discussions can also take place in other ways[43]. Settlement discussions will take place on a "without prejudice" basis. This means

[43] This may include letter, email, face to face discussion, telephone or video link or similar technology.

that if discussions break down, neither party can rely on admissions or statements made during the settlement discussions in any subsequent contested case.[44] Nothing that is said by the case team in settlement discussions can fetter the discretion of the decision maker in the case.

7.16. The aim of discussions will be to allow the decision-maker to consider the person's position and then to offer terms of settlement including on the wording of any warning, decision, final notice, restitution notice or statement and to provide an opportunity for the investigated person to comment on the draft press notice.[45] We may also offer and agree other terms with the person as part of a settlement.[46]

Settlement Decisions

7.17. There are two decision-making options for settling cases:

a) The formation of and decision by a Settlement Committee;[47] or

b) The Director responsible for Enforcement makes the settlement decisions for the case or delegates another Ofgem Director to act on their behalf.

7.18. The EOB will advise, and the Director responsible for Enforcement will decide, on the appropriate decision-maker on a case-by-case basis.

7.19. Where the decision is made to conclude the case via the formation of a Settlement Committee, the names of the members of the Committee will be provided to the person in writing by the EDP secretariat or the Ofgem case team. Our Settlement Committee Terms of Reference have been published on the Ofgem website.[48]

7.20. In order to reach its decision, the relevant decision maker will be presented with all of the relevant facts about the case, including the SSIL, Supplementary SSIL, the

[44] If for any reason a company that has entered into settlement discussions chooses to reveal to the Panel dealing with the contested case any of the detail of the settlement discussions, we reserve the right, similarly, to reveal information (including any admissions) that were made during those discussions if we consider that it is appropriate to do so.
[45] This means that (unlike in contested cases) we will seek to reach agreement with the company on the wording that will appear in the warning, decision and final notice, any restitution order and any statement. There will be an exchange of press notices and an opportunity for the parties to comment on the content before they are published. The final decision as to what we publish will be made by us.
[46] For example, other terms of settlement may include the possibility of paying a sum of money in lieu of (or in addition to) a financial penalty, to appropriate charities, trusts or organisations for specific activities. We have published guidance which provides information on the current process and the set of principles involved in allocating voluntary redress payments in this respect, in the context of enforcement investigations conducted under the Gas Act and the Electricity Act. This guidance is available at https://www.ofgem.gov.uk/publications-and-updates/open-letter-guidance-allocation-voluntary-redress-payments for further information.
[47] This includes Ofgem staff at equivalent or higher grades than Director.
[48] Committees of The Authority - Terms of Reference and Non-Executive membership | Ofgem.

person's formal response to both documents (if appropriate), and any other documents the case team considers appropriate.

7.21. As well as deciding whether a breach has occurred, and on the terms of settlement that the Authority will offer, where a breach is found to have occurred, the decision maker will approve, in principle, the content of the Warning Notice, the Decision Notice and the Final Notice. These are the legal documents necessary to conclude the case. More information on these notices is provided in Chapter 8 'Concluding a Case – Contest', however in settled cases the timeline for the publication of these documents may differ from the timeline indicated in that chapter, in line with any settlement agreement.

Settlement Discount

7.22. In recognition of the benefits of settlement, in line with our REMIT Penalties Statement, as part of the settlement agreement, we may offer a discount on the penal element of any settlement.

7.23. The Authority has provided for one settlement window, and one settlement discount, as follows:

- **30 percent discount:** This will usually be the only offer of discount available and settlement must be achieved within the settlement window in order for the person to benefit from it.

- **The settlement window opens when the settlement mandate, including any relevant notice (decision or final) and press notice are provided to the person.**

- **The settlement window closes on expiry of a reasonable period (usually 28 days) which will be notified to the person when the above documents are provided.** The settlement window may be reopened at the Authority's discretion in exceptional circumstances, however if the settlement window is reopened there is no guarantee that a settlement discount will remain available.

7.24. If a person wishes to take advantage of the settlement discount, it will have the duration of the settlement window to agree and sign the settlement agreement. This agreement is subject to the settlement processes set out in this section and there will be no extension to the deadline that we set, except in exceptional circumstances.

7.25. If, after settlement discussions, an agreement cannot be reached between the person and the case team within the settlement mandate (for example because new material has come to light during the discussions), the case team may, in exceptional circumstances, go back to the decision-maker to seek a revised mandate.

7.26. If settlement is agreed within the terms of the mandate given by the Settlement Committee or Director, the person will have to sign a settlement agreement. The settlement decision will be made and the relevant notice (decision and / or final),

statement and/or restitution order will be published in accordance with the statutory requirements[49]

7.27. If a settlement cannot be reached, and we continue to consider that a breach of REMIT has occurred, the case will move to the contested route. The EDP members of any Settlement Committee cannot be part of the EDP contest panel if they have been on an earlier Settlement Committee that has considered the same case.

[49] See Regulation 39 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

8. Concluding a Case – Contest

8.1. This section explains how we conclude an investigation via contest.

8.2. If a settlement cannot be reached, and we continue to consider that a breach of REMIT has occurred, the case will move to the contested route. Prior to starting the contest procedure, first we will normally issue the person with a Full Issues Letter (FIL), and in all cases, will provide the person with a disclosure of all the evidence we will rely on in the contest hearing.

The Full Issues Letter

8.3. If the case is not settled, we do not consider that settlement is appropriate or where the person does not want to settle the case we will normally issue a FIL. The FIL will be accompanied by an evidence bundle of documents to support our findings and the other relevant content within the FIL.

8.4. In some cases, the FIL may be substantially different from the SSIL. In other cases, where the facts of the case have already been fully established in the SSIL, the FIL may be unchanged from the SSIL. New breaches may be added, and different reasons relied on. We may also request further information from the persons before drafting the FIL.

8.5. We will usually write to the person to advise it that the FIL is being drafted and provide an updated timeline for the case. When the FIL is ready we will send it to the person and notify them of the deadline for any written representations.

8.6. The person's written representations will be invited on the FIL, and we may invite the person to attend a case direction meeting for discussions to take place. We will also disclose any relevant documents.

8.7. If the case is to be contested, we will inform the EDP secretariat so that a Panel can be selected to deal with the case.[50]

<u>Disclosure</u>

8.8. Along with the FIL, we will disclose a list of all the documents that we will rely on. Many of them are likely to be documents that the person has already provided to us during the investigation. However, we will produce copies of any other documents on which we rely that are reasonably requested by the persons, subject to any legal restrictions on disclosure including questions of confidentiality and privilege.[51]

8.9. In some cases, we may rely on information contained in confidential documents. In these cases, our disclosure list will note the reference number/name of the documents where full disclosure is not possible. It may be necessary to limit the description of the documents themselves. We will explain the alternative arrangements, which will allow the recipient to review the evidence on which we rely. Typically, this will mean that confidential material will be removed so that

[50] The decision-making structure is described in Section 3.
[51] Material may be redacted where appropriate.

confidence is maintained. Other arrangements may sometimes be required, for example, a confidentiality ring.

8.10. We will also disclose, by list, documents in the knowledge or possession of the case team or the relevant policy team, which might undermine the case advanced in the FIL. Again, we will note the reference number/names of those documents where full disclosure is not possible and the alternative arrangements that will be made. Privileged documents may be listed by class and will not be disclosed.

Written representations

8.11. Making written representations in response to the FIL is the persons' opportunity to provide further information, including any challenge, in relation to the case made against it. The persons should submit any evidence it has to support its representations. There is no obligation to submit a response, but persons should note that there are restrictions on introducing new material in any subsequent oral hearing.

8.12. We will usually allow 28 days for a person to respond to a FIL, however this may be more or less time depending on the case.

8.13. Once we have received any written representations and supporting evidence from the persons, we will review the material and our case. This may lead to us deciding that issues raised may no longer be of concern and we may close the case or withdraw from parts of it. It may lead to us making further requests for information to the persons or replying to the persons' representations.

8.14. If there is a material change in the nature of the breaches in the light of the written representations, we may prepare a Supplementary or Revised FIL. The persons will be given an opportunity to respond in writing to the new document. We will usually allow a further 28 days for this but may shorten or extend the time if it appears reasonable to do so in a particular case.

8.15. If there are difficulties in meeting any deadline, a request for an extension should be made in writing by email to the Ofgem contact (or in urgent cases by telephone and email or via a video link or similar technology).

8.16. If a person has not requested the opportunity to make oral representations to the decision-making body (the Panel) and the case is to be decided by consideration of the written representations only, the EDP Secretariat will issue a notice to the persons informing it of the relevant deadlines.

8.17. Once the written representations to the FIL have been received, it will be decided whether a supplementary FIL is required. Once all written representations (FIL/supplementary FIL) have been received the case will be passed over to the Panel. All future deadlines and arrangements will be made via the EDP Secretariat and will no longer be the responsibility of the case team.

8.18. Having reviewed the written representations and considered whether the person has requested the opportunity to make oral representations, the EDP will determine whether it wants to hear oral representations from the parties. The EDP secretariat will tell the parties whether there will be a hearing. If there is a hearing it will be for the person under investigation to decide if it wants to make any representations.

The Enforcement Decision Panel

8.19. In contested cases, 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 taken by Panels made up of people drawn from the EDP.[52] The EDP consists of a pool of members who are employees of the Authority, one of whom is appointed as the EDP chair.

8.20. EDP members are independent from the investigation team. Decisions on finding breaches, imposing sanctions and publishing information about Warning or Decision Notices will therefore be taken by people who have had no direct involvement in establishing the evidence on which the decision is based.

8.21. Contested cases are decided by a decision-making Panel of usually three members appointed from the EDP by the EDP chair. A Panel is constituted as and when required to deal with a particular case. There will be a Panel Chair who will chair the decision making discussions, and who has the casting vote in the event of a deadlock. The identity of the Panel members will be notified to the parties in writing by the EDP Secretariat.

8.22. The EDP Secretariat is independent of the investigation team. It liaises with the parties on behalf of the Panel. The Panel, or its individual members, should not be contacted directly by any party or their representatives outside of any oral representations.

Warning Notices

8.23. The EDP Panel will decide, after considering the investigation team's recommendations, on whether to issue a Warning Notice and whether to publicise any matters that relate to it. The Panel will have access to any written representations made in response to the Issues Letter. The Panel will then decide whether or not to issue a Warning Notice and whether or not to publish any matters that relate to it.

8.24. The Panel 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. The Warning Notice will include the extent of any person's right to access Authority material, as well as the following:

a) for a proposed financial penalty, it will specify the amount of the proposed penalty

b) for a restitution order, it will specify the proposed amount that the person is required to pay or distribute, and

c) for a statement of non-compliance, it will set out the terms of the statement.

[52] This is with the exception of applications to the court for a restitution order, which is reserved to the Authority.

8.25. If any of the reasons underpinning the decision to issue a Warning Notice 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 Panel, is prejudicial to that third party, the Panel will, where practicable, give the third party a copy of the notice. This is unless the Panel is separately giving that third party a Warning Notice in relation to the same matter.

8.26. Neither the Panel nor those to whom Warning Notices have been given or copied may publish them. We may impose a penalty for improper publication of the Warning Notice or any details concerning it. However, where the Warning Notice proposes a financial penalty or a statement of non-compliance, the Panel may decide to publish such information relating to the matters contained in the Warning Notice as it considers appropriate. If Panel does so, a person to whom the Warning Notice has been given or copied may publish the same details.[53] If the Panel wishes to publish information about a Warning Notice proposing a financial penalty or a statement of non-compliance, it will first consult those to whom the notice was given or copied.

8.27. The Panel may not publish information about a Warning Notice if, in its opinion, publication would be:

a) unfair to the person against whom action is proposed

b) prejudicial to the interests of consumers, or

c) detrimental to the stability of the wholesale energy markets in Great Britain.[54]

8.28. The Panel will consider any response to our proposal to publish information about a Warning Notice. A person seeking to demonstrate potential unfairness from publication should 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 a likely consequence of publication).

8.29. Decisions to publish information about the matter to which a Warning Notice relates will not be taken by the persons who have proposed publication[55]. Consequently where the Panel recommend information of this nature should be published, the decision whether or not to do so will be made by a member of the EDP who does not sit on that Panel. This is in line with the need to form an independent view of the proposals to publish.

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[53] 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.

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

[55] 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).

8.30. The Panel must allow at least 14 days for the person to make representations about the proposals in the Warning Notice. It may allow more, taking account of any bank or other public holidays that may fall within this period. It may also extend the period for making representations. But it will require a clear and reasonable case to be made for this.

Oral representations

8.31. Once the Warning Notice has been served on a person, that person under investigation will have an opportunity to make oral representations to the Panel at a hearing. The person will be asked to indicate in the written response to the Warning Notice whether they wish to exercise this option.

8.32. 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 Panel will be arranged. Where a firm is under investigation, we would normally expect senior members of its management team to be present. The person under investigation may have legal representation at oral hearings.

8.33. Even where a person has not requested the opportunity to make oral representations, we may do so. The Panel may also invite further representations, in any case, if it needs further clarification on the papers. It may request that these clarifications are made orally. It cannot compel attendance, so it will always be possible to submit clarifications in writing.

8.34. Save in exceptional circumstances, neither we nor the person under investigation should introduce any new material during oral representations. The agreement of Panel will be required before new material is introduced.

8.35. The form and duration of the oral hearing will be determined by the Panel taking account of all the circumstances of the case. The EDP Secretariat will fix the date taking into account the parties' availability. It will aim to find a date convenient to all parties where possible.

8.36. At least 28 days prior to the fixed date, the Panel will issue directions in writing to the parties concerned via the EDP Secretariat, indicating how it intends to conduct the hearing. The parties may make written representations on the directions about the hearing within the time period set out in the directions (at least seven days). If the parties raise any issues, these will be resolved on the papers and the decision notified to the parties in writing.

8.37. Where a person has exercised the option to make oral representations, only those members of the EDP who were present at the hearing will be involved in deciding whether to issue a Decision Notice in relation to the case.

Decision Notices

8.38. After receiving and considering any representations (written and/or oral) on a Warning Notice, and any views from the investigations team, the Panel will then decide, within a reasonable period, whether to impose a financial penalty, publish a statement of non-compliance, and/or or make a restitution order. It will also hear the investigation team's recommendations on the matter.

8.39. If the Panel decides to impose a financial penalty, publish a statement of non-compliance and/or to make a restitution order, it will issue a Decision Notice. This Decision Notice will be sent to the person in relation to whom the powers are being exercised. A copy will also be given to any third party to whom the Warning Notice was copied.

8.40. All Decision Notices 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.

8.41. A Decision Notice imposing a financial penalty will also set out:

a) the amount of the penalty

b) the manner in which and the date by which the penalty must be paid, and

c) how the penalty will be recovered if it is not paid by that date, including any interest charges that may be payable.

8.42. A Decision Notice confirming the making of a restitution order will also set out:

a) the amount that the person is to pay or distribute

b) the persons to whom that amount is to be paid or among whom that amount is to be distributed, and

c) how the payment or distribution is to be made and the time period for doing so.

8.43. A Decision Notice issuing a non-compliance statement will also set out the terms of the statement.

8.44. The Decision Notice must impose sanctions made under the same regulation as that proposed in the Warning Notice. However, if after considering representations on the Warning Notice the Panel decides to impose sanctions in respect of the same matter that differ from those originally proposed, it may, before it takes the action set out in a Decision Notice, give the person concerned a further Decision Notice. In this case, the Panel must obtain the consent of the person to whom the original Decision Notice was sent. The right to make a reference in respect of any further Decision Notice will be the same as for the original Decision Notice.

8.45. The person receiving a Decision Notice must not publish the notice or any details concerning it, unless we have done so first. We may impose a penalty for improper publication. The Panel must publish such information as it considers appropriate about the matters contained in a Decision Notice. However, it may not publish such information if, in its opinion, publication would be:

a) unfair to the person against whom action is to be taken

b) prejudicial to the interests of consumers, or

c) detrimental to the stability of wholesale energy markets.

8.46. If the Panel wishes to publish information relating to a Decision Notice, it shall first consult the person against whom the action is to be taken in order to obtain their views on the factors listed in the paragraph above. The Panel 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 8.23-8.37).

References

8.47. If the Panel 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 refer the decision to the Upper Tribunal (Tax and Chancery Division).

8.48. 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 Panel in relation to him.

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

8.50. If a financial penalty decision is being referred, 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.

8.51. If a person is referring a decision to issue a restitution order, the Tribunal must either dismiss the reference 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:

a) issues of fact or law

b) the matters to be, or not to be, taken into account by the Authority in making the decision, and/or

c) the procedural or other steps to be taken by the Authority in connection with making the decision.

8.52. The Authority must comply with any directions given to it by the Tribunal. For example, if the Tribunal (or the court following an appeal of a Tribunal decision) directs the Panel to take different action to that set out in the Decision Notice, the Panel will issue a further Decision Notice accordingly.

8.53. 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

8.54. If the Panel decides not to take the action proposed in a Warning or Decision Notice, it will give a Discontinuance Notice to the person concerned. It will also send a copy to any third parties to whom the Warning or Decision Notice was copied.

8.55. A Discontinuance Notice will identify the proceedings that are being discontinued. It will confirm that they are being discontinued, and it will state that if the person to

whom the Notice is given consents the Panel may publish such information as it considers appropriate about the matter. Consent for publication will also be required from any third parties to whom the notice is copied, in so far as the material to be published is relevant to those persons. Prior to publication we will also give consideration to whether any material is confidential.

Final Notices

8.56. If the Panel has given a person a Decision Notice and the matter is not referred in the time period given by the Tribunal, the Panel will issue a Final Notice. A copy of the Final Notice will also go to any third party who received a copy of the Decision Notice. The Final Notice is the point at which the Panel will take the action set out in the Decision Notice.

8.57. If the matter is referred to the Upper Tribunal and the Tribunal upholds the Panel's decision, the Panel must issue a Final Notice. If, however, the Tribunal (or the court following an appeal of a Tribunal decision) directs the Panel to take different action to that set out in the Decision Notice, the Panel will issue a further Decision Notice. All such notices will be given to the person concerned and to any person to whom the original Decision Notice was copied.

8.58. 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). If all or any of the amount of the penalty is outstanding at the end of the period that was allowed for payment, we may recover the outstanding amount as a debt due to us.

8.59. 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. If all or any of a required payment or distribution has not been made at by the specified date, the obligation to make the payment is enforceable on the application of the Authority for an injunction or, in Scotland, by an order of the Court of Session.

8.60. The specified date for payment of a penalty or of restitution must be at least 14 days from the date of the Final Notice.[56] The Panel may give more time, taking account of any bank or other public holidays that may fall within this period.

8.61. 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.

8.62. The Panel must publish such information about the matter to which a Final Notice relates as it considers appropriate. However, it may not publish information relating to a Final Notice if, in its opinion, publication would be:

a) unfair to the person against whom action is proposed

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

b) prejudicial to the interests of consumers, or

c) detrimental to the stability of the wholesale energy markets in Great Britain.

Access to Authority material

8.63. Any Warning or Decision Notice must set out the extent to which the person receiving it may access the material on which the Panel relied in deciding to issue the Notice. It will also set out the right of access to any other material it considers might undermine that decision. Any third party to whom a Notice is copied will at the same time be told whether it may access the same material where it identifies that third party.[57]

8.64. We are not required to grant access to material if the material relates to a case involving another person and the Panel took it into account only for comparative purposes.

8.65. We may refuse the person access to material where it considers that allowing access:

a) would not be in the public interest, or

b) 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.

8.66. If we refuse to allow access to such material, we will notify the person in writing, giving reasons for the refusal.

8.67. The requirement to grant access to Ofgem material does not extend to material that is legally privileged.

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

9. Sanctions available to the Authority

9.1. This section explains the sanctions available to the Authority. In settled cases sanctions can be made by the formation of a Settlement Committee or by the Director responsible for Enforcement, and in contested cases by the EDP. In this section 'decision maker' can be understood as any one of the three, depending on whether the case is settled or contested.

Financial penalty or statement of failure to comply

9.2. If the decision maker finds that a person has breached a REMIT requirement it may impose a financial penalty. This will be of such amount as the decision maker consider appropriate. It may also impose a financial penalty for a breach of the obligation to record conversations and keep a copy of electronic communications, and/or the prohibition on the disclosure of information in relation to a Warning or Decision Notice without our prior consent.

9.3. Alternatively, the decision maker may, instead of imposing a financial penalty, publish a statement to the effect that the person has failed to comply with one or more of these requirements.[58]

9.4. The Authority's policy on imposing financial penalties is set out in a separate statement. The decision maker will have regard to that statement in exercising, or deciding whether to exercise, its power to impose a financial penalty.

9.5. The procedural steps that the decision maker must follow before it may impose a penalty are set out in Chapter 8 above.

Restitution orders

9.6. Instead of (or in addition to) imposing a financial penalty, the decision maker may make a restitution order or apply to a court for one.[59] The decision maker or court will need to be satisfied that:

a. 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

b. 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.

9.7. In cases where the decision maker considers it appropriate to obtain restitution, it will first consider using its own powers before considering whether to seek an Authority decision to take 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).

[58] See regulation 26 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.
[59] See, respectively, regulations 23 and 22 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

9.8. The court may order the person concerned to pay to us 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 us must then be paid to, or distributed among, such persons as the court may direct. If issuing its own restitution order, the decision maker 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.

9.9. 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 decision maker may, if issuing its own restitution order, order the person to provide similar information to it via a report from an approved[60] skilled person.

9.10. When deciding whether to exercise these powers, the Authority (in respect of an application to the court) or the decision maker will consider all the circumstances of the case. The factors that the Authority or the decision maker will consider may include, but are not limited to:

c. 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

d. whether restitution might be achieved more efficiently or cost-effectively through other means (for instance via private court actions[61], an ombudsman service, corporate compensation schemes or another regulatory authority)

e. the adequacy of any proposals by the person concerned to offer restitution, and

f. the extent to which the person had reasonable grounds for believing that his conduct did not amount to a failure to comply or had taken all reasonable precautions and exercised due diligence to prevent the breach from occurring.

9.11. The decision maker 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 breach.

9.12. 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.

[60] Approved by us.
[61] Private actions to recover losses are available irrespective of whether the Authority applies for or issues a restitution order.

10. Cooperating with ACER and other regulators

10.1. Following the UK's departure from the EU, we remain committed to using our REMIT powers efficiently and fairly. Effective cooperation with other regulators is an essential part of this. Cooperation may take a number of forms.

10.2. The REMIT Regulation, as it applies in GB following the UK's departure from the EU, specifies that Ofgem, and the Northern Irish Authority, must cooperate with each other, and may, 'if they consider it expedient to do so, cooperate with the Agency (ACER) and national regulatory authorities of (EU) member States. The REMIT Regulation also requires that Ofgem cooperates with the Competition Market Authority and the Financial Conduct Authority.

10.3. Further, Article ENER.7 of the EU-UK Trade and Cooperation Agreement (TCA) provides that 'The Parties shall cooperate, including in accordance with Article ENER.20 [Cooperation between regulatory authorities], with a view to detecting and preventing trading based on inside information and market manipulation and, where appropriate, may exchange information including on market monitoring and enforcement activities.

10.4. In line with the TCA, Ofgem, ACER and the Northern Irish Authority for Utility Regulation (NIAUR) have developed an Administrative Arrangement (AA) that reflects the requirements under the TCA to ensure that protections are in place to preserve market integrity and provides for, among other things, an agreement to alert each other of any suspected market abuse on each other's respective wholesale energy markets which may come to light in the course of respective monitoring and information gathering activities. The AA has been submitted for approval to the European Commission and UK Government. Ofgem also intends to conclude similar bilateral agreements with respective EU NRAs.

Appendix 1: REMIT Case Process Flowchart