Decision

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Decision on changes to Ofgem's REMIT Procedural Guidelines and REMIT Penalties Statement

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Our REMIT Procedural Guidelines and REMIT Penalties Statement set out how we use our powers to enforce REMIT and how we determine penalties for REMIT breaches. On 17 August 2021 we published a consultation on changes to both documents. The consultation closed on 28 September 2021 and we received 8 consultation responses.

This document summarises the responses received, provides our response to the issues raised, and explains the reasons for our decisions on the proposed changes. The changes to the REMIT Procedural Guidelines and REMIT Penalties Statement outlined in this decision document come into immediate effect.

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Executive summary

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 regarding market conduct.

Under the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013, the Authority[1] 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.

Our REMIT Procedural Guidelines sets out how we use our powers under the Regulations 2013 to enforce REMIT. Our REMIT Penalties Statement discharges the Authority's obligation under the Regulations 2013, to publish a statement of its policy on the imposition of REMIT penalties and the determination of their amount.

In 2021 Ofgem carried out a review of its approach to enforcement. On 17 August 2021, we consulted on changes to the REMIT Procedural Guidelines and to the REMIT Penalties Statement.

Since the consultation closed on 28 September 2021 we have carefully considered all stakeholder responses. This document summarises the responses received, provides our response to the issues raised, and explains the reasons for our decisions.

For the reasons explained in the document, save for two relatively minor changes, we have decided to implement the proposals completely as proposed in the statutory consultation document. This includes the decision to remove the middle and late settlement windows, and to allow the Director with responsibility for Enforcement to make decisions in settlement cases.

The changes to both documents come into immediate effect.

[1] In this document the terms "we", "us", "our", "Ofgem" and "the "Authority" are used interchangeably and refer to the Gas and Electricity Markets Authority. Ofgem is the office of the Authority.

1. Introduction

1.1. 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.

1.2. Under the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 ('the 2013 Regulations'), 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.

1.3. Our REMIT Procedural Guidelines set out how we use our powers under the 2013 Regulations to enforce REMIT. Our REMIT Penalties Statement discharges the Authority's obligation under the 2013 Regulations, to publish a statement of its policy on the imposition of REMIT penalties and the determination of their amount. Our REMIT Procedural Guidelines were last updated in 2016. Our REMIT Penalties Statement was first published in 2015 and has not been updated since.

Ofgem's review of its enforcement procedures

1.4. In order to take account of changes to the energy market and to the enforcement landscape which have evolved since its Enforcement Guidelines and Sectoral Statement of Policy with respect to Financial Penalties and Consumer Redress were first introduced, in 2021 Ofgem carried out a comprehensive review of its wider approach to enforcement.

1.5. As part of the review, in June 2021 we consulted on proposed changes to our Enforcement Guidelines and Sectoral Statement of Policy with respect to Financial Penalties and Consumer Redress. On 17 August 2021, we consulted on changes to the REMIT Procedural Guidelines and to the REMIT Penalties Statement.

1.6. Our consultation on changes to the REMIT Procedural Guidelines and to the REMIT Penalties Statement included the following proposals:

- In line with the approach set out in the consultation on changes to Ofgem's Enforcement Guidelines, a proposal to remove the middle and late settlement windows, retaining a 30% discount for settlement.

- In line with the approach set out in the consultation on changes to Ofgem's Enforcement Guidelines, a proposal to change the decision-making process to

allow the Director responsible for Enforcement to be a decision maker for settlement, where appropriate, as an alternative to a Settlement Committee, whilst retaining the option to use a Settlement Committee.

- To make the Penalties Statement more streamlined and easier to read, a proposal to significantly reduce the number of factors used to assess the level of seriousness of a breach of REMIT.

- In line with the approach set out in the consultation on changes to Ofgem's Sectoral Penalty Statement, a proposal only to calculate detriment and gain where it is proportionate, reasonable and practicable to quantify it.

- A proposal to use Financial Penalties 'Step One' (proposed Chapters Five and Six of the REMIT Penalties Statement) only to calculate the financial gain to the person as a result of the breach, as opposed to the gain and detriment. If the person's gain can be attributed to other market participants' loss, we would seek a restitution order if proportionate, reasonable and practicable. Any wider market detriment (in addition to the person's gain), if it is proportionate, reasonable and practicable to quantify, would be taken account of in the assessment of seriousness.

- Drafting and structure changes to improve the efficiency and clarity of both documents. These also included necessary changes to reflect the fact that the UK has left the European Union.

1.7. The Consultation on changes to the REMIT Procedural Guidelines and to the REMIT Penalties Statement closed on 28 September 2021. We received responses from eight stakeholders. We have carefully considered each response. This document summarises the responses received, provides our response to the issues raised, and explains the reasons for our decisions. The changes to both documents come into effect immediately.

2. Settlement window

Section summary

There are currently three settlement windows, with sliding discounts applied to the penalty amount that has been agreed in the settlement.

Consistent with the decision on Ofgem's Enforcement Guidelines, we have decided to remove the middle and late settlement windows, having one settlement window with a discount of 30%.

What did we consult on?

2.1. The consultation proposed removing the middle and late settlement windows and the associated 20% and 10% settlement discounts.

2.2. We proposed this change to incentivise settlement and to avoid the risk that a cumbersome multi-window settlement process unnecessarily prolongs the length of time taken to resolve a case.

Stakeholder feedback on statutory consultation

2.3. We asked stakeholders for their views on our proposal and received a range of views in response. There was some support for streamlining the current process, however a majority of those who responded to this proposal indicated support for retaining the middle and late settlement windows and associated discounts.

2.4. The principal concern that stakeholders cited was that removing the middle and late settlement windows would not allow enough time to settle cases. Stakeholders considered that this could particularly be the case for complex cases, or cases where new information came to light after the settlement window opened. One respondent noted that this could be of particular importance if the Statement of Case were to introduce new findings or details not provided in the Summary.

2.5. Stakeholders cited similar concerns in connection with the settlement window closing after 28 days, although this was not part of the consultation, and does not represent a change from our existing approach. In relation to the settlement window, stakeholders also highlighted the lack of certainty over the circumstances under which the settlement window could be reopened.

2.6. In sum, stakeholders were concerned that rather than improve the efficiency of the process, the proposed change could lead to more cases being resolved through the contested procedure, which would be less resource efficient in the long run. One stakeholder also expressed the concern that the removal of the later windows may motivate Ofgem to inflate the initial penalty calculation.

Ofgem's views

2.7. We fully recognise stakeholders concern that sufficient time should be provided to allow constructive settlement discussions to take place, and that absent this, there would be a risk that more cases would go to contest. However, we disagree that the proposal to remove the later settlement windows significantly increases this risk.

2.8. In the first instance, it is important to note that persons under investigation will have the opportunity to respond to Ofgem's findings prior to the opening of the settlement window, in their response to the Summary Statement of Issues Letter (SSIL). The SSIL will clearly outline the outcome of the investigation phase. As outlined in the proposed Procedural Guidelines, 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.

2.9. After considering any written or oral representations to the SSIL, we may remain satisfied that there are circumstances suggesting a person has failed to comply with one or more of the obligations covered by the 2013 Regulations[2] 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. As a matter of course we would also provide persons under investigation the opportunity of a meeting or meetings with us, to discuss our findings at the SSIL and/or Supplementary SSIL stage.

2.10. This process is designed to ensure that all of the substantive facts about a case are known before a case proceeds to settlement. However, should new information unexpectedly come to light after the settlement window has opened, as set out in the proposed Procedural Guidelines, in exceptional circumstances, the settlement window may be reopened at the Authority's discretion.

[2] These obligations are summarised at Paragraph 4.10 of the Procedural Guidelines.

2.11. On the exceptional circumstances that would lead to reopening or extending the settlement window at the Authority's discretion, it would be the responsibility of the person under investigation to demonstrate that circumstances are exceptional. Each case will be considered on its merits. One of these reasons could be that new evidence comes to light that may significantly change the position of the company under investigation.

2.12. Regards the risk that, for complex cases, the removal of the later settlement windows will not provide sufficient time for constructive settlement discussions to take place, it is important to note that the process, as outlined in the proposed Procedural Guidelines, allows for settlement discussions to take place prior to the Settlement Window opening. Indeed, it is unlikely that we would seek a settlement mandate absent those discussions.

2.13. 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 Chapter 3), 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.

2.14. It is for Settlement Committee or the Director with responsibility for Enforcement (see Chapter 3) to consider and decide whether a person has failed to comply with one or more of the obligations covered by the 2013 Regulations and on the terms of settlement that the Authority will offer. However, the settlement discussions in advance of seeking the mandate allow the case team to determine whether settlement is likely and on what terms, therefore we would normally not expect significant or substantive new issues to emerge within the 28 day settlement period. For the avoidance of doubt, it will remain for the Director with responsibility for Enforcement or the Settlement Committee, as appropriate, to decide on the terms of settlement (if any) that are offered. These may depart from what has been discussed with the case team.

2.15. Regards the point about the Statement of Case (or Full Issues Letter as it is called in the proposed Procedural Guidelines) introducing new findings or details, it is important to note that the Full Issues Letter would only be issued during contest, therefore it will not impact on the efficiency of the settlement process.

2.16. Finally, we note that in all cases the Authority calculates the penalty based on the factors set out in the REMIT Penalties Statement, therefore we disagree that the removal of the later settlement windows is likely to increase the level of penalty

initially calculated. The penalty is discounted in the settlement window to provide an incentive to settle, reflective of the resource and time saving by both sides.

Decision

2.17. We have carefully considered the responses that we received from our 17 August 2021 consultation. The Authority has decided to remove the middle and late settlement windows and the respective 20% and 10% discounts. This will mean we will have one settlement window, 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.

2.18. The Authority considers that the removal of the later settlement windows and the availability of a single 30% discount will provide a strong incentive on persons under investigation to consider, and where appropriate, to agree to settlement in a timely manner, and avoid the risk that a cumbersome multi-window settlement process unnecessarily prolongs the length of time taken to resolve a case.

2.19. The Authority is satisfied that the proposal will not unduly compress the time available to persons under investigation to consider their position, present their case, and to enter into constructive settlement discussions. Drawing on experience from sectoral cases, the Authority notes that the availability of the middle and late settlement windows has had little impact on cases which were contested to date i.e. they were still contested and the later windows merely served to unnecessarily prolong the overall process.

3. Decision making in settlement cases

Section summary

Currently, a Settlement Committee made up of two Enforcement Decision Panel (EDP) members and one Ofgem Director makes settlement decisions.

This section explains our decision that the Director responsible for Enforcement can also be a decision maker for settlement, dependant on the circumstances of the case.

What did we consult on?

3.1. The consultation proposed to allow the Director with responsibility for Enforcement to be the decision maker as an alternative to a Settlement Committee in some settlement cases. We also sought views on any other steps we could take to speed up the settlement process, without undermining the evidence - based nature of our decision making.

3.2. We made this proposal in order to provide for a more efficient means of concluding REMIT cases, and to bring the REMIT Procedural Guidelines into line with the proposed approach outlined in the consultation on Ofgem's sectoral Enforcement Guidelines.

Stakeholder feedback on statutory consultation

3.3. We asked stakeholders for their views on our proposal and received a range of views in response. There was some support for allowing the Director with responsibility for Enforcement to be the decision maker in less serious REMIT cases, subject to an objective criteria, however a majority of those who responded to this proposal indicated concerns.

3.4. The principal concern cited was that the proposal would reduce the independence of the decision-maker. These stakeholders considered it is important that there is a formal separation between the decision maker and the case team. Although under the proposal the option to use a Settlement Committee would be retained, some stakeholders were also concerned that the Director with responsibility for Enforcement would have the final say on whether they alone should make the settlement decision rather than the Settlement Committee. Overall, these

stakeholders were concerned that if the objectivity of the settlement process was undermined it could result in more contested cases.

3.5. One stakeholder considered that if the proposal was implemented then, as well as an objective criteria over who the decision maker should be, the party under investigation, as well as Ofgem, should be able to request that a Settlement Committee is used. Another stakeholder considered that if the Director was the decision maker then it was important that the Director had sufficient technical and industry knowledge to make the decision, and that the Director's decision should be subject to independent review.

3.6. On steps we could take to speed up the settlement process, one stakeholder suggested increasing the size of the settlement discount, while two stakeholders suggested that we consider adopting a 'neither admit nor deny' way of concluding cases.

3.7. Finally, two stakeholders made the point that in their view the speed of the investigation process was a greater concern than the speed of the settlement process. These stakeholders noted that while Ofgem can send multiple requests for information with fixed deadlines, the same constraints do not apply to Ofgem in carrying out the investigation. One stakeholder indicated that it would useful for Ofgem to provide persons under investigation with a roadmap and a timeline at the outset of an investigation and to communicate any changes to the plan in a timely manner. Another stakeholder indicated that Ofgem should be subject to formal deadlines to complete various stages of investigations.

Ofgem's views

3.8. We fully recognise stakeholders concern that decision making in settlement cases should be subject to an objective and evidence-based process, but we disagree that the proposal to allow the Director with responsibility for Enforcement to be a decision maker for settlement cases will undermine that.

3.9. First, the investigatory phase of an investigation, a stage to which no changes are being made, will continue to involve the rigorous examination of all evidence, thereby ensuring all decision makers are fully informed of the circumstances of each investigation.

3.10. Second, when a case reaches the settlement stage, all evidence and the circumstances of the case will be taken into account when the choice of decision-

maker is being made. Although it would be the Director with responsibility for Enforcement who would make this decision, it is important to note that the Director would be advised by the Enforcement Oversight Board (EOB), and the members of the EOB would be presented with the same information as the Director.

3.11. Following this procedure, all of the circumstances of the case would be taken into consideration by the Director, advised by the EOB, when deciding upon the most appropriate decision maker. Forming a Settlement Committee remains an option if this is more appropriate for the circumstances of the case. The Director with responsibility for Enforcement may also delegate the decision to another Director, where appropriate, for example one who may have a different area of expertise on a given case.

3.12. Concerns the objectivity of the Director, we note that while the Director responsible for Enforcement will have responsibility, advised by the EOB, for opening a case, he or she will not be involved in the day to day running of investigations. Further, as mentioned in Chapter Two, in all settled enforcement cases, a penalty is imposed in line with the REMIT Penalties Statement, which ensures transparency and robustness.

3.13. In considering this issue, it is also important to note the fundamental difference between settlement and contest. A person under investigation is not obliged to agree to settlement, but if they do they must be willing to admit that a breach of one or more of the obligations covered by the 2013 Regulations has occurred. It is for this reason, that we do not consider that it is necessary or appropriate to subject the Director's decision in settlement cases to independent review, or that parties under investigation should have the option of choosing to have a case decided by a Settlement Committee rather than the Director. Where the person under investigation does not agree with the settlement outcome, or does not agree that a breach has occurred, they have recourse to the contest procedure (and a right of appeal following that procedure).

3.14. Regards the proposals to speed up the settlement process, we consider that the current 30% discount strikes the right balance between incentivising persons under investigation to settle, and ensuring that an appropriate financial penalty is levied. We have not seen any evidence that increasing the discount would make settlement significantly more attractive, while retaining appropriate deterrence. We do not agree that a 'neither admit nor deny' way of concluding cases would be appropriate. In our view it is essential that persons who have breached REMIT admit the breach in order to send a strong message to the market regards future conduct.

3.15. Regards the proposals to speed up the investigation process, we recognise stakeholders concerns that investigations are carried out as efficiently as possible. However, REMIT investigations vary significantly in type, complexity and size, making it difficult to set fixed timelines. As noted in the current version of the Procedural Guidelines, where possible, we will provide the person under investigation with updates as the investigation progresses. To help stakeholders manage their resources whilst under investigation, we propose to amend the Procedural Guidelines to include the commitment to provide an indicative timeline at the outset of an investigation, but due to the nature of the investigation process, this will inevitably be subject to change, and it would not be appropriate for us to make formal commitments regards timescales. We will continue to endeavour to communicate changes to expected timelines to persons under investigation in a timely manner.

Decision

3.16. We have carefully considered the responses received from our 17 August 2021 consultation. After considering this feedback, the Authority has decided to allow the Director responsible for Enforcement to be a sole decision maker in settlement, or to delegate another Ofgem Director to act on their behalf, and be able to:

- issue a settlement mandate; and
- approve and issue the settlement penalty notice; and
- approve final settlement decisions.

3.17. For cases considered suitable, this should speed up the process and reduce the resource burden on Ofgem and on persons under investigation. It may also result in REMIT cases being resolved through settlement rather than Alternative Action, where previously Alternative Action may have been prioritised simply to conclude the matter more quickly.

3.18. We do not foresee more cases reaching contest because of this as we have previously secured successful outcomes through Alternative Action, where a Director is a decision maker and received feedback from previous investigations that parties under investigation want to reach settlement in a timely manner. All decision making, regardless of the decision maker, is evidence-based and the penalty is calculated in accordance with the REMIT Penalties Statement.

3.19. As noted in the section above, as a result of our consideration of stakeholders consultation responses, we will amend the document to include the commitment to provide stakeholders with an indicative timeline at the outset of an investigation.

3.20. For the avoidance of doubt, the changes outlined in this section do not affect the fact that Alternative Action remains an option for concluding REMIT cases, that the formation of settlement committee remains an option for the resolution of settlement cases, and that the EDP will remain the decision makers in contested cases.

4. Changes to improve the efficiency and clarity of the REMIT Procedural Guidelines

Section summary

We consulted on a number of changes aimed at improving the efficiency and clarity of our REMIT Procedural Guidelines. This section explains our decision to implement these amendments.

What did we consult on?

4.1. To improve the efficiency and clarity of the processes described in our REMIT Procedural Guidelines we consulted on the following changes:

a) Explanation in Chapter One of the role of the different decision making bodies within our governance structure. This includes the Director with responsibility for Enforcement, the Enforcement Oversight Board (EOB), the Settlement Committee, and the Enforcement Decision Panel (EDP).

b) A revision and clarification in Chapter Four, of our criteria for opening an investigation, and an explanation of our Alternative Action process. Where appropriate, we propose to align our criteria for opening a REMIT investigation with that of the Enforcement Guidelines. Our Alternative Action process is not currently described in our Procedural Guidelines, but Alternative Action is something we have the discretion to use in REMIT and have used to good effect, so we consider that it is appropriate that this is explained in the Procedural Guidelines.

c) An enhanced explanation in Chapter Five of when we would normally publish a SSIL and what purpose the SSIL serves. The new text explains that we would normally send a SSIL following the information gathering and analysis phase of an investigation, providing we continue to consider that a breach of REMIT requirements has occurred. It also explains that we may send a Supplementary SSIL as a follow up to the SSIL.

d) An explanation in a revised and restructured Chapter Seven of how our settlement process works. This includes a description of what settlement is,

who makes settlement decisions and when, and how the settlement window discount works. Included within the changes is our proposal that for certain cases (dependent on all the circumstances of the case) the Director with responsibility for Enforcement may make settlement decisions. We have also included a new section within this Chapter which explains how we decide whether a case is suitable for settlement. To make the process of seeking settlement more efficient we propose the flexibility to seek an indication in writing that the person under investigation is interested in settlement before taking this route. This chapter would replace what was Chapter Ten in the current document.

e) An explanation in a revised Chapter Eight of when we would normally publish a Full Issues Letter (FIL), what purpose the FIL serves, and how it connects with our contest procedure[3]. There are no changes proposed to the Contest procedure itself.

4.2. We also invited views on any other changes that would improve the clarity of the REMIT Procedural Guidelines.

Stakeholder feedback on statutory consultation

4.3. Several stakeholders indicated that a track-changed version of the proposed changes would have made the assessment easier, however all of those who responded to this section indicated support and agreed that the changes made the document clearer.

4.4. Commenting on specific drafting proposals, one stakeholder disagreed with the statement at Paragraph 1.7 that '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', and with a similar statement at Paragraph 7.13 in respect of settlement, that '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'. This stakeholder considered that where Ofgem

[3] The contest procedure is used when Ofgem considers that a breach of REMIT has occurred but the person under investigation is not willing to admit to the breach or is not willing to agree to the terms of settlement offered. In such circumstances the case is concluded by referral to the Enforcement Decision Panel.

makes such a departure it should provide reasoning and clarity on its alternative approach.

4.5. Although the text in question was not new, referring to Paragraph 4.14, in connection to our 'Prioritisation criteria for deciding whether to open (or continue) a case', one stakeholder considered that it would not be appropriate for Ofgem to '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'. This stakeholder considered it would be unfair to consider instances where non-compliance had not been established.

4.6. Again, although the text in question was not new, in reviewing the section of Chapter Three relating to the submission of confidential information concerning a suspected breach of REMIT, one stakeholder was concerned that paragraphs 3.19 and 3.20 suggest there is an obligation on parties submitting Suspicious Transaction Reports (STRs) to assess the impact of the STR on the business interests of the person the STR relates to. This stakeholder considered that the party submitting the STR should not be responsible for this.

4.7. Also referring to text included in the current Procedural Guidelines, the same stakeholder was concerned about the statement in Paragraph 5.19, relating to the investigation process, that '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.' This stakeholder queried the legal basis upon which Ofgem may require PPATs to write such reports, in addition to the analysis and information already submitted via an STR. The stakeholder requested that Ofgem removes the part of the statement referring to 'PPATs (or fellow members of their group or partnership)'.

4.8. Concerning other changes that would improve the clarity of the REMIT Procedural Guidelines, two stakeholders suggested that it would be helpful for Ofgem to publish alongside any Warning/Decision/Final Notice, a 'lessons learnt' or 'What we expect from firms' section outlining the expectations that Ofgem have in relation to the issue in question. These stakeholders considered that this commitment should be explicit in the document.

4.9. Finally, as noted in Chapter Three above, one stakeholder indicated that it would useful for Ofgem to provide persons under investigation with a roadmap and a timeline at the outset of an investigation and to communicate any changes to the

plan in a timely manner. This stakeholder considered that this commitment should be explicit in the Procedural Guidelines.

Ofgem's views

4.10. Regarding the concern with the statements at Paragraphs 1.7 and 7.13, that we may depart from the general approach to set out in these guidelines, we consider that although we would do our utmost to adhere to the approach set out in the guidelines, this is a necessary caveat to ensure that nothing in the guidance restricts our ability to enforce REMIT in the most effective manner. This change aligns the REMIT Procedural Guidelines with Ofgem's sectoral Enforcement Guidelines. It is important to remember that the guidance is namely that, a guidance and not a set of legal obligations. As a matter of course, we would always communicate and explain any departure to the approach set out in the guidelines to persons under investigation.

4.11. Regarding the concern with Paragraph 4.14, we disagree that it would not be appropriate to 'consider 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' as part of our prioritisation criteria for deciding whether to open (or continue) a case. Ofgem often sees repeat behaviours which have not necessarily been sanctioned before deciding to open an investigation. Sometimes it is the repeat behaviour that causes a particular concern. It would be remiss of us not to take this into account in deciding whether to open a case. This is completely without prejudice to whether a breach of REMIT has occurred. The REMIT investigation phase involves the rigorous examination of all evidence, regardless of whether previous non-compliance has been established.

4.12. Regards the concern that paragraphs 3.19 and 3.20 suggest there is an obligation on parties submitting STRs to assess the impact of the STR on the business interests of the person the STR relates to, we can confirm that in these paragraphs Ofgem is not seeking to introduce such a new obligation. All parties submitting STRs should be aware of their legal responsibilities in respect of confidential data. Paragraphs 3.19 and 3.20 explain an approach parties submitting STRs may use when they have such concerns.

4.13. Regards the concern with Paragraph 5.19, that 'where an investigation is open, we may require a market participant or a PPAT to prepare a report for us', we note that the power to make this request comes from Regulation 13 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013, and as stated in the regulation it applies to Regulated Persons. Regulated Persons is

defined in Regulation 3 of the Regulations and includes 'a person subject to an obligation imposed by Article 15 of REMIT', therefore we consider it is appropriate that the request for a report may apply to PPATs.

4.14. Regards the suggestion that it would be helpful for Ofgem to publish, alongside any Warning/Decision/Final Notice, a 'lessons learnt' or 'What we expect from firms' section outlining the expectations that Ofgem has in relation to the issue in question, we agree that a new enforcement action may provide an appropriate opportunity to highlight inappropriate behaviour or explain good conduct. We consider that a combination of the legal notices and the press notice already allows us to emphasise important information to the market, but we will consider on a case by case basis whether there is more we could say about a particular type of breach. Sometimes this is compromised by the confidential aspects of a particular case. When we have a particular behaviour we want to highlight, we also have the option of publishing an open letter, as we did in respect of behaviour in the balancing market in September 2020[4]. In this regard we also note that, unless or until indicated otherwise, Ofgem will continue to enforce REMIT with regard to the EU Agency for the Cooperation of Energy Regulators (ACER's) Guidance on the application of REMIT. This is publicly stated on our website, and is among the EU related changes included within the revised REMIT Procedural Guidelines.

4.15. We have addressed the suggestion to provide a roadmap and a timeline at the outset of an investigation and to communicate any changes to the plan in a timely manner in Chapter Three. We will amend the document to include the commitment to provide stakeholders with an indicative roadmap timeline at the outset of an investigation. Due to the nature of the investigation process, this will inevitably be subject to change, and it would not be appropriate for us to make formal commitments regards timescales.

4.16. Concerns the suggested provision of a track-changed version of the proposed changes, we would agree that this may have made assessment of the changes easier for stakeholders. We will consider whether there is a more effective way we can indicate proposed changes in future consultations, however the extent of the changes proposed, more in structure than on substance, made the provision of a track-changed version difficult on this occasion.

[4] Open letter on dynamic parameters and other information submitted by generators in the Balancing Mechanism | Ofgem

Decision

4.17. We have considered all of the responses in relation to our proposals to improve the efficiency and clarity of the processes described in our REMIT Procedural Guidelines. Following review, we have decided to implement all of the proposed changes.

5. Changes to improve the efficiency and clarity of the REMIT Penalties Statement

Section summary

In reviewing the REMIT Penalties Statement we identified a number of places where it could be clearer and easier to read. To address this we consulted on a number of changes aimed at improving efficiency and clarity. This section explains our decision to implement these changes.

What did we consult on?

5.1. The changes we consulted on are summarised in the sub-sections below. We also invited views on any other changes that would improve the clarity of the REMIT Penalties Statement. For full detail on the reasons for the proposed changes, please see Chapter Five of the Consultation on changes to Ofgem's REMIT Procedural Guidelines and REMIT Penalties Statement. For full details on all text changes proposed, please see Annex Two – REMIT Penalties Statement of the consultation.

Factors used to determine the seriousness of a REMIT breach

5.2. In line with the approach set out in the consultation on changes to Ofgem's Sectoral Penalty Statement, we carried out a review of the factors the Authority may consider in determining the level of seriousness of a REMIT breach. To improve efficiency and clarity we consulted on a proposal to significantly reduce the number of factors listed, removing those which we consider overlap with others, or which are less likely to be applicable to REMIT. Full detail on the changes proposed was set out in Annex Two – REMIT Penalties Statement.

Calculation of Gain and Detriment

5.3. In line with the approach set out in the consultation on changes to Ofgem's Sectoral Penalty Statement, we also consulted on proposals only to calculate detriment and gain where it is 'proportionate, reasonable and practicable to quantify it'. The reason for this is to make it clear that we can find that a person has breached REMIT

requirements and impose a significant penalty even where it is not possible calculate gain or detriment.

5.4. In addition, we consulted on a proposal to use 'Step One' in proposed Chapters Five and Six only to calculate the financial gain to the person as a result of the breach, as opposed to the gain and detriment. If the person's gain can be attributed to other market participants' loss, we would seek to compensate those market participants via a restitution order if proportionate, reasonable and practicable.

Reduction of duplication

5.5. To improve efficiency and clarity we also consulted on the deletion of what is currently Chapter Three of the Penalties Statement, and the merging of Chapter Eight with Chapter Seven (becomes Chapter Six). In our view the content of Chapter Three is adequately covered in Chapter Four. Further, we do not think it is necessary to have separate chapters for financial penalties and restitution in relation to individuals for market abuse and non-market abuse cases.

Other changes

5.6. In line with the approach set out in the consultation on changes to Ofgem's Sectoral Penalty Statement, we also consulted on the introduction an explanation at the beginning of Chapter Three that, where a behaviour may be in breach of other conditions or requirements, in addition to REMIT, the Authority reserves the right to investigate and impose a penalty or make a restitution order in respect of that conduct in line with Ofgem's sectoral Enforcement Guidelines, rather than investigate and impose a penalty under REMIT.

5.7. In line with the proposals only to calculate detriment and gain where it is 'proportionate, reasonable and practicable to quantify it' we consulted on a proposed clarification in Paragraph 2.5, that 'the Authority may impose a financial penalty even where the gain to the person, or the detriment caused to other market participants, cannot be reasonably calculated or estimated, or where it can be calculated and it is shown to be zero'.

5.8. Finally, in the chapter relating to 'serious financial hardship in relation to individuals' we proposed an inflationary adjustment (rounded up to the nearest thousand) to the figures quoted as the starting point for this assessment.

Stakeholder feedback on statutory consultation

5.9. Several stakeholders indicated that a track-changed version of the proposed changes would have made the assessment easier, however all of those who responded to this section agreed that the changes generally made the document clearer.

5.10. Commenting on the proposal only to calculate detriment and gain where it is 'proportionate, reasonable and practicable to quantify it' one stakeholder was concerned that the text provided no detail on how we would make this assessment. The same stakeholder commented that it was not clear how Ofgem would determine penalty amounts where no detriment is calculated, and that the rationale for the proposal to use 'Step One' in proposed Chapters Five and Six only to calculate the financial gain to the person as a result of the breach, as opposed to the gain and detriment, was not clear.

5.11. Although not the subject of the consultation, one stakeholder indicated that they could not see any reason to exclude the option of determining a penalty on the basis of a 'profit multiple' for firms, as described in Chapter 6 in relation to individuals. One stakeholder queried whether the Penalties Statement allows for a percentage penalty reduction where the breach is self-reported, where processes have been in put in place to prevent a reoccurrence of the breach, or where restitution has already taken place.

5.12. Commenting on the text relating to restitution, two stakeholders indicated that while they supported restitution in principle, they considered it was important that a cautious approach was adopted to guard against an excessive cascade effect – only transactions directly affected by market manipulation should be include in any assessment, not transactions simply responding to market prices. Another stakeholder considered it was not clear how Ofgem would determine restitution when no detriment is calculated but sums are expected to be returned to affected parties.

5.13. In relation to other changes to improve the REMIT Penalties Statement, one stakeholder indicated that they would like to see more detail published on how Ofgem calculates penalties in particular cases. This stakeholder considered that other regulators make more detailed information available in this regard.

Ofgem's views

5.14. Regards the concern that the text provided no detail on how we would make the assessment over whether it was 'proportionate, reasonable and practicable to

quantify' gain and detriment, we consider that it is appropriate to retain an element of discretion here: what is reasonable will inevitably be a value judgement. Generally, this can be understood as meaning that we will usually consider trying to quantify gain and detriment, but where this proves to be impracticable, overly complex, and subject to too many sensitive assumptions, we may conclude that it is not proportionate or reasonable to pursue.

5.15. Regards the concern about how Ofgem would determine penalty amounts where no detriment is calculated, we can clarify that the determination of penalty amounts is not dependent on the calculation of detriment. Indeed, it is important to note that we can impose a significant penalty even where it is not possible calculate gain or detriment. This could be the case where the Authority finds that an attempted breach of REMIT occurred, or where the materiality of a breach in financial terms is less than its wider negative affect. This would be determined following the approach set out in Step Two in Chapters Five and Six.

5.16. To clarify on the proposal to use 'Step One' in proposed Chapters Five and Six only to calculate the financial gain to the person as a result of the breach, as opposed to the gain and detriment, the reason for this is that we consider that the priority in 'Step One' should be to deprive a person of all the financial benefit derived from the breach. Where this gain can be understood as detriment and attributed to other market participants losses, where it is proportionate, reasonable and practicable to do so, we would seek to compensate those market participants via a restitution order. However, we consider that any wider market detriment (in addition to the person's gain i.e. not 'Step One'), if it is proportionate, reasonable and practicable to quantify, would be taken account of in the assessment of seriousness, 'Step Two'. In following this approach, we would retain the flexibility to ensure that any financial penalty, and compensation or other payment under a restitution order, or any combination of them, significantly exceeds, the gain to the regulated person and the detriment caused to other market participants, as stated in Chapter Two of the REMIT Penalties Statement.

5.17. Regards the concern about the exclusion of the option of determining a penalty on the basis of a 'profit multiple' for firms, as described in Chapter 6 in relation to individuals, we can confirm that this is not the case. As set out in paragraph 5.10, 'there may be many cases where revenue is not an appropriate indicator of the harm or potential harm that may be caused by a firm's non-compliance. In those cases, the Authority will use an appropriate alternative such as a firm's profits. We can also confirm that the Penalties Statement allows for a potential percentage penalty reduction where the breach is self-reported, or where processes have been in put in

place to prevent a reoccurrence of the breach. This would be applied, if we consider it is appropriate, at the assessment of mitigating factors at 'Step Three'. It is unlikely that a percentage penalty reduction would be applied where restitution has already taken place, rather we would ensure that no double counting took place and that the restitution already paid, was taken account of as part of any restitution calculated as part of Step One.

5.18. In relation to the concern about the cascade effect of a complex restitution process, we can clarify that the 'proportionate, reasonable and practicable' would also apply to any proposed restitution order. We would always try to ensure that market participants who suffer a loss as a result of a breach of REMIT are compensated, but where restitution proves to be impracticable, overly complex and subject to many sensitive assumptions, we may conclude that it is not proportionate or reasonable to pursue. We can also clarify that where it is not 'proportionate, reasonable and practicable' to calculate gain or detriment, it is unlikely that we would issue a restitution order.

5.19. Concerns the request to see more detail published on how Ofgem calculates penalties in particular cases, we will consider on a case-by-case basis whether there is more we could say about the penalty calculation for a given breach. In Ofgem's view the most important element of the penalty calculation is that the overall penalty is proportionate to the seriousness of the breach. This is the test the EDP would apply if the case was contested.

Decision

5.20. We have considered all of the responses in relation to our proposals to improve the efficiency and clarity of the processes described in our REMIT Penalties Statement. Having responded to the queries and concerns raised in the section above, we have decided to implement all of the proposed changes.

5.21. We have also decided to introduce one minor change not included in version of the REMIT Penalties Statement consulted on. This is to reference the Authority's open letter of 29 September 2020 concerning dynamic parameters and other information

submitted by generators in the balancing mechanism[5] among the publications listed in connection with 'Reasonable belief and reasonable precautions' at Paragraph 5.25.

[5] https://www.ofgem.gov.uk/publications/open-letter-dynamic-parameters-and-other-information-submittedgenerators-balancing-mechanism

6. Conclusion and Next Steps

6.1. The Consultation on changes to the REMIT Procedural Guidelines and to the REMIT Penalties Statement Since the consultation closed on 28 September 2021.

6.2. Having taken into account the eight responses received, the decision of the Authority is to accept the changes to the Enforcement Guidelines and Penalty Statement that proposed in the 17 August 2021 consultation, saved for two relatively minor changes to the REMIT Procedural Guidelines and the REMIT Penalties Statement, respectively.

6.3. The changes are as follows:

- Amendment to Paragraph 5.5 of the REMIT Procedural Guidelines to include the commitment to provide stakeholders where possible with an indicative timeline at the outset of an investigation.

- Amendment to Paragraph 5.25 of the REMIT Penalties Statement to reference the Authority's open letter of 29 September 2020 concerning dynamic parameters and other information submitted by generators in the balancing mechanism[6] among the publications listed in connection with 'Reasonable belief and reasonable precautions'.

6.4. The changes to both documents come into immediate effect. The EDP terms of reference have also been updated to reflect the changes made to the guidance with effect from the same date.

6.5. If you have any questions about this decision, please contact REMITconsulation@ofgem.gov.uk.

[6] https://www.ofgem.gov.uk/publications/open-letter-dynamic-parameters-and-other-information-submittedgenerators-balancing-mechanism