

# **THE GAS AND ELECTRICITY MARKETS AUTHORITY'S STATEMENT OF POLICY WITH RESPECT TO REGULATION (EU) NO 1227/2011 AS INCORPORATED INTO UK LAW<sup>1</sup> AND THE ELECTRICITY AND GAS (MARKET INTEGRITY AND TRANSPARENCY) (ENFORCEMENT ETC.) REGULATIONS 2013**

## **1. Introduction**

1.1. REMIT is Regulation (EU) no. 1227/2011 on wholesale energy market integrity and transparency<sup>2</sup>, as incorporated into UK law by the European Union (Withdrawal) Act 2018 as amended by the European Union (Withdrawal Agreement) Act 2020<sup>3</sup> on 1 January 2021.

1.2. 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<sup>4</sup>

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<sup>1</sup> 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).

<sup>2</sup> 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>

<sup>3</sup> <https://www.legislation.gov.uk/ukxi/2019/534/made>

<sup>4</sup> 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>

- Obligation, to the extent required by Chapter II of the REMIT Implementing Regulation<sup>5</sup> to report wholesale energy market transactions, including orders to trade to Ofgem<sup>6</sup>.

1.3. 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.

1.4. 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 to impose a financial penalty, make a restitution order or issue a statement of non-compliance.<sup>7</sup> 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.<sup>8</sup>

1.5. Under the 2013 Regulations, the Authority is required, having undertaken such consultation as it considers appropriate, to publish a statement of its policy on the imposition of penalties and the determination of their amount. The Authority is also required to consult on any alteration of that statement.

1.6. This statement has been prepared according to those requirements and replaces that previously published by the Authority on 23 June 2015. The Authority will have regard to this statement in exercising, or deciding whether to exercise, its powers to impose financial

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<sup>5</sup> 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

<sup>6</sup> 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.

<sup>7</sup> See Regulation 26(1) of the 2013 Regulations.

<sup>8</sup> See Regulation 8 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) (Amendment) Regulations 2015.

penalties, make a restitution order<sup>9</sup> or issue a statement of non-compliance in relation to any REMIT breach which occurred on or after [publication date]<sup>10</sup>

1.7. A 'REMIT breach' for the purposes of this statement is:

- a failure to comply with a REMIT requirement as defined in Regulation 4 of the 2013 Regulations, and the amendment from Regulation 8 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) (Amendment) Regulations 2015, and/or
- a failure to comply with a requirement imposed by or under Regulation 8 of the 2013 Regulations.

#### *Revision of the statement of policy*

1.8. The Authority may at any time revise this statement in accordance with the 2013 Regulations. Any revised statement will, following appropriate consultation, be published.

1.9. This statement has been agreed by the Authority. The Authority has not delegated to the EDP, or to any member or employee of the Authority, the power to vary this statement.

## **2. Objectives of the Authority under REMIT**

2.1. The Authority's vision for its enforcement work is to achieve a culture where businesses put energy consumers first and act in line with their obligations. In REMIT cases this vision applies to individuals as well as to businesses<sup>11</sup>.

2.2. The Authority is clear that no person should benefit financially from a REMIT breach. Indeed, the Authority considers that non-compliance should normally cost significantly more than

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<sup>9</sup> Restitution may be ordered where a person has accrued profits or one or more other persons have suffered loss or been otherwise adversely affected as a result of a REMIT breach.

<sup>10</sup> 1 July 2015 for breaches of the obligations to register with an NRA and to report transaction data.

<sup>11</sup> Throughout this statement the term 'person' refers to both firms and individuals.









however, take action if it considers that an individual's conduct was below the standard that would be reasonable in all the circumstances at the time of the conduct concerned.

## **4. Determining the appropriate level of financial penalty and/or restitution**

4.1. This section summarises the steps that the Authority will normally follow in determining a person's financial liability as a result of a REMIT breach.

4.2. The total amount payable will normally be made up of two elements:

- i. removal of any gain made by the person as a result of the breach, where it is proportionate, reasonable and practicable to calculate or estimate this. Where it is possible to attribute this sum to affected parties who suffered a loss, this sum may be returned to those parties via a restitution order. Where this is not the case this may be included in a financial penalty.
- ii. an amount that reflects the seriousness of the breach, the behaviour of the person, whether the person on whom the penalty is to be imposed is an individual and the need for deterrence (the 'penal element'). Normally, the penal element will be paid as a financial penalty.

4.3. The table below summarises the steps the Authority will normally follow to calculate the financial liability in respect of a REMIT breach. We describe in more detail how these elements are built up in the text which follows.



Table 1 - Penalty calculator

Penalty steps	Calculation
<b>Calculate financial gain resulting from the breach (Step 1)</b>	
The Authority will seek to deprive a firm of all the financial benefit derived from the breach where practicable to do so (this step will include restitution to affected parties, if appropriate).	Financial Gain
<b>Assessment of Seriousness of breach (Step 2)</b>	
The Authority will determine the most appropriate basis for the penalty by reference to the relevant revenue (or a suitable alternative). The Authority will then assess the seriousness of the breach as Level 1 to Level 5. The Authority will multiply the appropriate basis for the penalty (such as relevant revenue) by a factor corresponding to the seriousness level established.	Relevant Revenue % Relevant Revenue x %
<b>Assessment of aggravating/mitigating factors (Step 3)</b>	
The Authority will assess whether an adjustment for aggravating/mitigating factors is warranted. If so, the Authority will apply a percentage adjustment to the figure derived at Step 2.	Step 2 output x %
<b>Deterrence (Step 4)</b>	
The Authority will assess whether an adjustment for deterrence is warranted. If so the Authority will apply a percentage adjustment to the figure derived at Step 3.	- Step 3 output x %
<b>Settlement discount (Step 5)</b>	
Where a case is settled within the Settlement Window, apply a 30% discount to the penal element.	Step 4 x 30% reduction
Penal element	Step 5 output
Disgorgement of any financial gain	Step 1 output
<b>Final liability (Step 6)</b>	<b>Sum of Steps 1 &amp; 5</b>

**Removal of any financial benefit derived from the breach**

1. Calculate or estimate the financial gain to the person as a result of the breach, where it is proportionate, reasonable and practicable to do so.

Where any gain calculated can reasonably be attributed to affected parties in terms of financial loss, consider whether restitution payments are appropriate and, if they are, determine the amount of restitution to be required. This will be the amount that appears to be appropriate having regard to the profits accrued and/or the loss or other adverse effects suffered as a result of the breach. As noted above, if restitution payments are not appropriate these sums may be included in a financial penalty.

### ***Penal element***

2. Consider the seriousness of the breach, the behaviour of the person<sup>14</sup>, and whether the person on whom the penalty is to be imposed is an individual. The starting point figure for the penal element will reflect these factors. Included in this step, where it is proportionate, reasonable and practicable to calculate or estimate, will be an assessment of any wider market detriment as a result of the breach i.e. in addition to any amount calculated to be the financial gain to the person as a result of the breach.
3. Consider any aggravating and mitigating factors that may increase or decrease the amount arrived at after step 2.
4. Consider the need for a deterrence uplift, having regard to the principle that non-compliance should be more costly than compliance and that enforcement should deliver strong deterrence against future non-compliance. If a deterrence uplift is appropriate, add this to the amount arrived at after step 3. This figure is the penal element
5. Where a case is settled within the Settlement Window, as defined in the REMIT Procedural Guidelines, apply a discount to the penal element.

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<sup>14</sup> In respect of the behaviour of the person, the Authority will have regard to, amongst other things, whether the person believed, on reasonable grounds, that the behaviour did not amount to a REMIT breach, whether the person took all reasonable precautions and exercised due diligence to avoid behaving in a way that amounts to a REMIT breach and the extent to which the behaviour was deliberate. See paragraphs 6.17-6.21, 7.15-7.19 and 8.17-8.21.

6. The total amount to be paid by the person will be the sum of the figures determined at step 1 and step 4 (or step 5 if the case is settled). At this point the Authority will consider the overall appropriateness of the total financial liability (excluding any settlement discount), including considering any representations to the effect that a proposed financial penalty and/or restitution order will cause serious financial hardship.<sup>15</sup>

The Authority will then impose a financial penalty and/or make a restitution order as appropriate.

- 4.4. We would normally expect to apply these steps in all cases. However, some of the details may differ in cases against firms as opposed to cases against individuals.

## **5. Financial penalties and restitution in relation to firms**

### **Step 1: Calculate or estimate the financial gain to the person as a result of the breach**

- 5.1. The Authority will seek to deprive a firm of all the financial benefit derived from the breach where it is proportionate, reasonable and practicable to calculate or estimate this. As part of this, the Authority will ordinarily also charge interest on the benefit.
- 5.2. The Authority will seek to calculate the gain to the person as accurately as it can. Gain may come in the form of additional profits, avoided costs or some other undue advantage to the person. The Authority will have regard to additional profits when determining the level of any restitution payments. Other gains to the firm as a result of a REMIT breach may be taken into account when determining the amount of any financial penalty.
- 5.3. Where any gain calculated can reasonably be attributed to financial loss incurred by affected parties, the Authority will normally seek to ensure that they receive appropriate restitution payments.

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<sup>15</sup> Paragraphs 6.39-6.43 set out how the Authority will assess serious financial hardship in cases against firms. Section 9 sets out the Authority's approach in cases against individuals.

5.4. It is important to note that the Authority may impose a financial penalty even where it is not proportionate, reasonable and practicable to calculate or estimate the financial benefit to the person, or where it can be calculated and it is shown to be zero. 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 impact.

5.5. The Authority expects a firm proactively to take adequate steps to remedy the consequences of a breach, for example by:

- identifying, contacting and compensating the affected parties
- correcting any misleading statement or impression
- taking disciplinary action against staff and
- taking steps to ensure that similar problems cannot arise in the future.

5.6. Where a firm proactively agrees to provide adequate restitution or other forms of redress, the Authority will take this into account in its assessment of whether, and what, restitution and/or financial penalty may be appropriate. Where the Authority finds that adequate restitution has been made by the firm then it is unlikely to include any further sum attributable to restitution in any total financial penalty.

5.7. As noted above, the amount of any restitution payment ordered by the Authority must be that which appears to be appropriate, having regard to the profits that appear to have been accrued and/or to the loss or other adverse effect suffered as a result of the breach.

## **Step 2: Assess the seriousness of the breach and the behaviour of the person**

5.8. The starting point for calculating the penal element will be to determine a figure that reflects the seriousness of the breach. This is a key factor in calculating the penal element of the final liability, irrespective of whether the Authority has identified financial gain.

5.9. In some cases, the amount of revenue generated by a firm from a particular product line or business area may be indicative of the harm or potential harm that the breach may cause. In such cases the Authority will determine a figure that will be based on a percentage of the firm's revenue from those products or areas. The Authority also believes

that the amount of revenue generated by a firm is relevant in terms of the size of financial penalty necessary to act as a credible deterrent.

- 5.10. The Authority recognises, however, that 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.
- 5.11. In cases where the Authority considers that revenue is an appropriate indicator of harm or potential harm, the Authority will determine a figure based on a percentage of the firm's 'relevant revenue'. 'Relevant revenue' will be the revenue derived by the firm during the period of non-compliance from the products or business areas to which the non-compliance relates.
- 5.12. Where the non-compliance lasted less than 12 months, or was a one-off event, the relevant revenue will be that derived by the firm in the 12 months preceding the end of the breach. Where the firm was in existence for less than 12 months, its relevant revenue will be calculated on a pro rata basis to the equivalent of 12 months' relevant revenue.
- 5.13. Having determined the relevant revenue, the Authority will then decide on the percentage of that revenue which will form the starting point of the penalty. The Authority will consider the seriousness of the breach and choose a percentage from 0% to 20%.
- 5.14. This range is divided into five fixed levels that represent, on a sliding scale, the seriousness of the breach. The more serious the breach, the higher the level. For penalties imposed on firms there are the following five levels

- Level 1 = 0%
- Level 2 = 5%
- Level 3 = 10%
- Level 4 = 15%
- Level 5 = 20%.

- 5.15. The Authority will assess the seriousness of a breach to determine which level is most appropriate to the case. In doing so, the Authority will take into account various factors

which usually fall into several categories. However, the Authority's overall assessment depends on the overall circumstances of the case.

5.16. Factors relating to the impact of a breach committed by a firm may include but are not limited to:

- the level of financial or other benefit gained or loss avoided, or intended to be gained or avoided, by the firm from the breach, either directly or indirectly;
- the loss or risk of loss suffered by consumers, investors or other market participants (whether individually or as a whole); and
- whether the breach had, or could have had, an adverse effect on the gas and/or electricity wholesale markets and, if so, how serious that effect was. This may include having regard to whether, in the opinion of the Authority, the orderliness of, or confidence in, those markets was damaged or put at risk.

5.17. Factors relating to the nature of a breach committed by a firm may include but are not limited to:

- the frequency of the breach;
- whether the breach revealed serious or systemic weaknesses in the firm's procedures or in the management systems or internal controls relating to all or part of the firm's business;
- whether the firm's senior management were aware or should have been aware of the breach or the circumstances leading to the breach;
- whether the firm believed, on reasonable grounds, that the conduct did not amount to a breach; and
- whether the firm took all reasonable precautions and exercised all due diligence to avoid committing a breach.

5.18. Factors tending to show that the firm's breach was deliberate may include but are not limited to:

- the breach was intentional, in that the firm's senior management, or a responsible individual, intended or foresaw that the likely or actual consequences of their actions or inaction would result in a breach;
- the firm's senior management, or a responsible individual, knew that their actions were not in accordance with the firm's internal procedures;
- the firm's senior management, or a responsible individual acted in such a way as to avoid or reduce the risk that the breach would be discovered; and
- the firm obtained reasonable professional advice before the contravention occurred and failed to follow that advice. Obtaining professional advice does not remove a person's responsibility for compliance with applicable rules and requirements.

5.19. Factors tending to show that the firm's breach was reckless may include but are not limited to:

- the firm's senior management, or a responsible individual, appreciated there was a risk that their actions or inaction could result in a breach and failed adequately to mitigate that risk or to check if they were acting in accordance with the firm's internal procedures; and
- failing to provide adequate oversight of the colleagues whose actions resulted in the breach.

5.20. In following this approach factors that are likely to be considered 'level 4 factors' or 'level 5 factors' may include but are not limited to:

- the breach caused a significant loss or risk of loss to individual consumers, investors or other market users;

- the level of financial or other benefit gained or loss avoided, or intended to be gained or avoided, directly by the firm from the breach was significant;
- the breach had an adverse effect, or the risk of an adverse effect, on the orderliness of, or confidence in, the gas and/or electricity wholesale markets;
- the breach revealed serious or systemic weaknesses in the firm's procedures or in the management systems or internal controls relating to all or part of the firm's business;
- the firm failed to conduct its business with integrity; and
- the breach was committed deliberately or recklessly.

5.21. Factors that are likely to be considered 'level 1 factors', 'level 2 factors' or 'level 3 factors' may include but are not limited to:

- little, or no, profits were made or losses avoided as a result of the breach, either directly or indirectly;
- there was no or little loss or risk of loss to consumers, investors or other market users individually and in general;
- there was no, or limited, actual or potential effect on the orderliness of, or confidence in, the wholesale gas and/or electricity markets as a result of the breach;
- there is no evidence that the breach indicates a widespread problem or weakness at the firm; and
- the breach was committed inadvertently.

5.22. In reaching the overall assessment of seriousness, we note that the framework set out in Paragraphs 5.20 and 5.21 is indicative. The overall assessment will not depend simply



on adding up the number of factors in each category. All factors will be taken into account, but depending on the case and its circumstances, a single factor may be of sufficient importance to determine the overall outcome.

5.23. In cases where revenue is not an appropriate indicator of the harm or potential harm that a firm's breach may cause, we will adopt a similar approach. We will determine the appropriate step 2 amount for a particular breach by taking into account relevant factors, including those listed above. In such cases we may not use the percentage levels that are applied in cases in which revenue is an appropriate indicator of the harm or potential harm caused by a firm's breach.

*Reasonable belief and reasonable precautions*

5.24. The Authority will consider any representations that a person reasonably believed that its conduct did not amount to a REMIT breach, and/or that it took all reasonable precautions and exercised all due diligence to avoid such a breach.

5.25. The Authority will normally accept such representations (that is, it will expect to regard a person as having a reasonable belief that the conduct did not amount to a REMIT breach or that the person took all reasonable precautions and exercised all due diligence to avoid a REMIT breach) where the person can demonstrate satisfactorily that it considered all relevant matters, including but not limited to:

- having proper regard to the Authority's open letter of 11 July 2014 about the disclosure of inside information under REMIT<sup>16</sup>
- having proper regard to the Authority's open letter of 29 September 2020 concerning Dynamic parameters and other information submitted by generators in the Balancing Mechanism<sup>17</sup>
- following other relevant guidance published by the Authority, including any guidelines and policies, open letters and bespoke guidance

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<sup>16</sup> <https://www.ofgem.gov.uk/ofgem-publications/88732/ofgemopenletteronremitinsideinformation.pdf>.

<sup>17</sup> <https://www.ofgem.gov.uk/publications/open-letter-dynamic-parameters-and-other-information-submitted-generators-balancing-mechanism>

- following internal policies or procedures
- discussing the conduct with internal managers or legal advisers and following their advice
- engaging in the conduct for a legitimate purpose.

### **Step 3: Consider aggravating and mitigating factors**

5.26. The Authority may increase or decrease the amount of the penal element arrived at after step 2 to take into account factors that aggravate or mitigate the breach. Such factors may be considered one step removed from the breach itself. Such an adjustment will not affect any amount to be recovered from the firm as set out in step 1.

5.27. Aggravating factors that would tend to increase the penal element may include but are not limited to:

- repeated breaches, including failure to comply with previous undertakings (statutory or otherwise) or other agreed action in relation to concerns identified by the Authority;
- the Authority had published guidance or publicly called for an improvement in standards in relation to the behaviour constituting the breach or similar behaviour before or during the occurrence of the breach;
- the firm continued the breach after becoming aware of it or after becoming aware of the start of the Authority's investigation;
- failure to cooperate fully with reasonable requests from Ofgem's investigation team (for example, any failure to comply, without proper justification, with information requests).

5.28. Mitigating factors that would tend to decrease the penal element may include but are not limited to:

- The firm self-reported the breach;
- the firm was aware of the breach or of the potential for a breach and took steps to stop it (either specifically or by maintaining and following an appropriate compliance policy, with suitable management supervision);
- the firm took appropriate action to remedy the breach, including whether the remedial action was taken on the firm's own initiative rather than that of the Authority or another regulatory authority (for example, identifying, contacting and compensating the affected parties, correcting any misleading statement or impression, taking disciplinary action against staff involved and taking steps to ensure that similar problems cannot arise in the future)

5.29. The Authority considers that senior management has a vital role to play in ensuring that firms comply with all their legal obligations. In particular, the Authority looks to senior management to ensure that robust compliance systems are established and properly maintained and that, if a contravention or failure does occur, the matter is reported promptly to Ofgem and effective remedial action is taken promptly.

5.30. When considering factors that may mitigate the level of a penalty, the Authority attaches significant value to the self-reporting of breaches. However, firms should expect to receive less credit where self-reporting has not occurred promptly on first discovering that a breach has occurred. The Authority expects firms to be prompt in reporting when a potential breach is first uncovered and to be prompt, accurate and comprehensive in reporting any further information that comes to light.

#### **Step 4: Consider an adjustment for deterrence**

5.31. If the Authority considers the figure arrived at after step 3 is insufficient to deter the firm that committed the breach, or others, from committing further or similar breaches then the Authority may increase the penalty.

5.32. The Authority may for example do this where it considers that

- the penal element would otherwise be too small in relation to the breach to meet its objective of credible deterrence
- it is likely that similar contraventions or failures will be committed by the firm or by other firms in the future in the absence of such an increase to the penal element
- previous action in respect of similar breaches has failed to improve industry standards. This may include similar breaches relating to different wholesale energy products or
- the likelihood of detection in the case in question was low or in future similar cases would be low. This applies only to cases which were not first brought to Ofgem's attention through self-reporting.

### **Step 5: Apply a discount in settled cases**

5.33. If a case is suitable for settlement, the Authority may offer the firm the opportunity to settle the case. Settlement has many potential advantages. It can, for example, result in

- restitution being made earlier than would otherwise be the case
- the saving of Authority resources and those of the person under investigation
- messages getting out to the energy market sooner, and
- timely and effective action that improves market and consumer confidence.

5.34. In recognition of the potential benefits of settlement, the Authority may offer to reduce the penal element of the overall financial liability to be imposed on the firm by 30 percent, if settlement is agreed within the Settlement Window.

5.35. Further detail of the Authority's settlement process, including how the Settlement Window operates, and how the Authority assesses whether a case is suitable for settlement, is set out in Ofgem's REMIT Procedural Guidelines.

## **Step 6: Establish the total financial liability**

5.36. The Authority will determine the firm's total financial liability by adding the final penal element (step 4 or 5) to any sum that has been established which removes any financial benefit derived by the person from the breach (step 1).

5.37. The Authority may adjust the total financial liability to ensure that any financial penalty and/or restitution payments are appropriate in all the circumstances of the case. For example, the Authority may adjust the proposed penalty in order to avoid causing serious financial hardship to a firm.

### *Serious financial hardship*

5.38. The Authority may consider reducing a penalty if it is satisfied that a firm may suffer serious financial hardship as a result of paying the entire penalty.

5.39. Where a firm considers that payment of the proposed penalty will cause serious financial hardship, the Authority will consider whether to reduce the proposed penalty only if:

- the firm provides verifiable evidence that payment of the penalty will cause it serious financial hardship; and
- the firm provides full, frank and timely disclosure of the verifiable evidence and cooperates fully in answering any question asked by the authority about its financial position.

5.40. In deciding whether it is appropriate to reduce the penalty, the Authority will take into consideration:

- the firm's financial circumstances, including whether the penalty would render the firm insolvent or threaten its solvency; and
- its regulatory objectives (see section 2 of this statement), for example in situations where consumers would be harmed or market confidence would suffer, the Authority

may reduce a penalty to allow a business to continue to operate and/or make restitution payments.

5.41. There may be cases where, even though the firm has satisfied the Authority that payment of the financial penalty would cause it serious financial hardship, the Authority considers the breach to be so serious that it is not appropriate to reduce the penalty. The Authority will consider all the circumstances of the case in determining whether this course of action is appropriate, including whether:

- the firm directly derived a significant benefit from the breach and, if so, the extent of that financial benefit;
- the firm acted fraudulently or dishonestly in order to benefit financially;
- previous action in respect of similar breaches has failed to improve industry standards; or
- the firm has spent money or dissipated assets with a view to frustrating or limiting the impact of enforcement action taken by the Authority or other regulatory bodies.

5.42. The Authority may, separately, seek an injunction to prohibit the firm temporarily from carrying out professional activities. If such an injunction is granted, this will not affect the Authority's assessment of the appropriate financial penalty for the breach. However, the injunction may mean that the firm has less earning potential and this may be relevant in assessing whether the penalty will cause the firm serious financial hardship.

5.43. Where the Authority considers that, following commencement of an Authority investigation, a firm has reduced its solvency in order to reduce the amount of any gain and/or detriment to be recovered or financial penalty payable (for example by transferring assets to third parties), the Authority will normally take account of the firm's solvency before it took action to reduce it when determining whether the firm would suffer serious financial hardship as a result of giving up the gain/detriment and paying the financial penalty.

5.44. Having considered all the circumstances of the case, the Authority will determine an appropriate amount for any financial penalty and/or any payments required under a restitution order.

## **6. Financial penalties and restitution in relation to individuals**

### **Step 1: Calculate or estimate the financial gain to the person as a result of the breach**

- 6.1. The Authority will seek to deprive an individual of all the financial benefit derived from the breach where it is proportionate, reasonable and practicable to calculate or estimate this. As part of this, the Authority will ordinarily also charge interest on the benefit.
- 6.2. The Authority will seek to calculate the gain to the individual. Gain may come in the form of additional profits, avoided costs or some other undue advantage. The Authority will have regard to additional profits when determining the level of any restitution payments. Other gains to the individual as a result of a REMIT breach may be taken into account when determining the amount of any financial penalty.
- 6.3. Where it is possible to show that other market participants have suffered loss or other adverse consequences as result of the breach, the Authority will seek to ensure that they receive appropriate restitution payments.
- 6.4. It is important to note that the Authority may impose a financial penalty even where the gain to the person cannot be reasonably calculated or estimated, or where it can be calculated and it is shown to be zero. 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 impact.
- 6.5. The Authority expects an individual proactively to take adequate steps to remedy the consequences of a breach, for example by:
- identifying, contacting and compensating the affected parties;
  - correcting any misleading statement or impression; and
  - taking steps to ensure that similar problems cannot arise in the future.

6.6. Where an individual proactively agrees to provide adequate restitution or other forms of redress, the Authority will take this into account in its assessment of whether, and what, financial penalty and/or restitution may be appropriate. Where the Authority finds that adequate restitution has been made by the firm then it is unlikely to include any further sum attributable to restitution in any total financial penalty.

6.7. As noted above, the amount of any restitution payment ordered by the Authority must be that which appears to be appropriate, having regard to the profits that appear to have been accrued and/or to the loss or other adverse effect suffered as a result of the breach.

## **Step 2: Assess the seriousness of the breach and the behaviour of the person**

6.8. Once the Authority has calculated any benefit to be recovered from the individual, it will calculate the additional penal element.

### ***Non-market abuse cases***

6.9. In non-market abuse cases, the Authority will determine a starting point for the penalty based on the individual's 'relevant income'.

6.10. An individual's 'relevant income' will be the gross amount of all benefits received by the individual from the employment in connection with which the breach occurred (the 'relevant employment') and for the period of the breach. In determining an individual's relevant income

- 'benefits' includes but is not limited to salary, bonus, pension contributions, share options and share schemes and
- 'employment' includes but is not limited to employment as an advisor, director, partner or contractor.



- 6.11. Where the breach lasted less than 12 months, or was a one-off event, the relevant income will be that earned by the individual in the 12 months preceding the end of the breach. Where the individual was in the relevant employment for less than 12 months, his or her relevant income will be calculated on a pro rata basis to the equivalent of 12 months' relevant income.
- 6.12. This approach reflects the Authority's view that individuals receive remuneration commensurate with their responsibilities and so it is appropriate to base the amount of penalties for failure to discharge their duties properly on their remuneration. The Authority also believes that the extent of the financial benefit derived by an individual is relevant in terms of the size of the financial penalty necessary to act as a credible deterrent.
- 6.13. Having determined the relevant income the Authority will decide on the percentage of that income that will form the basis of the penalty. In making this determination the Authority will consider the seriousness of the breach and choose a percentage between 0% and 40%. This range is divided into five fixed levels that reflect, on a sliding scale, the seriousness of the breach. The five levels are

- Level 1 = 0%
- Level 2 = 10%
- Level 3 = 20%
- Level 4 = 30%
- Level 5 = 40%.

### ***Market abuse cases***

- 6.14. In market abuse cases, the Authority will determine a starting point for the penalty based on the seriousness of the abuse and on whether an individual's employment had put him or her into a position to commit the breach. The Authority considers that where the market abuse has been facilitated by the individual's employment, the penalty imposed should reflect the gross amount of all benefits derived from that employment.
- 6.15. Where the market abuse was facilitated by the individual's employment, the penalty starting point will be the greater of:

- a figure based on a percentage of the individual's 'relevant income' (see 6.17 below)
- a multiple of the profit made or loss avoided by the individual for his or her own benefit, or for the benefit of others where the individual has been instrumental in achieving that benefit, as a direct result of the breach (see 6.19 – 6.20 below) or
- £100,000 if the Authority assesses the breach as level 4 or 5 (which will usually be the case if the breach is deliberate).

6.16. Where the market abuse was not facilitated by the individual's employment, the penalty starting point will be the greater of

- a multiple of the profit made or loss avoided by the individual for his or her own benefit, or for the benefit of others where the individual has been instrumental in achieving that benefit, as a direct result of the breach (see 6.19 – 6.20 below) or
- £100,000 if the Authority assesses the breach as level 4 or 5 (which will usually be the case if the breach is deliberate).

6.17. An individual's 'relevant income' will be the gross amount of all benefits received by the individual from the employment in connection with which the breach occurred (the 'relevant employment') and for the period of the breach. In determining an individual's relevant income

- 'benefits' includes but is not limited to salary, bonus, pension contributions, share options and share schemes and
- 'employment' includes but is not limited to employment as an advisor, director, partner or contractor.

6.18. Where the market abuse lasted less than 12 months, or was a one-off event, the relevant income will be that earned by the individual in the 12 months preceding the final market abuse. Where the individual was in the relevant employment for less than 12

months, his or her relevant income will be calculated on a pro rata basis to the equivalent of 12 months' relevant income.

6.19. Where the market abuse was facilitated by the individual's employment:

- the Authority will determine the percentage of relevant income by considering the seriousness of the breach and choosing a percentage between 0% and 40% and
- the Authority will determine the 'profit multiple' by considering the seriousness of the breach and choosing a multiple between 0 and 4.

6.20. The income percentage (for market abuse cases where the breach was facilitated by the individual's employment) and the profit multiple ranges (for all market abuse cases) are divided into five fixed levels that reflect the seriousness of the breach:

Level 1 = 0% of relevant income; profit multiple of 0

Level 2 = 10% of relevant income; profit multiple of 1

Level 3 = 20% of relevant income; profit multiple of 2

Level 4 = 30% of relevant income; profit multiple of 3

Level 5 = 40% of relevant income; profit multiple of 4.

6.21. The Authority will assess the seriousness of a breach to determine which level is most appropriate to the case. In doing so, the Authority will take into account various factors that usually fall into several categories. However, the Authority's assessment of the seriousness of the breach will depend on the overall circumstances of the case.

6.22. Factors relating to the impact of a breach committed by an individual may include but are not limited to:

- the level of financial or other benefit gained or loss avoided, or intended to be gained or avoided, by the individual from the breach, either directly or indirectly;
- the loss or risk of loss suffered by consumers, investors or other market participants (whether individually or as a whole); and

- whether the breach had, or could have had, an adverse effect on the gas and/or electricity wholesale markets and, if so, how serious that effect was. This may include having regard to whether, in the opinion of the Authority, the orderliness of, or confidence in, those markets has been damaged or put at risk.

6.23. Factors relating to the nature of a breach committed by an individual may include but are not limited to:

- the frequency of the breach;
- whether the individual failed to act with integrity or abused a position of trust;
- whether the individual caused or encouraged other individuals to commit a breach;
- whether the individual is an experienced industry professional;
- whether the individual held a senior position with the firm;
- whether the individual believed, on reasonable grounds, that the conduct did not amount to a breach<sup>18</sup>; and
- whether the individual took all reasonable precautions and exercised all due diligence to avoid committing a breach<sup>19</sup>.

6.24. Factors tending to show that the breach was deliberate may include but are not limited to:

- the breach was intentional, in that the individual intended or foresaw that the likely or actual consequences of his or her actions would result in a breach;

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<sup>18</sup> See paragraph 6.29 for an indication of the circumstances in which the Authority expects to regard an individual as having reasonable grounds to believe that his or her conduct did not amount to a breach.

<sup>19</sup> See paragraph 6.29 for an indication of the circumstances in which the Authority expects to regard an individual as having taken all reasonable precautions and exercised all due diligence to avoid committing a breach.

- the individual knew that the conduct was not in accordance with his or her firm's internal procedures;
- the individual acted in such a way as to avoid or reduce the risk that it would be discovered;
- in market abuse cases, the individual knew or recognised that the information on which the dealing was based was inside information; and
- the individual obtained reasonable professional advice before the contravention occurred and failed to follow that advice. Obtaining professional advice does not remove an individual's responsibility for compliance with applicable rules and requirements.

6.25. Factors tending to show that the firm's breach was reckless may include but are not limited to:

- the individual appreciated there was a risk that his or her actions or inactions could result in a breach and failed adequately to mitigate that risk; and
- the individual was aware there was a risk that his or her actions could result in market abuse but failed to check if he was acting in accordance with the firm's internal procedures.

6.26. In following this approach factors which are likely to be considered 'level 4 factors' or 'level 5 factors' include:

- the breach caused a significant loss or risk of loss to individual consumers, investors or other market users;
- the level of financial or other benefit gained or loss avoided, or intended to be gained or avoided, directly by the individual from the breach was significant;
- the breach had, or could have had, an adverse effect on the orderliness of, or confidence in, the wholesale gas and/or electricity markets;

- the individual failed to act with integrity; and
- the breach was committed deliberately or recklessly.

6.27. In following this approach factors that are likely to be considered 'level 1 factors', 'level 2 factors' or 'level 3 factors' may include but are not limited to:

- little or no profits were made or losses avoided as a result of the breach, either directly or indirectly;
- there was no or little risk of loss to consumers, investors or other market users individually and in general;
- there was no, or limited, actual or potential effect on the orderliness of, or confidence in, the gas and/or electricity wholesale markets as a result of the breach; and
- the breach was committed inadvertently.

6.28. In reaching the overall assessment of seriousness, we note that the framework set out in Paragraphs 6.26 and 6.27 is indicative. The overall assessment will not depend simply on adding up the number of factors in each category. All factors will be taken into account, but depending on the case, a single factor may be of sufficient importance to determine the overall outcome.

#### *Reasonable belief and reasonable precautions*

6.29. The Authority will consider any representations that a person reasonably believed that its conduct did not amount to a REMIT breach, and/or that it took all reasonable precautions and exercised all due diligence to avoid such a breach.

6.30. The Authority will normally accept such representations (that is, it will expect to regard a person as having a reasonable belief that the conduct did not amount to a REMIT breach or that the person took all reasonable precautions and exercised all due diligence to avoid

a REMIT breach) where the person can demonstrate satisfactorily that it considered all relevant matters, such as:

- having proper regard to the Authority’s open letter of 11 July 2014 about the disclosure of inside information under REMIT<sup>20</sup>;
- having proper regard to the Authority’s open letter of 29 September 2020 on the submission of dynamic parameters and other information in the Balancing Mechanism<sup>21</sup>;
- following other relevant guidance published by the Authority, including any guidelines and policies, open letters and bespoke guidance;
- following internal policies or procedures;
- discussing the conduct with internal managers or legal advisers and following their advice; and
- engaging in the conduct for a legitimate purpose.

### **Step 3: Consider aggravating and mitigating factors**

6.31. The Authority may increase or decrease the amount of the penal element arrived at after step 2 in order to take into account of factors that aggravate or mitigate the breach. Such factors may be considered one step removed from the breach itself. Such an adjustment will not affect any amount to be recovered from the individual as set out in step 1.

6.32. Aggravating factors that would tend to increase the penal element may include but are not limited to:

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<sup>20</sup> <https://www.ofgem.gov.uk/ofgem-publications/88732/ofgemopenletteronremitinsideinformation.pdf>.

<sup>21</sup> [Open letter on dynamic parameters and other information submitted by generators in the Balancing Mechanism | Ofgem](#)

- repeated breaches, including failure to comply with previous undertakings (statutory or otherwise) or other agreed action in relation to concerns identified by the Authority;
- the Authority had published guidance or publicly called for an improvement in standards in relation to the behaviour constituting the breach or similar behaviour before or during the occurrence of the breach;
- the individual continued the breach after becoming aware of it or after becoming aware of the start of the Authority's investigation; and
- failure to cooperate fully with reasonable requests from Ofgem's investigation team (for example, any failure to comply, without proper justification, with information requests).

6.33. Mitigating factors that would tend to decrease the penal element may include but are not limited to:

- the individual self-reported the breach;
- the individual was aware of the breach or of the potential for a breach and took steps to stop it;
- the individual took appropriate action to remedy the breach, including whether the remedial action was taken on the individual's or the firm's own initiative or that of the Authority or another regulatory authority (for example, identifying and compensating those who suffered loss, correcting any misleading statement or impression and taking steps to ensure that similar problems cannot arise in the future); and
- the individual has assisted the Authority in action taken against other individuals for market abuse and/or in criminal proceedings

6.34. When considering factors that may mitigate the level of a penalty, the Authority attaches significant value to the self-reporting of breaches. However, individuals should expect to receive less credit where self-reporting has not occurred promptly on first discovering that a breach has occurred. The Authority expects individuals to be prompt in



reporting when a potential breach is first uncovered and to be prompt, accurate and comprehensive in reporting any further information that comes to light.

#### **Step 4: Consider an adjustment for deterrence**

6.35. If the Authority considers that the figure arrived at after step 3 is insufficient to deter the individual that committed the market abuse, or others, from committing further or similar breaches then the Authority may increase the penalty.

6.36. The Authority may for example do this where it considers that:

- the penal element would otherwise be too small to meet its objective of credible deterrence given the size of the individual's income or net assets;
- it is likely that similar contraventions or failures will be committed by the individual or by other individuals in the future in the absence of such an increase to the penal element;
- previous action in respect of similar breaches has failed to improve industry standards. This may include similar breaches relating to different wholesale energy products;
- a penalty based on the individual's income may not act as a deterrent (for example, if an individual has a small or zero income but owns assets of high value);
- the likelihood of detection in the case in question was low or in future similar cases would be low. This applies only to cases which were not first brought to Ofgem's attention through self-reporting.

#### **Step 5: Apply a discount in settled cases**

6.37. If a case is suitable for settlement, the Authority may offer the individual the opportunity to settle the case. Settlement has many potential advantages. It can, for example, result in:

- restitution being made earlier than would otherwise be the case
- the saving of Authority resources and those of the person under investigation
- messages getting out to the energy market sooner and
- timely and effective action that improves market and consumer confidence.

6.38. In recognition of the benefits of settlement, the Authority may offer to reduce the penal element of the overall financial liability to be imposed on the individual by 30 percent if settlement is agreed within the Settlement Window.

6.39. Further detail of the Authority's settlement process, including how the Settlement Window operates and how the Authority assesses whether a case is suitable for settlement , is set out in Ofgem's REMIT procedural guidelines.

## **Step 6: Establish the total financial liability**

6.40. The Authority will determine the individual's total financial liability by adding the final penal element (step 4 or 5) to any sum that has been established which removes any financial benefit derived by the person from the breach (step 1).

6.41. The Authority may adjust the total financial liability to ensure that any financial penalty and/or restitution payments are appropriate in all the circumstances of the case. For example, the Authority may adjust the proposed penalty and/or restitution payment in order to avoid causing serious financial hardship to an individual. Section 7 sets out the Authority's policy on serious financial hardship in relation to individuals.

6.42. Having considered all the circumstances of the case, the Authority will determine an appropriate amount for any financial penalty and/or any payments required under a restitution order.

## 7. Serious financial hardship in relation to individuals

- 7.1. The Authority recognises that penalties may affect persons differently and that the Authority should consider whether a reduction in the proposed penalty is appropriate if the penalty would cause the subject of enforcement action serious financial hardship.
- 7.2. Where an individual claims that payment of the proposed penalty will cause him or her serious financial hardship, the Authority will consider whether to reduce the proposed penalty only if:
- the individual provides verifiable evidence that payment of the penalty will cause serious financial hardship and
  - the individual provides full, frank and timely disclosure of the verifiable evidence and cooperates fully in answering any question asked by the Authority about his or her financial position.
- 7.3. The onus is on the individual to satisfy the Authority that payment of the penalty will cause serious financial hardship. In assessing this, the Authority will consider an individual's ability to pay the penalty over a reasonable period (normally no greater than three years).
- 7.4. The Authority's starting point is that an individual will suffer serious financial hardship only if during that period his or her net annual income will fall below £16,000 and his or her capital will fall below £18,000 as a result of payment of the penalty. Unless the Authority believes that both the individual's income and capital will fall below these respective thresholds as a result of payment of the penalty, the Authority is unlikely to be satisfied that the penalty will result in serious financial hardship.
- 7.5. The Authority will consider all relevant circumstances in determining whether the income and capital threshold levels should be increased in a particular case.
- 7.6. The Authority will consider agreeing to payment of the penalty by instalments where the individual requires time to realise his or her assets, for example by waiting for payment of a salary or by selling property.

- 7.7. The Authority will consider as capital anything that could provide the individual a source of income, including savings, property (including personal possessions), investments and land.
- 7.8. The Authority will normally consider as capital the equity that an individual has in the home in which he or she lives but will consider any representations by the individual about this (for example, as to the exceptionally severe impact a sale of the property might have upon other occupants of the property or the impracticability of re-mortgaging or selling the property within a reasonable period).
- 7.9. The Authority may also consider the extent to which the individual has access to other means of financial support in determining whether he or she can pay the penalty without being caused serious financial hardship.
- 7.10. Where a penalty is reduced it will be reduced to an amount that the individual can pay without going below the threshold levels that apply in that case. If an individual has no income, any reduction in the penalty will be to an amount that the individual can pay without going below the capital threshold.
- 7.11. There may be cases where, even though the individual has satisfied that Authority that payment of a penalty would cause serious financial hardship, the Authority considers the breach to be so serious that it is not appropriate to reduce the penalty. The Authority will consider all the circumstances of the case in determining whether this course of action is appropriate, including whether:
- the individual directly derived a financial benefit from the breach and, if so, the extent of that financial benefit
  - the individual acted fraudulently or dishonestly with a view to personal gain
  - previous action in respect of similar breaches has failed to improve industry standards or

- the individual has spent money or dissipated assets in anticipation of Authority or other enforcement action with a view to frustrating or limiting the impact of action taken by the Authority or other regulatory bodies.

7.12. The Authority may, separately, seek an injunction to prohibit an individual temporarily from carrying out professional activities. If such an injunction is granted, this will not affect the Authority's assessment of the appropriate financial penalty for the breach. However, the injunction may mean that the individual has less earning potential and this may be relevant in assessing whether the penalty will cause the individual serious financial hardship.

7.13. Where the Authority considers that, following commencement of an Authority investigation, an individual has reduced his or her solvency in order to reduce the amount of any gain and/or detriment to be recovered or financial penalty payable (for example by transferring assets to third parties), the Authority will normally take account of those assets when determining whether the individual would suffer serious financial hardship as a result of giving up the gain/detriment and paying the financial penalty.

## **8. Application, adoption and revision of the Statement of Policy**

8.1. The Authority, having undertaken such consultation as it considers appropriate, has prepared and published this Statement of Policy. The Authority will have regard to this statement in respect of any contravention which occurred on or after 23-03-2022:

- i. in deciding whether to impose a financial penalty;
- ii. in determining the amount of any financial penalty; and
- iii. in deciding whether to make a restitution order.

8.2. The Authority may refer to further policies or statements as are relevant to the contraventions or failures at issue and as the Authority may publish from time to time.

8.3. This statement has been adopted by the Authority. The Authority has not delegated to the Enforcement Decision Panel, or to any member or employee of the Authority, the power to vary this statement. The Authority may, from time to time, revise this statement, in accordance with the 2013 Regulations. Any revised statement will be issued for consultation and published.

**Gas and Electricity Markets Authority**

**23-03-2022**