

- a) the amount of the penalty
 - b) the manner in which and the date by which the penalty must be paid, and
 - c) how the penalty will be recovered if it is not paid by that date, including any interest charges that may be payable.
- 8.42. A Decision Notice confirming the making of a restitution order will also set out:
- a) the amount that the person is to pay or distribute
 - b) the persons to whom that amount is to be paid or among whom that amount is to be distributed, and
 - c) how the payment or distribution is to be made and the time period for doing so.
- 8.43. A Decision Notice issuing a non-compliance statement will also set out the terms of the statement.
- 8.44. The Decision Notice must impose sanctions made under the same regulation as that proposed in the Warning Notice. However, if after considering representations on the Warning Notice the Panel decides to impose sanctions in respect of the same matter that differ from those originally proposed, it may, before it takes the action set out in a Decision Notice, give the person concerned a further Decision Notice. In this case, the Panel must obtain the consent of the person to whom the original Decision Notice was sent. The right to make a reference in respect of any further Decision Notice will be the same as for the original Decision Notice.
- 8.45. The person receiving a Decision Notice must not publish the notice or any details concerning it, unless we have done so first. We may impose a penalty for improper publication. The Panel must publish such information as it considers appropriate about the matters contained in a Decision Notice. However, it may not publish such information if, in its opinion, publication would be:
- a) unfair to the person against whom action is to be taken
 - b) prejudicial to the interests of consumers, or
 - c) detrimental to the stability of wholesale energy markets.
- 8.46. If the Panel wishes to publish information relating to a Decision Notice, it shall first consult the person against whom the action is to be taken in order to obtain their views on the factors listed in the paragraph above. The Panel will take the same approach to considering any representations that it receives as it would in deciding whether to publish information relating to a Warning Notice (see paragraphs 8.23-8.37).

References

- 8.47. If the Panel decides to impose a financial penalty, to make a restitution order, or to issue a statement of non-compliance against a person, that person may refer the decision to the Upper Tribunal (Tax and Chancery Division).
- 8.48. A third party to whom a copy of a Decision Notice has been given may refer to the Tribunal the decision in question, so far as that decision is based on a reason that

relates to a matter that is prejudicial to the third party. The third party may also refer to the Tribunal any opinion expressed by the Panel in relation to him.

- 8.49. The Tribunal may take account of any relevant evidence whether or not it was available to the Panel when it made the decision that is the subject of the reference.
- 8.50. If a financial penalty decision is being referred, the Tribunal must determine what (if any) is the appropriate action for the Authority to take and remit the matter to the Authority with such directions (if any) as the Tribunal considers appropriate for giving effect to the determination. However, the Tribunal may not direct the Authority to do anything that the Authority did not have the power to do when making its decision.
- 8.51. If a person is referring a decision to issue a restitution order, the Tribunal must either dismiss the reference or remit the matter to the Authority with a direction to reconsider it and reach a decision in accordance with the Tribunal's findings. The Tribunal's findings in such cases may relate to:
 - a) issues of fact or law
 - b) the matters to be, or not to be, taken into account by the Authority in making the decision, and/or
 - c) the procedural or other steps to be taken by the Authority in connection with making the decision.
- 8.52. The Authority must comply with any directions given to it by the Tribunal. For example, if the Tribunal (or the court following an appeal of a Tribunal decision) directs the Panel to take different action to that set out in the Decision Notice, the Panel will issue a further Decision Notice accordingly.
- 8.53. An order of the Tribunal may be enforced as if it were an order of a county court (or, in Scotland, as if it were an order of the Court of Session).

Discontinuance Notices

- 8.54. If the Panel decides not to take the action proposed in a Warning or Decision Notice, it will give a Discontinuance Notice to the person concerned. It will also send a copy to any third parties to whom the Warning or Decision Notice was copied.
- 8.55. A Discontinuance Notice will identify the proceedings that are being discontinued. It will confirm that they are being discontinued, and it will state that if the person to whom the Notice is given consents the Panel may publish such information as it considers appropriate about the matter. Consent for publication will also be required from any third parties to whom the notice is copied, in so far as the material to be published is relevant to those persons. Prior to publication we will also give consideration to whether any material is confidential.

Final Notices

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

- 8.57. If the matter is referred to the Upper Tribunal and the Tribunal upholds the Panel's decision, the Panel must issue a Final Notice. If, however, the Tribunal (or the court following an appeal of a Tribunal decision) directs the Panel to take different action to that set out in the Decision Notice, the Panel will issue a further Decision Notice. All such notices will be given to the person concerned and to any person to whom the original Decision Notice was copied.
- 8.58. A Final Notice about a financial penalty will state the amount of the penalty and the manner in which and period within which it must be paid. It will also set out how the penalty will be recovered if it is not paid by the specified date (including any interest charges that may be payable). If all or any of the amount of the penalty is outstanding at the end of the period that was allowed for payment, we may recover the outstanding amount as a debt due to us.
- 8.59. A Final Notice about restitution will set out the amount to be paid to, or distributed among, those who have suffered loss as a result of the breach. It will also set out the manner in which and date by which restitution must be given. If all or any of a required payment or distribution has not been made at by the specified date, the obligation to make the payment is enforceable on the application of the Authority for an injunction or, in Scotland, by an order of the Court of Session.
- 8.60. The specified date for payment of a penalty or of restitution must be at least 14 days from the date of the Final Notice.⁵⁶ The Panel may give more time, taking account of any bank or other public holidays that may fall within this period.
- 8.61. A Final Notice about a statement of non-compliance must set out the terms of the statement and give details of when and how it will be published.
- 8.62. The Panel must publish such information about the matter to which a Final Notice relates as it considers appropriate. However, it may not publish information relating to a Final Notice if, in its opinion, publication would be:
- a) unfair to the person against whom action is proposed
 - b) prejudicial to the interests of consumers, or
 - c) detrimental to the stability of the wholesale energy markets in Great Britain.

Access to Authority material

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

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

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

- 8.64. We are not required to grant access to material if the material relates to a case involving another person and the Panel took it into account only for comparative purposes.
- 8.65. We may refuse the person access to material where it considers that allowing access:
- a) would not be in the public interest, or
 - b) would not be fair, having regard to the likely significance of the material to the person to whom the Warning or Decision Notice is addressed, and the potential prejudice to the commercial interests of persons other than those to whom the Warning or Decision Notice is addressed.
- 8.66. If we refuse to allow access to such material, we will notify the person in writing, giving reasons for the refusal.
- 8.67. The requirement to grant access to Ofgem material does not extend to material that is legally privileged.

9. Sanctions available to the Authority

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

Financial penalty or statement of failure to comply

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

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

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

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

Restitution orders

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

- a. a person has breached a REMIT requirement (or has required or encouraged another person or persons to engage in behaviour that would have amounted to a breach if the person had done it himself), and
- b. the person has accrued profits from the breach or that one or more persons have suffered loss or been otherwise adversely affected by the breach.

9.7. In cases where the decision maker considers it appropriate to obtain restitution, it will first consider using its own powers before considering whether to seek an Authority decision to take court action. However, there may be circumstances in which the Authority will choose to apply to the court for a restitution order. For example, the Authority may wish to combine an application for a restitution order with other court action against the person (such as seeking an injunction).

⁵⁸ See regulation 26 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

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

