



To all wholesale energy market participants, persons professionally arranging transactions and other interested parties

Promoting choice and value for all gas and electricity customers

8 November 2013

Dear colleague,

REMIT penalties statement and procedural guidelines

Introduction

We published consultation papers in June on proposed penalties and procedural guidelines for REMIT investigations and are grateful for the responses we received.

Most respondents agreed that our approach to enforcement should, as far as possible, be consistent across all our functions. There was wide support for the objectives that we proposed to promote in exercising our power to impose penalties under REMIT. There was also wide support for the factors that we set out as influencing our decisions on whether to impose a financial penalty and determining its amount. This confirms that our general approach is appropriate.

Some respondents, however, expressed the view that our REMIT guidance should align more closely with guidance issued by the Financial Conduct Authority ('the FCA'), for example on our approach to calculating penalties and on publicising the launch of REMIT cases. I address below these and the other main issues raised by respondents.

Effective prioritisation of cases and proportionate action

Some respondents expressed the view that the enforcement regime should distinguish between minor, technical breaches and repeated, deliberate manipulation of the market. It was felt that our focus should very much be on the latter and that penalties should not be imposed for minor breaches. Investigations involve time and resources for Ofgem and those being investigated. We will aim to prioritise cases where the circumstances suggest that a potentially serious breach has occurred.

As our penalties guidance states, we will be more likely to impose financial penalties if the breach is of one of the core REMIT prohibitions of insider trading and attempted or actual market manipulation. However, we reserve the right to impose penalties for breaches of the other REMIT requirements as provided for in the regulations. In exercising its powers, the Gas and Electricity Markets Authority ('the Authority') will act reasonably and have regard to better regulation principles, which means that investigation processes should be proportionate and the level of any penalties will take full account of the particular facts and circumstances of each case.

Calculating financial penalties

In June we sought views on the factors that should influence the Authority's decisions of whether to impose a financial penalty and determining its amount. There was general agreement that the factors we listed were appropriate. However, as noted above, some respondents stated that we should adopt the FCA's approach to calculating the level of the penalty, including specified percentage discounts for reaching a settlement.

The Authority has decided not to adopt certain aspects of the FCA's approach to calculating penalties in our REMIT guidelines before it has had the chance to consider them as part of the Enforcement Review. We drew attention to this in our consultation letter, which noted that deferring consideration of these issues would ensure that the REMIT regime was, as far as possible, consistent with our general approach to setting penalties in the short and long term. This remains our intended approach. We are now reviewing our approach to calculating financial penalties in contested and settled cases and as part of this we are considering the FCA's approach (and those of other regulators). We expect to consult on a revised penalties statement in 2014.

Financial penalties against individuals

A couple of respondents stated that where an individual employed by a market participant commits a breach, Ofgem should make it clear that penalties should be imposed on firms rather than individuals unless the Authority can clearly demonstrate personal culpability. Our position is that the primary responsibility for ensuring compliance with regulatory obligations rests with firms but that the Authority may take action against individuals where there is evidence of personal culpability. The penalties statement sets out our view on where personal culpability might arise. As part of our Enforcement Review we are considering the FCA's approach to calculating penalties for individuals, including its method of assessing serious financial hardship. We may, of course, already take into account hardship when ensuring the amount of the penalty is proportionate.

Avoiding 'double jeopardy'

A number of respondents were concerned about the possibility of double jeopardy, where a business or individual might be investigated and penalised by more than one regulatory body in relation to the same conduct.

Our procedures guidelines set out that the Authority will coordinate its REMIT market monitoring, investigation and enforcement activities with other regulatory authorities in the UK and in other EU Member States. Work is still continuing on the practical details that will underpin cooperation between ACER and Member States. However, we are committed to achieving efficient cooperation with other regulatory bodies. In addition, our penalties statement is clear that where other regulatory bodies have taken action in respect of the same conduct, we will consider whether that action would be adequate to address our concerns and, in determining the amount of any penalty, we will have regard to any penalty imposed by another body in respect of that conduct.

Publicising the launch of investigations

Several respondents argued that Ofgem should adopt the FCA's presumption against publicising cases when they are begun and that investigations should only be announced when Ofgem is clear that a breach has occurred. Ofgem's usual approach is to publish investigations when they are launched (while making clear that the opening of an investigation does not in itself imply that a breach has occurred). However, in the light of consultation responses we have considered the matter further.

Our view is that REMIT investigations have some distinct characteristics:

- an investigation can be opened where there are circumstances suggesting that a breach of REMIT has occurred. This is a relatively low hurdle and as such might result in a relatively large number of cases being opened and closed without there being a case to answer, giving a misleading impression of the integrity of the market and participants in it
- publicising the opening of an investigation may provide greater opportunity for individuals who have done wrong to destroy evidence and more generally to hamper any investigation, as they will not have the formal compliance structures that we would expect to exist in companies
- in investigating potential breaches, Ofgem expects that in some cases it will work with other regulators, some of whom have criminal investigation powers. Where there is the prospect of a related criminal investigation we would not wish to risk prejudicing or frustrating this by publishing the opening of our investigation.

These are important considerations. On balance, therefore, we have decided that we will not normally publicise potential breaches of the core REMIT prohibitions of insider trading and attempted or actual market manipulation. We consider that adopting this approach is appropriate in these most sensitive cases. However, we reserve our right to publicise the opening of any REMIT investigation, for example, if we consider that an announcement is in the interests of consumers, would avoid damage to market confidence or would aid the investigation. Of course, where there is a proven breach we will publicise the case and the outcome.

Other issues

In the light of respondents' comments we have made a number of other changes to the guidance. Amongst other things, these relate to encouraging the prompt submission of Suspicious Transaction Reports, making it clear that our power to seize material covers all documents and information recorded in any format and specifying that we will allow a reasonable period of time to enable a lawyer to arrive at a site inspection but that, after this period, the site inspection will commence. The guidance also confirms that legal representation is allowed at interviews and oral hearings but that the lack of it will not prevent interviews and hearings from taking place. Finally, stakeholders should note that Ofgem is considering its procedures in relation to Statements of Case as part of the Enforcement Review and expects to consult on them in 2014.

The REMIT penalties statement and procedures guidelines are available on our website. They are, however, likely to be revised in 2014 to reflect our Enforcement Review conclusions and any further REMIT-related regulations that may be passed by Parliament.

Yours faithfully

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Ofgem