

# REMIT Procedural Guidelines and Penalties Statement

## Consultation

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### Overview

We are today consulting on proposed changes to two documents that describe how we monitor, investigate and enforce the requirements in "REMIT" - the EU regulation on wholesale energy market integrity and transparency. Our proposals will affect companies and individuals who are connected to or involved in wholesale energy markets. We want your views on some changes to:

1. the REMIT Procedural Guidelines. These explain how we take action under our REMIT powers, and
2. the REMIT Penalties Statement. This explains when and how we would impose a penalty if a company or individual breached REMIT.

The changes we are proposing came from:

- changes to our wider enforcement policies and procedures
- looking at the approach to regulation in financial markets
- what we have learnt through using our REMIT monitoring and enforcement powers, and
- the need to encompass imminent new powers that will allow us to take action if REMIT market participants fail to register or submit REMIT data.

The REMIT Enforcement Regulations require us to consult on our proposed changes. Please send us your views by 19 February 2015. We would like to issue an updated REMIT Procedural Guidelines and REMIT Penalties Statement in the summer of 2015.

## Context

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It is important that wholesale energy markets are transparent and trusted. This helps markets work better and achieve value for money for consumers. We will therefore monitor the market for breaches of the EU Regulation on wholesale energy market integrity and transparency (REMIT), and take enforcement action where appropriate.

There are three main parts to the REMIT regulation. First, it introduced prohibitions for market manipulation and insider trading, along with certain transparency and suspicious transaction reporting obligations. These requirements came into effect on December 2011. Second, National Regulatory Authorities (NRAs) were given until June 2013 to have in place appropriate powers to take action against REMIT breaches. Parliament accordingly passed the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013. The requirement to publish our REMIT Procedural Guidelines and REMIT Penalties Statement (and to reconsult on certain changes) is set out in those regulations. Third, REMIT will require parties participating in the wholesale energy markets to register as a market participant and to report trading information. More detail on, and timings for, this part of REMIT is set out in Implementing Acts. There were adopted on 17 December 2014 and will take effect early in 2015. We are required to provide a registration facility within three months of the Implementing Acts being adopted. We opened the registration for market participants registering in Great Britain on 1 December 2014. Support details, including a handbook on how to register, a registration hotline and an email address for registration related questions can be found on our website, [www.ofgem.gov.uk](http://www.ofgem.gov.uk).

Our regular dialogue continues with the Agency for the Cooperation of Energy Regulators (ACER), other European regulators and GB regulators (in particular the Financial Conduct Authority (FCA)). This is because of the close interdependencies between energy and financial markets and the importance of a consistent approach to regulation across Europe. Amongst other discussions, work is ongoing to prepare for secure receipt of the GB market data that ACER will share with us when the REMIT data reporting obligations start.

## Associated documents

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Below are links to the following documents:

- EU regulation no 1227/2011 (REMIT): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:326:0001:0016:en:PDF>
- The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013: <http://www.legislation.gov.uk/uksi/2013/1389/contents/made>
- ACER Guidance on the application of REMIT (third edition): [http://www.acer.europa.eu/remi/Documents/REMIT%20ACER%20Guidance%203rd%20Edition\\_FINAL.pdf](http://www.acer.europa.eu/remi/Documents/REMIT%20ACER%20Guidance%203rd%20Edition_FINAL.pdf)
- Ofgem's REMIT Procedural Guidance and Penalties Statement: <https://www.ofgem.gov.uk/publications-and-updates/consultation-decision-remit-penalties-statement-and-procedural-guidelines>
- Ofgem's Enforcement Guidelines decision document: <https://www.ofgem.gov.uk/publications-and-updates/enforcement-guidelines-decision-document>

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# Executive Summary

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Market abuse in wholesale gas and electricity markets is prohibited. The European Regulation on wholesale energy market integrity and transparency (REMIT) creates a very important framework for identifying and penalising breaches of REMIT across Europe. This helps consumers, industry and other participants to have confidence that wholesale energy prices are open, fair and competitive.

We are actively monitoring the market for breaches of REMIT. In our REMIT Procedural Guidelines and REMIT Penalties Statement, we set out our approach to using our powers<sup>1</sup> to investigate and enforce against breaches of REMIT.

## **We are now proposing to revise our REMIT Procedural Guidelines and REMIT Penalties Statement.**

We said that we would update the guidelines and statement when appropriate. Earlier this year, we finished a review of our approach to Ofgem's enforcement. We now need to update our REMIT documents to reflect some of the changes that emerged from that review. We also need to take account of some new REMIT-related regulations we are expecting soon. And we want to make changes to reflect our experience in REMIT investigations and in using our powers under the Enforcement Regulations.

## **Our proposals**

We are interested in hearing your views on the changes we are proposing to make. You can read the draft revised REMIT Guidelines and Penalties Statement in the annexes to this document. The consultation document highlights the main changes we are consulting on. These are summarised below.

- a) In both the REMIT Procedural Guidelines and the REMIT Penalties Statement we introduce a vision and strategic objectives for REMIT casework.
- b) In the REMIT Procedural Guidelines there are proposed changes to:
  - the processes for conducting settlement discussions,
  - decision-makers following the introduction of the Enforcement Decision Panel, and
  - how oral representations are made.
- c) In the REMIT Penalties Statement our proposed changes cover
  - when restitution orders may be appropriate
  - the steps we propose to follow to decide the amount of a penalty, for companies and for individuals. This includes how we would take account of factors such as the potential to cause serious financial hardship, and

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<sup>1</sup> The UK Parliament has set out in regulations the investigatory and enforcement powers available to the Authority on REMIT matters in The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

- what discounts to a penalty are available for agreeing settlement and how these decrease over time.

### **Our next steps**

This consultation closes on 19 February 2015. Following our review of responses, we intend to issue our new REMIT Procedural Guidelines and REMIT Penalty statement in summer 2015.

# 1. Introduction

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## Chapter Summary

This chapter explains what is in the REMIT Procedural Guidelines and REMIT Penalties Statement. It gives more information on why we need to update the current documents and guides you through the structure of our consultation document. Finally, it notes some related work.

- 1.1. The EU Regulation on wholesale energy market integrity and transparency (REMIT) came into force on December 2011. It prohibits market manipulation and insider trading in wholesale energy markets. It also puts various obligations on participants in these markets, persons professionally arranging transactions (PPATs), the Association for the Cooperation of Energy Regulators (ACER) and National Regulatory Authorities (NRAs). Ofgem is the NRA for Great Britain (GB).
- 1.2. Parliament introduced regulations granting investigatory and enforcement powers to Ofgem in relation to failures by companies or individuals to comply with a REMIT requirement. These regulations (the Enforcement Regulations) came into force on 29 June 2013. Shortly after that, we consulted and then approved statements on our approach to using these powers.
- 1.3. The REMIT Procedural Guidelines set out the market monitoring, investigatory and enforcement powers that the Authority has been given. They also outline the procedures that we expect to follow in exercising them. In particular, they cover:
  - our regulatory objectives
  - the factors that we usually consider when deciding whether to launch an investigation and what we might investigate
  - the investigation process
  - the decision-making processes
  - the processes by which we will decide whether to issue Warning and Decision Notices and to publish information about Warning Notices, and
  - how we will coordinate our REMIT market monitoring, investigation and enforcement activities with other regulatory authorities in the UK and other EU Member States.
- 1.4. The REMIT statement of policy with respect to financial penalties under REMIT (REMIT Penalties Statement) sets out the objectives and criteria the Authority will use when deciding whether to impose a financial penalty or to issue a statement of non-compliance. It also sets out how the level of a penalty is determined, the reductions given for settlement and the penalty policy when a case is brought against individuals.

1.5. We are now proposing to update and revise the above documents to reflect:

- the Authority's decisions and approach in our recent Enforcement Review, including the creation of the Enforcement Oversight Board and the Enforcement Decision Panel
- our growing experience in REMIT investigations and in using our powers under the Enforcement Regulations
- how, in the interests of consistency between the regimes, we can take account of the approach used by the Financial Conduct Authority,<sup>2</sup> and
- proposed new regulations that will extend our investigation and enforcement powers to Articles 8 (requirement to report transactions) and 9 (requirement on market participants to register with a National Regulatory Authority) of REMIT.

### **This consultation document**

1.6. This consultation document explains the main changes we are proposing to make to the REMIT Procedural Guidelines and Penalties Statement. It seeks views on the proposed revisions.

1.7. We are not consulting on the parts of the existing REMIT statements that will stay the same. For example, we will still not publish the opening of REMIT investigations unless there are compelling reasons to do so.<sup>3</sup> This differs from the approach Ofgem might take in other enforcement work, but it remains the right stance for REMIT casework at this time.

1.8. The consultation document is structured as follows:

- chapter 2 describes the Vision and Strategic Objectives that we propose to incorporate in both documents
- chapters 3 and 4 respectively highlight the main changes we propose to make to the REMIT Procedural Guidelines and the Penalties Statement
- appendix 1 sets out how to respond to the consultation, and
- the full proposed REMIT Procedural Guidelines and Penalties Statements are attached as appendices 2 and 3 respectively.

1.9. We are asking for responses by 19 February 2015.

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<sup>2</sup> The Government has consulted on enforcement decision-making at the financial services regulators. We will look at any relevant changes that the Financial Conduct Authority makes as a result of the Government's conclusions.

<sup>3</sup> This is because REMIT investigations have some distinct characteristics. These characteristics are set out on our website in more detail <https://www.ofgem.gov.uk/publications-and-updates/consultation-decision-remit-penalties-statement-and-procedural-guidelines>.

## Related issues

- 1.10. The legal framework for REMIT in GB is evolving. As noted in paragraph 1.5, DECC propose to create new regulations extending our civil investigation and enforcement powers. DECC also recently consulted on proposals to create criminal offences for insider trading and market manipulation in wholesale energy markets. Pending parliamentary process, these new criminal offences could come into force in 2015. If this happens, we will consult on the relevant policies relating to the new powers and put in place appropriate procedures.
- 1.11. We place a high value on wholesale energy markets that are transparent and trusted. We are engaging with market participants and persons professionally arranging transactions to ensure they are aware of their obligations under REMIT. Rather than simply trying to meet the letter of the law, we would like to see a culture of transparency and integrity drive the decisions that organisations make when considering how to comply with REMIT.
- 1.12. We will also continue to monitor actively for any breaches of REMIT. To date we have looked into unusual events both informally and formally, using our monitoring or our investigation powers, as appropriate. Anyone who wishes to notify us of activity that may breach REMIT should use our dedicated email address: [Market.Conduct@ofgem.gov.uk](mailto:Market.Conduct@ofgem.gov.uk). If you have more general questions you are welcome to contact us using our email address [REMIT@ofgem.gov.uk](mailto:REMIT@ofgem.gov.uk).



## 2. Vision and strategic objectives

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### Chapter Summary

We want to incorporate our enforcement vision and strategic objectives into both the REMIT Procedures Guidelines and the REMIT Penalties Statement. This chapter describes them.

### Question 1: Do you agree with the proposed Vision and Strategic Objectives for REMIT?

### Proposal

2.1. We propose to incorporate the Authority's Vision and Strategic Objectives for its enforcement work into both the REMIT Procedural Guidelines and Penalties Statement.

### The Authority's vision for REMIT enforcement

2.2. Our enforcement Vision is to achieve a culture where individuals and businesses working with wholesale energy products or in wholesale energy markets put energy consumers first and act in line with their obligations.

### Our Strategic Objectives

2.3. Underpinning this, our Strategic Objectives are to:

- deliver credible deterrence
- ensure visible and meaningful consequences for businesses that fail consumers and do not comply with their legal and regulatory obligations, and
- achieve the greatest positive impact by targeting enforcement resources and powers

2.4. In the REMIT context, the Vision and Strategic Objectives will apply to individuals and businesses alike. This is because the obligations under REMIT apply to both natural and legal persons.

2.5. Both the REMIT Procedural Guideline and Penalties Statements then list Regulatory Objectives that the Authority will promote when using its REMIT powers. These Regulatory Objectives include:

- obtaining fair outcomes for those who have suffered loss or otherwise been adversely affected by a REMIT breach

- deterring future non-compliance with REMIT obligations not only by the individual or business concerned but also by any other individual or business
- maintaining confidence and fostering competition in wholesale energy markets, and
- ensuring that no profits can be drawn from REMIT breaches.

## 3. Procedural Guidelines

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### Chapter Summary

This chapter summarises the main changes we want to make to the REMIT Procedural Guidelines. In particular, the changes relate to the processes for settlement and oral representation.

### Question box

**Question 2: Do you have any comments on the proposed changes to the settlement processes?**

**Question 3: Do you have any comments on our proposals for oral representations?**

**Question 4: Do you have any other comments on the proposed REMIT Procedural Guidelines?**

- 3.1. The REMIT Procedural Guidelines (the Guidelines) set out how we will conduct REMIT casework. They cover the period from when we become aware of a potential issue through to, where appropriate, imposing a sanction, such as a financial penalty.
- 3.2. We said in chapter one that we will need to update the Guidelines to reflect an expected development of the enforcement regime to include breaches of Articles 8 (transaction and fundamental data reporting) and 9 (registration of market participants) of REMIT. Please note that the proposed Guidelines have been written as if this development has taken place, but these elements will only come into force if and when this occurs.
- 3.3. But, as listed in paragraph 1.5, we have other drivers for changing the REMIT Procedural Guidelines themselves. The sections below highlight the main proposed changes. Please refer to appendix 2 for the full document.

### Decision-makers and the Settlement Processes

- 3.4. We have updated the Guidelines to reflect the introduction of the Enforcement Decision Panel ("EDP"). The EDP<sup>4</sup> is our newly-created body established to take important decisions in contested enforcement cases on behalf of the Gas and Electricity Markets Authority (our governing body). The terms of reference for the EDP cover contested REMIT cases, so we are revising our REMIT Guidelines to reflect this. We have also updated the Guidelines for the composition of

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<sup>4</sup> For more information on the EDP, including its terms of reference, see <https://www.ofgem.gov.uk/about-us/how-we-work/our-approach-regulation/enforcement-decision-panel>.

Settlement Committees as set out in our recently published Enforcement Guidelines<sup>5</sup> (see Chapter 9 of the proposed Guidelines). This includes describing that a Settlement Committee will usually comprise one person from the EDP and one member of Ofgem's Executive Committee.<sup>6</sup>

- 3.5. The settlement process is set out in Chapter 10 of the proposed Guidelines in Appendix 2.
- 3.6. We will generally be open to requests to enter into settlement discussions in REMIT investigations. However we currently take the decision as to whether settlement is appropriate in a particular investigation. We do not propose to change this approach at this time.
- 3.7. One outcome of the Enforcement Review was a process for settlement discussions tied to discount windows with clearly defined opening and closing points. The new process recognises the procedural efficiencies and savings of time and resource which are achieved when investigations can be resolved swiftly and within a set reasonable period. Our proposals for REMIT cases are intended to broadly follow our approach in sectoral cases of set settlement windows with discounts that decrease the closer the case comes to conclusion.
- 3.8. The settlement windows we are proposing are summarised below:
  - Early – From the time when we issue a settlement mandate (in the form of a draft Warning Notice, for example) to a deadline set by us, usually 28 days later.
  - Middle – From the time when the early window closes until the deadline for written representations on a Warning Notice.
  - Late – From the time when the middle window closes until a Decision Notice is issued.
- 3.9. This process means that it may be possible to settle a case even after the EDP Panel has issued a Warning Notice. Where that happens, the Settlement Committee will take over the task of issuing the Decision Notice and Final Notice. We anticipate expediting the issue of these two Notices to the minimum time possible under the Enforcement Regulations.

## Oral Representations

- 3.10. The subject of proposed enforcement action has a right to be heard in person by the decision-makers in their case. In contested REMIT cases, as explained above, those decision-makers will be a panel drawn from the EDP. Under the

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<sup>5</sup> <https://www.ofgem.gov.uk/ofgem-publications/89753/enforcementguidelines12september2014publishedversion.pdf>.

<sup>6</sup> In cases where the penalty amount is below £100,000 or the issues raised are unlikely to attract significant industry or media interest or are otherwise uncontentious, the case may be handled by a Senior Partner.

Enforcement Regulations, subjects have a right to this hearing once a Warning Notice is issued. The Warning Notice will set out the action the EDP Panel intends to take, the reasons for it and the recipient's right to access the material on which those reasons rest. These will form the basis of the hearing. This right is set out explicitly in the proposed Guidelines (see paragraphs 9.13-9.19).

- 3.11. In our current REMIT Guidelines, we introduced the opportunity for the subject of an investigation also to make representations at an earlier stage. The investigation team will set out its case and consider representations before deciding whether to refer the matter to the Panel. We intend to retain this opportunity. But in the majority of cases we believe written representations at this earlier stage will be sufficient to allow the Panel to take decisions on a Warning Notice. Our proposed Guidelines explain that representations on the investigation team's Issues Letter must be in writing. We will, however, allow parties to request an oral hearing at this earlier stage. It will be a matter for the Panel as to whether it considers a hearing is necessary in order for it to decide on a Warning Notice.

## **Other Changes**

- 3.12. We are also proposing a number of smaller changes to the Guidelines, including:
- changing the name of the Statement of Case issued by the investigation team to an Issues Letter. This is to avoid confusion with the Statement of Case issued in our other enforcement work, which follows different processes, and
  - making the language and structure of the Guidelines easier to read and follow.

## 4. Penalties Statement

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### Chapter Summary

We highlight here the main changes we want to make to our REMIT Penalties Statement. We outline and seek views on the steps that we propose to follow when calculating financial penalties and making restitution orders.

### Question box

**Question 5: Do you agree with the proposed factors that affect the decision to impose a financial penalty and/or make restitution or issue a statement of non-compliance?**

**Question 6: Is the proposed process for determining the amount of penalties and/or restitution appropriate?**

**Question 7: Do you agree with the proposed approach to assessing the seriousness of a breach and calculating the starting point for a financial penalty?**

**Question 8: Do you agree with our proposed approach in relation to representations that a person believed that the behaviour was not a breach or that a person had taken all reasonable precautions and exercised due diligence to avoid the breach?**

**Question 9: Do you agree with the factors that may aggravate or mitigate the level of the penal element?**

**Question 10: Do you agree with the proposed settlement percentage discounts in REMIT cases?**

**Question 11: Do you agree with our proposed approach to restitution under REMIT?**

**Question 12: Do you agree with our proposals in respect of serious financial hardship?**

**Question 13: Do you have any other comments on the proposed REMIT Penalties Statement?**

- 4.1. The REMIT Penalties Statement sets out the Authority's proposed approach to imposing financial penalties, making restitution orders and issuing statements of non-compliance in relation to REMIT breaches. The following sections highlight the key changes we are proposing to make to this document.

## **Deciding to impose a financial penalty, make a restitution order or issue a statement of non-compliance**

- 4.2. Section 4 of the proposed REMIT Penalties Statement (see appendix 3) makes clear that the Authority will consider the full circumstances of each case when deciding whether or not to impose a financial penalty, and/or make a restitution order or issue a statement of non-compliance. It also sets out the factors that make each of these sanctions more likely.
- 4.3. This section of the statement also sets out the Authority's position with respect to taking action against an individual rather than a firm. We propose to amend paragraphs 4.9-4.12 of the penalties statement to make clear that all persons, legal or natural, to whom REMIT applies are equally responsible for complying with it. We will take appropriate action against any person, legal or natural, who we find to have breached REMIT.

## **Determining the amount payable under penalties and restitution orders**

- 4.4. Parties should not benefit financially from any failure to comply with REMIT. Indeed, we consider that non-compliance should normally cost significantly more than compliance. Our proposed Penalties Statement makes clear that in normal circumstances any financial penalty will significantly exceed the gain to the person and the detriment caused to affected parties. It also states that any restitution should fully recompense the losses suffered by affected parties.
- 4.5. In paragraph 5.2 of the proposed REMIT Penalties Statement we set out that the amount of a financial penalty and/or restitution order will normally comprise two elements:
  - A. an amount to remove the detriment suffered by affected parties and any gain made by the person in breach (there may be overlap between these quantities), and
  - B. an amount that reflects the seriousness of the breach, the behaviour of the person, whether the person concerned is an individual and the need for deterrence (the penal element).
- 4.6. In paragraph 5.3 of the proposed REMIT Penalties Statement, we explain that to determine these elements we will:
  - seek to calculate the detriment to affected parties and/or gain to the person in breach
  - consider whether restitution payments are appropriate and, if they are, how much should be paid
  - consider the seriousness of the breach, the behaviour of the person, and whether the person concerned is an individual, in order to establish the starting figure for the penal element;

- consider any aggravating or mitigating factors that may warrant an adjustment to the starting point;
  - consider deterrence, including the principle that the total amount paid by the person should exceed the benefit gained from failing to comply with obligations
  - where a case is settled, apply a discount to the penal element
  - consider the appropriateness of the total financial liability, and
  - impose a financial penalty and/or make a restitution order as appropriate.
- 4.7. Our proposed REMIT Penalties Statement describes the above steps in detail. Some of the details differ in cases against firms as opposed to cases against individuals (for example, the method of calculating the starting point for a financial penalty will differ as outlined in paragraphs 4.9-4.13 below). Any financial penalty must be appropriate and any restitution must be just, having regard to the profits accrued and losses incurred as a result of the breach.

## **Calculating the amount of a financial penalty**

- 4.8. The proposed REMIT Penalties Statement includes factors that we propose will affect whether we are more or less likely to impose a sanction, and what the scale of that sanction should be. For example, they may affect the size of a financial penalty. When calculating the penal element of any financial penalty the EDP will consider a range of factors (for example, relating to the nature and impact of the breach) that will help it assess the seriousness of a breach. The EDP will then consider any aggravating and mitigating factors and may adjust the penal element accordingly.
- 4.9. For firms, we propose that the starting point may be calculated having regard to a percentage of a firm's revenue from the relevant products or business areas. The percentage range has five fixed levels that vary from 0% to 20% according to the seriousness of the breach. If, however, the Authority decides that revenue is not an appropriate indicator of the harm or potential harm caused by a breach, we propose that it will use another indicator such as a firm's profits.
- 4.10. For individuals in market abuse cases where the breach was facilitated by the individual's job, we propose that the starting point will be the greater of
- a percentage of the individual's relevant income
  - a multiple of the profit made or loss avoided by the individual, or
  - £100,000 (in the most serious cases).
- 4.11. We propose that the relevant income and profit multiple ranges have five fixed levels that vary from 0% to 40% according to the seriousness of the breach.



- 4.12. Where the market abuse was not facilitated by the individual's job, we propose that the starting point for any penalty will be based on a percentage of relevant income or a multiple of the profits. The percentage will be in a range 0% to 40% according to the seriousness of the breach.
- 4.13. For individuals in non-market abuse cases, we propose that the starting point will be a percentage of relevant income. Again, the percentage will be in a range of 0% to 40% according to the seriousness of the breach.

## **Reasonable belief and reasonable precautions**

- 4.14. The Authority's policy on determining the amount of a penalty must have regard to whether the person believed, on reasonable grounds, that the behaviour was not a breach and whether the person took all reasonable precautions and exercised due diligence to avoid behaving in a way that breached an obligation.
- 4.15. We are required by the Enforcement Regulations to indicate the circumstances where the Authority expects to accept representations of this nature. We propose that the Authority would normally accept such representations where it is satisfied that the person:
- followed relevant written Authority guidance
  - if employed by a company, followed the company's internal policies or procedures or followed the advice of the company's management or lawyers
  - engaged in the conduct for a legitimate purpose.

## **Aggravating or mitigating circumstances**

- 4.16. The proposals now give greater emphasis to the importance of individuals and companies acting diligently and proactively in order to minimise the risks of non-compliance. We expect robust processes and procedures to be employed by individuals and firms to guard against this risk. We are placing particular focus on the role that senior management play in maintaining an effective culture of full compliance in firms.
- 4.17. The Authority considers that the person under investigation should cooperate fully with the Ofgem investigation team in each case. We propose to strengthen the penalties statement to make clear that a penalty may be increased if there is any failure to cooperate fully with reasonable requests from the investigating team or if relevant evidence is withheld or submitted in a manner that hinders the investigation. We also propose that the mitigating factor reducing the penalty to reflect cooperation with Ofgem will only apply if a person provides cooperation that goes well beyond what would be expected of any person facing enforcement action: this goes well beyond merely meeting prescribed timescales for responding to notices or an Issues Letter.
- 4.18. We continue to emphasise the importance of, amongst other things, reporting breaches to us promptly and taking effective remedial action. The proposed statement now additionally makes clear that firms and individuals should expect

to receive less credit where self-reporting has not occurred promptly on discovering that a breach has occurred. The Authority expects firms and 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. This is set out in the proposed penalties statement.

## Settlement Discounts

- 4.19. The current REMIT Penalties Statement makes clear that where cases are settled the financial penalty will be reduced to reflect resource savings to Ofgem and the Authority. It does not, however, give any indication as to the amounts of the discounts that can be expected. We now propose to introduce fixed percentage settlement discounts in relation to penalties for REMIT breaches.
- 4.20. The proposed percentages are the same as those we have introduced in cases settled under the Gas Act or Electricity Act. Consistent with our policy under sectoral legislation, we intend that these discounts will be applied only to the penal element and not to any gain and/or detriment that may have been identified by the Authority. We propose:
- a 30% discount for early settlement
  - a 20% discount for middle settlement, and
  - a 10% discount for late settlement.

## Restitution Orders

- 4.21. The Penalties Statement sets out the Authority's expectation that parties will take prompt and proactive steps to remedy the consequences of any REMIT breach. This means identifying, contacting and adequately compensating those who have suffered loss as a result of the breach. If this does not happen, the Authority may make (or apply to the court for) an order requiring a company or individual to make restitution payments.
- 4.22. It may not always be straightforward to establish a clear link between a REMIT breach and an adverse impact on a group of consumers (whether domestic or non-domestic). In those circumstances, it may not be possible to demonstrate which consumers have suffered a loss as a result of the breach. In addition, under REMIT we may not direct that restitution payments be made to proxy groups. This means that if the Authority cannot identify the parties that have suffered, it may not make a restitution order (though it could impose a financial penalty).
- 4.23. However, there will be some cases where it may be more straightforward to establish whether a particular company has suffered a loss, such as by identifying the counterparties to manipulative trades. In these cases restitution may be appropriate. These cases would make clear the link between restitution and increased market integrity, and between market integrity and benefits for consumers. In appropriate circumstances, and if the party has not already provided adequate restitution to those affected, we would expect to use our powers to make a restitution order (or apply to the Court for one).

## **Serious Financial Hardship**

- 4.24. The proposals for our approach to serious financial hardship are set out at paragraphs 6.38 to 6.43 for businesses and in section 9 for individuals. Subject to the need to ensure that any financial penalty is reasonable in all the circumstances, our intention is that any financial penalty or payment under a redress order will significantly exceed the gain to the person and/or the detriment caused to affected parties.

# Appendices

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# Appendix 1 - Consultation Response and Questions

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- A.1. We would like to hear the views of interested parties in relation to any of the issues set out in this document. In particular we welcome responses from market participants and persons professionally arranging transactions.
- A.2. Responses should be received by 19 February 2015 and should be sent to:
- Louise Edwards,  
REMIT Team,  
Wholesale Market Performance,  
Ofgem  
9 Milbank  
SW1P 3GE  
Email: remit@ofgem.gov.uk**
- A.3. Unless marked confidential, all responses will be published on our website, [www.ofgem.gov.uk](http://www.ofgem.gov.uk). You may request that their response is kept confidential. We will respect this request, subject to any obligations to disclose information, for example, under the Freedom of Information Act 2000 or the Environmental Information Regulations 2004.
- A.4. The Authority will take full account of all responses in finalising the Procedural Guidelines and Penalties Statement. We anticipate the revised documents being published in summer 2015.
- A.5. If you have any comments or questions about this consultation, please contact Louise Edwards using the details above.

## Consultation Questions

**Question 1: Are these the right Vision and Strategic Objectives?**

**Question 2: Do you have any comments on the proposed changes to the settlement processes?**

**Question 3: Do you have any comments on these proposals?**

**Question 4: Do you have any other comments on the proposed REMIT Procedural Guidelines?**

**Question 5. Do you agree with the proposed factors that affect the decision to impose a financial penalty and/or make restitution or issue a statement of non-compliance?**

**Question 6. Is the proposed process for determining the amount of penalties and/or restitution appropriate?**

**Question 7. Do you agree with the proposed approach to assessing the seriousness of a breach and calculating the starting point for a financial penalty?**

**Question 8. Do you agree with our proposed approach in relation to representations that a person believed that the behaviour was not a breach or**

**that a person had taken all reasonable precautions and exercised due diligence to avoid the breach?**

**Question 9. Do you agree with the factors that may aggravate or mitigate the level of the penal element?**

**Question 10. Do you agree with the proposed settlement percentage discounts in REMIT cases?**

**Question 11. Do you agree with our proposed approach to restitution under REMIT?**

**Question 12. Do you agree with our proposals in respect of serious financial hardship?**

**Question 13: Do you have any other comments on the proposed REMIT Penalties Statement?**

## Appendix 2 – REMIT Procedural Guidelines

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### **PROCEDURAL GUIDELINES ON THE AUTHORITY’S USE OF ITS INVESTIGATORY AND ENFORCEMENT POWERS UNDER REMIT PURSUANT TO REGULATION (EU) NO 1227/2011 AND THE ELECTRICITY AND GAS (MARKET INTEGRITY AND TRANSPARENCY) (ENFORCEMENT ETC.) REGULATIONS 2013 AND 2014**

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# 1. Introduction

## **REMIT**

- 1.1. The EU Regulation on wholesale energy market integrity and transparency ('REMIT')<sup>7</sup> prohibits market abuse - insider trading and actual or attempted market manipulation - in wholesale energy markets. REMIT came into force in December 2011.
- 1.2. REMIT imposes obligations on market participants to:
  - a. register<sup>8</sup> with a National Regulatory Authority (NRA) in the EU, which for Great Britain is the Gas and Electricity Markets Authority ('the Authority')
  - b. provide the Agency for the Cooperation of Energy Regulators ('ACER') with information (primarily transaction data) for the purpose of monitoring trading in wholesale energy markets, and
  - c. publicly disclose inside information in an effective and timely manner.
- 1.3. It also obliges persons professionally arranging transactions ('PPATs') to tell us, as the NRA, without delay if they reasonably suspect that a wholesale energy market transaction might breach the prohibitions on insider trading or market manipulation.
- 1.4. REMIT requires each Member State to provide its NRA with the powers necessary to investigate and enforce the market abuse prohibitions, as well as the obligation to disclose inside information. On 29 June 2013, the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 ('the Regulations') took effect. These gave the Authority these investigatory and enforcement powers, as well as powers to investigate and enforce failures by PPATs to report suspicious transactions. In 2015 the investigatory and enforcement powers were extended to the obligations to register with an NRA and report transaction data.

## ***These Procedural Guidelines***

- 1.5. These Procedural Guidelines set out the market monitoring, investigatory and enforcement powers that the Authority has been given. They also outline the procedures that we expect to follow in exercising them. In particular, they cover:
  - a. our regulatory objectives
  - b. the factors that we normally consider when deciding whether to launch an investigation and what we might investigate
  - c. the investigation process
  - d. the decision-making processes
  - e. the processes for deciding to issue Warning and Decision Notices and to publish information about Warning Notices, and

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<sup>7</sup> The REMIT Regulation (OJ L 326/1, 8.12.2011) is available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:326:0001:0016:en:PDF> .

<sup>8</sup> Further guidance on registration can be found here: <https://www.ofgem.gov.uk/electricity/wholesale-market/european-market/remit/registering-market-participant-under-remit>.



- f. how we will coordinate our REMIT market monitoring, investigation and enforcement activities with other regulatory authorities in the UK and other EU Member States.
- 1.6. The Regulations require the Authority to consult on and issue guidance on the processes it will follow when deciding whether to issue a Warning or Decision Notice, and when deciding whether to publicise matters to which a Warning Notice refers. These Procedural Guidelines have been written in line with that requirement and replace those previously issued on 8 November 2013.

***Note on terminology***

- 1.7. The Office of Gas and Electricity Markets ('Ofgem') supports the work of the Authority by carrying out its day-to-day work. Any investigations that Ofgem conducts are therefore carried out on behalf of the Authority. The Authority decides whether or not a failure to comply with REMIT has occurred and whether or not to impose sanctions. The majority of these decisions will be taken by members of the Enforcement Decision Panel ('EDP') whose Chair will appoint a Panel to take decisions in individual investigations.<sup>9</sup> These guidelines reflect this division of activities by referring to:
- a. Ofgem or 'we' when describing the monitoring and investigatory process
  - b. the Enforcement Oversight Board or 'EOB' where decisions are taken by this body<sup>10</sup>
  - c. the EDP when outlining decisions that its members take on behalf of the Authority, and
  - d. the Authority where a particular sanction or decision has been reserved to the Authority.

## **2. Our Regulatory Objectives 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.
- 2.2 The Authority's strategic objectives for its enforcement activities are to:
- a. deliver credible deterrence across its range of functions
  - b. ensure visible and meaningful consequences for businesses and individuals who fail consumers and who do not comply, and
  - c. achieve the greatest positive impact by targeting enforcement resources and powers.
- 2.3 These objectives apply equally across all our enforcement functions, except that in REMIT cases, we will apply them to individuals, not solely to businesses. In addition, the failures to comply in REMIT cases refers to failure to comply with

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<sup>9</sup> See section 9 below for details of the EDP, as well as here <https://www.ofgem.gov.uk/publications-and-updates/enforcement-decision-panel-terms-reference>.

<sup>10</sup> The EOB provides strategic oversight and governance to our enforcement work and oversees the portfolio of cases and investigations. The members of the EOB are usually senior civil servants from across Ofgem. It is chaired by the senior partner with responsibility for enforcement.

REMIT requirements<sup>11</sup> and other requirements imposed by the Electricity and Gas (Market Integrity and Transparency) (Enforcement Etc.) Regulations 2013 ('the Regulations'), and any amendments thereof.

- 2.4 The Authority has other regulatory objectives that it will seek to promote when using its REMIT powers. When exercising our REMIT powers we, the members of the EDP and the Authority, will act in a manner that we consider is best calculated to:
- a. maintain confidence in the integrity of wholesale energy markets
  - b. ensure that wholesale energy market prices are set in an efficient manner
  - c. deter failures to comply with REMIT requirements
  - d. ensure that no profits can be drawn from REMIT breaches
  - e. foster competition in wholesale energy markets for the benefit of final consumers of energy
  - f. protect the interests of consumers in wholesale energy markets and of final consumers of energy, including vulnerable consumers, and
  - g. obtain fair outcomes for those that have suffered loss or have been otherwise adversely affected by a REMIT breach.
- 2.5 In exercising REMIT powers we, the members of the EDP and the Authority will have regard to:
- a. the need to use resources in the most efficient way
  - b. the principles of best regulatory practice, including the need to be proportionate and to ensure that any sanctions we impose are effective, dissuasive and proportionate, and
  - c. any non-binding guidance that may be published by ACER.

### **3. Sources of information about possible REMIT breaches**

- 3.1. We may be alerted to possible failures to comply with the REMIT requirements in a number of ways, including:
- a. through our market monitoring or our other information-gathering powers
  - b. through a suspicious transaction report (STR)
  - c. by whistleblowers
  - d. by complaints from the public or companies
  - e. by companies or individuals reporting their own conduct
  - f. by ACER, or

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<sup>11</sup> See paragraph 4.4 for a definition of a REMIT requirement.

- g. following a referral from another regulator, such as the Financial Conduct Authority ('FCA') or an NRA in another EU Member State.

### ***Monitoring of wholesale energy markets***

- 3.2. We monitor wholesale energy markets in GB. Where that monitoring is for the purpose of maintaining market integrity and transparency, we can require relevant information or documents from a 'Regulated Person' (a market participant or PPAT) or a person who has at any time been connected with a Regulated Person.<sup>12</sup>
- 3.3. We also have powers to request information for market monitoring purposes under the Gas Act 1986 and Electricity Act 1989.
- 3.4. The Regulations oblige Regulated Persons to take reasonable steps to:
  - a. record all telephone conversations made for the direct or indirect purpose of entering into transactions in wholesale energy products, and
  - b. keep a copy of all electronic communication (email, fax, instant messaging etc) made for the direct or indirect purpose of entering into transactions in wholesale energy products.<sup>13</sup>
- 3.5. This obligation does not apply to Regulated Persons who are individuals acting in the course of their employment with another person who is a Regulated Person (the employer). In that case, it will be for the employer to fulfil the obligation.
- 3.6. These records and copies must be retained for at least six months from the date they were created. They have to be kept in a medium that allows us to access them in the future, should that prove to be necessary. We may impose a financial penalty for a failure to comply with this obligation.<sup>14</sup>
- 3.7. We may issue a notice to a Regulated Person requiring it to ensure that any specified relevant communications are retained for longer than six months. We will always specify a date until which it must be retained. If, during that time, we no longer require the Regulated Person to retain the communications, we will let them know and discharge the obligation to retain them. We may impose a penalty for a failure to comply with this obligation.<sup>15</sup>

### ***Notification of a Suspicious Transaction Report (STR)***

- 3.8. Any PPAT in wholesale energy products who reasonably suspects that a transaction might breach Articles 3 (prohibition of insider trading) or 5 (prohibition of market manipulation) of REMIT in Great Britain must notify us without delay. They can do so by emailing [market.conduct@ofgem.gov.uk](mailto:market.conduct@ofgem.gov.uk). PPATs must establish and maintain effective arrangements and procedures to help identify potential breaches. We may impose a financial penalty for a failure to comply with these obligations.<sup>16</sup>

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<sup>12</sup> Regulation 9 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

<sup>13</sup> Regulation 8 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement Etc.) Regulations 2013.

<sup>14</sup> See regulations 8 and 26 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement Etc.) Regulations 2013.

<sup>15</sup> See regulations 8 and 26 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement Etc.) Regulations 2013.

<sup>16</sup> Regulations 4(d) and 26 of the Electricity and Gas (Market Integrity and Transparency)

- 3.9. STRs should include as much of the following information as possible:
- a. a description of the transaction(s) and/or order(s) concerned
  - b. the reasons for suspecting that the transaction(s) and/or order(s) might constitute market abuse
  - c. the Member State in which the suspected breach is being or has been carried out
  - d. identities and roles of persons carrying out or otherwise known to be involved in the transaction(s) and/or order(s)
  - e. identities and roles of any other relevant persons
  - f. the identity of the person making the STR, and
  - g. any further information that may be of significance.
- 3.10. We know that there will be occasions when not all this information is available at the time of notification. Nonetheless a PPAT must submit an STR without delay, with as much information as they have available at the time. As a minimum the notification should explain why the PPAT reasonably suspects a transaction might constitute insider dealing or actual or attempted market manipulation. PPATs should provide any remaining information to us if it becomes available later.

### ***Whistleblowers***

- 3.11. We invite contact from all parties with information regarding potential breaches of REMIT, including whistleblowers.<sup>17</sup> Our Whistleblowing policy explains what Whistleblowing is and how the law protects whistleblowers. It also gives details of how to report concerns to Ofgem. The Whistleblowing policy can be found here: <https://www.ofgem.gov.uk/publications-and-updates/guidance-whistleblowing-ofgem>.

### ***Complaints and self-reporting***

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

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(Enforcement Etc.) Regulations 2013.

<sup>17</sup> Our Whistleblowing Policy explains that you blow the whistle when you raise a concern about a wrongdoing, risk or malpractice that you are aware of **through your work**. This can be raised within your workplace as well as externally, such as to a regulator.

- 3.14. Due to resource constraints we will not be able to enter into individual correspondence with all complainants, although we will confirm receipt of a complaint in writing.
- 3.15. We will analyse material provided and keep it under review to help us decide if we need to take action. If we need any further information from a complainant or reporter we will contact them and tell them what we require. We will not usually inform the complainant or reporter of whether or not we intend to look into the matter further, especially where we consider it necessary to preserve the confidentiality of an investigation.
- 3.16. If you wish to make a complaint about or report a potential breach of a REMIT requirement, please contact us on [market.conduct@ofgem.gov.uk](mailto:market.conduct@ofgem.gov.uk).

#### ***Information received from ACER and other authorities***

- 3.17. Where ACER, through its market monitoring activities or otherwise, suspects that there has been a breach of REMIT in GB, it will pass the information to us. In addition ACER may request that we supply it with information related to the suspected breach or that we commence an investigation. ACER may also establish an investigatory group of two or more NRAs to investigate potential breaches of REMIT with cross-border impacts.
- 3.18. We may also receive information about potential abuse of wholesale energy markets in GB from the FCA, other regulators, or other NRAs.

#### ***Confidential information***

- 3.19. At times we may need to disclose information provided to us about a potential REMIT breach to the person concerned or to other parties connected to issues. Where information is confidential or the source does not wish it to be disclosed, this should be made clear and the reasons given in writing.
- 3.20. If a person or company thinks that any information they are giving us or that we have acquired is commercially sensitive or contains details of an individual's private affairs, and that disclosing it might significantly harm the interests of the business or person, they should submit a separate non-confidential version of the information in which any confidential parts are removed. They should also, in an annex clearly marked as confidential, set out why the information that has been removed should be considered confidential. Non-confidential versions of documents should be provided at the same time as the original document or at an alternative time as required by us. If such a version is not provided within the timescale set by us we will presume that the provider of that information does not wish to continue to claim confidentiality.
- 3.21. We will make our own assessment of whether material should be treated as confidential. We may not agree that the information in question is confidential. This will depend on the circumstances and will be assessed on a case-by-case basis. Any request that information is treated as confidential will be considered in accordance with the appropriate legislation.<sup>18</sup>
- 3.22. Even where information is marked as confidential or the source does not wish it to be disclosed, there may still be circumstances in which its disclosure is required. Information, including personal information, may be subject to

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<sup>18</sup> We will comply with section 105 of the Utilities Act 2000 and Art 9 of the Enterprise Act when deciding whether information is confidential and/or whether it should be disclosed.

publication or disclosure in accordance with the Freedom of Information Act (FOIA) 2000. In our handling of information, we will act in accordance with our obligations under the Data Protection Act (DPA) 1998.

## 4. Criteria for opening an investigation

- 4.1. Investigations involve time and resources, not only for Ofgem and the firms and individuals subject to them but for other interested parties as well. It is, therefore, important to ensure that resources are allocated efficiently. We will therefore first of all establish if it is a matter that we can investigate. We will then consider our prioritisation criteria for deciding whether to open (or continue) an investigation.<sup>19</sup>

### ***What we may investigate***

- 4.2. In order to open an investigation, we must be satisfied that there are circumstances suggesting that a person may:<sup>20</sup>
- a. have failed to comply with a REMIT requirement
  - b. have failed to comply with a requirement in relation to recording documents and keeping copies of electronic communications
  - c. have disclosed information in relation to a Warning or Decision Notice without our prior consent
  - d. be guilty of an offence relating to the provision of documents or information required by Ofgem.<sup>21</sup>
- 4.3. The REMIT requirements are as follows:<sup>22</sup>
- a. the prohibition on insider trading
  - b. the obligation to publish inside information
  - c. the prohibition on actual or attempted market manipulation
  - d. the obligation to report data to ACER
  - e. the obligation to register with an NRA, and
  - f. the obligation on PPATs to report suspicious transactions and have systems in place to identify suspicious transactions.

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

- 4.4. This section contains a non-exhaustive list of the factors that we will generally take into account in deciding whether to proceed with an investigation.

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<sup>19</sup> Sectoral and Competition Act cases are covered in separate guidelines. However, when assessing the resource requirements of a potential investigation, consideration is given to other current and potential cases under all of our enforcement powers.

<sup>20</sup> One investigation may cover multiple potential breaches, of the same or different types.

<sup>21</sup> The offences are set out in regulation 20 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013. They are not within the scope of these Procedural Guidelines. When dealing with criminal cases we will follow, where applicable, the 'Code for Crown Prosecutors' issued by the Crown Prosecution Service.

<sup>22</sup> The obligations to report data to ACER and to register with an NRA were introduced by the 2014 Regulations.

- 4.5. We will consider the specific facts of the matter, the legal context and our available resources. We will make decisions on a case by case basis, and have regard to our regulatory objectives.
- 4.6. To help us make a decision, we will generally consider the following:
- a. Do we have the power to take action and are we best placed to act?
  - b. Is it a priority matter for us, due to its apparent seriousness and impact, or potential impact, on consumers or competition?
- Do we have the power to take action and are we best placed to act?*
- 4.7. This means asking whether the potential investigation falls within the scope of the matters we may investigate, as set out in paragraph 4.2 above.
- 4.8. Where there is a concurrent power to take enforcement action with another regulator, a decision will be made about who is best placed to act. This may result in the case being referred to another regulator for investigation. Equally, sometimes other regulators will refer matters to us.
- Is it a priority matter for Ofgem?*
- 4.9. We will look at a range of factors in order to decide whether an issue is a priority matter, in light of our Enforcement Vision and Strategic Objectives. These factors include:
- a. the harm or potential harm to consumers (including business consumers), our ability to regulate effectively, or to competition, that resulted or could have resulted from the alleged breach
  - b. whether the person has derived or is deriving a financial gain or other benefit from the alleged breach
  - c. the strength of the evidence and what evidence is or may be available<sup>23</sup>
  - d. whether the alleged breach is ongoing and/or the person is taking action to address the situation
  - e. whether the allegation concerns conduct that is, or appears to be, an intentional or reckless breach
  - f. whether there has been a failure to comply with a previous undertaking or assurances made to us
  - g. whether the person has a history of similar breaches, or a demonstrated record of poor compliance
  - h. whether there has been a series of concerns raised over time, none of which in isolation might be considered serious enough to warrant opening an investigation
  - i. whether the type of breach is a widespread problem across the market
  - j. the likely impact of enforcement action and whether action would be likely to discourage similar behaviour in future, either by the person or by others
  - k. the annual priorities for enforcement set by the Authority
  - l. any action already taken, or to be taken, by another body to remedy the situation

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<sup>23</sup> The assessment takes account of the threshold for opening a REMIT investigation and the corresponding amount of evidence likely to have been gathered at the time we consider whether to open an investigation.

- m. the resources required to investigate the matter and the resources available, and
  - n. whether we are under an obligation to take action on behalf of, or provide assistance to, ACER or another NRA.
- 4.10. The list of criteria set out above is not exhaustive and we may consider other factors where relevant. We may not have anticipated every scenario that could arise in a case. We also do not know what further changes there may be to the enforcement landscape. Not all of the above factors will apply in every case.
- 4.11. The extent to which factor (d) may impact on a decision to open an investigation will depend on other factors such as the harm, or potential harm, to consumers or the market. Even if a person has taken steps to address an issue of concern and the alleged breach has stopped, we may still consider taking action.
- 4.12. When considering factor (m) the most serious potential breaches, individually or in the round, will be prioritised.
- 4.13. We may not open an investigation where we are focussing resources on a relevant policy project which we consider may better address the identified harm.
- 4.14. Having applied the relevant criteria, a decision will be made about whether to open (or continue) an investigation.

## **5. The investigation process**

### ***Notifying the person under investigation***

- 5.1. Decisions as to whether to open an investigation are taken by the EOB. Should the EOB decide to open an investigation, we will generally write to the person being investigated. We will give as full details as possible of the focus of the investigation. We will also provide a contact point for the investigation. However, we will not notify the person under investigation if we consider that providing written notice would be likely to frustrate the investigation.
- 5.2. The initial subject of the investigation may not be the perpetrator of the breach. When an investigation is first opened, we may not know the identity of the potential perpetrator. In these cases, when we ask people for information or documents to assist us, we will give an indication of the nature and subject matter of the investigation. Where we gave written notice of an investigation to a person but we later decide to discontinue the investigation without any intention to take further action, we will tell the person concerned as soon as it is appropriate to do so, bearing in mind the circumstances of the case.
- 5.3. In all cases when the EDP proposes to take enforcement action, we will tell the person under investigation.<sup>24</sup>

### ***Timescale for carrying out an investigation***

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

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<sup>24</sup> See section 7 for details.



### ***Making an investigation public***

- 5.5. We will not normally make a public announcement when we open a REMIT investigation. But in some circumstances we may make an investigation public. We will only make the opening of an investigation public if we consider that an announcement is in the interests of consumers or would help prevent or reduce damage to market confidence. This may be, for example, where publicity may assist the investigation by enabling us to collect evidence from third parties.

### ***Information gathering***

- 5.6. Where we have opened an investigation, we can gather information through different means. When appropriate, we may ask for information or documents voluntarily, but we also have powers to compel their provision. We may issue notices requiring the production of information or documents, or requiring a person to attend an interview and answer questions. We may also require a report to be produced. Further details on each of these are given below.
- 5.7. We will take very seriously any failure to provide documents or information that we require to be provided. Where we consider that a person has failed to comply with such a requirement, we may certify that fact in writing to the court. If the court is satisfied that the person failed to comply without reasonable excuse, it may deal with the person as if they were in contempt.
- 5.8. Delays in the provision of information can have an impact on overall timescales for the investigation. We expect stakeholders to respond within deadlines to the notices served upon them. It is therefore important that recipients of information notices tell us as soon as possible if they have good reason to believe that they will be unable to supply the required information or documents at the specified time. If the reasons justify it, we may extend the deadline.
- 5.9. In conducting any investigation, we will comply with applicable requirements governing the admissibility of evidence.
- 5.10. We will uphold our obligations regarding confidential information, and will only disclose such information where:
- a. we have permission to disclose
  - b. we are required to by law (eg under court order), or
  - c. where disclosure is sanctioned by law.<sup>25</sup>
- 5.11. The Regulations created a number of criminal offences related to our information gathering powers. A person who knows or suspects that we are or are likely to conduct an investigation using our REMIT powers is committing a criminal offence if he falsifies, conceals, destroys or otherwise disposes of information in any form that he suspects is or would be relevant to an investigation (or causes or permits others to behave in this way). A person who - recklessly or otherwise - provides information to us in response to a notice that he knows to be materially false or misleading is also committing a criminal offence. In each case the person is potentially liable to fines and/or imprisonment.<sup>26</sup>

### ***Requiring the production of information or documents***

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<sup>25</sup> See paragraphs 3.19-3.22 on confidential information.

<sup>26</sup> See regulation 20 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

- 5.12. Where we have opened an investigation, we may issue a written notice requiring any person to provide relevant specified information or specified documents.<sup>27</sup> This may include written documents, emails, computer hardware and telephone and data traffic records. We will not and cannot ask for protected items such as documents that are legally privileged.<sup>28</sup>
- 5.13. When we issue such a notice we will set out a reasonable deadline for the information or documents to be provided. In setting this deadline, we will take account of the volume and complexity of the information or documents requested and any public holidays that may fall within this period.
- 5.14. The recipient of the notice must at a minimum comply with the terms set out in the notice, but may also provide us with further information that they believe is relevant to our investigation.
- 5.15. We may also specify the form in which the information or documents is to be provided and may require it to be verified or authenticated. Further, we may require explanations of the documents and may take copies of or extracts from them. If a person who is required to provide a document fails to do so, we may require that person to state, to the best of his knowledge and belief, where the document is. Where we have the power to require a person to provide information, but it appears that that information is in the possession of a third person, we may require the third person to provide that information.
- 5.16. Finally, we will always be as clear as possible in setting out the information and documents that we require. But we will always provide a contact name so that the recipient can ask questions. We may issue more than one notice during an investigation. However, we will aim to avoid requesting the same information more than once without good reason.

#### *Interviews*

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

#### *Reports*

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

#### *Entering and searching premises*

- 5.18. We have the power to enter and search premises under a warrant, and to remove documents and other forms of information.<sup>29</sup> In order to use this power,

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<sup>27</sup> See regulations 11 and 52 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

<sup>28</sup> See regulation 52 for the full definition of a protected item.

<sup>29</sup> See regulation 16 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

we must first seek a warrant from a Justice of the Peace ('JP').<sup>30</sup> If granted a warrant, we must use it within one month.

- 5.19. A JP may issue a warrant if satisfied that there are reasonable grounds for believing that a person has failed to comply with an information notice or that any document or information which we could require in an information notice would be removed, tampered with, concealed or destroyed.
- 5.20. The warrant will authorise us to:
  - a. enter and search the premises specified in it
  - b. take such other persons as we consider are needed to assist us in doing anything the warrant authorises us to do (for instance, police constables)
  - c. take possession of any relevant documents or information (or to take any steps that appear necessary to preserve or prevent interference with such documents or information)
  - d. take copies of, or extracts from, any relevant documents or information
  - e. require any person on the premises to provide an explanation of such documents or information or to state where such documents or information might be found, and
  - f. use such force as may be reasonably necessary.
- 5.21. On arrival at the premises we will produce the warrant. This will specify as far as possible the documents and/or information we are looking for. We will also provide documentary evidence that the officials who are conducting the inspection have been properly authorised to do so.
- 5.22. Before starting the search, we will allow a reasonable period of time for a legal representative of the owner or occupier of the premises to be present. During this period, we may take necessary measures to prevent tampering with evidence or warning other companies about our investigation. The search will commence after that time whether or not a legal representative is present.
- 5.23. We will make a written record of:
  - a. the date and time of entry onto the premises
  - b. the number and name of all the officials involved in the inspection
  - c. the period for which the officials remained on the premises, and
  - d. all documents (including information recorded in any form) that we take possession of while there.
- 5.24. If there is a dispute during a search as to whether communications, or parts of communications, are privileged, we may request that the communications are placed in a sealed envelope or package. We will then arrange for safe-keeping of these items by us pending satisfactory resolution of the dispute.
- 5.25. We will provide a copy of the written record to the occupier of the premises (or someone acting on the occupier's behalf). We will do so before we leave the premises unless it is not reasonably practicable to do so, in which case we will do so as soon as possible afterwards.
- 5.26. We will retain any items taken away from the premises for so long as it is necessary to retain them for the purposes of the investigation. When this is no

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<sup>30</sup> References to JP in this document include a sheriff in Scotland.

longer necessary, we will arrange for items to be returned as soon as reasonably practicable.

- 5.27. We may wish to visit multiple sites at one time or to visit a particular site on more than one occasion. We may wish to search business and domestic premises. It is entirely possible that evidence may be located in domestic premises (for example if someone under suspicion has been working at home or we suspect they have been concealing documents there).
- 5.28. Searches will occur during reasonable hours unless we think that that the purpose of a search may be frustrated on an entry at a reasonable hour. We will seek to minimise disruption to business whilst on the premises and will take reasonable steps to ensure that the premises are left in the same state as they were found.
- 5.29. Any person who intentionally obstructs the exercise of our rights under a warrant is guilty of an offence liable on summary conviction to imprisonment or a fine.<sup>31</sup>

## 6. Seeking injunctions

- 6.1. We may, at any stage after becoming aware of a possible breach of REMIT, seek a court order (or interdict in Scotland) either restraining a person from doing something or directing them to take certain action.<sup>32</sup> When deciding whether to make an application to the court, we will always consider the circumstances of the case. We will also look at any relevant factors, such as:
  - a. the strength of evidence to suggest that the individual or group of individuals has engaged in market abuse
  - b. the previous disciplinary record and compliance history of the individual or group of individuals, and
  - c. the severity of the risk which the individual or group of individuals poses to consumers and confidence in the stability of the wholesale energy markets.
- 6.2. We will seek an injunction where we believe it is the most effective way to promote our regulatory objectives. In deciding whether this is the case, we may consider factors, such as
  - a. the nature and seriousness of a breach or expected breach
  - b. the extent of loss, risk of loss or other adverse effects on consumers
  - c. the impact or potential impact on wholesale energy markets
  - d. the likelihood that a failure to comply may continue or be repeated
  - e. whether there are steps a person could take to remedy a breach or provide redress
  - f. the costs that we would incur in applying for and enforcing an injunction and the benefits that would result
  - g. whether there is a danger that assets might be dissipated

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<sup>31</sup> See regulation 20 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

<sup>32</sup> See regulation 21 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

- h. the extent to which another regulatory body can adequately address the matter, and
  - i. whether the conduct in question can be adequately addressed by other means, for example a statement of non-compliance or financial penalty.
- 6.3. We may also, on an application to the court for an injunction, request that the court consider whether a financial penalty should be imposed on the person to whom the application relates. The court may make an order requiring the person concerned to pay to us a penalty of such an amount as it considers appropriate. We will not use our own powers to impose a financial penalty if the court has already imposed a financial penalty in respect of the same matter.
- 6.4. The sections below set out the four types of injunction that we may ask the court to make.

***Restraining a failure to comply***

- 6.5. The court may make an order restraining (or interdict prohibiting) a failure to comply with a REMIT requirement. The court may also direct the person to take steps to remedy an actual or potential breach.
- 6.6. This power may be used where a court is satisfied that:
- a. there is a reasonable likelihood that any person will fail to comply with a REMIT requirement, or that any person is failing or has failed to comply with a REMIT requirement and there is a reasonable likelihood that the failure to comply will continue or be repeated, or
  - b. there is a reasonable likelihood that any person will fail to comply with the requirement to record conversations and keep a copy of electronic communications, or that any person is failing or has failed to comply with such a requirement and there is a reasonable likelihood that the failure to comply will continue or be repeated,

***Temporary prohibition of professional activity***

- 6.7. The court may issue an order to prohibit, temporarily, professional activity, such as prohibiting a PPAT from arranging transactions. We may consider seeking such an order where we have serious concerns about the honesty, integrity or competence of an individual or group of individuals in respect of their compliance with REMIT.<sup>33</sup>
- 6.8. This power may be used where the court is satisfied that there is a reasonable likelihood that any person will fail to comply with a REMIT requirement, or that any person is failing or has failed to comply with a REMIT requirement and there is a reasonable likelihood that the failure to comply will continue or be repeated.

***Freezing of assets***

- 6.9. The court may issue an order restraining a person from disposing of, or otherwise dealing with, any of its assets. We may seek such an injunction where we have reasonable evidence that a person may be failing or may have failed to comply with a REMIT requirement and that the person is reasonably likely to dispose of assets.

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<sup>33</sup> For example, but not restricted to, providing the Authority with false or misleading information.

- 6.10. In these cases we will not have to show that a failure to comply with REMIT has definitely occurred. Rather, an asset-freezing order may be made if the court is satisfied that a person may be failing or may have failed to comply with a REMIT requirement and that the person is reasonably likely to attempt to dispose of assets.

## **7. Issues Letter**

- 7.1. When we consider that there has been a failure to comply with a REMIT requirement, we will prepare an Issues Letter. This will set out the relevant facts, explain our initial findings and the case against the person, and seek the person's views.
- 7.2. The person will have an opportunity to respond in writing. The period of time allowed will depend on the facts and the complexity of the case but we generally expect to allow 28 days. 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.
- 7.3. The person can also request the opportunity to make oral representations in front of the EDP Panel who will, if the matter is referred to the EDP, take decisions in respect of Warning and Decision Notices. If the EDP agree to hear oral representations, the procedures in paragraphs 9.13-9.19 below will apply.
- 7.4. After considering any written or oral representations, we may decide that there is insufficient evidence of a breach and may close the case. Alternatively, we may retain a reasonable suspicion that a breach has occurred but consider that it is necessary to amend our initial findings and prepare a Supplementary Issues Letter. In these circumstances, we will provide it to the person and offer a further opportunity to make written representations.
- 7.5. Following any representations on the Issues Letter, we will consider whether the person being investigated has failed to comply with a REMIT requirement. If we consider that there has been no failure to comply, the person will be informed that the case has been closed. If we consider that there has been a failure to comply with a REMIT requirement, we will refer the case to the EDP. The EDP's Panel will then decide whether to propose a financial penalty, a statement of non-compliance with REMIT and/or restitution. This will be done by way of issuing a Warning Notice (see section 9 below).

## **8. Sanctions available to the Authority**

### ***Financial penalty or statement of failure to comply***

- 8.1. If the EDP finds that a person has breached a REMIT requirement it may impose a financial penalty. This will be of such amount as the EDP 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.
- 8.2. Alternatively, the EDP 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.<sup>34</sup>

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<sup>34</sup> See regulation 26 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement

- 8.3. The Authority's policy on imposing financial penalties is set out in a separate statement. The EDP will have regard to that statement in exercising, or deciding whether to exercise, its power to impose a financial penalty.
- 8.4. The procedural steps that the EDP must follow before it may impose a penalty are set out in section 9 below.

### ***Restitution orders***

- 8.5. Instead of (or in addition to) imposing a financial penalty, the EDP may make a restitution order or apply to a court for one.<sup>35</sup> The EDP 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.
- 8.6. In cases where the EDP 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).
- 8.7. The court may order the person concerned to pay to us such a sum as appears to the court to be just having regard to the profits accrued and/or the loss or other adverse effects suffered. Any amount paid to us must then be paid to, or distributed among, such persons as the court may direct. If issuing its own restitution order, the EDP may require the person concerned to pay or distribute to the affected person or persons, an amount that appears just having regard to the same considerations.
- 8.8. The court may require the person to supply it with accounting and other information to enable the court to establish the profits accrued and the losses or other adverse effects suffered as a result of the breach, and to determine how any amounts are to be paid or distributed to those who have been adversely affected. The court may require such information to be independently verified. The EDP may, if issuing its own restitution order, order the person to provide similar information to it via a report from an approved<sup>36</sup> skilled person.
- 8.9. When deciding whether to exercise these powers, the Authority (in respect of an application to the court) or the EDP will consider all the circumstances of the case. The factors that the Authority or the EDP will consider may include, but are not limited to:
- a. whether this would be the best use of its limited resources, taking into account, for example, whether the profits are quantifiable, the likely amount of any recovery and the costs of identifying and distributing such sums

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etc.) Regulations 2013.

<sup>35</sup> See, respectively, regulations 23 and 22 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

<sup>36</sup> Approved by us.

- b. whether restitution might be achieved more efficiently or cost-effectively through other means (for instance via private court actions<sup>37</sup>, an ombudsman service, corporate compensation schemes or another regulatory authority)
  - c. the adequacy of any proposals by the person concerned to offer restitution, and
  - d. the extent to which the person had reasonable grounds for believing that his conduct did not amount to a failure to comply or had taken all reasonable precautions and exercised due diligence to prevent the breach from occurring.
- 8.10. The EDP will not use its own powers to make a restitution order if the court has already issued a restitution order in respect of the same breach.
- 8.11. The Authority also has the power, on an application to the court for restitution, to request the court to consider whether a financial penalty should be imposed on the person to whom the application relates. The court may make an order requiring the person concerned to pay to the Authority a penalty of such an amount as it considers appropriate.

## **9. The decision-making process for contested cases**

### ***The Enforcement Decision Panel***

- 9.1. In contested cases, decisions on whether a breach of a REMIT requirement has occurred and, if so, whether to impose a sanction directly on the person (or to seek to impose sanctions via the courts) are taken by Panels made up of people drawn from the EDP.<sup>38</sup> The EDP consists of a pool of members who are employees of the Authority, one of whom is appointed as the EDP chair.
- 9.2. EDP members are independent from the investigation team. Decisions on finding breaches, imposing sanctions and publishing information about Warning or Decision Notices will therefore be taken by people who have had no direct involvement in establishing the evidence on which the decision is based.
- 9.3. Contested cases are decided by a decision-making Panel of usually three members appointed from the EDP by the EDP chair. A Panel is constituted as and when required to deal with a particular case. There will be a Panel Chair who will chair the decision making discussions, and who has the casting vote in the event of a deadlock. The identity of the Panel members will be notified to the parties in writing by the EDP Secretariat.
- 9.4. The EDP Secretariat is independent of the investigation team. It liaises with the parties on behalf of the Panel. The Panel, or its individual members, should not be contacted directly by any party or their representatives outside of any oral representations.

### ***Warning Notices***

- 9.5. The EDP Panel will decide, after considering the investigation team's recommendations, on whether to issue a Warning Notice and whether to

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<sup>37</sup> Private actions to recover losses are available irrespective of whether the Authority applies for or issues a restitution order.

<sup>38</sup> This is with the exception of applications to the court for a restitution order, which is reserved to the Authority.



publicise any matters that relate to it. The Panel will have access to any written representations made in response to the Issues Letter. The Panel will then decide whether or not to issue a Warning Notice and whether or not to publish any matters that relate to it.

- 9.6. The Panel will issue a Warning Notice if it proposes to impose a financial penalty and/or to make a restitution order or to publish a statement of non-compliance. The Warning Notice will include the extent of any person's right to access Authority material, as well as the following:
- a. for a proposed financial penalty, it will specify the amount of the proposed penalty
  - b. for a restitution order, it will specify the proposed amount that the person is required to pay or distribute, and
  - c. for a statement of non-compliance, it will set out the terms of the statement.
- 9.7. If any of the reasons underpinning the decision to issue a Warning Notice relate to a matter that identifies a person other than the person to whom the notice was given ('the third party') and, in the opinion of the Panel, is prejudicial to that third party, the Panel will, where practicable, give the third party a copy of the notice. This is unless the Panel is separately giving that third party a Warning Notice in relation to the same matter.
- 9.8. Neither the Panel nor those to whom Warning Notices have been given or copied may publish them. We may impose a penalty for improper publication of the Warning Notice or any details concerning it. However, where the Warning Notice proposes a financial penalty or a statement of non-compliance, the Panel may decide to publish such information relating to the matters contained in the Warning Notice as it considers appropriate. If Panel does so, a person to whom the Warning Notice has been given or copied may publish the same details.<sup>39</sup> If the Panel wishes to publish information about a Warning Notice proposing a financial penalty or a statement of non-compliance, it will first consult those to whom the notice was given or copied.
- 9.9. The Panel may not publish information about a Warning Notice if, in its opinion, publication would be:
- a. unfair to the person against whom action is proposed
  - b. prejudicial to the interests of consumers, or
  - c. detrimental to the stability of the wholesale energy markets in Great Britain.<sup>40</sup>
- 9.10. The Panel will consider any response to our proposal to publish information about a Warning Notice. A person seeking to demonstrate potential unfairness from publication should provide clear and convincing evidence of how that unfairness may arise and how they could suffer a disproportionate level of damage. They would need to demonstrate, for example, that publication could materially affect their health, result in a disproportionate loss of income or livelihood, prejudice criminal proceedings to which they are a party or give rise

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<sup>39</sup> Regulation 39 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 precludes the Authority from publishing Warning Notices proposing restitution or any information relating to them. Any person given or copied such a Warning Notice is similarly precluded from publishing any details.

<sup>40</sup> See regulation 39 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

to some other equal degree of harm. It will not normally be sufficient to claim that publishing information about a Warning Notice is unfair solely because it could have a negative impact on a person's reputation (given that this is a likely consequence of publication).

- 9.11. Decisions to publish information about the matter to which a Warning Notice relates will not be taken by the persons who have proposed publication.<sup>41</sup> Consequently where the Panel recommend information of this nature should be published, the decision whether or not to do so will be made by a member of the EDP who has not previously been involved in the proposal. This is in line with the need to form an independent view of the proposals to publish.
- 9.12. The Panel must allow at least 14 days for the person to make representations about the proposals in the Warning Notice. It may allow more, taking account of any bank or other public holidays that may fall within this period. It may also extend the period for making representations. But it will require a clear and reasonable case to be made for this.

### ***Oral representations***

- 9.13. Once the Warning Notice has been served on a person, that person under investigation will have an opportunity to make oral representations to the Panel at a hearing. The person will be asked to indicate in the written response to the Warning Notice whether they wish to exercise this option.
- 9.14. There is no obligation to make oral representations and a person might decide not to do so (in the interests of expediency or to save costs). If the person does wish to make oral representations a hearing with the Panel will be arranged. Where a firm is under investigation, we would normally expect senior members of its management team to be present. The person under investigation may have legal representation at oral hearings.
- 9.15. Even where a person has not requested the opportunity to make oral representations, we may do so. The Panel may also invite further representations, in any case, if it needs further clarification on the papers. It may request that these clarifications are made orally. It cannot compel attendance, so it will always be possible to submit clarifications in writing.
- 9.16. Save in exceptional circumstances, neither we nor the person under investigation should introduce any new material during oral representations. The agreement of Panel will be required before new material is introduced.
- 9.17. The form and duration of the oral hearing will be determined by the Panel taking account of all the circumstances of the case. The EDP Secretariat will fix the date taking into account the parties' availability. It will aim to find a date convenient to all parties where possible.
- 9.18. At least 28 days prior to the fixed date, the Panel will issue directions in writing to the parties concerned via the EDP Secretariat, indicating how it intends to conduct the hearing. The parties may make written representations on the directions about the hearing within the time period set out in the directions (at least seven days). If the parties raise any issues, these will be resolved on the papers and the decision notified to the parties in writing.

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<sup>41</sup> See regulation 42 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013. A similar requirement for operational separation has been imposed in respect of publishing material about Decision Notices (see below).

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

### ***Decision Notices***

- 9.20. After receiving and considering any representations (written and/or oral) on a Warning Notice, and any views from the investigations team, the Panel will then decide, within a reasonable period, whether to impose a financial penalty, publish a statement of non-compliance, and/or or make a restitution order. It will also hear the investigation team's recommendations on the matter.
- 9.21. If the Panel decides to impose a financial penalty, publish a statement of non-compliance and/or to make a restitution order, it will issue a Decision Notice. This Decision Notice will be sent to the person in relation to whom the powers are being exercised. A copy will also be given to any third party to whom the Warning Notice was copied.
- 9.22. All Decision Notices will set out the reasons for the decision, the extent of any rights of access to Authority material and outline any right to have the matter referred to the Tribunal and associated procedures.
- 9.23. A Decision Notice imposing a financial penalty will also set out:
- a. the amount of the penalty
  - b. the manner in which and the date by which the penalty must be paid, and
  - c. how the penalty will be recovered if it is not paid by that date, including any interest charges that may be payable.
- 9.24. 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.
- 9.25. A Decision Notice issuing a non-compliance statement will also set out the terms of the statement.
- 9.26. 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.
- 9.27. 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.

- 9.28. 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 9.5-9.19).

### ***References***

- 9.29. 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).
- 9.30. 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.
- 9.31. 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.
- 9.32. 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.
- 9.33. 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.
- 9.34. 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.
- 9.35. 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***

- 9.36. 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.
- 9.37. 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***

- 9.38. 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.
- 9.39. 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.
- 9.40. 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.
- 9.41. 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.
- 9.42. The specified date for payment of a penalty or of restitution must be at least 14 days from the date of the Final Notice.<sup>42</sup> The Panel may give more time, taking account of any bank or other public holidays that may fall within this period.
- 9.43. 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.
- 9.44. 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.

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<sup>42</sup> See regulation 38 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

### ***Access to Authority material***

- 9.45. 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.<sup>43</sup>
- 9.46. 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.
- 9.47. 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.
- 9.48. If we refuse to allow access to such material, we will notify the person in writing, giving reasons for the refusal.
- 9.49. The requirement to grant access to Ofgem material does not extend to material that is legally privileged.

## **10. Settlement procedure**

- 10.1. The settlement procedure enables us to work with the person subject to the investigation to bring the case to an early resolution by agreement. To settle a case, the person under investigation must be prepared to admit to the breach(es) that have occurred. The settlement will lead to a finding of breach. The person will be expected to agree with this finding and to any penalty, statement of non-compliance and/or restitution order.
- 10.2. The person will also be expected to agree not to refer any finding of breach, penalty, statement or restitution order that is agreed to as part of the settlement.
- 10.3. It is important to appreciate that settlement in the regulatory context is not the same as settlement of a commercial dispute. An Ofgem settlement is a regulatory decision taken by us, the terms of which are accepted by the person under investigation. We will have regard to our regulatory objectives when agreeing the terms.
- 10.4. Settling does not reduce the seriousness of any breach. It will, however, result in a lower penalty than would likely be imposed if the matters were contested, and the case will be dealt with more quickly.
- 10.5. Settlement is a voluntary process. There is no obligation on persons to enter into settlement discussions or to settle. Any decision to settle should be based on a full awareness of the requirements of settlement and the consequences of settling, including that a finding of breach will occur. Persons considering

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<sup>43</sup> See regulation 41 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

settlement should consider whether to obtain legal or other advice before settling a case.

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

### ***The Settlement Committee***

- 10.7. A Settlement Committee may deal with any REMIT case which is settling. In cases where the penalty amount is below £100,000 or the issues raised are unlikely to attract significant industry or media interest or are otherwise uncontentious, the case may be handled by a Senior Partner. The identity of the Senior Partner will be provided to the person under investigation in writing. In all other cases, a Settlement Committee will be constituted as and when required to deal with an investigation. It will comprise one member of the EDP and one member of the Executive.<sup>44</sup> The membership of the Settlement Committee will be provided to the person under investigation in writing by the EDP Secretariat.
- 10.8. If settlement negotiations are not successful, an EDP member will not hear the contested case if they have been on an earlier Settlement Committee that has considered the same case.

### ***When we will consider settlement***

- 10.9. Persons under investigation may ask to enter into settlement negotiations at any time, including after the Issues Letter has been received. If we agree to engage in settlement discussions it will not usually be possible to start such discussions until we have sufficient information to assess the nature and extent of the breaches and the harm caused. To speed up our investigations, we may ask the company to cooperate with us by providing information in the meantime. While we will normally consider settlement as an option, it may not always be possible to enter into settlement discussions on all cases.

### ***Settlement Discounts***

- 10.10. Early settlement results in cases being resolved more quickly, and saves resources for both the person concerned and Ofgem. In recognition of the benefits of early settlement, we have a discount scheme.
- 10.11. The discount is applied to a penalty amount that has been agreed in the settlement. It is available on a sliding scale, depending on when the settlement is reached (the earlier the settlement, the greater the discount). In REMIT cases there are three settlement windows, as follows:
- a. Early Settlement Window: Opens when a settlement mandate is issued and closes 28 days later, or at a time agreed by us.
  - b. Middle Settlement Window: Opens when the Early Settlement Window closes and closes on expiry of the period for making written representations on a Warning Notice.
  - c. Late Settlement Window: Opens when the Middle Settlement Window closes and closes when the Decision Notice is issued.

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<sup>44</sup> This includes the Chief Executive, a Senior Partner or a Managing Director of Ofgem.

- 10.12. The percentage discounts are set out in the Statement of Financial Penalties under REMIT.

### **Settlement Framework**

- 10.13. In cases which have been judged suitable for settlement, after we have conducted our investigations we will serve the person under investigation with a Summary Statement of Issues Letter.<sup>45</sup> We will offer the person a meeting (or other contact) where we can, if appropriate, discuss the person's views on settlement discussions. This contact will not affect the deadline for written representations on the Summary Statement of Issues Letter.
- 10.14. The Summary Statement of Issues Letter will set out the breaches the investigation team considers have been committed and/or that may be ongoing, our thinking about the detriment and/or the gain, and such other matters as may be appropriate. We will give the person a reasonable time, usually 21 days, to consider this.
- 10.15. The purpose of these steps is not to negotiate but for us to understand the person's position on the Issues Letter or summary of initial issues, so that we can take account of it in making recommendations to a Settlement Committee.<sup>46</sup> If, after this, we agree that settlement discussions may be appropriate, we will obtain a settlement mandate from a Settlement Committee. The person will then be provided with details of the proposed Warning Notice, the proposed sanction, and a draft press notice. Together, these will be the 'settlement mandate'. At the same time, the person will be told that the Early Settlement Window has opened, and the date that it closes.
- 10.16. Settlement discussions will take place on a "without prejudice" basis. This means that if negotiations are unsuccessful, neither party can rely on admissions or statements made during the settlement discussions in any subsequent contested case.<sup>47</sup>
- 10.17. The aim of discussions will be to agree the terms of a Warning, Decision and Final Notice, including any penalty and/or restitution. We may also agree other terms as part of a settlement.
- 10.18. If a settlement is reached, the person concerned will be expected to sign a settlement agreement. If a settlement cannot be reached, the case will move to the contested route. The person may still take advantage of the middle or late settlement windows, which will open and close as set out above.
- 10.19. In order to impose a penalty, issue a statement of non-compliance and/or impose a restitution order, the Settlement Committee will need to issue a Warning Notice, a Decision Notice and then a Final Notice. This will follow the process set out above. We expect, given the company will have agreed not to refer the decision (see paragraph 10.2 above), that the process will be followed in the minimum time possible.

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<sup>45</sup> In cases which are not judged suitable for settlement until after the Issues Letter has been received by the person under investigation, no Summary Statement of Issues Letter will be served. Discussions will instead be based on the Issues Letter.

<sup>46</sup> The body with delegated powers to issue a settlement mandate prior to settlement discussions.

<sup>47</sup> If for any reason a person that has entered into settlement discussions chooses to reveal to the Panel any detail of the settlement discussions, we reserve the right, similarly, to reveal information (including any admissions) that were made during those discussions.



## **11. Cooperating with ACER and other regulators**

- 11.1. The REMIT Regulation states that ACER, NRAs (including the Authority), the European Securities and Markets Authority (ESMA), competent financial authorities of Member States (such as the FCA) and, where appropriate, national competition authorities may establish appropriate forms of cooperation in order to ensure that a consistent approach is taken to enforcing the REMIT requirements.
- 11.2. We are committed to using our REMIT powers efficiently and fairly. Effective cooperation with other regulators is an essential part of this. Cooperation may take a number of forms.

### ***Cooperation on investigations***

- 11.3. ACER will promote cooperation at EU and national level by publishing non-binding guidance on the application of the definitions of, for example, inside information, market manipulation and attempted market manipulation. We and the EDP will have regard to any such guidance that may be published.
- 11.4. Where, on the basis of initial assessment or analysis, ACER suspects that a REMIT requirement has been breached, it may:
  - a. request that one or more NRAs supply it with any information related to the suspected breach
  - b. request that one or more NRAs look into the matter further and take appropriate action to remedy any breach found (such action will be for the NRA or NRAs to determine), or
  - c. if it considers that the possible breach has, or has had, a cross-border impact, establish and coordinate an investigatory group consisting of representatives of the concerned NRAs (and potentially other regulatory bodies) to investigate whether a breach has taken place and in which Member State it occurred. Such a group will render all necessary assistance to ACER.
- 11.5. If ACER submits a request for information or a request to look into a matter, we will immediately take the necessary measures to comply. If we are unable to supply the required information immediately, we shall without delay notify ACER of the reasons for this.
- 11.6. We may refuse to act on a request from ACER to provide information or look into a matter further where:
  - a. compliance might adversely affect the UK's sovereignty or security
  - b. judicial proceedings have already been initiated in respect of the same actions and against the same persons, or
  - c. a final judgment has already been delivered in relation to such persons for the same actions in Great Britain.
- 11.7. In any such case, we will notify ACER immediately.
- 11.8. We will, without delay, inform ACER in as specific a manner as possible where we have reasonable grounds to suspect that acts in breach of REMIT are being, or have been, carried out either in GB or in another Member State. We will also inform the FCA and/or the Competition and Markets Authority where we suspect breaches of financial services and/or competition legislation.

- 11.9. Where we suspect that acts that affect wholesale energy markets or the price of wholesale energy products in GB are being carried out in another Member State, we may request that ACER take action (such as requesting information from one or more NRAs).

***Information sharing***

- 11.10. We and other NRAs will cooperate at regional level and with ACER in monitoring wholesale energy markets. Market participants must provide ACER and the NRAs with the information they need to monitor those markets effectively. ACER will share the information that it receives with NRAs and with the other regulatory bodies listed above. All those bodies, including us, shall ensure the confidentiality, integrity and protection of the information that they receive.
- 11.11. Any confidential information received, exchanged or transmitted pursuant to REMIT is subject to certain conditions of professional secrecy. This obligation of professional secrecy applies to people who work or who have worked for ACER, for the NRAs including the Authority, and for other relevant authorities that receive confidential information in accordance with the REMIT Regulation. It also applies to auditors and experts instructed by those bodies.
- 11.12. Confidential information received by these people in the course of their duties may not be divulged to any other person or authority, except in summary or aggregate form such that an individual market participant or market place cannot be identified, without prejudice to cases covered by criminal law, the other provisions of the REMIT Regulation or other relevant EU legislation.
- 11.13. Without prejudice to cases covered by criminal law, ACER, NRAs (including us), ESMA, competent financial authorities of Member States and, where appropriate, national competition authorities and other persons which receive confidential information pursuant to REMIT may use it only in the performance of their duties and for the exercise of their functions (which includes REMIT functions and those under the Gas Act and the Electricity Act).
- 11.14. Other authorities, bodies or persons may use that information for the purpose for which it was provided to them or in the context of administrative or judicial proceedings specifically related to the exercise of those functions. The authority receiving that information may use it for other purposes only if the provider of the information gives consent.
- 11.15. These requirements do not prevent us from exchanging or transmitting, in accordance with national law, confidential information provided that it has not been received from ACER or from an authority of another Member State under REMIT.

## Appendix 3 – REMIT Penalties Statement

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### THE AUTHORITY'S STATEMENT OF POLICY ON FINANCIAL PENALTIES AND RESTITUTION UNDER REMIT

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## 1. Introduction

- 1.1 The EU Regulation on wholesale energy market integrity and transparency ('REMIT')<sup>48</sup> prohibits market abuse - insider trading and attempted or actual market manipulation - in wholesale energy markets. REMIT came into force in December 2011.
- 1.2 REMIT imposes obligations on market participants to:
  - register with a National Regulatory Authority ('NRA') in the EU, which for Great Britain is the Gas and Electricity Markets Authority ('the Authority')
  - provide the Agency for the Cooperation of Energy Regulators ('ACER') and the Authority with information (primarily transaction data) for the purpose of monitoring trading in wholesale energy markets and
  - publicly disclose inside information in an effective and timely manner.
- 1.3 REMIT 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 REMIT requires each Member State to provide its NRA with investigation and enforcement powers to cover breaches of REMIT. Each Member State must also make regulations about the penalties applicable to REMIT breaches. The penalties provided for must be effective, dissuasive and proportionate.
- 1.5 The UK Parliament has set out in regulations the investigatory and enforcement powers available to the Authority on REMIT matters. The regulations came into force on 29 June 2013.<sup>49</sup> They include powers for the Authority to impose a financial penalty, make a restitution order or issue a statement of non-compliance.<sup>50</sup>
- 1.6 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.
- 1.7 This statement has been prepared according to those requirements and replaces that previously published by the Authority on 8 November 2013. The Authority will have regard to this statement in exercising, or deciding whether to exercise, its powers to impose financial penalties, make a restitution order<sup>51</sup> or issue a statement of non-compliance in relation to any REMIT breach which occurred on or after [the date on which this statement is published].

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<sup>48</sup> Regulation (EU) No 1227/2011, which is available here <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:326:0001:0016:en:PDF>.

<sup>49</sup> The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 ('the 2013 Regulations').

<sup>50</sup> See Regulation 26(1) of the 2013 Regulations.

<sup>51</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.

- 1.8 A 'REMIT breach' for the purposes of this statement is a breach of the provisions of REMIT referred to in Regulation 26(1) of the 2013 Regulations.

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

- 1.9 The Authority may at any time revise this statement in accordance with the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013. Any revised statement will, following appropriate consultation, be published.
- 1.10 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.
- 2.2 The Authority's strategic objectives for its enforcement activities are to:
- deliver credible deterrence across the range of its functions
  - ensure visible and meaningful consequences for businesses who fail consumers and do not comply and
  - achieve the greatest positive impact by targeting enforcement resources and powers.
- 2.3 These objectives apply equally across all its enforcement functions, except that in REMIT cases they also apply to individuals, not solely to businesses.
- 2.4 The Authority has other regulatory objectives that it will seek to promote when using its REMIT powers. In particular, the Authority will, when deciding whether to impose a financial penalty and/or make a restitution order, and when determining the amount of any financial penalty or restitution payment, act in the manner it considers is best calculated to:
- obtain fair outcomes for those that have suffered loss or have been otherwise adversely affected by a REMIT breach
  - deter failures to comply with REMIT requirements, by the person<sup>52</sup> concerned or by any other person with obligations under REMIT
  - maintain confidence in the integrity of wholesale energy markets
  - ensure that wholesale energy market prices are set in an efficient manner
  - ensure that no profits can be drawn from REMIT breaches

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<sup>52</sup> Throughout this statement the term 'person' refers to both firms and individuals.

- foster competition in wholesale energy markets for the benefit of final consumers of energy and
  - protect the interests of consumers in wholesale energy markets and of final consumers of energy, including vulnerable consumers.
- 2.5 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 compliance and that financial penalties should act as a significant deterrent to future non-compliance.
- 2.6 The Authority will, therefore, normally seek to ensure that
- any financial penalty significantly exceeds the gain to the person (where this can reasonably be calculated or estimated) and the detriment caused to those parties affected by the REMIT breach and/or that
  - any restitution fully recompenses the losses suffered by those parties affected by the REMIT breach.
- 2.7 When determining the amount of a financial penalty and/or restitution payment, the Authority will consider any remedial measures that have been taken by a person. However, the Authority may impose a financial penalty significantly in excess of the gain or detriment even where the gain or detriment has been mitigated in full. The Authority considers that this may be necessary in order to deter REMIT breaches and provide appropriate encouragement for all persons to comply with their obligations.
- 2.8 In exercising its powers to impose a financial penalty, the Authority will also have regard to
- the principles of best regulatory practice, and
  - any non-binding guidance that may be published by ACER.

### **3. Interaction between restitution and financial penalties**

- 3.1 In considering any case in which a financial penalty and/or restitution might be imposed, the Authority will need to determine:
- whether there has been a REMIT breach and, if there has
  - whether to impose a financial penalty, make a restitution order or issue a statement of non-compliance and
  - the amount of any financial penalty being imposed or any restitution payment being ordered.
- 3.2 The Authority will follow the procedural requirements set out in the 2013 Regulations in relation to imposing a financial penalty, making a restitution order or issuing a statement of non-compliance.
- 3.3 The Authority expects firms and individuals promptly and proactively to take steps to remedy the consequences of a REMIT breach by identifying, contacting and adequately compensating parties that have suffered any financial loss as a

result of a REMIT breach. If this does not happen, the Authority may make an order requiring a firm or individual to make restitution payments or the Authority may apply to the court for a restitution order.<sup>53</sup>

- 3.4 The Authority (or the court) may make such an order where it is satisfied that a firm or individual has committed a breach and that as a result profits have accrued to the firm or individual and/or others have suffered a loss or other adverse effect.
- 3.5 The firm or individual may be required to distribute, to the persons that have suffered the loss, a sum that appears to be just having regard to (and where applicable) the profits that appear to have been accrued and/or to the loss or other adverse effect suffered as a result of the breach.
- 3.6 It may not be straightforward to establish a clear linkage between a REMIT breach and an adverse impact on a specific firm or group of consumers. Where the Authority can identify the affected parties, it would normally expect to make a restitution order if the person in breach does not agree to provide appropriate restitution voluntarily.
- 3.7 The amount of any financial penalty must be one that the Authority considers appropriate. When determining this, the Authority will have regard to the level of any restitution ordered (whether by the Authority or by a court) and/or any restitution which is being or has been made.
- 3.8 If restitution is not possible, the Authority will take account of the detriment and/or gain caused by a REMIT breach when calculating the financial penalty.

#### **4. Deciding to impose a financial penalty, make a restitution order or issue a statement of non-compliance**

- 4.1 The Authority will consider the full circumstances of each case when deciding whether or not to impose a financial penalty, and/or make a restitution order or issue a statement of non-compliance.
- 4.2 The Authority will, for example, consider the seriousness of the suspected breach, the behaviour and previous compliance history of the person, any guidance that the Authority has published, and any action taken by the Authority or other domestic or international regulatory authorities.

##### ***Financial penalty and/or restitution***

- 4.3 The Authority is more likely to impose a financial penalty and/or make a restitution order where:
  - the person has made a profit or avoided a loss as a result of the breach, on the basis that a person should not be permitted to benefit from the breach
  - the breach damaged, or could have damaged, the interests of consumers or other market participants

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<sup>53</sup> REMIT procedural guidelines set out the circumstances in which the Authority might seek restitution via the court and/or ask the court to impose a financial penalty.

- the breach had, or could have had, an impact on the orderliness of and confidence in wholesale energy markets
- a financial penalty and/or restitution payment is necessary to deter future breaches and encourage compliance
- the breach was deliberate or reckless
- the circumstances from which the breach arose were within the control of the person under investigation
- the breach or possibility of it would have been apparent to a person acting diligently
- a lack of effective remedial action after the breach becomes apparent to the person
- the person gave false or inaccurate information to Ofgem or the Authority and it appears that this was an attempt knowingly to mislead Ofgem or the Authority
- the regulated person has a record of previous breaches, similar or otherwise, on the basis that it may be particularly important to deter future cases.

***Statement of non-compliance***

4.4 The Authority is more likely to issue a statement of non-compliance where:

- the REMIT breach is of a very minor nature
- another domestic or international regulatory body is likely to impose a financial penalty in respect of the breach that is under consideration by the Authority (in those circumstances the Authority will consider whether or not it is appropriate for it to impose any additional sanctions)
- deterrence may be effectively achieved by issuing a statement of non-compliance
- the person has brought the breach to the attention of the Authority (depending upon the nature and seriousness of the breach) or
- the person has admitted the breach and provides full and immediate co-operation to the Authority, and takes steps to ensure that those who have suffered loss because of the breach are fully compensated (depending upon the nature and seriousness of the breach).

4.5 The Authority nevertheless reserves the right to impose a penalty in such circumstances.

4.6 The Authority will also consider whether its objectives under REMIT, as set out in section 2 above, in any way suggest that the imposition of a penalty would be inappropriate.

4.7 In certain exceptional circumstances the Authority may be prepared to issue a statement of non-compliance rather than impose a financial penalty even



though a financial penalty would otherwise be appropriate. This may, for example, occur where

- the application of the Authority's policy on serious financial hardship results in a financial penalty being reduced to zero
- there is verifiable evidence that the person would be unable to meet other regulatory requirements, particularly financial resource requirements, if the Authority imposed a financial penalty at an appropriate level or
- there is the likelihood of a severe adverse impact on a person's shareholders or an impact on market confidence or market stability if a financial penalty was imposed. However, this does not exclude the imposition of a financial penalty even though this may have an impact on a person's shareholders.

4.8 As noted above, the Authority will consider all the relevant circumstances of the case when deciding whether to impose a financial penalty, make a restitution order or issue a statement of non-compliance. As such, the factors set out above are not exhaustive. Not all of the factors may be relevant in a particular case and there may be other factors, not listed, that are relevant.

#### ***Taking action against an individual rather than a firm***

- 4.9 In some cases, it may not be appropriate to take action against a firm for the conduct of an individual (for instance, where a firm can show that it took all reasonable steps to prevent the breach).
- 4.10 In other cases, it may be appropriate to take action against both the firm and the individual. For example, a firm may have failed to establish an appropriate monitoring and compliance system and an individual may have taken advantage of these deficiencies to manipulate the market or conduct insider trading.
- 4.11 In assessing the seriousness of a breach we will, for example, consider whether the individual acted under duress. For example, an individual might have been pressured by a colleague or senior manager to commit a breach. In such cases the Authority may reduce the level of any penalty for the perpetrator of the breach, but increase the level of any penalty imposed on the individual who pressured the individual to commit the breach. Not all factors may be relevant to every case and there may be other considerations, not listed, that are relevant.
- 4.12 The Authority will not hold individuals responsible for the conduct of others, provided that appropriate delegation and supervision have taken place. In particular, action will not necessarily be taken against an individual only because a regulatory failure has taken place in an area of business for which the individual is responsible. The Authority may, 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.

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

- 5.1 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.
- 5.2 The total amount payable will normally be made up of two elements:

- (i) removal of the detriment suffered by affected parties and/or any gain made by the person as a result of the breach, where these can reasonably be calculated or estimated (these sums may be returned to affected parties via a restitution order or may be included in a financial penalty) and
- (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.

5.3 We describe how these elements are built up in the steps below.

#### ***Removal of detriment and/or gain***

1. Calculate the detriment to consumers and the gain to the person.

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 just, 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>54</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.
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, apply a discount to the penal element.
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>55</sup>

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<sup>54</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 or reckless. See paragraphs 6.17-6.21, 7.15-7.19 and 8.17-8.21.

<sup>55</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.

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

- 5.4 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. Annex 1 contains a flow chart of the process.

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

### ***Step 1: Calculate the detriment and gain***

- 6.1 The Authority will seek to deprive a firm of all the financial benefit derived from the breach where it is practicable to quantify it. 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 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.
- 6.3 Where it is possible to show that market participants or consumers have suffered loss or other adverse consequences, the Authority will seek to ensure that they receive appropriate restitution payments. The Authority will therefore seek to calculate the detriment to market participants or consumers resulting from the breach.
- 6.4 There may be some degree of overlap between the gain and the detriment but in most cases the gain to the firm will not equal the detriment suffered by the market participant or consumer. Where the firm has not made any gain or the Authority is unable to calculate any gain or detriment, the Authority may still consider whether to impose a financial penalty.
- 6.5 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.
- 6.6 Where a firm 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.
- 6.7 As noted above, the amount of any restitution payment ordered by the Authority must be that which appears to be just, 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 The starting point for the penal element will be 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 and calculated detriment and/or gain.
- 6.9 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.
- 6.10 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.
- 6.11 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.
- 6.12 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.
- 6.13 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%.
- 6.14 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%.
- 6.15 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 the following categories:
- (a) factors relating to the impact of the breach
  - (b) factors relating to the nature of the breach
  - (c) factors tending to show that the breach was deliberate and

(d) factors tending to show that the breach was reckless.

6.16 Factors relating to the impact of a breach committed by a firm include:

- 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)
- the extent of other adverse effects, such as inconvenience or distress, caused to consumers
- whether the breach had an effect on particularly vulnerable people, whether intentionally or otherwise
- whether the breach 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, and
- the extent of any detrimental effect on the ability of Ofgem or the Authority to fulfil statutory duties.

6.17 Factors relating to the nature of a breach committed by a firm include:

- the nature of the rules, requirements or provisions breached
- the frequency of the breach
- whether the firm has failed to comply with statutory deadlines or other requirements set out in legislation
- 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 circumstances leading to the breach
- whether the firm's senior management were aware or should have been aware of the breach
- the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the breach
- whether the firm failed to conduct its business with integrity
- whether the firm believed, on reasonable grounds, that the conduct did not amount to a breach<sup>56</sup> and

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<sup>56</sup> See paragraph 6.24 for an indication of the circumstances in which the Authority expects to

- whether the firm took all reasonable precautions and exercised all due diligence to avoid committing a breach.<sup>57</sup>

6.18 Factors tending to show that the firm's breach was deliberate include:

- 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 intended to benefit financially from the breach, either directly or indirectly
- 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, sought to conceal their misconduct
- the firm's senior management, or a responsible individual, committed the breach in such a way as to avoid or reduce the risk that the breach would be discovered
- the firm's senior management, or a responsible individual, were influenced to commit the breach by the belief that it would be difficult to detect
- the breach was repeated 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.

6.19 Factors tending to show that the firm's breach was reckless include:

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

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regard a firm as having reasonable grounds to believe that its conduct did not amount to a breach.

<sup>57</sup> See paragraph 6.24 for an indication of the circumstances in which the Authority expects to regard a firm as having taken all reasonable precautions and exercised all due diligence to avoid committing a breach.

6.20 In following this approach factors that 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 firm from the breach was significant
- the breach had a serious adverse effect on the orderliness of, or confidence in, the gas and/or electricity wholesale markets
- the breach was committed on multiple occasions
- 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
- financial crime was facilitated, occasioned or otherwise attributable to the breach
- the firm failed to conduct its business with integrity and
- the breach was committed deliberately or recklessly.

6.21 Factors that are likely to be considered 'level 1 factors', 'level 2 factors' or 'level 3 factors' include

- 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<sup>58</sup> and
- the breach was committed negligently or inadvertently.

6.22 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*

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<sup>58</sup> In the overall assessment of seriousness this factor may be outweighed by other factors likely to be considered level 4 or 5 factors.

- 6.23 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.
- 6.24 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 reasonable precautions and exercised due diligence to avoid a REMIT breach) where the person
- had proper regard to the Authority’s open letter of 11 July 2014 about the disclosure of inside information under REMIT<sup>59</sup>
  - followed other relevant guidance published by the Authority, including any guidelines and policies, open letters and bespoke guidance
  - followed internal policies or procedures
  - discussed the conduct with internal managers or legal advisers and followed their advice
  - engaged in the conduct for a legitimate purpose.

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

- 6.25 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 an adjustment will not affect any amount to be recovered from the firm as set out in step 1.
- 6.26 Factors tending to increase the penal element include:
- repeated breaches, including failure to comply with previous undertakings (statutory or otherwise) or other agreed action
  - the firm’s compliance history includes previous action taken against the firm by the Authority or by other domestic or international regulatory authorities that the Authority considers relevant
  - the firm had previously been told about the Authority’s concerns in relation to the issue and failed to address these concerns adequately
  - the Authority had published guidance or other materials raising relevant concerns
  - the Authority had 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

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<sup>59</sup> <https://www.ofgem.gov.uk/ofgem-publications/88732/ofgemopenletteronremitinsideinformation.pdf>.



- senior management involvement in any breach or a lack of sufficient senior management involvement to prevent it
- the absence of any evidence of effective internal mechanisms or procedures intended to prevent a breach
- the absence of any evidence that such internal mechanisms and procedures as exist within the firm have been properly applied and kept under appropriate review by senior management
- failure to cooperate fully with reasonable requests from Ofgem's investigation team (for example, any failure to comply, without proper justification, with information requests)
- withholding relevant evidence and/or submitting it in a manner that hinders the investigation (whether, for example, it is late, incomplete and/or inaccurate) and
- the firm has arranged its resources in such a way as to allow or avoid giving up the financial benefits it has made and/or to avoid payment of a financial penalty.

6.27 Factors tending to decrease the penal element may include:

- 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)
- the firm provided cooperation with Ofgem's investigation that is well beyond what would be expected of any person facing enforcement action (or with an investigation by another regulatory body allowed to share information with the Authority) and goes well beyond merely meeting prescribed timescales for responding, for example, to notices or an Issues Letter and
- the firm had complied with any requirement or rulings of another regulatory authority relating to the breach.

6.28 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.

6.29 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**

- 6.30 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.
- 6.31 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**

- 6.32 The Authority may offer the firm the opportunity to settle the case. Early 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.
- 6.33 In many cases it is likely to be in the interests of consumers for a firm to be offered the chance to resolve matters through settlement. In recognition of the benefits of such agreements, the Authority will reduce the penal element of the overall financial liability to be imposed on the firm. Such discounts will not apply to any gain and/or detriment identified by the Authority.
- 6.34 The settlement process, including the beginning and end of the three settlement periods, is set out in our REMIT procedural guidelines.
- 6.35 The size of the discount will reflect the stage of the process at which the agreement is reached. The discounts are as follows:
- 30 per cent for early settlement
  - 20 per cent for middle settlement

- 10 per cent for late settlement.

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

- 6.36 The Authority will determine the firm's total financial liability (not including the settlement discount) by adding the final penal element (step 4 or 5) to any gain and/or detriment that the Authority has identified as resulting from the contravention or failure (step 1).
- 6.37 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*

- 6.38 The Authority will consider reducing a penalty if it is satisfied that a firm will suffer serious financial hardship as a result of paying the entire penalty.
- 6.39 Where a firm claims 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.
- 6.40 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.
- 6.41 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.

- 6.42 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.
- 6.43 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.
- 6.44 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.

## **7. Financial penalties and restitution in relation to individuals in non-market abuse cases**

### ***Step 1: Calculate the detriment and gain***

- 7.1 The Authority will seek to deprive an individual of all the financial benefit derived from the breach where it is practicable to quantify it. As part of this, the Authority will ordinarily also charge interest on the benefit.
- 7.2 The Authority will seek to calculate the gain to the individual as accurately as it can. 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.
- 7.3 Where it is possible to show that market participants or consumers have suffered loss or other adverse consequences, the Authority will seek to ensure that they receive appropriate restitution payments. The Authority will therefore seek to calculate the detriment to market participants or consumers resulting from the breach.
- 7.4 There may be some degree of overlap between the gain and the detriment but in most cases the gain to the individual will not equal the detriment suffered by the market participant or consumer.
- 7.5 Where the individual has not made any gain or the Authority is unable to calculate any gain or detriment accurately, the Authority may still consider whether to impose a financial penalty.
- 7.6 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.

7.7 Where an individual 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. As noted above, the amount of any restitution payment ordered by the Authority must be that which appears to be just, 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***

7.8 Once the Authority has calculated the benefit to be recovered from the individual, it will calculate the additional penal element. In non-market abuse cases, the Authority will determine a starting point for the penalty based on the individual's 'relevant income'.

7.9 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.

7.10 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.

7.11 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.

7.12 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%.

7.13 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 the following four categories:

- (a) factors relating to the impact of the breach
- (b) factors relating to the nature of the breach
- (c) factors tending to show that the breach was deliberate and
- (d) factors tending to show that the breach was reckless.

7.14 Factors relating to the impact of a breach committed by an individual include:

- 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)
- the extent of other adverse effects, such as inconvenience or distress, caused to consumers
- whether the breach had an effect on particularly vulnerable people, whether intentionally or otherwise
- whether the breach 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 and
- the extent of any detrimental effect on the ability of Ofgem or the Authority to fulfil statutory duties.

7.15 Factors relating to the nature of a breach committed by an individual include:

- the nature of the rules, requirements or provisions breached
- the frequency of the breach
- the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to 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 has a prominent position in the market
- whether the individual is an experienced industry professional
- whether the individual held a senior position with the firm

- the extent of the responsibility of the individual for the wholesale energy product affected by the breach and for the particular matter that was the subject of the breach
- whether the individual acted under duress
- whether the individual believed, on reasonable grounds, that the conduct did not amount to a breach<sup>60</sup> and
- whether the individual took all reasonable precautions and exercised all due diligence to avoid committing a breach.<sup>61</sup>

7.16 Factors tending to show that the breach was deliberate include:

- 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
- the individual intended to benefit financially from the breach, either directly or indirectly
- the individual knew that the conduct was not in accordance with his or her firm's internal procedures
- the individual sought to conceal the misconduct
- the individual committed the breach in such a way as to avoid or reduce the risk that it would be discovered
- the individual was influenced to commit the breach by the belief that it would be difficult to detect
- the individual's actions were repeated 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.

7.17 Factors tending to show that the breach was reckless include:

- 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.

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<sup>60</sup> See paragraph 7.21 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>61</sup> See paragraph 7.21 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.

7.18 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 a serious adverse effect on the orderliness of, or confidence in, the wholesale gas and/or electricity markets
- the breach was committed on multiple occasions
- financial crime was facilitated, occasioned or otherwise attributable to the breach
- the individual failed to act with integrity
- the individual abused a position of trust
- the individual has a prominent position within the industry and
- the breach was committed deliberately or recklessly.

7.19 In following this approach factors which are likely to be considered 'level 1 factors', 'level 2 factors' or 'level 3 factors' include:

- 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 negligently or inadvertently.

*Reasonable belief and reasonable precautions*

7.20 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.

7.21 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 reasonable precautions and exercised due diligence to avoid a REMIT breach) where the person



- had proper regard to the Authority’s open letter of 11 July 2014 about the disclosure of inside information under REMIT<sup>62</sup>
- followed other relevant guidance published by the Authority, including any guidelines and policies, open letters and bespoke guidance
- followed internal policies or procedures
- discussed the conduct with internal managers or legal advisers and followed their advice
- engaged in the conduct for a legitimate purpose.

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

7.22 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 an adjustment will not affect any amount to be recovered from the individual as set out in step 1.

7.23 Factors tending to increase the penal element may include:

- repeated breaches, including failure to comply with previous undertakings (statutory or otherwise) or other agreed action
- the individual’s compliance history includes previous action taken him or her by the Authority or by other domestic or international regulatory authorities that the Authority considers relevant
- the individual had previously been told about the Authority’s concerns in relation to the issue and failed to address these concerns adequately
- the Authority had published guidance or other materials raising relevant concerns
- the Authority had 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
- failure to cooperate fully with reasonable requests from Ofgem’s investigation team (for example, any failure to comply, without proper justification, with information requests)
- withholding relevant evidence and/or submitting it in a manner that hinders the investigation (whether, for example, it is late, incomplete and/or inaccurate) and

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<sup>62</sup> <https://www.ofgem.gov.uk/ofgem-publications/88732/ofgemopenletteronremitinsideinformation.pdf>.

- the individual has arranged his or her resources in such a way as to avoid recovery of the gain and/or detriment and/or payment of a financial penalty.

7.24 Factors tending to decrease the penal element may include:

- 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)
- the individual provided cooperation with Ofgem's investigation that is well beyond what would be expected of any person facing enforcement action (or with an investigation by another regulatory body allowed to share information with the Authority) and goes well beyond merely meeting prescribed timescales for responding, for example, to notices or an Issues Letter
- the individual had complied with any requirement or rulings of another regulatory authority relating to the breach
- the individual has assisted the Authority in action taken against other individuals for market abuse and/or in criminal proceedings
- the individual agreed to undertake relevant REMIT training subsequent to the breach.

7.25 The Authority considers that senior management has a vital role to play in ensuring that individuals 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.

7.26 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**

7.27 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.

7.28 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***

7.29 The Authority may offer the individual the opportunity to settle the case. Early 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.

7.30 In many cases it is likely to be in the interests of consumers for an individual to be offered the chance to resolve matters through settlement. In recognition of the benefits of such agreements, the Authority will reduce the penal element of the overall financial liability to be imposed on the individual. Such discounts will not apply to any gain and/or detriment identified by the Authority.

7.31 The settlement process, including the beginning and end of the three settlement periods, is set out in our REMIT procedural guidelines.

7.32 The size of the discount will reflect the stage of the process at which the agreement is reached. The discounts are as follows:

- 30 per cent for early settlement
- 20 per cent for middle settlement
- 10 per cent for late settlement.

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

7.33 The Authority will determine the individual's total financial liability by adding the final penal element (step 4 or 5) to any gain and/or detriment that the Authority has identified as resulting from the market abuse (step 1).

- 7.34 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 9 sets out the Authority's policy on serious financial hardship in relation to individuals.
- 7.35 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.

## **8. Financial penalties and restitution in relation to individuals in market abuse cases**

### ***Step 1: Calculate the detriment and gain***

- 8.1 The Authority will seek to deprive an individual of all the financial benefit derived from the breach where it is practicable to quantify it. As part of this, the Authority will ordinarily also charge interest on the benefit.
- 8.2 The Authority will seek to calculate the gain to the individual as accurately as it can. 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.
- 8.3 Where it is possible to show that market participants or consumers have suffered loss or other adverse consequences, the Authority will seek to ensure that they receive appropriate restitution payments. The Authority will therefore seek to calculate the detriment to market participants or consumers resulting from the breach.
- 8.4 There may be some degree of overlap between the gain and the detriment but in most cases the gain to the individual will not equal the detriment suffered by the market participant or consumer.
- 8.5 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.
- 8.6 Where the individual has not made any gain or the Authority is unable to calculate any gain or detriment accurately, the Authority may still consider whether to impose a financial penalty. Where an individual 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.
- 8.7 As noted above, the amount of any restitution payment ordered by the Authority must be that which appears to be just, 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***

- 8.8 Once the Authority has calculated the benefit to be recovered from the individual, it will calculate the additional penal element. 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.
- 8.9 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 8.11 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 8.13-14 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).
- 8.10 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 8.13-14 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).
- 8.11 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.
- 8.12 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.

- 8.13 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.
- 8.14 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.
- 8.15 The Authority will assess the seriousness of the market abuse to determine which level is most appropriate to the case. In deciding which level is most appropriate to a market abuse case, the Authority will take into account various factors that usually fall into the following four categories:
- a) factors relating to the impact of the market abuse
  - b) factors relating to the nature of the market abuse
  - c) factors tending to show that the market abuse was deliberate and
  - d) factors tending to show that the market abuse was reckless.
- 8.16 Factors relating to the impact of the market abuse include:
- the level of financial or other benefit gained or loss avoided, or intended to be gained or avoided, by the individual from the market abuse, either directly or indirectly
  - the loss or risk of loss suffered by consumers, investors or other market participants (whether individually or as a whole)
  - the extent of other adverse effects, such as inconvenience or distress, caused to consumers
  - whether the breach had an effect on particularly vulnerable people, whether intentionally or otherwise
  - whether the market abuse 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
  - the extent of any detrimental effect on the ability of Ofgem or the Authority to fulfil statutory duties and

- whether the market abuse had a significant impact on the price of shares or other investments.

8.17 Factors relating to the nature of the market abuse include:

- the nature of the rules, requirements or provisions breached
- the frequency of the market abuse
- whether the individual failed to act with integrity or abused a position of trust
- whether the individual caused or encouraged other individuals to commit market abuse
- whether the individual has a prominent position in the market
- whether the individual is an experienced industry professional
- whether the individual held a senior position with the firm
- the extent of the responsibility of the individual for the wholesale energy product affected by the breach and for the particular matter that was the subject of the breach
- whether the individual acted under duress
- whether the individual believed, on reasonable grounds, that the conduct did not amount to a breach<sup>63</sup> and
- whether the individual took all reasonable precautions and exercised all due diligence to avoid committing a breach.<sup>64</sup>

8.18 Factors tending to show that the market abuse was deliberate include:

- the market abuse was intentional, in that the individual intended or foresaw that the likely or actual consequences of his or her actions would result in market abuse
- the individual intended to benefit financially from the market abuse, either directly or indirectly
- the individual knew that his or her actions were not in accordance with exchange rules and/or the firm's internal procedures
- the individual sought to conceal the misconduct
- the individual committed the market abuse in such a way as to avoid or reduce the risk that the market abuse would be discovered

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<sup>63</sup> See paragraph 8.23 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>64</sup> See paragraph 8.23 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 was influenced to commit the market abuse by the belief that it would be difficult to detect
- the individual's actions were repeated and
- 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.

8.19 Factors tending to show that the market abuse was reckless include:

- the individual appreciated there was a risk that his or her actions could result in market abuse 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 or she was acting in accordance with the firm's internal procedures.

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

- the level of financial or other benefit gained or loss avoided, or intended to be gained or avoided, directly by the individual from the market abuse was significant
- the market abuse had a serious adverse effect on the orderliness of, or confidence in, the wholesale gas and/or electricity markets
- the market abuse was committed on multiple occasions
- the individual failed to act with integrity or abused a position of trust
- the individual has a prominent position in the market and
- the market abuse was committed deliberately or recklessly.

8.21 In following this approach factors which are likely to be considered 'level 1 factors', 'level 2 factors' or 'level 3 factors' include:

- little or no profits were made or losses avoided as a result of the market abuse, 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 market abuse and
- the market abuse was committed negligently or inadvertently.



### *Reasonable belief and reasonable precautions*

- 8.22 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.
- 8.23 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 reasonable precautions and exercised due diligence to avoid a REMIT breach) where the person
- had proper regard to the Authority's open letter of 11 July 2014 about the disclosure of inside information under REMIT<sup>65</sup>
  - followed other relevant guidance published by the Authority, including any guidelines and policies, open letters and bespoke guidance
  - followed internal policies or procedures
  - discussed the conduct with internal managers or legal advisers and followed their advice
  - engaged in the conduct for a legitimate purpose.

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

- 8.24 The Authority may increase or decrease the amount of the penal element, to take into account factors that aggravate or mitigate the market abuse. The adjustment will not affect any amount to be recovered from the individual as set out in step 1.
- 8.25 Factors tending to increase the penal element may include:
- repeated breaches, including failure to comply with previous undertakings (statutory or otherwise) or other agreed action
  - the individual's compliance history includes previous action taken against him or her by the Authority or by other domestic or international regulatory authorities that the Authority considers relevant
  - the individual had previously been told about the Authority's concerns in relation to the issue and failed to address these concerns adequately
  - the Authority had published guidance or other materials raising relevant concerns
  - the Authority had 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

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<sup>65</sup> <https://www.ofgem.gov.uk/ofgem-publications/88732/ofgemopenletteronremitinsideinformation.pdf>.

- the individual 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)
- withholding relevant evidence and/or submitting it in a manner that hinders the investigation (whether, for example, it is late, incomplete and/or inaccurate)
- the individual has arranged his or her resources in such a way as to avoid recovery of the gain and/or detriment and/or payment of a financial penalty.

8.26 Factors tending to decrease the penal element may include:

- 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, contacting 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)
- the individual provided cooperation with Ofgem's investigation that is well beyond what would be expected of any person facing enforcement action (or with an investigation by another regulatory body allowed to share information with the Authority) and goes well beyond merely meeting prescribed timescales for responding, for example, to notices or an Issues Letter
- the individual has assisted the Authority in action taken against other individuals for market abuse and/or in criminal proceedings
- the individual had complied with any requirement or rulings of another regulatory authority relating to the breach
- the individual agreed to undertake relevant REMIT training subsequent to the market abuse.

8.27 The Authority considers that senior management has a vital role to play in ensuring that individuals 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.

8.28 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**

- 8.29 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.
- 8.30 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
  - 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**

- 8.31 The Authority may offer the individual the opportunity to settle the case. Early 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.
- 8.32 In many cases it is likely to be in the interests of consumers for an individual to be offered the chance to resolve matters through settlement. In recognition of the benefits of such agreements, the Authority will reduce the penal element of the overall financial liability to be imposed on the individual. Such discounts will not apply to any gain and/or detriment identified by the Authority.
- 8.33 The settlement process, including the beginning and end of the three settlement periods, is set out in our REMIT procedural guidelines.
- 8.34 The size of the discount will reflect the stage of the process at which the agreement is reached. The discounts are as follows:
- 30 per cent for early settlement
  - 20 per cent for middle settlement
  - 10 per cent for late settlement.

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

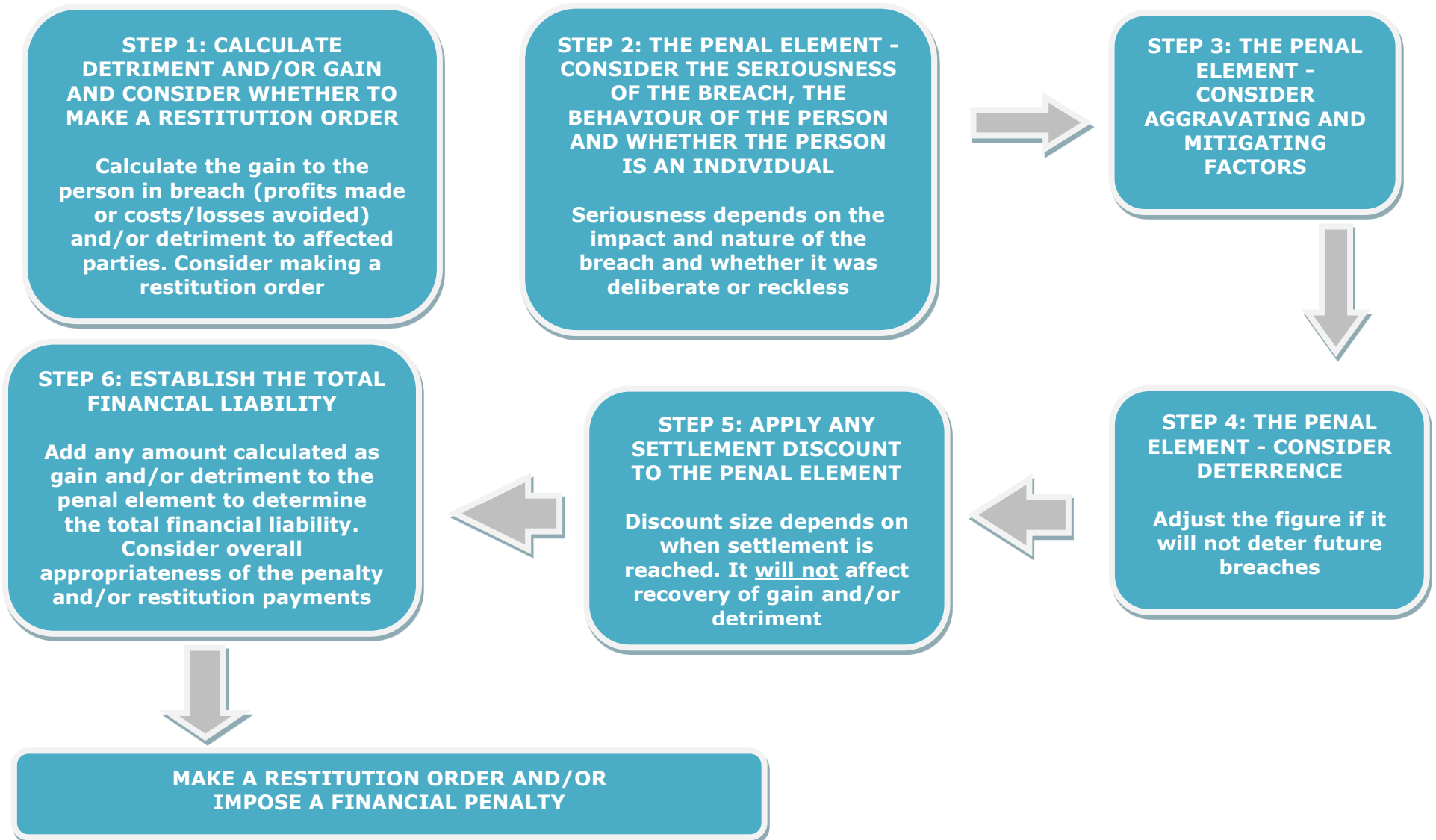
- 8.35 The Authority will determine the individual's total financial liability by adding the final penal element (step 4 or 5) to any gain and/or detriment that the Authority has identified as resulting from the market abuse (step 1).
- 8.36 The Authority may also adjust the total financial liability 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 an individual. Section 9 sets out the Authority's policy on serious financial hardship in relation to individuals.
- 8.37 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.

## **9. Serious financial hardship in relation to individuals**

- 9.1 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.
- 9.2 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.
- 9.3 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).
- 9.4 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 £14,000 and his or her capital will fall below £16,000 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.
- 9.5 The Authority will consider all relevant circumstances in determining whether the income and capital threshold levels should be increased in a particular case.

- 9.6 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.
- 9.7 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.
- 9.8 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).
- 9.9 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.
- 9.10 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.
- 9.11 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.
- 9.12 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.
- 9.13 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.

**Annex 1: Process for calculating the total financial liability of the person in breach**



## Appendix 4 - Feedback Questionnaire

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1.1. Ofgem considers that consultation is at the heart of good policy development. We are keen to consider any comments or complaints about the manner in which this consultation has been conducted. In any case we would be keen to get your answers to the following questions:

1. Do you have any comments about the overall process, which was adopted for this consultation?
2. Do you have any comments about the overall tone and content of the report?
3. Was the report easy to read and understand, could it have been better written?
4. To what extent did the report's conclusions provide a balanced view?
5. To what extent did the report make reasoned recommendations for improvement?
6. Please add any further comments?

1.2. Please send your comments to:

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