

APPENDIX 1

All references to Article are to articles of the EU REMIT Regulation (1227/2011). All references to Regulation are to specific sections of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013. All references to our Previous Response are to our response dated 29 August 2013 to the Procedural Guidelines and Penalties Statement as first proposed by Ofgem in its Consultation dated 6 June 2013.

Vision and strategic objectives

Q1: Do you agree with the proposed Vision and Strategic Objectives for REMIT?

1. National Grid welcomes a consistent approach by Ofgem to its enforcement processes as regards REMIT and its wider enforcement activities. As such, it seems appropriate to extend Ofgem's Vision and Strategic Objectives to REMIT enforcement.
2. However, National Grid notes that Ofgem will also continue to pursue specific regulatory objectives when exercising its REMIT powers, and clarity on the interaction between these two different sets of objectives is needed, including which will prevail where in a particular case they may conflict. An example is the prioritisation criteria for deciding whether to open (or continue) a case. In Paragraph 4.5 of the Procedural Guidelines, Ofgem is to have regard to its regulatory objectives when considering whether to proceed with an investigation in a particular case. However, Paragraph 4.6b of the Procedural Guidelines says that to help Ofgem make that decision it will consider whether it is a priority matter, and in accordance with Paragraph 4.9 of the Procedural Guidelines this is to be considered in light of the Enforcement Vision and Strategic Objectives.

Procedural Guidelines

Q2: Do you have any comments on the proposed changes to the settlement processes?

3. In general National Grid welcomes the proposed changes to the settlement processes, particularly as the changes introduce greater clarity in terms of the applicable settlement process and settlement windows. National Grid is pleased to note that (as suggested in our Previous Response) an indication of the percentage reduction in penalty for an early settlement is now included in the Procedural Guidelines, in line with the approach adopted in the FCA's Enforcement Guide. However, National Grid has further comments on the proposed changes as set out in the following paragraphs.
4. National Grid notes that Paragraph 10.1 of the Procedural Guidelines now explicitly states that the person under investigation must be prepared to admit to the breach(es) that have occurred. In National Grid's view, a requirement that the respondent must admit breach is an unnecessary barrier to settlement and is likely to create procedural unfairness. This requirement also does not reflect the commercial reality that a market participant under investigation may decide to engage in settlement rather than continuing with an investigation for commercial reasons, whilst still maintaining that it has not breached REMIT.
5. In Paragraph 10.2 of the Procedural Guidelines, we suggest that, for clarity, reference to "refer" more clearly references the appeal process to the Upper Tribunal.
6. The criteria in Paragraph 10.7 of the Procedural Guidelines, whereby a settlement mandate may be sought from a Senior Partner rather than from the Settlement Committee, are very wide and expressed in subjective terms, and furthermore include size of penalty, which will presumably not be ascertainable at the investigation stage.
7. National Grid notes (in Paragraph 10.9 of the Procedural Guidelines) that Ofgem will normally consider settlement as an option, but no guidance is given as to when that will not be the case.

8. National Grid welcomes the indication of the percentage reduction in penalty in relation to early settlement (referred to in Paragraph 10.11 of the Procedural Guidelines and Paragraph 6.35 of the Penalties Statement) and notes that Ofgem has adopted the same approach as the FCA in its Enforcement Guide. In National Grid's view, the percentage discount is not at the level which is sufficiently persuasive towards settlement, particularly because it only relates to the penal element of the financial penalty.
9. In Paragraph 10.11 of the Procedural Guidelines, the Early Settlement Window is stated to be 28 days, which itself is a short period within which to consider the terms of a settlement mandate, and in any event is stated to be alternatively any time agreed by Ofgem. It would seem more appropriate to use the terminology of "reasonable time" as used in Paragraph 10.14 of the Procedural Guidelines in the context of consideration of Ofgem's Summary Statement of Issues Letter.
10. Furthermore, the end of the Middle Settlement Window and the beginning of the Late Settlement Window is defined by reference to expiry of the period for making written representations on a Warning Notice, which is only 14 days subject to the Panel's discretion to extend. Again, extending the settlement window would further encourage and facilitate settlement.
11. In Paragraph 10.18 of the Procedural Guidelines, we would suggest the word "expected" is replaced by "invited".

Q3: Do you have any comments on our proposals for oral representations?

12. We welcome the further detail included in relation to oral hearings (Paragraph 9.13 to 9.19 of the Procedural Guidelines). However, further clarity is still required as to the arrangements for the oral hearing. For example, will it be in public or in private? Will a transcript be made available to participants?
13. As stated in our Previous Response, in National Grid's view the procedure to be followed in respect of the oral hearing should be the same for all cases rather than at the Panel's discretion, and should be published, in order to ensure consistency and transparency of the approach taken.
14. As stated in our Previous Response, the arrangements in relation to the addition of new material during oral investigations are unsatisfactory. Whilst National Grid does not disagree with notice of the material being provided to the Enforcement Decision Panel, it is important that the person under investigation is entitled to use the hearing as an opportunity to raise all arguments open to them. Accordingly, the Panel should not be allowed to unilaterally decide whether new material may be added, as this could potentially lead to a breach of the Human Rights Act 1998, as the person may not be afforded a fair hearing.

Q4: Do you have any other comments on the proposed REMIT Procedural Guidelines?

15. In the section on prioritisation criteria for deciding whether to open (or continue) a case, Paragraph 4.6 of the Procedural Guidelines states what Ofgem will generally consider in making a decision. That includes at Paragraph 4.6b of the Procedural Guidelines whether it is a priority matter for Ofgem "*due to its apparent seriousness and impact, or potential impact, on consumers or competition*". However, this appears to be contradictory to Paragraph 4.9 of the Procedural Guidelines, which specifies a much wider list of factors to be considered when Ofgem decides if an issue is a priority matter or not.
16. As stated in our Previous Response, we would like to see greater clarity in the use of the words "REMIT requirement", "REMIT breach" and "compliance with REMIT", given the crucial distinction between those specific Articles of REMIT defined in Regulation 4 of the 2013 Regulations as "REMIT requirements" (i.e. the market abuse prohibitions, the obligation to publish inside information and the obligations on PPATs) and other requirements not only in the REMIT Regulation but also in the 2013 Regulations notably those in Regulation 8 regarding recording and retaining records. For example, in the 2013 Regulations the restitution order provisions apply only to failure to comply with a "REMIT requirement", which

is defined in Regulation 4 and is limited to failure to comply with certain Articles of the REMIT Regulation, whereas the penalty order provisions apply more widely to include Regulation 8.

17. A small point, but footnote 11 has an incorrect reference.

Penalties Statement

Q5: 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?

18. In relation to Paragraph 4.3 of the Penalties Statement, the inclusion of “*the breach had, or could have had, an impact on the orderliness of and confidence in wholesale energy markets*” is potentially too wide. As per our Previous Response, very minor breaches could potentially impact on the orderliness of the markets. Further clarification is therefore required, otherwise this potentially allows an unlimited financial penalty to be imposed in wide ranging circumstances including for a minor breach.
19. As stated in our Previous Response, there is still no mention of the duration of the breach as either a mitigating or aggravating factor. This seems to be a material consideration and therefore in National Grid’s view, reference to the duration of the breach should be made.
20. As stated in our Previous Response, Paragraph 4.3 of the Penalties Statement should include as a mitigating factor whether guidance has been published on the behaviour in question and the extent to which the person sought to follow that guidance to take account of those materials. This should encompass guidance by Ofgem, the Authority, ACER, the CMA and any other relevant regulator. A further factor that should be included is whether the behaviour complied with the rules of any relevant prescribed market or any other relevant market or other regulatory requirements or any relevant code of conduct or best practice.
21. A further consideration that should affect the decision as to whether to impose a financial penalty and/or make restitution or issue a statement of non-compliance should, in National Grid’s view, be whether the behaviour or activity complained of is consistent with custom and practice within the wholesale energy market and whether the Authority and relevant authorities have allowed such behaviour or activity to occur.

Q6: Is the proposed process for determining the amount of penalties and/or restitution appropriate?

22. National Grid broadly welcomes the additional clarity provided at Paragraph 5.3 of the Penalties Statement as to the process of determining the level of financial penalty and/or restitution.
23. However, at Sub-Clause 1 of Paragraph 5.3 of the Penalties Statement, the amount of any restitution payment (and see also Paragraph 6.7 of the Penalties Statement) should in addition reflect the seriousness of the breach, recognising that Article 13 of REMIT requires enforcement powers to be exercised in a proportionate manner.
24. In Paragraph 5.3 of the Penalties Statement, at Sub-Paragraph 5, it should be clarified that the settlement discount will be calculated in accordance with the Procedural Guidelines.
25. National Grid welcomes the differentiation in terms of the relevant considerations which are applicable to an individual as opposed to a company or organisation.

Q7: Do you agree with the proposed approach to assessing the seriousness of a breach and calculating the starting point for a financial penalty?

26. National Grid welcomes the further clarification provided, but has some concerns.
27. In Paragraphs 6.10 and 6.22 of the Penalties Statement, it is not explained in what circumstances the Authority will reach a decision as to whether profit rather than revenue is a more appropriate basis for calculating the financial penalty, nor is it explained how profit will

be derived from any particular product line or business areas or what alternative percentage levels the Authority will use to those specified for revenue in Paragraph 6.14 of the Penalties Statement. These decisions could have a material impact on the level of financial penalty.

28. National Grid welcomes the approach of including at Paragraphs 6.16 to 6.19 inclusive of the Penalties Statement the various factors that will usually be taken into account by the Authority in assessing the seriousness of breach in order to determine the appropriate percentage level, and also welcomes the additional clarity offered by Paragraphs 6.20 and 6.21 as to relative weight to be attached to each.
29. National Grid notes that the percentage level in penalties provided in Paragraph 6.14 is consistent with approach adopted by the FCA.

Q8: 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?

30. National Grid would also expect to see reference in Paragraph 6.24 to guidance published by ACER and, insofar as relevant, the FCA and other competent authorities.

Q9: Do you agree with the factors that may aggravate or mitigate the level of the penal element?

31. National Grid broadly welcomes clarification around aggravating and mitigating factors which may tend to increase or reduce the amount of the penal element. However, in practice, we foresee difficulties in distinguishing these from the factors that will be taken into account in assessing the seriousness of the breach so as to determine the relevant percentage level. There would arguably be “double counting”, for example, where behaviour caused the seriousness to be considered Level 5, and that same behaviour was also treated as an aggravating factor so as to increase the penal element still further.
32. National Grid is also concerned with those aggravating factors described at Paragraph 6.26 of the Penalties Statement which refer in general terms to “being told about the Authority’s concerns”, and “published guidance and other materials” from the Authority. Given the frequency of contact that many companies have with Ofgem staff, at all levels, this could act to hinder helpful dialogue and raise the prominence of informal or unrelated communications.
33. At Paragraph 6.27 of the Penalties Statement, we believe that conformance with normal industry practice, or behaviour customary within the sector, should be included as a mitigating factor.

Q10: Do you agree with the proposed settlement percentage discounts in REMIT cases?

34. National Grid refers to its response at paragraph 8 above. Ofgem has adopted the percentage discounts set out by the FCA and in National Grid’s view these are not sufficient to encourage settlement.

Q11: Do you agree with the proposed approach to restitution under REMIT?

35. National Grid considers that Paragraphs 8.5 et al of the Penalties Statement should make clear that restitution is not an option with respect to breaches of Regulation 8, and furthermore considers that the nature of a breach of the registration and data reporting obligations in REMIT is such that they should also be considered to be not appropriate for a restitution order.
36. National Grid considers that an application by Ofgem/the Authority to Court should only be considered as a last resort and that alternative procedures should be considered first in order to determine whether restitution might be achieved by other means.
37. National Grid would welcome clarification in relation to the circumstances in which Ofgem is likely to consider that a court application is appropriate.

Q12: Do you agree with our proposals in respect of serious financial hardship?

38. These seem broadly acceptable and in line with National Grid's previous proposals.

Q13: Do you have any other comments on the proposed REMIT Penalties Statement?

39. Our comment at 2 above regarding the interaction between the Enforcement Vision and Strategic Objectives, and the specific REMIT regulatory objectives, apply equally with respect to Paragraph 2 of the Penalties Statement.
40. Paragraph 1.4 of the Penalties Statement is misleading, as it recites REMIT as requiring each Member State to provide its NRA with investigation and enforcement powers "to cover breaches of REMIT", whereas the requirement is actually more limited, as correctly described in Paragraph 1.4 of the Procedural Guidelines.
41. As with our comment at 16 above, we would like to see greater clarity in use of the words "REMIT requirement", "REMIT breach" and "compliance with REMIT", given the crucial distinction between those specific Articles of REMIT defined in Regulation 4 of the 2013 Regulations as "REMIT requirements" (i.e. the market abuse prohibitions, the obligation to publish inside information and the obligations on PPATs) and other requirements not only in the REMIT Regulation but also in the 2013 Regulations, notably those in Regulation 8 regarding recording and retaining records. For example, in the 2013 Regulations the restitution order provisions apply only to failure to comply with a "REMIT requirement", which is defined in Regulation 4 and is limited to failure to comply with certain Articles of the REMIT Regulation. However, footnote 51 to Paragraph 1.7 of the Penalties Statement talks about restitution in the context of "REMIT breaches" which are defined in Paragraph 1.8 of the Penalties Statement by reference to Regulation 26(1) of the Regulations (i.e. to include a breach of Regulation 8 as well as breaches of the REMIT requirements).
42. With respect to the level of financial penalty and deterrence, National Grid notes that at Paragraph 6.30 of the Penalties Statement a penalty may be increased by the Authority, at step 4, if the Authority believes that the figure arrived at after step 3 is insufficient to deter. However, at Paragraph 6.9, it seems that deterrence is also to be a factor as part of step 2, and this would seem to introduce a risk of "double counting".
43. National Grid is also concerned that, in Paragraph 6.31 of the Penalties Statement, the first two examples of where a penalty may be increased for deterrence are extremely subjective. When combined with a lack of clarity around size of increase in penalty under step 4, this could give the Authority a very wide discretion indeed to depart from the level of penalty determined as a result of the previous steps. This point equally applies to the final adjustment which can be made by the Authority, referred to in Paragraph 6.37 of the Penalties Statement.
44. National Grid notes that the suggested approach to be taken in relation to determining financial penalties and restitution in relation to individuals differs slightly as between market abuse cases and non-market abuse cases. It would be helpful for the Penalties Statement to explicitly define these concepts.