

REMIT Penalties Statement

Guidelines

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

**PURSUANT TO REGULATION (EU) NO 1227/2011 AND THE
ELECTRICITY AND GAS (MARKET INTEGRITY AND
TRANSPARENCY) (ENFORCEMENT ETC.) REGULATIONS 2013**

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1. Introduction

- 1.1 The EU Regulation on wholesale energy market integrity and transparency ('REMIT')¹ 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 the powers necessary to investigate and enforce the market abuse provisions and the obligation to disclose inside information. On 29 June 2013 the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 ('the 2013 Regulations') came into effect.
- 1.5 These Regulations gave the Authority powers to investigate and enforce failures by PPATs to report suspicious transactions. With effect from 1 July 2015, the Authority's investigation and enforcement powers were extended to cover the obligations to register with an NRA and to report transaction data.²
- 1.6 Each Member State is required to make regulations about the penalties applicable to infringements of the REMIT Regulation. The penalties provided for must be effective, dissuasive and proportionate. The 2013 Regulations also gave the Authority powers to impose a financial penalty, make a restitution order or issue a statement of non-compliance.³
- 1.7 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.
- 1.8 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,

¹ The REMIT Regulation (EU No 1227/2011) is available here <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:326:0001:0016:en:PDF>.

² See Regulation 8 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) (Amendment) Regulations 2015.

³ See Regulation 26(1) of the 2013 Regulations.

its powers to impose financial penalties, make a restitution order⁴ or issue a statement of non-compliance in relation to any REMIT breach which occurred on or after 23 June 2015.⁵

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

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

Revision of the statement of policy

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

1.11 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

⁴ 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.

⁵ 1 July 2015 for breaches of the obligations to register with an NRA and to report transaction data.

- deter failures to comply with REMIT requirements, by the person⁶ 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
 - 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

⁶ Throughout this statement the term 'person' refers to both firms and individuals.

- 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.⁷
- 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, including its duration and frequency

⁷ 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 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
- 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 or has imposed 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 person⁸, 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.

⁸ 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.

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.⁹

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.

⁹ 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.

- 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 breach¹⁰ and
- whether the firm took all reasonable precautions and exercised all due diligence to avoid committing a breach.¹¹

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.

¹⁰ See paragraph 6.24 for an indication of the circumstances in which the Authority expects to regard a firm as having reasonable grounds to believe that its conduct did not amount to a breach.

¹¹ 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.

6.19 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.

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 firm¹² 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

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 all reasonable precautions and exercised all due diligence to avoid a REMIT breach) where the person can demonstrate satisfactorily that it considered all relevant matters, such as

- having proper regard to the Authority's open letter of 11 July 2014 about the disclosure of inside information under REMIT¹³
- following other relevant guidance published by the Authority, including any guidelines and policies, open letters and bespoke guidance
- following internal policies or procedures
- discussing the conduct with internal managers or legal advisers and following their advice
- engaging 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

¹² In the overall assessment of seriousness this factor may be outweighed by other factors likely to be considered level 4 or 5 factors.

¹³ <https://www.ofgem.gov.uk/ofgem-publications/88732/ofgemopenletteronremitinsideinformation.pdf>.

- 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
- 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 breach¹⁴ and
- whether the individual took all reasonable precautions and exercised all due diligence to avoid committing a breach.¹⁵

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

¹⁴ 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.

¹⁵ 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.

- 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.

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 all reasonable precautions and exercised all due diligence to avoid a REMIT breach) where the person can demonstrate satisfactorily that it considered all relevant matters, such as
- having proper regard to the Authority's open letter of 11 July 2014 about the disclosure of inside information under REMIT¹⁶
 - following other relevant guidance published by the Authority, including any guidelines and policies, open letters and bespoke guidance
 - following internal policies or procedures
 - discussing the conduct with internal managers or legal advisers and following their advice
 - engaging 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

¹⁶ <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) and
- 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 cases¹⁷

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

¹⁷ This section relates to breaches of Articles 3 and 5 of REMIT.

- 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 breach¹⁸ and
- whether the individual took all reasonable precautions and exercised all due diligence to avoid committing a breach.¹⁹

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

¹⁸ 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.

¹⁹ 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 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
 - 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 all reasonable precautions and exercised all due diligence to avoid a REMIT breach) where the person can demonstrate satisfactorily that it considered all relevant matters, such as
- having proper regard to the Authority's open letter of 11 July 2014 about the disclosure of inside information under REMIT²⁰
 - following other relevant guidance published by the Authority, including any guidelines and policies, open letters and bespoke guidance
 - following internal policies or procedures
 - discussing the conduct with internal managers or legal advisers and following their advice
 - engaging 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

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

- 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
- 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

