

REMIT Procedural Guidelines

Guidelines

Publication date: 23 June 2015

Contact: Louise van Rensburg

Team: REMIT

Tel: 020 7901 7000

Email: REMIT@Ofgem.gov.uk

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

Contents

| | |
|---|----|
| 1. Introduction | 03 |
| 2. Our Regulatory Objectives under REMIT | 04 |
| 3. Sources of information about possible REMIT breaches | 06 |
| 4. Criteria for opening an investigation | 09 |
| 5. The investigation process | 12 |
| 6. Seeking injunctions | 17 |
| 7. Issues Letter | 19 |
| 8. Sanctions available to the Authority | 19 |
| 9. The decision-making process for contested cases | 21 |
| 10. Settlement procedure | 28 |
| 11. Cooperating with ACER and other regulators | 31 |

Changes to these Guidelines:

| Change number | Date | Summary of change |
|---------------|--------------|--|
| 1 | 14-09 - 2016 | Document updated to reflect changes to the composition of a Settlement Committee |

1. Introduction

REMIT

- 1.1. The EU Regulation on wholesale energy market integrity and transparency ('REMIT')¹ prohibits market abuse - insider trading and actual or attempted market manipulation - in wholesale energy markets. REMIT came into force in December 2011.
- 1.2. REMIT imposes obligations on market participants to:
 - a. register² with a National Regulatory Authority ('NRA') in the EU, which for Great Britain is the Gas and Electricity Markets Authority ('the Authority')
 - b. provide the Agency for the Cooperation of Energy Regulators ('ACER') with information (primarily transaction data) for the purpose of monitoring trading in wholesale energy markets, and
 - c. publicly disclose inside information in an effective and timely manner.
- 1.3. It also obliges persons professionally arranging transactions ('PPATs') to tell us, as the NRA, without delay if they reasonably suspect that a wholesale energy market transaction might breach the prohibitions on insider trading or market manipulation.
- 1.4. REMIT requires each Member State to provide its NRA with the powers necessary to investigate and enforce the market abuse prohibitions, as well as the obligation to disclose inside information. On 29 June 2013, the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 ('the Regulations') took effect. These gave the Authority these investigatory and enforcement powers, as well as powers to investigate and enforce failures by PPATs to report suspicious transactions. In 2015 the investigatory and enforcement powers were extended to the obligations to register with an NRA and report transaction data.

These Procedural Guidelines

- 1.5. These Procedural Guidelines set out the market monitoring, investigatory and enforcement powers that the Authority has been given. They also outline the procedures that we expect to follow in exercising them. In particular, they cover:
 - a. our regulatory objectives
 - b. the factors that we normally consider when deciding whether to launch an investigation and what we might investigate

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

² Further guidance on registration can be found here: <https://www.ofgem.gov.uk/electricity/wholesale-market/european-market/remit/registering-market-participant-under-remit>.

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

Note on terminology

- 1.7. The Office of Gas and Electricity Markets ('Ofgem') supports the work of the Authority by carrying out its day-to-day work. Any investigations that Ofgem conducts are therefore carried out on behalf of the Authority. The Authority decides whether or not a failure to comply with REMIT has occurred and whether or not to impose sanctions. The majority of these decisions will be taken by members of the Enforcement Decision Panel ('EDP') whose Chair will appoint a Panel to take decisions in individual investigations.³ These guidelines reflect this division of activities by referring to:
- a. Ofgem or 'we' when describing the monitoring and investigatory process
 - b. the Enforcement Oversight Board or 'EOB' where decisions are taken by this body⁴
 - c. the EDP when outlining decisions that its members take on behalf of the Authority, and
 - d. the Authority where a particular sanction or decision has been reserved to the Authority.

2. Our Regulatory Objectives under REMIT

- 2.1 The Authority's vision for its enforcement work is:
-

³ See section 9 below for details of the EDP, as well as here <https://www.ofgem.gov.uk/publications-and-updates/enforcement-decision-panel-terms-reference>.

⁴ The EOB provides strategic oversight and governance to our enforcement work and oversees the portfolio of cases and investigations. The members of the EOB are usually senior civil servants from across Ofgem. It is chaired by the senior partner with responsibility for enforcement.



Guidelines

To achieve a culture where businesses put energy consumers first and act in line with their obligations.

- 2.2 The Authority's strategic objectives for its enforcement activities are to:
- a. deliver credible deterrence across its range of functions
 - b. ensure visible and meaningful consequences for businesses and individuals who fail consumers and who do not comply, and
 - c. achieve the greatest positive impact by targeting enforcement resources and powers.
- 2.3 These objectives apply equally across all our enforcement functions. In REMIT cases, we will apply them to individuals as well, not solely to businesses. In addition, the failures to comply in REMIT cases refers to failure to comply with REMIT requirements⁵ and other requirements imposed by the Regulations, and any amendments thereof.
- 2.4 The Authority has other regulatory objectives that it will seek to promote when using its REMIT powers. When exercising our REMIT powers we, the members of the EDP and the Authority, will act in a manner that we consider is best calculated to:
- a. maintain confidence in the integrity of wholesale energy markets
 - b. ensure that wholesale energy market prices are set in an efficient manner
 - c. deter failures to comply with REMIT requirements
 - d. ensure that no profits can be drawn from REMIT breaches
 - e. foster competition in wholesale energy markets for the benefit of final consumers of energy
 - f. protect the interests of consumers in wholesale energy markets and of final consumers of energy, including vulnerable consumers, and
 - g. obtain fair outcomes for those that have suffered loss or have been otherwise adversely affected by a REMIT breach.
- 2.5 In exercising REMIT powers we, the members of the EDP and the Authority will have regard to:
- a. the need to use resources in the most efficient way

⁵ See paragraph 4.4 for a definition of a REMIT requirement.

- b. the principles of best regulatory practice, including the need to be proportionate and to ensure that any sanctions we impose are effective, dissuasive and proportionate, and
- c. any non-binding guidance that may be published by ACER.

3. Sources of information about possible REMIT breaches

- 3.1. We may be alerted to possible failures to comply with the REMIT requirements in a number of ways, including:
- a. through our market monitoring or our other information-gathering powers
 - b. through a suspicious transaction report ('STR')
 - c. by whistleblowers
 - d. by complaints from the public or companies
 - e. by companies or individuals reporting their own conduct
 - f. by ACER, or
 - g. following a referral from another regulator, such as the Financial Conduct Authority ('FCA') or an NRA in another EU Member State.

Monitoring of wholesale energy markets

- 3.2. We monitor wholesale energy markets in GB. Where that monitoring is for the purpose of maintaining market integrity and transparency, we can require relevant information or documents from a 'Regulated Person' (a market participant or PPAT) or a person who has at any time been connected with a Regulated Person.⁶
- 3.3. We also have powers to request information for market monitoring purposes under the Gas Act 1986 and Electricity Act 1989.
- 3.4. The Regulations oblige Regulated Persons to take reasonable steps to:
- a. record all telephone conversations made for the direct or indirect purpose of entering into transactions in wholesale energy products, and
 - b. keep a copy of all electronic communication (email, fax, instant messaging etc) made for the direct or indirect purpose of entering into transactions in wholesale energy products.⁷
- 3.5. This obligation does not apply to Regulated Persons who are individuals acting in the course of their employment with another person who is a

⁶ Regulation 9 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

⁷ Regulation 8 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement Etc.) Regulations 2013.

Regulated Person (the employer). In that case, it will be for the employer to fulfil the obligation.

- 3.6. These records and copies must be retained for at least six months from the date they were created. They have to be kept in a medium that allows us to access them in the future, should that prove to be necessary. We may impose a financial penalty for a failure to comply with this obligation.⁸
- 3.7. We may issue a notice to a Regulated Person requiring it to ensure that any specified relevant communications are retained for longer than six months. We will always specify a date until which it must be retained. If, during that time, we no longer require the Regulated Person to retain the communications, we will let them know and discharge the obligation to retain them. We may impose a penalty for a failure to comply with this obligation.⁹

Notification of a Suspicious Transaction Report (STR)

- 3.8. Any PPAT in wholesale energy products who reasonably suspects that a transaction might breach Articles 3 (prohibition of insider trading) or 5 (prohibition of market manipulation) of REMIT in Great Britain must notify us without delay. They can do so by emailing market.conduct@ofgem.gov.uk. PPATs must establish and maintain effective arrangements and procedures to help identify potential breaches. We may impose a financial penalty for a failure to comply with these obligations.¹⁰
- 3.9. STRs should include as much of the following information as possible:
 - a. a description of the transaction(s) and/or order(s) concerned
 - b. the reasons for suspecting that the transaction(s) and/or order(s) might constitute market abuse
 - c. the Member State in which the suspected breach is being or has been carried out
 - d. identities and roles of persons carrying out or otherwise known to be involved in the transaction(s) and/or order(s)
 - e. identities and roles of any other relevant persons
 - f. the identity of the person making the STR, and
 - g. any further information that may be of significance.
- 3.10. We know that there will be occasions when not all this information is available at the time of notification. Nonetheless a PPAT must submit an STR without delay, with as much information as they have available at the time.

⁸ See regulations 8 and 26 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement Etc.) Regulations 2013.

⁹ See regulations 8 and 26 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement Etc.) Regulations 2013.

¹⁰ Regulations 4(d) and 26 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement Etc.) Regulations 2013.

As a minimum the notification should explain why the PPAT reasonably suspects a transaction might constitute insider dealing or actual or attempted market manipulation. PPATs should provide any remaining information to us if it becomes available later.

Whistleblowers

- 3.11. We invite contact from all parties with information regarding potential breaches of REMIT, including whistleblowers.¹¹ Our whistleblowing policy explains what whistleblowing is and how the law protects whistleblowers. It also gives details of how to report concerns to Ofgem. The whistleblowing policy can be found here: <https://www.ofgem.gov.uk/publications-and-updates/guidance-whistleblowing-ofgem>.

Complaints and self-reporting

- 3.12. We will assess complaints from the public or companies about practices that appear to breach REMIT. We also welcome reports from individuals or companies about their own conduct.
- 3.13. We appreciate that the level of detail in complaints or reports will depend on the issue and who is contacting us. However, the more relevant information that is provided at the outset, the more likely it is that we will be able to deal with the complaint or report efficiently. If not all the information we need to properly assess the issue is provided, we may need to seek further information before deciding whether to open an investigation. It is therefore helpful to us for complaints or reports to be specific, well-reasoned, clear and supported by evidence.
- 3.14. Due to resource constraints we will not be able to enter into individual correspondence with all complainants, although we will confirm receipt of a complaint in writing.
- 3.15. We will analyse material provided and keep it under review to help us decide if we need to take action. If we need any further information from a complainant or reporter we will contact them and tell them what we require. We will not usually inform the complainant or reporter of whether or not we intend to look into the matter further, especially where we consider it necessary to preserve the confidentiality of an investigation.
- 3.16. If you wish to make a complaint about or report a potential breach of a REMIT requirement, please contact us on market.conduct@ofgem.gov.uk.

Information received from ACER and other authorities

- 3.17. Where ACER, through its market monitoring activities or otherwise, suspects that there has been a breach of REMIT in GB, it will pass the information to

¹¹ Our Whistleblowing Policy explains that you blow the whistle when you raise a concern about a wrongdoing, risk or malpractice that you are aware of **through your work**. This can be raised within your workplace as well as externally, such as to a regulator.

us. In addition ACER may request that we supply it with information related to the suspected breach or that we commence an investigation. ACER may also establish an investigatory group of two or more NRAs to investigate potential breaches of REMIT with cross-border impacts.

- 3.18. We may also receive information about potential abuse of wholesale energy markets in GB from the FCA, other regulators, or other NRAs.

Confidential information

- 3.19. At times we may need to disclose information provided to us about a potential REMIT breach to the person concerned or to other parties connected to issues. Where information is confidential or the source does not wish it to be disclosed, this should be made clear and the reasons given in writing.
- 3.20. If a person or company thinks that any information they are giving us or that we have acquired is commercially sensitive or contains details of an individual's private affairs, and that disclosing it might significantly harm the interests of the business or person, they should submit a separate non-confidential version of the information in which any confidential parts are removed. They should also, in an annex clearly marked as confidential, set out why the information that has been removed should be considered confidential. Non-confidential versions of documents should be provided at the same time as the original document or at an alternative time as required by us. If such a version is not provided within the timescale set by us we will presume that the provider of that information does not wish to continue to claim confidentiality.
- 3.21. We will make our own assessment of whether material should be treated as confidential. We may not agree that the information in question is confidential. This will depend on the circumstances and will be assessed on a case-by-case basis. Any request that information is treated as confidential will be considered in accordance with the appropriate legislation.¹²
- 3.22. Even where information is marked as confidential or the source does not wish it to be disclosed, there may still be circumstances in which its disclosure is required. Information, including personal information, may be subject to publication or disclosure in accordance with the Freedom of Information Act (FOIA) 2000. In our handling of information, we will act in accordance with our obligations under the Data Protection Act (DPA) 1998.

4. Criteria for opening an investigation

- 4.1. Investigations involve time and resources, not only for Ofgem and the firms and individuals subject to them but for other interested parties as well. It is, therefore, important to ensure that resources are allocated efficiently. We will therefore first of all establish if it is a matter that we can investigate. We

¹² We will comply with section 105 of the Utilities Act 2000 and Art 9 of the Enterprise Act when deciding whether information is confidential and/or whether it should be disclosed.

will then consider our prioritisation criteria for deciding whether to open (or continue) an investigation.¹³

What we may investigate

- 4.2. In order to open an investigation, we must be satisfied that there are circumstances suggesting that a person may:¹⁴
 - a. have failed to comply with a REMIT requirement
 - b. have failed to comply with a requirement in relation to recording documents and keeping copies of electronic communications
 - c. have disclosed information in relation to a Warning or Decision Notice without our prior consent
 - d. be guilty of an offence relating to the provision of documents or information required by Ofgem.¹⁵
- 4.3. The REMIT requirements are as follows:¹⁶
 - a. the prohibition on insider trading
 - b. the obligation to publish inside information
 - c. the prohibition on actual or attempted market manipulation
 - d. the obligation to report data to ACER
 - e. the obligation to register with an NRA, and
 - f. the obligation on PPATs to report suspicious transactions and have systems in place to identify suspicious transactions.

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

- 4.4. This section contains a non-exhaustive list of the factors that we will generally take into account in deciding whether to proceed with an investigation.
- 4.5. We will consider the specific facts of the matter, the legal context and our available resources. We will make decisions on a case by case basis, and have regard to our regulatory objectives.

¹³ Sectoral and Competition Act cases are covered in separate guidelines. However, when assessing the resource requirements of a potential investigation, consideration is given to other current and potential cases under all of our enforcement powers.

¹⁴ One investigation may cover multiple potential breaches, of the same or different types.

¹⁵ The offences are set out in regulation 20 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013. They are not within the scope of these Procedural Guidelines. When dealing with criminal cases we will follow, where applicable, the 'Code for Crown Prosecutors' issued by the Crown Prosecution Service.

¹⁶ The obligations to report data to ACER and to register with an NRA were introduced by the 2015 Regulations.



Guidelines

- 4.6. To help us make a decision, we will generally consider the following:
- a. Do we have the power to take action and are we best placed to act?
 - b. Is it a priority matter for us?
- Do we have the power to take action and are we best placed to act?*
- 4.7. This means asking whether the potential investigation falls within the scope of the matters we may investigate, as set out in paragraph 4.2 above.
- 4.8. Where there is a concurrent power to take enforcement action with another regulator, a decision will be made about who is best placed to act. This may result in the case being referred to another regulator for investigation. Equally, sometimes other regulators will refer matters to us.
- Is it a priority matter for Ofgem?*
- 4.9. We will look at a range of factors in order to decide whether an issue is a priority matter, in light of our regulatory objectives under REMIT. These factors include:
- a. the harm or potential harm to consumers (including business consumers), our ability to regulate effectively, or to competition, that resulted or could have resulted from the alleged breach
 - b. whether the person has derived or is deriving a financial gain or other benefit from the alleged breach
 - c. the strength of the evidence and what evidence is or may be available¹⁷
 - d. whether the alleged breach is ongoing and/or the person is taking action to address the situation
 - e. whether the allegation concerns conduct that is, or appears to be, an intentional or reckless breach
 - f. whether there has been a failure to comply with a previous undertaking or assurances made to us
 - g. whether the person has a history of similar breaches, or a demonstrated record of poor compliance
 - h. whether there has been a series of concerns raised over time, none of which in isolation might be considered serious enough to warrant opening an investigation
 - i. whether the type of breach is a widespread problem across the market
 - j. the likely impact of enforcement action and whether action would be likely to discourage similar behaviour in future, either by the person or by others
 - k. the annual priorities for enforcement set by the Authority

¹⁷ The assessment takes account of the threshold for opening a REMIT investigation and the corresponding amount of evidence likely to have been gathered at the time we consider whether to open an investigation.

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

5. The investigation process

Notifying the person under investigation

- 5.1. Decisions as to whether to open an investigation are taken by the EOB. Should the EOB decide to open an investigation, we will generally write to the person being investigated. However, we will not notify the person under investigation if we consider that providing written notice would be likely to frustrate the investigation.
- 5.2. Where we notify the person under investigation, we will give as full details as possible of the focus of the investigation. We will provide contact details of the person who will be the main point of contact at Ofgem during the investigation. Any specific queries should be addressed to the Ofgem contact. The name of the Senior Responsible Officer (SRO) in the case will also be provided to the person. If a person wishes to raise any procedural issues during the course of the investigation, these should be taken up with the SRO.
- 5.3. The initial subject of the investigation may not be the perpetrator of the breach. When an investigation is first opened, we may not know the identity of the potential perpetrator. In these cases, when we ask people for information or documents to assist us, we will give an indication of the nature and subject matter of the investigation. Where we gave written notice of an investigation to a person but we later decide to discontinue the

investigation without any intention to take further action, we will tell the person concerned as soon as it is appropriate to do so, bearing in mind the circumstances of the case.

- 5.4. In all cases when the EDP proposes to take enforcement action, we will tell the person under investigation.¹⁸

Timescale for carrying out an investigation

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

Making an investigation public

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

Information gathering

- 5.7. Where we have opened an investigation, we can gather information through different means. When appropriate, we may ask for information or documents voluntarily, but we also have powers to compel their provision. We may issue notices requiring the production of information or documents, or requiring a person to attend an interview and answer questions. We may also require a report to be produced. Further details on each of these are given below.
- 5.8. We will take very seriously any failure to provide documents or information that we require to be provided. Where we consider that a person has failed to comply with such a requirement, we may certify that fact in writing to the court. If the court is satisfied that the person failed to comply without reasonable excuse, it may deal with the person as if they were in contempt.
- 5.9. Delays in the provision of information can have an impact on overall timescales for the investigation. We expect stakeholders to respond within deadlines to the notices served upon them. It is therefore important that recipients of information notices tell us as soon as possible if they have good reason to believe that they will be unable to supply the required information or documents at the specified time. If the reasons justify it, we may extend the deadline.

¹⁸ See section 7 for details.



Guidelines

- 5.10. In conducting any investigation, we will comply with applicable requirements governing the admissibility of evidence.
- 5.11. We will uphold our obligations regarding confidential information, and will only disclose such information where:
- a. we have permission to disclose
 - b. we are required to by law (eg under court order), or
 - c. where disclosure is sanctioned by law.¹⁹
- 5.12. The Regulations created a number of criminal offences related to our information gathering powers. A person who knows or suspects that we are or are likely to conduct an investigation using our REMIT powers is committing a criminal offence if he falsifies, conceals, destroys or otherwise disposes of information in any form that he suspects is or would be relevant to an investigation (or causes or permits others to behave in this way). A person who - recklessly or otherwise - provides information to us in response to a notice that he knows to be materially false or misleading is also committing a criminal offence. In each case the person is potentially liable to fines and/or imprisonment.²⁰

Requiring the production of information or documents

- 5.13. Where we have opened an investigation, we may issue a written notice requiring any person to provide relevant specified information or specified documents.²¹ This may include written documents, emails, computer hardware and telephone and data traffic records. We will not and cannot ask for protected items such as documents that are legally privileged.²²
- 5.14. When we issue such a notice we will set out a reasonable deadline for the information or documents to be provided. In setting this deadline, we will take account of the volume and complexity of the information or documents requested and any public holidays that may fall within this period.
- 5.15. The recipient of the notice must at a minimum comply with the terms set out in the notice, but may also provide us with further information that they believe is relevant to our investigation.
- 5.16. We may also specify the form in which the information or documents is to be provided and may require it to be verified or authenticated. Further, we may require explanations of the documents and may take copies of or extracts from them. If a person who is required to provide a document fails to do so, we may require that person to state, to the best of his knowledge and belief, where the document is. Where we have the power to require a person to provide information, but it appears that that information is in the possession of a third person, we may require the third person to provide that information.

¹⁹ See paragraphs 3.19-3.22 on confidential information.

²⁰ See regulation 20 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

²¹ See regulations 11 and 52 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

²² See regulation 52 for the full definition of a protected item.

- 5.17. Finally, we will always be as clear as possible in setting out the information and documents that we require. But we will always provide a contact name so that the recipient can ask questions. We may issue more than one notice during an investigation. However, we will aim to avoid requesting the same information more than once without good reason.

Interviews

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

Reports

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

Entering and searching premises

- 5.19. We have the power to enter and search premises under a warrant, and to remove documents and other forms of information.²³ In order to use this power, we must first seek a warrant from a Justice of the Peace ('JP').²⁴ If granted a warrant, we must use it within one month.
- 5.20. A JP may issue a warrant if satisfied that there are reasonable grounds for believing that a person has failed to comply with an information notice or that any document or information which we could require in an information notice would be removed, tampered with, concealed or destroyed.
- 5.21. The warrant will authorise us to:
- a. enter and search the premises specified in it
 - b. take such other persons as we consider are needed to assist us in doing anything the warrant authorises us to do (for instance, police constables)
 - c. take possession of any relevant documents or information (or to take any steps that appear necessary to preserve or prevent interference with such documents or information)
 - d. take copies of, or extracts from, any relevant documents or information

²³ See regulation 16 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

²⁴ References to JP in this document include a sheriff in Scotland.



Guidelines

- e. require any person on the premises to provide an explanation of such documents or information or to state where such documents or information might be found, and
 - f. use such force as may be reasonably necessary.
- 5.22. On arrival at the premises we will produce the warrant. This will specify as far as possible the documents and/or information we are looking for. We will also provide documentary evidence that the officials who are conducting the inspection have been properly authorised to do so.
- 5.23. Before starting the search, we will allow a reasonable period of time for a legal representative of the owner or occupier of the premises to be present. During this period, we may take necessary measures to prevent tampering with evidence or warning other companies about our investigation. The search will commence after that time whether or not a legal representative is present.
- 5.24. We will make a written record of:
 - a. the date and time of entry onto the premises
 - b. the number and name of all the officials involved in the inspection
 - c. the period for which the officials remained on the premises, and
 - d. all documents (including information recorded in any form) that we take possession of while there.
- 5.25. If there is a dispute during a search as to whether communications, or parts of communications, are privileged, we may request that the communications are placed in a sealed envelope or package. We will then arrange for safe-keeping of these items by us pending satisfactory resolution of the dispute.
- 5.26. We will provide a copy of the written record to the occupier of the premises (or someone acting on the occupier's behalf). We will do so before we leave the premises unless it is not reasonably practicable to do so, in which case we will do so as soon as possible afterwards.
- 5.27. We will retain any items taken away from the premises for so long as it is necessary to retain them for the purposes of the investigation. When this is no longer necessary, we will arrange for items to be returned as soon as reasonably practicable.
- 5.28. We may wish to visit multiple sites at one time or to visit a particular site on more than one occasion. We may wish to search business and domestic premises. It is entirely possible that evidence may be located in domestic premises (for example if someone under suspicion has been working at home or we suspect they have been concealing documents there).
- 5.29. Searches will occur during reasonable hours unless we think that that the purpose of a search may be frustrated on an entry at a reasonable hour. We will seek to minimise disruption to business whilst on the premises and will take reasonable steps to ensure that the premises are left in the same state as they were found.

- 5.30. Any person who intentionally obstructs the exercise of our rights under a warrant is guilty of an offence liable on summary conviction to imprisonment or a fine.²⁵

6. Seeking injunctions

- 6.1. We may, at any stage after becoming aware of a possible breach of REMIT, seek a court order (or interdict in Scotland) either restraining a person from doing something or directing them to take certain action.²⁶ When deciding whether to make an application to the court, we will always consider the circumstances of the case. We will also look at any relevant factors, such as:
- a. the strength of evidence to suggest that the individual or group of individuals has engaged in market abuse
 - b. the previous disciplinary record and compliance history of the individual or group of individuals, and
 - c. the severity of the risk which the individual or group of individuals poses to consumers and confidence in the stability of the wholesale energy markets.
- 6.2. We will seek an injunction where we believe it is the most effective way to promote our regulatory objectives. In deciding whether this is the case, we may consider factors, such as
- a. the nature and seriousness of a breach or expected breach
 - b. the extent of loss, risk of loss or other adverse effects on consumers
 - c. the impact or potential impact on wholesale energy markets
 - d. the likelihood that a failure to comply may continue or be repeated
 - e. whether there are steps a person could take to remedy a breach or provide redress
 - f. the costs that we would incur in applying for and enforcing an injunction and the benefits that would result
 - g. whether there is a danger that assets might be dissipated
 - h. the extent to which another regulatory body can adequately address the matter, and
 - i. whether the conduct in question can be adequately addressed by other means, for example a statement of non-compliance or financial penalty.
- 6.3. We may also, on an application to the court for an injunction, request that the court consider whether a financial penalty should be imposed on the person to whom the application relates. The court may make an order requiring the person concerned to pay to us a penalty of such an amount as

²⁵ See regulation 20 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

²⁶ See regulation 21 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

it considers appropriate. We will not use our own powers to impose a financial penalty if the court has already imposed a financial penalty in respect of the same matter.

- 6.4. The sections below set out the four types of injunction that we may ask the court to make.

Restraining a failure to comply

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

Temporary prohibition of professional activity

- 6.7. The court may issue an order to prohibit, temporarily, professional activity, such as prohibiting a PPAT from arranging transactions. We may consider seeking such an order where we have serious concerns about the honesty, integrity or competence of an individual or group of individuals in respect of their compliance with REMIT.²⁷
- 6.8. This power may be used where the court is satisfied that there is a reasonable likelihood that any person will fail to comply with a REMIT requirement, or that any person is failing or has failed to comply with a REMIT requirement and there is a reasonable likelihood that the failure to comply will continue or be repeated.

Freezing of assets

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

²⁷ For example, but not restricted to, providing the Authority with false or misleading information.

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

7. Issues Letter

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

8. Sanctions available to the Authority

Financial penalty or statement of failure to comply

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



Guidelines

- 8.2. Alternatively, the EDP may, instead of imposing a financial penalty, publish a statement to the effect that the person has failed to comply with one or more of these requirements.²⁸
- 8.3. The Authority's policy on imposing financial penalties is set out in a separate statement. The EDP will have regard to that statement in exercising, or deciding whether to exercise, its power to impose a financial penalty.
- 8.4. The procedural steps that the EDP must follow before it may impose a penalty are set out in section 9 below.

Restitution orders

- 8.5. Instead of (or in addition to) imposing a financial penalty, the EDP may make a restitution order or apply to a court for one.²⁹ The EDP or court will need to be satisfied that:
 - a. a person has breached a REMIT requirement (or has required or encouraged another person or persons to engage in behaviour that would have amounted to a breach if the person had done it himself), and
 - b. the person has accrued profits from the breach or that one or more persons have suffered loss or been otherwise adversely affected by the breach.
- 8.6. In cases where the EDP considers it appropriate to obtain restitution, it will first consider using its own powers before considering whether to seek an Authority decision to take court action. However, there may be circumstances in which the Authority will choose to apply to the court for a restitution order. For example, the Authority may wish to combine an application for a restitution order with other court action against the person (such as seeking an injunction).
- 8.7. The court may order the person concerned to pay to us such a sum as appears to the court to be just having regard to the profits accrued and/or the loss or other adverse effects suffered. Any amount paid to us must then be paid to, or distributed among, such persons as the court may direct. If issuing its own restitution order, the EDP may require the person concerned to pay or distribute to the affected person or persons, an amount that appears just having regard to the same considerations.
- 8.8. The court may require the person to supply it with accounting and other information to enable the court to establish the profits accrued and the losses or other adverse effects suffered as a result of the breach, and to determine how any amounts are to be paid or distributed to those who have been adversely affected. The court may require such information to be independently verified. The EDP may, if issuing its own restitution order,

²⁸ See regulation 26 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

²⁹ See, respectively, regulations 23 and 22 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

order the person to provide similar information to it via a report from an approved³⁰ skilled person.

- 8.9. When deciding whether to exercise these powers, the Authority (in respect of an application to the court) or the EDP will consider all the circumstances of the case. The factors that the Authority or the EDP will consider may include, but are not limited to:
- a. whether this would be the best use of its limited resources, taking into account, for example, whether the profits are quantifiable, the likely amount of any recovery and the costs of identifying and distributing such sums
 - b. whether restitution might be achieved more efficiently or cost-effectively through other means (for instance via private court actions³¹, an ombudsman service, corporate compensation schemes or another regulatory authority)
 - c. the adequacy of any proposals by the person concerned to offer restitution, and
 - d. the extent to which the person had reasonable grounds for believing that his conduct did not amount to a failure to comply or had taken all reasonable precautions and exercised due diligence to prevent the breach from occurring.
- 8.10. The EDP will not use its own powers to make a restitution order if the court has already issued a restitution order in respect of the same breach.
- 8.11. The Authority also has the power, on an application to the court for restitution, to request the court to consider whether a financial penalty should be imposed on the person to whom the application relates. The court may make an order requiring the person concerned to pay to the Authority a penalty of such an amount as it considers appropriate.

9. The decision-making process for contested cases

The Enforcement Decision Panel

- 9.1. In contested cases, decisions on whether a breach of a REMIT requirement has occurred and, if so, whether to impose a sanction directly on the person (or to seek to impose sanctions via the courts) are taken by Panels made up of people drawn from the EDP.³² The EDP consists of a pool of members who are employees of the Authority, one of whom is appointed as the EDP chair.
- 9.2. EDP members are independent from the investigation team. Decisions on finding breaches, imposing sanctions and publishing information about Warning or Decision Notices will therefore be taken by people who have had

³⁰ Approved by us.

³¹ Private actions to recover losses are available irrespective of whether the Authority applies for or issues a restitution order.

³² This is with the exception of applications to the court for a restitution order, which is reserved to the Authority.

no direct involvement in establishing the evidence on which the decision is based.

- 9.3. Contested cases are decided by a decision-making Panel of usually three members appointed from the EDP by the EDP chair. A Panel is constituted as and when required to deal with a particular case. There will be a Panel Chair who will chair the decision making discussions, and who has the casting vote in the event of a deadlock. The identity of the Panel members will be notified to the parties in writing by the EDP Secretariat.
- 9.4. The EDP Secretariat is independent of the investigation team. It liaises with the parties on behalf of the Panel. The Panel, or its individual members, should not be contacted directly by any party or their representatives outside of any oral representations.

Warning Notices

- 9.5. The EDP Panel will decide, after considering the investigation team's recommendations, on whether to issue a Warning Notice and whether to publicise any matters that relate to it. The Panel will have access to any written representations made in response to the Issues Letter. The Panel will then decide whether or not to issue a Warning Notice and whether or not to publish any matters that relate to it.
- 9.6. The Panel will issue a Warning Notice if it proposes to impose a financial penalty and/or to make a restitution order or to publish a statement of non-compliance. The Warning Notice will include the extent of any person's right to access Authority material, as well as the following:
 - a. for a proposed financial penalty, it will specify the amount of the proposed penalty
 - b. for a restitution order, it will specify the proposed amount that the person is required to pay or distribute, and
 - c. for a statement of non-compliance, it will set out the terms of the statement.
- 9.7. If any of the reasons underpinning the decision to issue a Warning Notice relate to a matter that identifies a person other than the person to whom the notice was given ('the third party') and, in the opinion of the Panel, is prejudicial to that third party, the Panel will, where practicable, give the third party a copy of the notice. This is unless the Panel is separately giving that third party a Warning Notice in relation to the same matter.
- 9.8. Neither the Panel nor those to whom Warning Notices have been given or copied may publish them. We may impose a penalty for improper publication of the Warning Notice or any details concerning it. However, where the Warning Notice proposes a financial penalty or a statement of non-compliance, the Panel may decide to publish such information relating to the matters contained in the Warning Notice as it considers appropriate. If Panel does so, a person to whom the Warning Notice has been given or copied

may publish the same details.³³ If the Panel wishes to publish information about a Warning Notice proposing a financial penalty or a statement of non-compliance, it will first consult those to whom the notice was given or copied.

- 9.9. The Panel may not publish information about a Warning Notice if, in its opinion, publication would be:
- a. unfair to the person against whom action is proposed
 - b. prejudicial to the interests of consumers, or
 - c. detrimental to the stability of the wholesale energy markets in Great Britain.³⁴
- 9.10. The Panel will consider any response to our proposal to publish information about a Warning Notice. A person seeking to demonstrate potential unfairness from publication should provide clear and convincing evidence of how that unfairness may arise and how they could suffer a disproportionate level of damage. They would need to demonstrate, for example, that publication could materially affect their health, result in a disproportionate loss of income or livelihood, prejudice criminal proceedings to which they are a party or give rise to some other equal degree of harm. It will not normally be sufficient to claim that publishing information about a Warning Notice is unfair solely because it could have a negative impact on a person's reputation (given that this is a likely consequence of publication).
- 9.11. Decisions to publish information about the matter to which a Warning Notice relates will not be taken by the persons who have proposed publication.³⁵ Consequently where the Panel recommend information of this nature should be published, the decision whether or not to do so will be made by a member of the EDP who does not sit on that Panel. This is in line with the need to form an independent view of the proposals to publish.
- 9.12. The Panel must allow at least 14 days for the person to make representations about the proposals in the Warning Notice. It may allow more, taking account of any bank or other public holidays that may fall within this period. It may also extend the period for making representations. But it will require a clear and reasonable case to be made for this.

Oral representations

- 9.13. Once the Warning Notice has been served on a person, that person under investigation will have an opportunity to make oral representations to the

³³ Regulation 39 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 precludes the Authority from publishing Warning Notices proposing restitution or any information relating to them. Any person given or copied such a Warning Notice is similarly precluded from publishing any details.

³⁴ See regulation 39 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

³⁵ See regulation 42 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013. A similar requirement for operational separation has been imposed in respect of publishing material about Decision Notices (see below).

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

Decision Notices

- 9.20. After receiving and considering any representations (written and/or oral) on a Warning Notice, and any views from the investigations team, the Panel will then decide, within a reasonable period, whether to impose a financial penalty, publish a statement of non-compliance, and/or or make a restitution order. It will also hear the investigation team's recommendations on the matter.
- 9.21. If the Panel decides to impose a financial penalty, publish a statement of non-compliance and/or to make a restitution order, it will issue a Decision Notice. This Decision Notice will be sent to the person in relation to whom the powers are being exercised. A copy will also be given to any third party to whom the Warning Notice was copied.
- 9.22. All Decision Notices will set out the reasons for the decision, the extent of any rights of access to Authority material and outline any right to have the matter referred to the Tribunal and associated procedures.



Guidelines

- 9.23. A Decision Notice imposing a financial penalty will also set out:
- a. the amount of the penalty
 - b. the manner in which and the date by which the penalty must be paid, and
 - c. how the penalty will be recovered if it is not paid by that date, including any interest charges that may be payable.
- 9.24. A Decision Notice confirming the making of a restitution order will also set out:
- a. the amount that the person is to pay or distribute
 - b. the persons to whom that amount is to be paid or among whom that amount is to be distributed, and
 - c. how the payment or distribution is to be made and the time period for doing so.
- 9.25. A Decision Notice issuing a non-compliance statement will also set out the terms of the statement.
- 9.26. The Decision Notice must impose sanctions made under the same regulation as that proposed in the Warning Notice. However, if after considering representations on the Warning Notice the Panel decides to impose sanctions in respect of the same matter that differ from those originally proposed, it may, before it takes the action set out in a Decision Notice, give the person concerned a further Decision Notice. In this case, the Panel must obtain the consent of the person to whom the original Decision Notice was sent. The right to make a reference in respect of any further Decision Notice will be the same as for the original Decision Notice.
- 9.27. The person receiving a Decision Notice must not publish the notice or any details concerning it, unless we have done so first. We may impose a penalty for improper publication. The Panel must publish such information as it considers appropriate about the matters contained in a Decision Notice. However, it may not publish such information if, in its opinion, publication would be:
- a. unfair to the person against whom action is to be taken
 - b. prejudicial to the interests of consumers, or
 - c. detrimental to the stability of wholesale energy markets.
- 9.28. If the Panel wishes to publish information relating to a Decision Notice, it shall first consult the person against whom the action is to be taken in order to obtain their views on the factors listed in the paragraph above. The Panel will take the same approach to considering any representations that it receives as it would in deciding whether to publish information relating to a Warning Notice (see paragraphs 9.5-9.19).

References

- 9.29. If the Panel decides to impose a financial penalty, to make a restitution order, or to issue a statement of non-compliance against a person, that

person may refer the decision to the Upper Tribunal (Tax and Chancery Division).

- 9.30. A third party to whom a copy of a Decision Notice has been given may refer to the Tribunal the decision in question, so far as that decision is based on a reason that relates to a matter that is prejudicial to the third party. The third party may also refer to the Tribunal any opinion expressed by the Panel in relation to him.
- 9.31. The Tribunal may take account of any relevant evidence whether or not it was available to the Panel when it made the decision that is the subject of the reference.
- 9.32. If a financial penalty decision is being referred, the Tribunal must determine what (if any) is the appropriate action for the Authority to take and remit the matter to the Authority with such directions (if any) as the Tribunal considers appropriate for giving effect to the determination. However, the Tribunal may not direct the Authority to do anything that the Authority did not have the power to do when making its decision.
- 9.33. If a person is referring a decision to issue a restitution order, the Tribunal must either dismiss the reference or remit the matter to the Authority with a direction to reconsider it and reach a decision in accordance with the Tribunal's findings. The Tribunal's findings in such cases may relate to:
- a. issues of fact or law
 - b. the matters to be, or not to be, taken into account by the Authority in making the decision, and/or
 - c. the procedural or other steps to be taken by the Authority in connection with making the decision.
- 9.34. The Authority must comply with any directions given to it by the Tribunal. For example, if the Tribunal (or the court following an appeal of a Tribunal decision) directs the Panel to take different action to that set out in the Decision Notice, the Panel will issue a further Decision Notice accordingly.
- 9.35. An order of the Tribunal may be enforced as if it were an order of a county court (or, in Scotland, as if it were an order of the Court of Session).

Discontinuance Notices

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

Final Notices

- 9.38. If the Panel has given a person a Decision Notice and the matter is not referred in the time period given by the Tribunal, the Panel will issue a Final Notice. A copy of the Final Notice will also go to any third party who received a copy of the Decision Notice. The Final Notice is the point at which the Panel will take the action set out in the Decision Notice.
- 9.39. If the matter is referred to the Upper Tribunal and the Tribunal upholds the Panel's decision, the Panel must issue a Final Notice. If, however, the Tribunal (or the court following an appeal of a Tribunal decision) directs the Panel to take different action to that set out in the Decision Notice, the Panel will issue a further Decision Notice. All such notices will be given to the person concerned and to any person to whom the original Decision Notice was copied.
- 9.40. A Final Notice about a financial penalty will state the amount of the penalty and the manner in which and period within which it must be paid. It will also set out how the penalty will be recovered if it is not paid by the specified date (including any interest charges that may be payable). If all or any of the amount of the penalty is outstanding at the end of the period that was allowed for payment, we may recover the outstanding amount as a debt due to us.
- 9.41. A Final Notice about restitution will set out the amount to be paid to, or distributed among, those who have suffered loss as a result of the breach. It will also set out the manner in which and date by which restitution must be given. If all or any of a required payment or distribution has not been made at by the specified date, the obligation to make the payment is enforceable on the application of the Authority for an injunction or, in Scotland, by an order of the Court of Session.
- 9.42. The specified date for payment of a penalty or of restitution must be at least 14 days from the date of the Final Notice.³⁶ The Panel may give more time, taking account of any bank or other public holidays that may fall within this period.
- 9.43. A Final Notice about a statement of non-compliance must set out the terms of the statement and give details of when and how it will be published.
- 9.44. The Panel must publish such information about the matter to which a Final Notice relates as it considers appropriate. However, it may not publish information relating to a Final Notice if, in its opinion, publication would be:
- a. unfair to the person against whom action is proposed
 - b. prejudicial to the interests of consumers, or
 - c. detrimental to the stability of the wholesale energy markets in Great Britain.

³⁶ See regulation 38 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

Access to Authority material

- 9.45. Any Warning or Decision Notice must set out the extent to which the person receiving it may access the material on which the Panel relied in deciding to issue the Notice. It will also set out the right of access to any other material it considers might undermine that decision. Any third party to whom a Notice is copied will at the same time be told whether it may access the same material where it identifies that third party.³⁷
- 9.46. We are not required to grant access to material if the material relates to a case involving another person and the Panel took it into account only for comparative purposes.
- 9.47. We may refuse the person access to material where it considers that allowing access:
- a. would not be in the public interest, or
 - b. would not be fair, having regard to the likely significance of the material to the person to whom the Warning or Decision Notice is addressed, and the potential prejudice to the commercial interests of persons other than those to whom the Warning or Decision Notice is addressed.
- 9.48. If we refuse to allow access to such material, we will notify the person in writing, giving reasons for the refusal.
- 9.49. The requirement to grant access to Ofgem material does not extend to material that is legally privileged.

10. Settlement procedure

- 10.1. The settlement procedure enables us to work with the person subject to the investigation to bring the case to an early resolution by agreement. To settle a case, the person under investigation must be prepared to admit to the breach(es) that have occurred. The settlement will lead to a finding of breach. The person will be expected to agree with this finding and to any penalty, statement of non-compliance and/or restitution order.
- 10.2. The person will also be expected to agree not to refer to the Upper Tribunal (Tax and Chancery Division) any finding of breach, penalty, statement or restitution order that is agreed to as part of the settlement.
- 10.3. It is important to appreciate that settlement in the regulatory context is not the same as settlement of a commercial dispute. An Ofgem settlement is a regulatory decision taken by us, the terms of which are accepted by the person under investigation. We will have regard to our regulatory objectives when agreeing the terms.
- 10.4. Settling does not reduce the seriousness of any breach. It will, however, result in a lower penalty than would likely be imposed if the matters were contested, and the case will be dealt with more quickly.

³⁷ See regulation 41 of The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013.

- 10.5. Settlement is a voluntary process. There is no obligation on persons to enter into settlement discussions or to settle. Any decision to settle should be based on a full awareness of the requirements of settlement and the consequences of settling, including that a finding of breach will occur. Persons considering settlement should consider whether to obtain legal or other advice before settling a case.
- 10.6. The fact that we have settled a case with a person does not prevent us from taking future action if further breaches occur, or if the actions agreed with the person to reach settlement are not carried out.

The Settlement Committee

- 10.7. A Settlement Committee may deal with any REMIT case which is settling. In cases where the penalty amount is below £100,000 or the issues raised are unlikely to attract significant industry or media interest or are otherwise uncontentious, the case may be handled by a Senior Partner. The identity of the Senior Partner will be provided to the person under investigation in writing. In all other cases, a Settlement Committee will be constituted as and when required to deal with an investigation. It will comprise two members of the EDP and one Ofgem Partner or Senior Partner.³⁸ The membership of the Settlement Committee will be provided to the person under investigation in writing by the EDP Secretariat.
- 10.8. If settlement negotiations are not successful, an EDP member will not hear the contested case if they have been on an earlier Settlement Committee that has considered the same case.

When we will consider settlement

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

Settlement discounts

- 10.10. Early settlement results in cases being resolved more quickly, and saves resources for both the person concerned and Ofgem. In recognition of the benefits of early settlement, we have a discount scheme.
- 10.11. The discount is applied to a penalty amount that has been agreed in the settlement. It is available on a sliding scale, depending on when the

³⁸ This includes Ofgem staff at equivalent or higher grades than Partner.

settlement is reached (the earlier the settlement, the greater the discount). In REMIT cases there are three settlement windows, as follows:

- a. Early Settlement Window: Opens when a settlement mandate is issued and closes 28 days later, or at a time agreed by us.
- b. Middle Settlement Window: Opens when the Early Settlement Window closes and closes on expiry of the period for making written representations on a Warning Notice.
- c. Late Settlement Window: Opens when the Middle Settlement Window closes and closes when the Decision Notice is issued.

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

Settlement framework

10.13. In cases which have been judged suitable for settlement, after we have conducted our investigations we will serve the person under investigation with a Summary Statement of Issues Letter.³⁹ We will offer the person a meeting (or other contact) where we can, if appropriate, discuss the person's views on settlement discussions. This contact will not affect the deadline for written representations on the Summary Statement of Issues Letter.

10.14. The Summary Statement of Issues Letter will set out the breaches the investigation team considers have been committed and/or that may be ongoing, our thinking about the detriment and/or the gain, and such other matters as may be appropriate. We will give the person a reasonable time, usually 21 days, to consider this.

10.15. The purpose of these steps is not to negotiate but for us to understand the person's position on the Issues Letter or summary of initial issues, so that we can take account of it in making recommendations to a Settlement Committee.⁴⁰ If, after this, we agree that settlement discussions may be appropriate, we will obtain a settlement mandate from a Settlement Committee. The person will then be provided with details of the proposed Warning Notice, the proposed sanction, and a draft press notice. Together, these will be the 'settlement mandate'. At the same time, the person will be told that the Early Settlement Window has opened, and the date that it closes.

10.16. Settlement discussions will take place on a "without prejudice" basis. This means that if negotiations are unsuccessful, neither party can rely on

³⁹ In cases which are not judged suitable for settlement until after the Issues Letter has been received by the person under investigation, no Summary Statement of Issues Letter will be served. Discussions will instead be based on the Issues Letter.

⁴⁰ The body with delegated powers to issue a settlement mandate prior to settlement discussions.

admissions or statements made during the settlement discussions in any subsequent contested case.⁴¹

- 10.17. The aim of discussions will be to agree the terms of a Warning, Decision and Final Notice, including any penalty and/or restitution. We may also agree other terms as part of a settlement.
- 10.18. If a settlement is reached, the person concerned will be expected to sign a settlement agreement. If a settlement cannot be reached, the case will move to the contested route. The person may still take advantage of the middle or late settlement windows, which will open and close as set out above.
- 10.19. In order to impose a penalty, issue a statement of non-compliance and/or impose a restitution order, the Settlement Committee will need to issue a Warning Notice, a Decision Notice and then a Final Notice. This will follow the process set out above. We expect, given the company will have agreed not to refer the decision (see paragraph 10.2 above), that the process will be followed in the minimum time possible.

11. Cooperating with ACER and other regulators

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

Cooperation on investigations

- 11.3. ACER will promote cooperation at EU and national level by publishing non-binding guidance on the application of the definitions of, for example, inside information, market manipulation and attempted market manipulation. We and the EDP will have regard to any such guidance that may be published.
- 11.4. Where, on the basis of initial assessment or analysis, ACER suspects that a REMIT requirement has been breached, it may:
 - a. request that one or more NRAs supply it with any information related to the suspected breach
 - b. request that one or more NRAs look into the matter further and take appropriate action to remedy any breach found (such action will be for the NRA or NRAs to determine), or

⁴¹ If for any reason a person that has entered into settlement discussions chooses to reveal to the Panel any detail of the settlement discussions, we reserve the right, similarly, to reveal information (including any admissions) that were made during those discussions.

- c. if it considers that the possible breach has, or has had, a cross-border impact, establish and coordinate an investigatory group consisting of representatives of the concerned NRAs (and potentially other regulatory bodies) to investigate whether a breach has taken place and in which Member State it occurred. Such a group will render all necessary assistance to ACER.
- 11.5. If ACER submits a request for information or a request to look into a matter, we will immediately take the necessary measures to comply. If we are unable to supply the required information immediately, we shall without delay notify ACER of the reasons for this.
- 11.6. We may refuse to act on a request from ACER to provide information or look into a matter further where:
 - a. compliance might adversely affect the UK's sovereignty or security
 - b. judicial proceedings have already been initiated in respect of the same actions and against the same persons, or
 - c. a final judgment has already been delivered in relation to such persons for the same actions in Great Britain.
- 11.7. In any such case, we will notify ACER immediately.
- 11.8. We will, without delay, inform ACER in as specific a manner as possible where we have reasonable grounds to suspect that acts in breach of REMIT are being, or have been, carried out either in GB or in another Member State. We will also inform the FCA and/or the Competition and Markets Authority where we suspect breaches of financial services and/or competition legislation.
- 11.9. Where we suspect that acts that affect wholesale energy markets or the price of wholesale energy products in GB are being carried out in another Member State, we may request that ACER take action (such as requesting information from one or more NRAs).

Information sharing

- 11.10. We and other NRAs will cooperate at regional level and with ACER in monitoring wholesale energy markets. Market participants must provide ACER and the NRAs with the information they need to monitor those markets effectively. ACER will share the information that it receives with NRAs and with the other regulatory bodies listed above. All those bodies, including us, shall ensure the confidentiality, integrity and protection of the information that they receive.
- 11.11. Any confidential information received, exchanged or transmitted pursuant to REMIT is subject to certain conditions of professional secrecy. This obligation of professional secrecy applies to people who work or who have worked for ACER, for the NRAs including the Authority, and for other relevant authorities that receive confidential information in accordance with the REMIT Regulation. It also applies to auditors and experts instructed by those bodies.
- 11.12. Confidential information received by these people in the course of their duties may not be divulged to any other person or authority, except in

summary or aggregate form such that an individual market participant or market place cannot be identified, without prejudice to cases covered by criminal law, the other provisions of the REMIT Regulation or other relevant EU legislation.

- 11.13. Without prejudice to cases covered by criminal law, ACER, NRAs (including us), ESMA, competent financial authorities of Member States and, where appropriate, national competition authorities and other persons which receive confidential information pursuant to REMIT may use it only in the performance of their duties and for the exercise of their functions (which includes REMIT functions and those under the Gas Act and the Electricity Act).
- 11.14. Other authorities, bodies or persons may use that information for the purpose for which it was provided to them or in the context of administrative or judicial proceedings specifically related to the exercise of those functions. The authority receiving that information may use it for other purposes only if the provider of the information gives consent.
- 11.15. These requirements do not prevent us from exchanging or transmitting, in accordance with national law, confidential information provided that it has not been received from ACER or from an authority of another Member State under REMIT.