

Ofgem's Consultation on changes to REMIT Penalties Statement and REMIT Procedural Guidelines

Energy UK Response

30 September 2021

About Energy UK

Energy UK is the trade association for the energy industry with over 100 members spanning every aspect of the energy sector – from established FTSE 100 companies, right through to new, growing suppliers and generators, which now make up over half of our membership.

We represent the diverse nature of the UK's energy industry with our members delivering over 80% of both the UK's power generation and energy supply for the 28 million UK homes as well as businesses.

The energy industry invests £13bn annually, delivers £31bn in gross value added on top of the £95bn in economic activity through its supply chain and interaction with other sectors, and supports 738,000 jobs in every corner of the country.

Executive Summary

We recognise Ofgem's rationale for undertaking its review of the REMIT Procedural Guidelines and Penalties Statement and welcome revisions that will make REMIT processes clearer and more efficient. We agree that the REMIT documents should reflect the current energy market and enforcement landscape and should be updated from the previous versions issued in 2015 and 2016.

However, we are concerned that a number of Ofgem's proposals to streamline its processes may not necessarily achieve the stated objectives. We believe that there are a number of areas where further clarification is required to ensure that all parties can have confidence in the proportionality and fairness of the decision-making process.

In addition, we consider that Ofgem has not fully explained the reasoning for a number of its proposed changes to the REMIT Procedural Guidelines and REMIT Penalties Statement. We are also disappointed that Ofgem has not provided 'tracked changes' versions of the documents as part of the consultation. This has made it difficult for respondents to compare the versions of the documents, and/or risks having some proposed changes go unnoticed.

Feedback on Ofgem's Proposals

Question 1: What is your view on the proposal to remove the middle and late settlement windows, and associated settlement discounts?

We have some concerns with the potential impacts of this proposal. We acknowledge that settlement has a clear benefit of resource savings for Ofgem, but we do not consider that this proposal would better incentivise a party to settle a case.

Firstly, there is a risk that moving to one settlement window, and not allowing sufficient time for Ofgem and the relevant party to have meaningful discussions around settlement, could reduce the total number of cases which are settled. This would have the opposite of the intended effect set out in the consultation.

We also note that as part of the rationale for this reform, Ofgem highlights that no party has opted to use the middle or late settlement windows since the Procedural Guidelines were introduced in 2015. However, just because they have not been used to date, does not mean that they may not be a useful tool to incentivise settlement in the future. In addition, the consultation notes that the proposal has originated from Ofgem's experience with sectoral cases, but there "has been less of a problem in REMIT enforcement to date". As such, we do not consider that the rationale for this proposal for REMIT cases has been sufficiently explained by Ofgem.

Another key issue regarding the settlement process relates to the transparency of the settlement value and whether a true discount is being applied. For example, if settlement values are artificially inflated to offset the benefit of a discount, a party which contests a case rather than settles it could end up with a financial penalty which is less than the original early settlement value. This scenario does not incentivise parties to settle early, as they may believe they can reach a better outcome by engaging in the full process. This could be further exacerbated by the other consultation proposal relating to the Enforcement Decision Panel (EDP) (see Question 2) which could result in more parties wanting to contest cases. Rather than remove the middle and late settlement windows, we would encourage Ofgem to confirm that settlement discounts will be consistently and transparently applied and explain how there is a true benefit for a party to settle a case versus contesting it.

Question 2: What are your views on the option of allowing the Director responsible for Enforcement to be a decision maker in settlement cases?

We acknowledge that the stated rationale for this proposal is to speed up the settlement process and reduce the resource burden on Ofgem and the party under investigation. However, we do not believe that this provides sufficient justification for the proposed change and we consider that the proposal may have the opposite of the intended effect.

The EDP was established to provide a separation between the case team and the decision maker. Therefore, we are concerned that this proposal will weaken the independence of the decision-making process and could increase the risk of parties contesting cases in order to obtain a level of independence and fairness in decisions, even if their preference would be to resolve matters more promptly.

Even for cases which are settled, this proposal could unintentionally risk increasing the burden on Ofgem by forcing parties down alternative appeal routes if they are left with the impression of an inappropriate outcome as a result of the investigation, decision and penalty all being determined by the same enforcement team. This would increase enforcement costs and timescales for all parties.

If Ofgem continues with this proposal despite these objections and concerns, it must provide further justification for the use of a single Director based on the seriousness of a case or their expertise, and outline thresholds for when parties can discuss or appeal the decision to use that Director.

Question 3: In your view, are there any other steps you think we could take to speed up the settlement process, without undermining the evidence-based nature of our decision making?

As noted above in response to Question 1, we would urge Ofgem to provide greater clarity on the benefits of early, open and transparent engagement. We agree that both Ofgem and the affected party can benefit from early settlement, but this outcome will only be achieved if the incentives are communicated effectively and parties believe that they are not disadvantaged by choosing this route over contesting a case.

In our view, it would also be useful to further explore the concept of “admitting breach(es)”. We would argue that as part of settlement, parties should be able to “neither admit nor deny” any breach (similar to US processes). This would become even more relevant should any settlement windows be removed as parties are essentially having time removed from the negotiation and agreement stage, especially in complex cases.

Question 4: Do you have any comments on the proposed changes to improve the efficiency and clarity of the REMIT Procedural Guidelines?

Our comments on the proposed changes in Section 4.2 of the consultation are as follows.

- a) We welcome the introduction of the explanations in Chapter One for the role of the different decision-making bodies.
- b) We welcome the clarification in Chapter Four regarding Ofgem’s criteria for opening an investigation. We welcome the explanation of the Alternative Action process as this was not included in the original REMIT Procedural Guidelines but is used by Ofgem for REMIT cases.
- c) We welcome the additional explanation in Chapter Five regarding the Summary Statement of Issues Letter as this improves the clarity of the document.
- d) Generally, we support the proposed changes for the formation of Chapter Seven, with the exception of the statements regarding the Director with responsibility for Enforcement being able to make settlement decisions in place of the EDP (as per our response to Question 2).
- e) We welcome the additional explanation in Chapter Eight regarding the Full Issues Letter as this improves the clarity of the document.

Question 5: Are there any other changes that you think would improve the clarity of the REMIT Procedural Guidelines?

Whilst we do not have any specific improvements to suggest, we note that the proposed changes were not easy to ascertain as a ‘tracked changes’ version of the document was not provided by Ofgem. This made it difficult to determine whether the changes improved the clarity of the document as the versions are very different in some chapters.

Question 6: Do you have any comments on the proposed changes to improve the efficiency and clarity of the REMIT Penalties Statement?

Our comments on the proposed changes in Section 5 of the consultation are as follows.

- Factors used to determine the seriousness of a REMIT breach – we do not have any specific objection to the proposal to remove the number of factors set out in the document. However, we note that it was difficult for us to compare the proposed changes as a tracked version of the document was not provided.
- Calculation of Gain and Detriment – the consultation does not fully explain the effects of the proposed changes or Ofgem’s rationale for implementing them. Ofgem should explain how it intends to assess and weigh proportionality and practicality when considering whether or not to calculate gain and/or detriment. There is also a lack of clarity on how Ofgem will determine penalty amounts where no detriment is calculated.
- Reduction of duplication – we do not have any specific objection to the proposals as they appear to make the document clearer and easier to read and improve clarity and efficiency by removing

unnecessary sections. However, we note that it has been difficult to review all of the proposed changes as a tracked version of the document was not provided.

- Other changes:
 - Section 5.12 – whilst we have no specific objection to this proposal, we note that a detailed explanation for the change was not provided. It is assumed that the proposal would reduce administrative burden by preventing investigation under two frameworks for the same actions, but confirmation of this from Ofgem would be welcomed.
 - Section 5.13 – refer to our response for ‘calculation of gain and detriment’ above.
 - Section 5.14 – we consider the proposed change to the figures for serious financial hardship to be reasonable.

Question 7: Are there any other changes that you think would improve the clarity of the REMIT Penalties Statement?

As with our response to Question 5, we do not have any specific improvements to suggest. However, we note that it was difficult to determine whether the changes proposed as part of this consultation improved the clarity of the Penalties Statement document as a tracked version was not provided by Ofgem.

Should you have any questions regarding this consultation response then please do not hesitate to get in touch via the details below.

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