



*Promoting choice and value for
all gas and electricity customers*

To all wholesale energy market participants,
persons professionally arranging transactions and
other interested parties

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Dear Colleague,

Consultation on our proposed REMIT penalties statement and procedural guidelines

Ofgem is consulting on its proposed approach to the use of new enforcement powers relating to market abuse in wholesale energy markets, which were laid in Parliament today. The powers are due to come into force later this month. We invite responses to our consultation by 29 August 2013.

Introduction

The EU Regulation on wholesale energy market integrity and transparency ('REMIT'), which came into force in 2011, prohibits insider trading and attempted or actual market manipulation in wholesale energy markets. REMIT also requires market participants to

- register with a National Regulatory Authority in the EU, which for Great Britain is the Gas and Electricity Markets Authority ('the Authority')
- provide the Authority with information for the purpose of monitoring trading in wholesale energy markets
- put in place effective arrangements to identify breaches of the insider trading and market manipulation prohibitions
- notify the Authority immediately if they reasonably suspect that a transaction might breach the prohibitions on insider trading or market manipulation¹
- publicly disclose inside information in an effective and timely manner.

The Government is required by REMIT to establish the regulatory regime for penalising breaches of these requirements in Great Britain. The penalties regime must be effective, dissuasive and proportionate, reflecting the nature, duration and seriousness of the infringement, the damage caused to consumers and the potential gains from trading on the basis of inside information and market manipulation. The Government has set out, in regulations that are currently before Parliament, the investigatory and enforcement powers that will, subject to the Parliamentary process, be available to the Authority.²

¹ This obligation applies to persons professionally arranging transactions.

² The regulations do not include investigatory and enforcement powers in relation to the obligations on market participants to register and to provide information to assist wholesale market monitoring. The Government intends to bring forward further secondary legislation giving these powers to Ofgem.

The regulations before Parliament also require us to consult on, finalise and publish

- procedures relating to issuing and publicising warning and decision notices
- a statement of the Authority's policy on imposing financial penalties.³

We are meeting that requirement today by consulting on general REMIT procedural guidelines and on the Authority's REMIT penalties statement.

In preparing these documents, the Authority has had regard to the REMIT Regulation, the regulations prepared by DECC, the Authority's existing Enforcement Guidelines and penalties statement for licence enforcement under the Gas Act and Electricity Act and the Financial Conduct Authority's (FCA) guidance on penalties and procedures.

The Authority proposes to model its approach to REMIT on its guidance for licence breaches, except where a different approach is necessary to comply with the REMIT Regulation or the Government's regulations. The Authority does not, for instance, propose at this stage to adopt the FCA's approach to imposing a penalty and calculating its amount. However, it intends to consider these and other issues as a part of its ongoing Enforcement Review. The Authority considers that this approach is desirable because it will promote as far as possible a consistent approach to Ofgem's enforcement in both the short and long term.

Question 1: Do stakeholders agree that taking this approach to the REMIT procedures and penalties documents is desirable?

Proposed procedural guidelines

The procedural guidelines set out the market monitoring, investigatory and enforcement powers that the Authority has been given and outline the procedures that it proposes to follow in exercising them. In particular, the guidelines set out

- the regulatory objectives that the Authority will promote in the exercise of its REMIT investigatory and enforcement powers
- the factors that the Authority may consider in deciding whether to investigate
- the investigation process, from issuing information requests and inspecting premises to issuing a statement of case and conducting an oral hearing
- the decision-making processes both where cases are contested and where it may be possible to reach a settlement with the Authority
- as required by the regulations, the procedures that the Authority will adopt in taking decisions that require it to issue and to publish information about warning and decision notices. Such decisions will be taken by individuals unconnected, respectively, with the investigation and with issuing warning and decision notices
- the requirements on the Authority to coordinate its REMIT market monitoring, investigation and enforcement activities with other regulatory authorities in the UK and in other EU Member States.

The Authority invites views on any aspects of the document and on the following specific issues.

³ Stakeholders should note that the regulations include transitional arrangements to enable the Authority to impose financial penalties in relation to conduct occurring after the regulations come into force but before its REMIT penalties statement takes effect.

Question 2: Are the regulatory objectives that the Authority proposes to promote in the exercise of its REMIT powers appropriate? Should any other objectives be included?

Question 3: Are the factors that we propose to consider in deciding whether to launch REMIT investigations appropriate? Should any other factors be included?

Question 4: Does the proposed process for REMIT investigations strike an appropriate balance between fairness to those being investigated and ensuring the effectiveness of the Authority's investigations (bearing in mind particularly the requirements of DECC's regulations in relation to warning and decision notices)?

Proposed penalties statement

The penalties statement sets out the Authority's proposed approach to using its power to impose financial penalties for REMIT breaches. In particular, the statement sets out

- the regulatory objectives that the Authority will promote in the exercise of its power to impose financial penalties for REMIT breaches
- the factors that the Authority proposes to consider in deciding whether to impose a financial penalty
- the factors that the Authority proposes to consider in determining the amount of any financial penalty (including aggravating and mitigating factors) and
- the Authority's proposed approach to imposing financial penalties on individuals.

The Authority invites views on any aspects of the document and on the following specific issues.

Question 5: Are the criteria that the Authority proposes to consider in deciding whether to impose a financial penalty appropriate? Should any other criteria be included?

Question 6: Are the factors that the Authority proposes to consider in determining the amount of a financial penalty appropriate? Should any other factors be included?

Question 7: Does the statement provide sufficient clarity about the factors that the Authority will take into account in relation to imposing financial penalties on individuals?

Next steps and interaction with our Enforcement Review

The Authority considers that the regulations, which include a civil power to impose unlimited financial penalties, are a significant first step in creating an effective regulatory regime. The Authority looks forward to discussing with Government the case for strengthened enforcement powers (including criminal sanctions) in a way that, for example, takes proper account of developments in the regulation of market abuse across the EU.

The Authority is at present conducting a thorough review of its approach to enforcement, including its case-handling procedures and its general policy on imposing financial penalties. The Authority will be aiming for maximum efficiency and impact across the board and expects to develop proposals for consultation.⁴ The Authority intends that, as far as possible, any changes to its policies and procedures arising from the Enforcement Review will apply to its REMIT enforcement activities unless there is a good reason for them not to.

In the meantime, we welcome responses to the questions in this letter and also any other observations you would like to make about the proposed penalties statement and procedural guidelines. Please send your response to Andy MacFaul at andrew.macfaul@ofgem.gov.uk by 29 August 2013.

Consultation responses will be published unless marked confidential. The Authority will take full account of them in finalising the penalties statement and procedural guidelines. We anticipate that the Authority will finalise the documents in October 2013.

If you have any comments or questions about this letter or the associated documents, please contact Andy MacFaul using the details given above.

Yours sincerely,

Joanna Whittington
Partner, Ofgem

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⁴ The Authority has already conducted a [consultation](#) on the vision, strategic objectives and decision-makers for its enforcement activities.