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Dear Andy

CONSULTATION ON REMIT PROCEDURES AND PENALTIES

This is the response of Bird & Bird LLP to Ofgem's consultation on its proposed REMIT penalties statement and procedural guidelines. Bird & Bird is a law firm with significant experience of advising clients across the EU on a range of competition and regulatory investigations in the energy and financial services sectors, and more recently on compliance with the requirements of REMIT. This response should not be seen as reflecting the views of any of Bird & Bird's clients.

Generally we welcome the penalties statement and procedural guidelines as contributing transparency to the enforcement process. We have the following specific comments.

Criteria for opening an investigation

The criteria for opening an investigation into a suspected REMIT infringement are generally appropriate. The overall consistency with the criteria set out in Ofgem's June 2012 enforcement guidelines is welcome. However, we suggest that it would be useful to add a couple of additional criteria. Firstly, it would be useful to clarify that Ofgem will consider whether it would be more appropriate to use other powers (such as its powers under the Competition Act 1998 and its powers under the Transmission Constraint Licence Condition) instead of its REMIT powers. Secondly, given the novelty of the substantive prohibitions created by REMIT, one relevant criterion for Ofgem might be whether the type of breach alleged or suspected is particularly novel or important in terms of developing REMIT enforcement policy. We also note that while the question of whether Ofgem is best placed to act is mentioned as a criterion in paragraph 4.3, the penultimate bullet point in paragraph 4.4 sets out the test in slightly different terms, namely whether action has already been taken, or is to be taken, by another body. That differs from the "best placed" test, which considers not only whether other bodies are already or will be investigating, but also whether they should do so.

Self-incrimination

In our view, enforcement proceedings under REMIT will have a criminal character for the purposes of Article 6 of the European Convention on Human Rights, given the "effective, dissuasive and proportionate" penalties that must be imposed (REMIT, Article 18). Ofgem's powers of investigation must be exercised accordingly, and in particular must respect the

privilege against self-incrimination. We note that regulation 15 of the REMIT enforcement regulations provides that evidence relating to statements made in response to an information requirement may be used in criminal proceedings only in the very limited circumstances set out there. However, EU law (see Case C-374/87 *Orkem. v. Commission*), recognises the privilege in the case of competition investigations, involving powers and penalties very similar to those applicable in non-criminal investigations and enforcement under REMIT, ie. where the Authority itself decides to impose a penalty under Part 5 of the regulations. Ofgem, in its capacity as one of the regulators covered by the OFT guideline on investigations, recognises this privilege too. OFT 404 explains that:

> "The OFT may compel an undertaking to provide specified documents or specified information but cannot compel the provision of answers which might involve an admission on its part of the existence of a competition law infringement, which it is incumbent upon the OFT to prove. The OFT may, however, request documents or information relating to facts: for example, whether a particular employee attended a particular meeting."

Ofgem should therefore make it clear in its procedural guidelines, in terms similar to those set out in OFT 404, that it will not compel persons under investigation (businesses or individuals) to incriminate themselves in investigations that may lead to Part 5 outcomes.

Seizure and claims of legal privilege

Given the prevalence of electronic evidence, and the likely use of seizure powers under regulation 16(4)(c) rather than copy powers under (d) in order to permit off-site review, we believe that it is essential to include in the guidelines a statement of Ofgem's approach to electronic evidence, "seize and sift" type powers and disputes on legal privilege. The European Commission's revised note on inspections: http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf provides a useful template.

Statement of case

The statement of case will be a pivotal point in any investigation under REMIT, providing an opportunity for the person under investigation to set out its views. It corresponds to the statement of objections in competition investigations, consistently held by the European Court of Justice to constitute a fundamental safeguard of due process in investigations. A warning notice is issued only once the Authority has decided that there has been an infringement, and therefore comes at a later stage in the decision-making process than a competition statement of objections. Ofgem should treat its statement of case in the same way as a statement of objections in competition investigations. The guidelines should therefore expand the explanation that the statement of case will set out the "relevant facts and the case against the person", to make it clear that this means that the statement of case will set out all elements of the proposed decision, namely the key evidence, facts, inferences drawn from them, legal and economic analysis, conclusions drawn and an indication of remedies being considered by Ofgem. The issue of a statement of case should also trigger the right of access to Ofgem's file. Access to the file is necessary in order to allow the person under investigation to set out its views effectively. Leaving file access until a warning notice is too late.

Procedural disputes

Given the complex procedures envisaged in the Regulations and procedural guidelines, we suggest that Ofgem should consider the adoption of a mechanism comparable to the OFT's Procedural Adjudicator, in which a senior official not involved in the case can resolve disputes about timing, access to documents etc.

Penalties – calculation

We welcome the transparency provided by the proposed penalties statement, which provides useful guidance on the overall approach to the imposition of penalties. We note the acknowledgement in Ofgem's letter dated 6 June 2013 that it does not propose to adopt the FCA's approach. However, the omission of guidance on the calculation of a penalty, along the lines of the OFT's guidance in competition investigations, or the FCA's DEPP, is a significant weakness of the statement. We believe that the provision of guidance on the calculation of penalties is an essential part of enforcement and deterrence.

Mitigating factors – self-reporting

Leniency applications are a major method of detection in cartel cases, promising immunity or a penalty reduction for cartel members that come forward before an authority investigates. Ofgem already proposes to encourage cooperation with its REMIT investigations through the offer of settlement discounts. Although the incentives to self-report differ somewhat between investigations into bilateral or multilateral cartels on one hand and investigations into generally unilateral market manipulation on the other, some form of incentive to self-report in REMIT investigations is likely to be an effective detection tool. We therefore recommend that self-reporting should at the very least be added to the list of mitigating factors, or ideally set out as a separate factor, allowing businesses to assess the benefits of coming forward before an investigation starts. The statement should ideally state the indicative level of reduction that self-reporting can be expected to secure (as in the case of settlements, discussed below). The benefits to Ofgem, in terms of enhanced detection and deterrence, and preserving its resources, are self-evident.

Following legal advice

We note that one of the factors taken into account in deciding whether a person believed that his conduct did not amount to a breach of REMIT is whether or not he sought and followed legal advice. We suggest that the guidelines make it clear that production of legal advice would involve the waiver of any privilege in the advice, that Ofgem will not compel the production of legal advice and that a failure to produce legal advice will not be treated as an aggravating factor.

Settlement discount

A key consideration in any decision whether to settle an investigation is the level of penalty reduction that it will deliver. An indication of the benefit (say 10-40%, depending on the point at which the case is settled) would be highly beneficial in highlighting the attraction of settling a REMIT investigation.

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Taking action against individuals

We suggest that Ofgem sets out the factors that it will consider in deciding whether to impose a penalty on an individual. These factors might include the level of seniority of the individual, whether the individual benefited or hoped to benefit personally from the infringement (either through a bonus or other remuneration, or through insider trading) and whether the individual was merely acting on the instructions of a superior.

We would be happy to discuss any of these comments in more detail if required.

Yours sincerely

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