

FINAL NOTICE REGARDING THE IMPOSITION OF A FINANCIAL PENALTY UNDER REGULATION 38 (1) AND 38 (5) OF THE ELECTRICITY AND GAS (MARKET INTEGRITY AND TRANSPARENCY) (ENFORCEMENT ETC.) REGULATIONS 2013 **Date:** 17 August 2023

Final Notice regarding the imposition of a financial penalty by the Gas and Electricity Markets Authority in respect of a breach of Regulation 8 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 (“the Enforcement Regulations”) by Morgan Stanley & Co. International plc.

1 Recipient of Notice

- 1.1 This Final Notice is given to Morgan Stanley & Co. International plc of 25 Cabot Square, Canary Wharf, London, E14 4QA, incorporated and registered in England and Wales with company number 02068222 (**referred to as “the Company” or “MSIP” interchangeably**).

2 Background

- 2.1 **“REMIT”** is Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency and is retained in UK law by effect of the European Union (Withdrawal) Act 2018 and amended by the Electricity and Gas (Market Integrity and Transparency) (Amendment) (EU Exit) Regulations 2019 (SI 2019/534).
- 2.2 The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 (**“the Enforcement Regulations”**) provide the Gas and Electricity Markets Authority (**“the Authority”**) with the powers to sanction any failure to comply with REMIT requirements, and any failure to comply with a requirement of Regulation 8 of the Enforcement Regulations. The Authority takes any breach of these requirements seriously.
- 2.3 Compliance with the requirements of Regulation 8 of the Enforcement Regulations, which includes the obligation on Relevant Persons to take reasonable steps to record and retain relevant communications, as defined by Regulation 8(2) in the Enforcement Regulations (**“Relevant Communications”**)¹, is critical to ensuring that the Authority is able to fully investigate and enforce any failure to comply with REMIT requirements. This is

¹ Regulation 8(2) of the Enforcement Regulations defines a relevant communication as “any telephone or electronic communication made for the direct or indirect purpose of entering into any transaction in wholesale energy products.”

essential to ensuring that energy consumers and wholesale energy market participants have confidence in the integrity of the market.

- 2.4 From communications provided to the Authority by MSIP in response to a Request for Information issued under the Enforcement Regulations, it became known to the Authority that electronic communications regarding wholesale energy trading had been carried out by MSIP employees using the WhatsApp instant messaging service, and these had not been recorded by the Company. As a result of this information, in 2021 the Authority opened an investigation into whether MSIP had breached Regulation 8.
- 2.5 Following investigation, the Authority is satisfied that from 1 January 2018 until 31 March 2020, MSIP breached Regulation 8(6) and Regulation 8(3) of the Enforcement Regulations, by failing to:
 - 2.5.1 take reasonable steps to prevent the making, sending, or receiving of any Relevant Communications (that it could not ensure were recorded and retained in accordance with Regulation 8(4)), and;
 - 2.5.2 take reasonable steps to ensure that Relevant Communications were recorded and retained in accordance with Regulation 8(3) of the Enforcement Regulations.

Relevant obligations

- 2.6 Regulation 8(6) of the Enforcement Regulations requires that a regulated person "*must take reasonable steps to prevent the making, sending or receiving of any relevant communications (including on privately-owned equipment) –*
 - (a) *that it cannot ensure is recorded, or*
 - (b) *if it cannot ensure that a copy is retained in accordance with paragraph (4)."*
- 2.7 Regulation 8(3) also requires that a regulated person "*must take reasonable steps to ensure –*
 - (a) *that any relevant communication is recorded; and*
 - (b) *that a copy of any relevant communication is retained in accordance with paragraph (4)."*
- 2.8 Regulation 8(4) requires that "*A copy of any relevant communication is to be retained –*
 - (a) *for a period of at least six months from the date the record was created;*
and

(b) in a medium that allows the storage of information in a way that is accessible for future reference by the Authority when the Authority is exercising the powers conferred on it by regulation 9, 11, 14 or 16.”

2.9 Regulation 8(2) defines a relevant communication as *“any telephone conversation or electronic communication made for the direct or indirect purpose of entering into any transaction in wholesale energy products, where*

(a) “electronic communication” includes any communication made by way of fax, email or instant messaging device; and

(b) “wholesale energy products” has the same meaning in REMIT.”

Unrecorded Relevant Communications

2.10 From the information provided to the Authority by MSIP in response to its Regulation 11 Notices², the Authority finds that electronic communications carried out by MSIP EU wholesale energy product traders, satisfied the definition of Relevant Communications under Regulation 8(2), and that those communications were not recorded and retained:

- Communications were made for the direct or indirect purpose of entering into transactions in wholesale energy products on unrecorded communication systems.
- Those communications were electronic communications as they were made by way of an instant messaging application via WhatsApp on privately owned mobile phone devices.
- MSIP could not ensure that those communications were recorded and retained in accordance with Regulation 8(4) of the Enforcement Regulations.

Reasonable Steps

2.11 The Authority finds that MSIP breached Regulations 8(3) and 8(6) of the Enforcement Regulations because it failed to take reasonable steps to record and retain Relevant Communications or to prevent the making, sending or receiving of any Relevant Communications, in this case WhatsApp instant messages, that it could not ensure were recorded and retained.

2.12 The Authority finds that MSIP did have policies in place which prohibited the use of non-Company approved messaging systems for Company business, and that MSIP took some steps to try and ensure the policy was conveyed to

² Regulation 11 of the Enforcement Regulations provides the Authority the power to require information from the Regulated Person.

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employees. These measures included e-mail reminders of the Company policy, the requirement for employees to sign an undertaking not to use unofficial means to carry out Relevant Communications and, from 2019, training for the EUPG Desk specifically focussed on the misuse of WhatsApp and similar messaging systems.

2.13 However, until March 2020, the Authority finds that the measures MSIP took were not sufficient to satisfy the requirements of Regulation 8. The Authority takes account of the following in forming the view that MSIP failed to take reasonable steps in accordance with Regulations 8(3) and 8(6):

- MSIP did not take reasonable steps to monitor compliance with its policy on the use of non-Company approved messaging systems or assess the risks of non-compliance with its policies. It was only after the Authority had identified that MSIP EU wholesale energy product traders had used WhatsApp to make Relevant Communications, that MSIP took steps to address it. The Authority acknowledges that after this happened, MSIP did take the discovery of the issue seriously and took action in response.

2.14 The Authority finds that by the end of March 2020 MSIP was no longer in breach of Regulation 8. The steps MSIP took to remedy its non-compliance included: providing training to employees which reinforced the prohibition on the use of WhatsApp; taking internal action over the use of WhatsApp by employees; and, launching an internal investigation into the use of WhatsApp and other non-Company approved messaging systems.

2.15 In these circumstances, and mindful of its obligations under REMIT to monitor the integrity and transparency of the wholesale energy market the Authority has imposed a financial penalty of **£7,730,213 (seven million, seven hundred and thirty thousand, two hundred and thirteen) pounds sterling** on MSIP in respect of its breach of Regulation 8 of the Enforcement Regulations.

2.16 The financial penalty was calculated with reference to the six-step process set out in the 2015 REMIT Penalties Statement³.

2.17 Recognising that MSIP has admitted it breached Regulation 8 of the Enforcement Regulations and has agreed to settle this matter during the settlement window, the Authority has discounted the penalty by 30% in accordance with its REMIT Penalties Statement published on 23 June 2015⁴. Accordingly, the penalty was reduced to **£5,411,149 (five million, four**

³ As the breach took place prior to 2022, the 2015 REMIT Penalties Statement applies.

⁴ <https://www.ofgem.gov.uk/publications/remit-procedural-guidelines-and-penalties-statement-consultation>

hundred and eleven thousand, one hundred and forty-nine) pounds sterling.

- 2.18 The Authority has given MSIP a warning notice (“**the Warning Notice**”) pursuant to Regulations 30 and 35 and a decision notice (“**the Decision Notice**”) pursuant to Regulations 31 and 36 of the Enforcement Regulations, detailing its proposal to impose and its decision to impose a penalty on MSIP under Regulation 26 of the Enforcement Regulations in respect of MSIP’s breach of Regulation 8 of the Enforcement Regulations.

3 Penalty

- 3.1 Provided that the Company does not refer the Decision Notice to the Upper Tribunal under Regulation 31(4) of the Enforcement Regulations within the timescale for doing so as prescribed by the Tribunal Procedure (Upper Tribunal) Rules 2008⁵, the Authority imposes a financial penalty on the Company in respect of its breach of Regulation 8 of the Enforcement Regulations in the sum of **£5,411,149 (five million, four hundred and eleven thousand, one hundred and forty-nine pounds sterling)**, such penalty is to be paid to the Authority in full, by means of electronic transfer and by no later than 5pm on the date that is the twenty-eighth day, after the date on which the Final Notice shall be deemed to have been served on the Company by the Authority, (excluding the day on which this Final Notice shall be deemed to be served on the Company).
- 3.2 If the Company does refer the Decision Notice to the Upper Tribunal under Regulation 31(4) of the Enforcement Regulations within the timescales for doing so as prescribed by the Tribunal Procedure (Upper Tribunal) Rules 2008, this Final Notice shall immediately cease to have effect, but for the avoidance of doubt the Warning Notice and Decision Notice shall remain extant.
- 3.3 If the financial penalty due to the Authority is not paid in full in accordance with paragraph 3.1, the financial penalty may be recovered and is recoverable by the Authority as a debt. The Authority may apply to the court for an injunction compelling payment of the penalty to the Authority or may use any other appropriate means of securing payment of the penalty to the Authority.

⁵ Statutory Instrument reference S.I. 2698/2008.

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4 Publication

4.1 The Authority will publish:

4.1.1 the Authority Web Text in the form set out in **Annex 1** to this Final Notice;

4.1.2 the Authority Press Release in the form set out in **Annex 2** to this Final Notice; and

4.1.3 this Final Notice dated 17 August 2023.

Dated: 17 August 2023



Nathan Macwhinnie

Deputy Director, Wholesale Market Oversight and International
Gas and Electricity Markets Authority