



Making a positive difference  
for energy consumers

To all interested parties

2<sup>nd</sup> July 2015

Dear Colleague

### **Consultation on our Prosecution Policy Statement**

We would like your views on our proposed Prosecution Policy Statement below (Annex A). Please let us know what you think by emailing [prosecution.consultation@ofgem.gov.uk](mailto:prosecution.consultation@ofgem.gov.uk) no later than Friday 25<sup>th</sup> September 2015.

### **Ofgem and enforcement**

As national energy regulator, enforcement is an important part of Ofgem's role. By enforcing the law effectively we can best protect the interests of existing and future gas and electricity consumers and the businesses that are active in the sector. We want to achieve a culture where businesses put energy consumers first and act in line with their obligations. For the purpose of the REMIT<sup>1</sup> Criminal Regulations this will apply to individuals as well as businesses as set out in paragraph 3.8 of Annex A.

We issued revised Enforcement Guidelines and a new Statement of Policy for financial penalties and consumer redress in 2014. In June of this year, following a consultation, we issued revised Procedural Guidelines and a revised Penalties Statement in respect of REMIT.

We can bring criminal prosecutions using the powers we have under a number of legislative frameworks. The available criminal offences cover areas such as unlicensed supply, failure to respond to information requests and market abuse. We will run criminal investigations in accordance with statutory requirements and relevant codes of practice. These include the Criminal Procedure and Investigations Act 1996 (CPIA) and the Police and Criminal Evidence Act 1984 (PACE) and the accompanying Codes of Practice.

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<sup>1</sup> REMIT is an EU regulation on wholesale energy market integrity and transparency that defines and prohibits market abuse in wholesale energy markets.

## **This consultation**

We are now consulting on a Prosecution Policy Statement to set out our approach to all criminal prosecutions including new REMIT offences. This will ensure that our processes are transparent for all prosecutions. The statement explains how we will use these prosecution powers, and how we will decide whether or not to prosecute in individual cases. We are seeking your comments on the proposed statement in Annex A. We summarise the key points below.

## **Our approach to our prosecution powers**

In line with other regulators, we act as the investigator and prosecutor of the alleged offences. The decision to prosecute is made entirely independently from the investigation team. The decision will be made by the Chair of the Enforcement Decision Panel or a legally qualified Panel member. The Chair/Panel member is independent of the case team.

Our proposed Policy Statement aims to make our approach to decision-making on criminal prosecutions fair, independent, objective and transparent. So we are proposing that the decision to prosecute is only made after applying the Full Code Test as set out in the Code for Crown Prosecutors. This Code is applied by the Crown Prosecution Service and other prosecutors either through convention or because they are required to do so by law.

The Full Code Test is made up of two stages. Firstly we consider the evidential stage: we must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. Only where the evidential test has been passed will we proceed to consider the public interest test. We must be satisfied that a prosecution would be in the public interest. Only where both tests are passed will we recommend proceeding with a prosecution. Our proposed decision-making process is set out in paragraphs 3.1-3.7 of the draft statement attached in Annex A.

## **Market abuse in wholesale energy markets**

In April 2015 the Electricity and Gas (Market Integrity and Transparency)(Criminal Sanctions) Regulations 2015 came into force. These created new criminal offences – which Ofgem can prosecute – of insider trading and market manipulation in wholesale energy products. We are required to publish guidelines on our policy for prosecuting under those Regulations. The final version of this Statement will do that.

In these market abuse cases we propose to apply the same approach and decision-making structures as with our other prosecution powers, applying the Code for Criminal Prosecutors. We also propose that the decision-maker takes into account three additional factors. These are in paragraph 3.10 of the draft Statement:

- the impact of the suspected market abuse on the orderliness of and confidence in wholesale energy markets
- whether there are grounds for believing that the suspected market abuse will continue or repeat, and if it appears that imposing a financial penalty would not deter further market abuse
- whether the person has a record of convictions for market abuse sanctions or has previously been subject to sanctions relating to market abuse

These ensure that our market abuse prosecution powers are used in circumstances where the suspected market abuse is particularly egregious in nature or impacts on the market, or because only a prosecution would deter future market abuse.

The statement sets out how we propose to approach situations where our legislative framework allows the potential for civil action or a criminal prosecution for market abuse arising from substantially the same matter. Our approach reflects the need to take appropriate and proportionate enforcement action and not to unfairly prejudice any related criminal proceedings.

### **Consultation questions**

*Q1: Do you agree with our proposed approach to the decision to prosecute criminal offences?*

*Q2: Do you agree that the additional factors set out for consideration in relation to REMIT market abuse offences are relevant and appropriate?*

*Q3: Are there any additional factors you feel we should set out in this policy statement?*

*Q4: Do you have any other comments on this policy statement?*

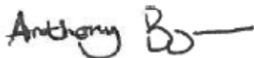
### **How to respond to this consultation**

We welcome your comments on the questions in this letter together with any other aspects of the statement in Annex A you may wish to raise.

Please send us your responses no later than Friday 25<sup>th</sup> September 2015 and email them to Andrew Shipp, Senior Enforcement Manager at [prosecution.consultation@ofgem.gov.uk](mailto:prosecution.consultation@ofgem.gov.uk)

Unless you mark them confidential, we will publish all responses on our website [www.ofgem.gov.uk](http://www.ofgem.gov.uk). If you wish your response to remain confidential please make this clear in your response and the reasons. We will respect this request unless the law requires us to disclose the information, for example under the Freedom of Information Act 2000.

Anthony Pygram  
Partner, Enforcement and Competition Policy



Annex A – Prosecution Policy Statement