

Annex A

PROSECUTION POLICY STATEMENT

1. INTRODUCTION

- 1.1. The Gas and Electricity Markets Authority (“the Authority”, “we”, “our”) regulates the gas and electricity markets in Great Britain. The Office of Gas and Electricity Markets (“Ofgem”) carries out the Authority’s day-to-day work and investigates matters on its behalf. Ofgem is a non-ministerial government department and an independent National Regulatory Authority.
- 1.2. We may investigate and prosecute certain criminal offences under legislation including the Gas Act 1986, the Electricity Act 1989 and the Electricity and Gas (Market Integrity and Transparency)(Criminal Sanctions) Regulations 2015 (“the REMIT¹ Criminal Regulations”). This policy statement explains how the Authority will determine whether to pursue a prosecution.
- 1.3. Under regulation 9 of the REMIT Criminal Regulations, we are required to publish guidelines setting out our policy in respect of prosecuting under those Regulations. This statement meets that requirement and sets out Ofgem’s prosecution policy more generally.
- 1.4. Please read this policy statement in conjunction with:
 - a. The Enforcement Guidelines: <https://www.ofgem.gov.uk/ofgem-publications/89755/enforcementguidelinesdecisiondocument12september2014publishedversion.pdf>
 - b. The REMIT Procedural Guidelines: <https://www.ofgem.gov.uk/ofgem-publications/95464/remitproceduralguidelines23june2015-pdf>
 - c. The REMIT Penalties Statement: <https://www.ofgem.gov.uk/ofgem-publications/95465/remitpenaltiesstatement23june2015-pdf>

2: CRIMINAL INVESTIGATIONS

- 2.1. We will launch criminal investigations in accordance with statutory requirements and relevant codes of practice, notably the Criminal Procedure and Investigations Act 1996 (CPIA) and the Police and Criminal Evidence Act 1984 (PACE).
- 2.2. If appropriate we will conduct a formal interview under caution. These will be held in accordance with PACE and the accompanying Codes of Practice. Ordinarily attendance for interviews will be on a voluntary basis. If a request to attend a voluntary interview is refused, we may ask the police to arrest an individual. We do not have statutory powers of arrest.

¹ REMIT is the EU regulation no. 1227/2011 on energy market integrity and transparency.

- 2.3. Ofgem will observe the requirements of the CPIA, the associated Codes of Practice and the Attorney General's Guidelines on Disclosure throughout the investigation and prosecution.

3: DECISION-MAKING PROCESS

England and Wales

- 3.1 The decision to prosecute will be made by applying the Full Code Test as set out in the Code for Crown Prosecutors and referred to below.
http://www.cps.gov.uk/publications/code_for_crown_prosecutors/.
- 3.2 In most cases, we will only decide whether to prosecute after the investigation is complete, and after all the available evidence has been reviewed. However there will be some cases where it is clear, before the evidence has been collected and considered, that the public interest does not require a criminal prosecution. In such circumstances, we may decide that the case should not proceed further. The investigation will then either close or an alternative disposal will be considered.
- 3.3 The decision to prosecute will only be made once the full extent of the criminality has been identified, so we can assess whether to prosecute would be in the public interest.
- 3.4 The Full Code Test has two stages:

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 when the evidential test has been met will the public interest test be considered. In the evidential test, we must consider the potential defence and how that may affect the prospects of conviction. We must also ask:

- i Can the evidence be used in court?
- ii Is the evidence reliable?
- iii Is the evidence credible?

The public interest stage: Where we consider whether a prosecution would be in the public interest. A prosecution will usually take place unless the public interest factors against it outweigh those in favour. When deciding whether prosecution is in the public interest, we will consider the questions below to identify and determine the public interest factors tending for and against prosecution. The questions are not exhaustive and not all of them will be relevant in every case:

- i How serious is the offence committed? The more serious the offence, the more likely a prosecution is required.
- ii How culpable does the suspect appear? The greater the suspect's culpability, the more likely it is that a prosecution is required.

- iii What harm was the victim caused, and what are their circumstances? The more vulnerable the victim(s), the more likely it is that a prosecution is required.
 - iv What is the impact on the community? The greater the impact of the offence on the community, the more likely it is that a prosecution is required.
 - v Is prosecution a proportionate response?
 - vi Do sources of information require protecting?
- 3.5 Only when both parts of the test are met can a prosecution begin. If we decide that prosecution is not appropriate, we will inform the affected parties.
- 3.6 The decision to prosecute will be kept under continuous review so that any new facts or circumstances, in support of or undermining the prosecution case are taken into account in the decision to continue or terminate the proceedings.
- 3.7 Where the circumstances warrant it and the evidence is available we may take a prosecution without prior warning or recourse to alternative actions.

Additional factors for REMIT market abuse offences

- 3.8 For the purpose of the REMIT Criminal Regulations, the enforcement vision and strategic objectives above apply to individuals as well as businesses.
- 3.9 We have the power to conduct investigations into wholesale energy market abuse under the Electricity and Gas (Market Integrity and Transparency)(Enforcement Etc.) Regulations 2013 (“the REMIT Enforcement Regulations”) and the REMIT Criminal Regulations. In some cases our investigation may conclude that the same circumstances may arguably involve a criminal offence of market abuse under the REMIT Criminal Regulations as well as a failure to comply with a REMIT requirement as defined in the REMIT Enforcement Regulations.
- 3.10 In these cases, we will need to decide whether to start a criminal prosecution for market abuse rather than pursue a civil sanction such as a penalty through our civil powers. When making this decision, we may, in addition to, and following consideration of the factors set out in the Full Code Test, consider the following factors:²
- a. the impact of the suspected market abuse on the orderliness of and confidence in wholesale energy markets
 - b. whether there are grounds for believing that the suspected market abuse will continue or repeat, and if it appears that imposing a financial penalty will not deter further market abuse
 - c. whether the person has a record of convictions for market abuse or has previously been subject to sanctions relating to market abuse

² This is a non-exhaustive list. The weight attached to each one of these factors may vary depending on the circumstances.

- 3.11 We will not generally pursue a civil sanction for a failure to comply with a REMIT requirement if a person is being prosecuted for market abuse offences arising from substantially the same matter. Neither will we generally pursue a civil sanction if a person has been convicted or acquitted of market abuse arising from substantially the same matter. Similarly we will not generally begin a prosecution for market abuse if we are or are seeking to impose a sanction for market abuse arising from substantially the same matter.
- 3.12 In cases where criminal proceedings have begun, or will begin, we may consider whether to also take civil action over the same or a related matter, and the same or a different party. This might include applying to the court for an injunction, or imposing a sanction under the REMIT Enforcement Regulations. The factors we may take into account when deciding this include:
- a. whether it is appropriate to take civil action, having regard to the scope of the criminal proceedings and the powers available to the criminal courts
 - b. whether, in our opinion, taking civil action might unfairly prejudice the prosecution, or proposed prosecution, of criminal offences
 - c. whether, in our opinion, taking civil action might unfairly prejudice the defendants in the criminal proceedings in the conduct of their defence

Scotland

- 3.13 In Scotland, it is the Procurator Fiscal who decides whether to bring a prosecution. After the investigation has been done, a report is submitted to the Procurator Fiscal, who then considers the evidence and decides what action to take in the public interest. See www.copfs.gov.uk.

4: WHO MAKES THE DECISION?

- 4.1 The decision to prosecute will be made by the Chair of the Enforcement Decision Panel or a legally qualified Panel member. The Enforcement Decision Panel is entirely independent of the case team. The decision will be free from departmental or Ministerial influence.

<https://www.ofgem.gov.uk/about-us/how-we-work/our-approach-regulation/enforcement-decision-panel.>

5: ALTERNATIVE ACTIONS

- 5.1 Depending on the provisions of the particular legislation, we may consider alternative action instead of a prosecution. This could include pursuing a civil sanction for breaching legal requirements, taking no further action, issuing advice or warnings, seeking undertakings, or issuing a formal caution. If we decide to issue a caution we will follow the Ministry of Justice guidance, Simple Cautions for Adult Offenders, commencement date 14 November 2013.

6: ANCILLIARY ORDERS

- 6.1 After conviction, the court may make additional ancillary orders such as disqualifying directors under the Company Directors Disqualification Act 1986, confiscating assets under the Proceeds of Crime Act 2002, and forfeiting equipment used to commit the offence. The Authority will seek to recover the costs of investigation and enforcement proceedings.

7: PUBLICITY

- 7.1 Ofgem will normally publicise the outcome of public hearings in criminal prosecutions. When conducting a criminal investigation, Ofgem may make a public announcement when suspects are arrested, when search warrants are executed and when charges are made. Public announcements may be considered at other stages of the investigation if appropriate. Ofgem will not release publicity material that may prejudice the fairness of any subsequent criminal proceedings.