



By email only

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Dear Mr Shipp,

### Consultation on Prosecution Policy Statement

Thank you for the opportunity to comment on your letter and consultation issued on 2 July.

Clearly, any decision to take criminal action will not be taken lightly, as Ofgem already has significant non-criminal sanctions that it can use to address problems in the markets it regulates. However, where a criminal prosecution is being considered, then it is important that Ofgem's decision-making process and whether or not to prosecute is both de facto and de jure separate from its investigation arm.

To that end, we welcome Ofgem's decision to abide by and apply the provisions in the Code for Crown Prosecutors (the Code), which governs the procedure followed by more traditional criminal law-enforcement bodies, even when it may not be legally necessary to do so (for example, because specific statutes under which Ofgem can prosecute do not require it). The corollary of applying the Code when launching a criminal investigation means that Ofgem will also follow the provisions of the Criminal Procedure and Investigations Act 1996 and the Police and Criminal Evidence Act 1984. Again, this is to be welcomed.

Turning to the draft Prosecution Policy Statement itself (the Statement), we make the following comments (for ease of reference, we refer to the numbering in the Statement when making them).

In **section 2.2**, it states:

*"If appropriate [our emphasis] we will conduct a formal interview under caution. These will be held in accordance with PACE and the accompanying Codes of Practice."*

This is ambiguous: we take it to mean that where a formal interview is necessary, it will always be conducted under caution; rather than as could be inferred, that where a formal interview takes place, Ofgem will decide if a caution is necessary (ie it is a permissive requirement whether or not to caution a suspect in these circumstances). Our understanding is that where a criminal investigation has been launched and a

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formal interview takes place, a caution must always be given for any evidence to be admissible in any subsequent court proceedings.

In **section 3.5**, Ofgem says that if a prosecution is not appropriate, it will inform the parties. On the grounds of fairness, this should be done quickly (as should the decision being taken about whether or not to prosecute).

**Sections 3.10 and 3.11** set out the considerations as to whether or not and when criminal or civil proceedings may be pursued. **Section 3.11**, in particular, sets out when a civil action will not be considered: in general terms, when a criminal prosecution is being pursued about the same matter in relation to market abuse; or when one has been completed about the same matter in relation to market abuse. However, this appears to be contradicted by **section 3.12**, where Ofgem reserves the right whether or not to take civil action when criminal proceedings have been commenced or will begin.

This seems unfair and raises the issue of double jeopardy. If the circumstances are sufficient to warrant a criminal prosecution, then that should clearly take its course. If it succeeds, the decision to undertake a prosecution was justified. If it fails, however, Ofgem must stand by that decision. Should new facts emerge, then it must consider its next steps by reference to the policy set out in the Statement and apply its provisions to test the weight of any new evidence. With the burden of proof being different between criminal and civil cases (beyond all reasonable doubt in the former; on the balance of probabilities in the latter), if Ofgem reserves the right to take civil action on the same evidence by which it had failed to secure a criminal conviction, it essentially gets to have 'a second bite of the cherry'. On a point of public policy, that cannot be right.

The section is also silent in the circumstances should there be a potential licence breach as well as any alleged criminal or civil offence(s) committed. Will Ofgem (continue to) pursue the former regardless of the outcome of any proceedings in relation to the latter? The same sentiments in the comments set out immediately above in relation to civil and criminal proceedings apply in these circumstances.

Ofgem's covering letter, on page 2 (under the heading "Our approach to our prosecution powers") and repeated in **section 4.1** of the Statement, says:

*"The decision [to prosecute] will be made by the Chair of the Enforcement Decision Panel or a legally qualified Panel member."*

While it is right that the decision whether or not to prosecute is taken independently of the investigation process, in the Crown Prosecution Service (CPS) the same decision (whether or not to prosecute based on the application of the Code) is, presumably, always taken by a criminal lawyer. This may not be the case for Ofgem prosecutions, as: (a) the Chair may not be legally qualified (although the current incumbent, John Swift, is, being a Queen's Counsel); and (b) even if he/she is qualified, or the decision is made by a lawyer on the Panel, they may not be a criminal lawyer. The decision taker or their legal adviser should be familiar with any legal precedents in applying the Code (for example, any case law, or new advice from the CPS that may affect what constitutes the public interest).

**Section 5** deals with alternative actions. This seems a sensible approach in that the remedies set out therein are *instead of* rather than *in addition to* a criminal prosecution. Again, however, affected parties should be told quickly what course of

action is being contemplated.

I hope you find the above helpful.

Yours sincerely,

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