



Making a positive difference
for energy consumers

To all interested parties

Date: 29 February 2016

Dear Colleague

Publication of our Prosecution Policy Statement

On 2 July 2015, we opened a public consultation on our proposed Prosecution Policy Statement. We received seven responses to our consultation by 25 September 2015, and I would like to thank the respondents to the consultation for their views. Stakeholders were supportive of the publication of a prosecution policy.

In line with other regulators, we act as the investigator and prosecutor of the alleged offences. We detailed our proposed policy in our letter dated 2 July 2015 in which we explained that the decision to prosecute would be made entirely independently from the investigation team. In the case of England and Wales, the decision to prosecute would be made by the Chair of the Enforcement Decision Panel or a legally qualified Panel member. All EDP members are independent of case teams. In Scotland, the Procurator Fiscal decides whether to bring a prosecution.

In the consultation, we proposed 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.

We have considered all the respondents' comments and are now publishing our Prosecution Policy Statement. Our Prosecution Policy Statement ensures our decision-making for criminal prosecutions is fair, independent, objective and transparent. Throughout development of the Prosecution Policy Statement, we have also taken into consideration any guidance from the Attorney General's office, as well as other regulators' prosecution policy statements to ensure a high-level of consistency and fairness.

As part of the public consultation, we asked stakeholders four 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?

In Annex 1, we have summarised respondents' key comments on each question and our response to each. We received a range of comments and have made some amendments to the Prosecution Policy Statement as a result. Some matters we consider are already addressed in the Prosecution Policy Statement, or are related to other procedures relating to investigation. In the Annex we provide further clarity on these matters to help our stakeholders better understand our position in these areas.

In addition, we have reviewed the Prosecution Policy Statement and made some minor amendments to the following areas:

- Decision-making process: Minor wording amendments to incorporate the Code for Crown Prosecutors, maintaining that in particular, we will apply the Full Code Test as set out in that Code.
- Alternative actions: We have removed reference to issuing a formal caution as Ofgem does not have this power.
- Ancillary Orders: We have removed specific reference to the Proceeds of Crime Act 2002 as Ofgem is currently not listed as an entity under the relevant regulations to seek confiscation of assets under this Act. However, should Ofgem become a listed authority in the future, this will be a possible additional ancillary order that the court may make. We have made minor wording amendments to allow this possibility by stating that 'After conviction, we may make an application to the court for any additional ancillary order available to us...'

The Criminal Prosecution Policy will take immediate effect.

Anthony Pygram
Partner, Enforcement and Compliance

ANNEX 1 - Summary of respondents' key comments to the proposed Prosecution Policy Statement and our response

Question 1: Do you agree with our proposed approach to the decision to prosecute criminal offences?

- Respondents' Views

A key element of the Prosecution Policy Statement is that 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 here:

http://www.cps.gov.uk/publications/code_for_crown_prosecutors/

The majority of respondents indicated support with this approach and the proposal that the decision to prosecute is made only once the Full Code Test has been applied.

Some respondents provided further comment on how we would apply the public interest test. For instance, one respondent commented that when deciding whether a criminal prosecution is in the public interest, the harm caused to victims and the impact on the community requires broad consideration given REMIT's primary focus on wholesale energy markets. Another respondent commented that the public interest test should be a positive obligation in that a prosecution should be brought where it is in the public interest to do so. A further respondent sought clarification on what is meant by a proportionate response and recognition that the decision by Ofgem as to whether to bring criminal sanctions is a serious one.

Another key element of the Prosecution Policy Statement is that 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. A respondent welcomed confirmation that the decision to prosecute will be made entirely independently from the investigation team. However, the respondent sought information about how Ofgem will ensure that independence is maintained throughout the investigation and decision-making process.

We also stated in the Prosecution Policy Statement that we may consider alternative action instead of a prosecution, depending on the provisions of the particular legislation. On this aspect of our approach, one respondent stated it would be helpful to provide examples of the circumstances in which alternative action may be taken, as well as examples of the circumstances in which the specific alternative actions would be pursued. Another respondent suggested that affected parties should be told quickly what course of action is being contemplated.

- Ofgem's Response

We are pleased that respondents agree with the proposal to apply the Full Code Test.

We are happy to clarify that outlined within the public interest stage of the Full Code Test; prosecutors should consider a set of questions. These questions include 'What are the circumstances of and the harm caused to the victim?', as well as 'What is the impact on the community?' We recognise that for REMIT market abuse offences, a broad consideration of the harm caused to victims and the impact on the community could be required. We would also note that the additional REMIT factors set out in the Prosecution Policy Statement provide further considerations to the Full Code Test that we may take into account when deciding whether to start a criminal prosecution for market abuse.

In relation to the comment about applying a positive obligation for the public interest test, the Full Code Test sets out that prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge.

In every case where there is sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest. The Full Code Test states that a prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour. The Full Code Test indicates that in some cases, the prosecutor may be satisfied that the public interest can be properly served by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal rather than bringing a prosecution. Please see the Full Code Test for further information.

In addition, whether a response is proportionate will be determined in light of the specific facts of the matter being investigated, taking into account such factors as financial gain/loss, the intention of the parties involved and any other relevant matters. This list is by no means exhaustive and will be dealt with on a case-by-case basis. The decision whether to pursue a criminal prosecution is a serious one, in line with the general principles set out in the Code for Crown Prosecutors. We re-iterate that by enforcing the law effectively, we can best protect the interests of existing and future gas and electricity customers and businesses in the sector.

We are pleased that a respondent specifically welcomed confirmation that the decision to prosecute will be made entirely independently from the investigation team. In England and Wales, the decision-maker will be the Chair or a legally qualified member of the Enforcement Decision Panel. The Enforcement Decision Panel was created to provide a clearly visible separation of functions between the investigation and decision-making functions of the Authority. It is populated by appropriately experienced and senior people who are separate from and independent of any investigation. We have edited the Prosecution Policy Statement to ensure clarity of the independence of the decision makers. In Scotland, it is the Procurator Fiscal who decides to bring a prosecution. The Crown Office and Procurator Fiscal Service provides Scotland's independent prosecution service.

In relation to comments about alternative action we may consider instead of a prosecution, the Prosecution Policy Statement lists the types of alternative action that may be taken. We expect that the alternative action we would take would depend upon the circumstances of the case. We have amended the Prosecution Policy Statement to reflect this. In the absence of specific examples at this time, we point readers to our Enforcement Guidelines¹ and, in the case of REMIT breaches, the REMIT Penalties Statement², which outline considerations we may take into account in pursuing alternative action.

In response to the respondent's comment about informing parties quickly what course of action is being contemplated, we have clarified in the Prosecution Policy Statement that we aim to advise affected parties as soon as reasonably practicable. We consider this as part of our responsibilities to be fair to parties involved.

Question 2: Do you agree that the additional factors set out for consideration in relation to REMIT market abuse offences are relevant and appropriate?

- Respondents' Views

The majority of respondents agreed with the additional factors set out for consideration in relation to REMIT market abuse offences as relevant and appropriate. The proposed factors outlined in the Prosecution Policy Statement were:

- a) the impact of the suspected market abuse on the orderliness of and confidence in wholesale energy markets

¹

https://www.ofgem.gov.uk/sites/default/files/docs/2014/09/enforcement_guidelines_12_september_2014_published_version_0.pdf

² https://www.ofgem.gov.uk/sites/default/files/docs/2015/06/remit_penalties_statement_23_june_2015_1.pdf

- 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

A respondent sought clarification on what is meant by the REMIT additional factor 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'*. The respondent asked whether it means the likelihood of the offender committing a repeat offence, or the likelihood of similar offences occurring elsewhere in the market.

The Prosecution Policy Statement highlighted that this is a non-exhaustive list and that the weight attached to each one of these factors may vary depending on the circumstances. However, a respondent suggested it would be helpful to provide further clarity in relation to the weighting to be applied to the various REMIT market abuse factors.

- Ofgem's response

We welcome confirmation from respondents that the REMIT additional factors are relevant and appropriate.

Where we stated that we may consider whether there are grounds for believing that suspected market abuse will continue or repeat, and if it appears that imposing a financial penalty will not deter further market abuse, this was intentionally broad to capture both the likelihood of the offender committing a repeat offence, and the likelihood of similar offences occurring elsewhere in the market

When deciding whether to pursue a criminal prosecution, we may take into account factors such as the likelihood of the offender committing a repeat offence or the likelihood of similar offences occurring elsewhere in the market. As stated in our REMIT Procedural Guidelines³, the Authority's strategic objective for its enforcement activities are to:

- *Deliver credible deterrence across its range of functions*
- *Ensure visible and meaningful consequences for businesses and individuals who fail consumers and who do not comply, and*
- *Achieve the greatest positive impact by targeting enforcement resources and powers.*

In REMIT cases, we will apply these objectives to individuals as well, not solely to businesses. When exercising our REMIT powers, we will act in a manner that we consider is best calculated to, among other things, maintain confidence in the integrity of wholesale energy markets and to deter failures to comply with REMIT requirements.

In response to the comment about providing further clarity in relation to weighting of the REMIT market abuse factors, we have maintained our position that the list is non-exhaustive and the weight attached to each of these factors may vary depending on the circumstances. Decisions whether to prosecute for REMIT market abuse will be considered on a case-by-case basis. This is aligned to guidance provided in the Full Code Test, in that the weight to be attached to the questions relating to public interest, and the factors identified, will vary according to the facts and merits of each case. We have, however, made an amendment to the relevant footnote to the Prosecution Policy Statement that the weight attached to each one of these factors may vary according to the facts and merits of each case.

³ https://www.ofgem.gov.uk/sites/default/files/docs/2015/06/remit_procedural_guidelines_23_june_2015_0.pdf

Question 3: Are there any additional factors you feel we should set out in this policy statement?

- Respondents' Views

While the majority of respondents agreed with the proposed additional factors set out for consideration in relation to REMIT market abuse offences as relevant and appropriate, there were mixed views as to whether there should be additional factors to be set out for the REMIT market abuse offences. Several stakeholders agreed with the additional factors as set out. Another respondent considered that the additional factors in the Prosecution Policy Statement were comprehensive. One respondent stated that they would like to see all factors from the REMIT Penalties Statement and the REMIT Procedural Guidelines incorporated into the policy statement, while other stakeholders appeared comfortable with the proposed selection and indicated that no further factors should be included. A further respondent proposed specific additional factors to be considered.

On this particular question, one respondent commented that the criminal REMIT regime states that an individual can commit an offence without intent if they are reckless in their actions, whereas the civil regime is less clear on this point. As such, the respondent suggested that it would be useful for the guidelines to state that a criminal action should not be brought solely because the wording of the criminal test provides Ofgem better prospect for successful enforcement than under the civil regime.

- Ofgem's response

There was useful discussion around the proposed additional factors in relation to market abuse with all participants generally positive. Following the responses, we consider the proposed additional factors strike an appropriate balance and have chosen to maintain the three additional factors listed in the original consultation. The additional factors listed in the Prosecution Policy Statement for the REMIT market abuse offences are not necessarily exhaustive. We selected those three factors in particular as we consider these to be most likely applicable, either individually or in combination, to a decision to pursue criminal prosecution in most circumstances for REMIT market abuse. We note that some of the content stakeholders would like incorporated in the Prosecution Policy Statement are already provided for in the Full Code Test, such as the level of seriousness of the offence committed, the level of culpability of the suspect, the circumstances of the individual and the harm caused to victims.

With regard to the comment relating to intent, the REMIT Regulation, as enforced under the civil regime, focuses on the effect of conduct rather than a person's state of mind. Where REMIT is silent regarding the person's state of mind, it is not necessary for Ofgem to demonstrate recklessness, intent or any other state of mind in order to find a failure to comply under the REMIT civil regulations. It should be noted however that if a person acted with intent or was reckless, this could be relevant to any civil sanction imposed.

Question 4: Do you have any other comments on this policy statement?

A number of further comments were received from respondents. We outline those comments and our response below.

Use of civil and criminal powers in the same or related matters (relating to REMIT market abuse provisions)

In the proposed Prosecution Policy Statement, we stated that:

'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.'

- Respondents' Views

A respondent suggested that the proposed Prosecution Policy statement set an expectation that Ofgem will not generally pursue both a civil enforcement action and a criminal prosecution for the same REMIT matter. However, the respondent expressed concerns about the proposal that Ofgem may consider whether to also take civil action over the same or related matter, including a sanction under the REMIT Enforcement Regulations in cases where criminal proceedings have begun or will begin. One respondent stated Ofgem should adopt the same policy position as the Financial Conduct Authority who (the respondent stated) do not apply this approach.

Similarly, another stakeholder raised similar concerns and suggested that this raises the issue of double jeopardy. Another respondent also indicated that the section is silent on circumstances should there be a potential licence breach as well as any alleged criminal or civil REMIT offences committed.

- Ofgem's Response

We have refined paragraphs 3.11 and 3.12 to provide clarity for our stakeholders on our proposed approach to the use of civil and criminal powers in the same or related matters. Paragraph 3.11 has been revised to reflect that we will not generally impose a civil penalty (previously this stated 'sanction') for a failure to comply with REMIT requirements relating to Articles 3 and 5 of REMIT as provided for in the REMIT Enforcement Regulations if a person is being prosecuted for market abuse offences arising from substantially the same matter. However, we may consider taking civil action such as applying to the court for an injunction and other civil action which might be appropriate in the circumstances of the case, but taking into consideration the factors outlined in paragraph 3.11.

We will take the decision to prosecute taking into account the Prosecution Policy Statement and the Code for Crown Prosecutors. The Code for Crown Prosecutors states prosecutors must apply the principles of the European Convention on Human Rights, in accordance with the Human Rights Act 1998, at each stage of a case, as well as comply with guidelines issued by the Attorney General; Criminal Procedure Rules currently in force; and have regard to the obligations arising from international conventions.

Conduct of investigations

- Respondents' Views

Some stakeholders commented on areas relating to how we might conduct investigations. For instance:

- i. One respondent commented that it would expect REMIT investigations to begin as civil investigations;
- ii. A stakeholder also sought clarification on whether enforcement under both the civil and criminal powers will be considered in every case of a potential breach of REMIT;
- iii. A respondent sought clarification about Ofgem's approach to carrying out criminal investigations in respect of a failure to respond to an information request and the new REMIT offences;
- iv. A respondent commented that the appropriateness of a criminal sanction should be kept under review throughout an investigation;
- v. A stakeholder raised ambiguity in Ofgem's approach to interviews in criminal investigations, and also suggested that if prosecution is not appropriate, Ofgem should inform the parties quickly.

- Ofgem's response

The Prosecution Policy Statement sets out how we will decide whether or not to prosecute in individual cases. Most of the additional comments relate to how investigations are conducted. We will conduct criminal investigations, including any interviews, in accordance with PACE⁴ and the accompanying PACE codes of practice. We have made amendments to the Prosecution Policy Statement to ensure that this point is clear. We do not believe that other changes are necessary to address these comments, but we will consider whether changes may be needed in our REMIT Procedural Guidelines for criminal investigations.

To provide clarification to respondents' specific comments:

- i. As stakeholders will be aware, there are specific requirements which apply to the gathering of evidence for criminal matters. It is unlikely to be practical for a matter commenced as a civil investigation to subsequently be pursued as a criminal investigation as suggested by stakeholders. It is, however, possible for Ofgem to decide to take forward a matter commenced as a criminal matter as a civil matter.*
- ii. We would like to clarify that not all REMIT provisions contain criminal offences. For instance, breaches of REMIT requirements for registration, reporting and the obligation to disclose inside information contain civil provisions only. Where there is an overlap between criminal and civil powers, both options will be considered.*
- iii. It should be noted that where a person fails to comply with an information requirement under the Electricity and Gas (Market Integrity and Transparency) Enforcement etc.) Regulations 2013, the Electricity Act 1989, the Gas Act 1986 or the Competition Act 1998 Ofgem may certify that fact in writing to the High Court or Court of Session. The Court may then deal with such person as if he or she were in contempt of court.*
- iv. We agree that the appropriateness of a criminal sanction should be kept on a constant review throughout an investigation. We anticipate through the collection of evidence that such reviews might be made and we will be fair, independent and*

⁴ Applies in England and Wales only

objective. The Prosecution Policy Statement states that 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 proceedings.

- v. *We will conduct criminal investigations, including any interviews, in accordance with PACE and the accompanying PACE codes of practice. We will aim to inform parties as soon as reasonably practicable if we decide criminal prosecution is inappropriate. We have made amendments to the Prosecution Policy Statement to ensure that this point is clear.*

Skills of those involved in investigations and prosecutions

- Respondents' Views

A respondent suggested that to support greater trust in the implementation of the policy, there must be high levels of confidence in the competencies of those carrying out enforcement functions. The respondent recommended that the Prosecution Policy Statement clearly set out the minimum competency levels set for all those involved in investigation or prosecution as they are specialist topics.

- Ofgem's response

Our staff receive appropriate training in line with their respective roles, with suitable experience and seniority provided for each investigation.

We do not consider it appropriate to incorporate wording about investigator skills in the Prosecution Policy Statement as the purpose of the Prosecution Policy Statement is to explain how we will use our prosecution powers, and how we will decide whether or not to prosecute individual cases (rather than how we investigate and how we would run a prosecution).

Decision-making

- Respondents' Views

A respondent suggested that a legally qualified panel member acting alone should not be allowed to make the decision whether or not to prosecute as non-legal factors should also be considered. A further respondent suggested that the decision should be made by a criminal lawyer and questioned whether the Chair of the EDP will always be a legally qualified person should the current incumbent leave.

- Ofgem's Response

We note that it is important to have a decision-maker that has suitable experience in the regulatory sphere. As such, we will ensure that the membership of the Enforcement Decision Panel contains the relevant experience and expertise in order to fulfil its functions. The Enforcement Decision Panel will always remain independent from our investigations teams. The decision-maker for criminal prosecutions can request additional advice on legal matters as well as advice on non-legal factors should they require. However, ultimately the decision to prosecute lies with that member of the EDP.

Publicity and publication

- Respondents' Views

A respondent welcomed Ofgem's publicity policy. One stakeholder indicated that it would welcome clarification that Ofgem will, so far as possible, keep confidential any commercially sensitive information in relation to the publication of matters relating to investigations.

- Ofgem's response

We confirm that we will, so far as possible, keep confidential information we consider to be commercially sensitive. We will make our own assessment of whether material should be treated as confidential. This will depend on the circumstances and will be assessed on a case-by-case basis. Any request that information is treated as confidential will be considered in accordance with the appropriate legislation.

Even where information is marked as confidential or the source does not wish it to be disclosed, there may still be circumstances in which its disclosure is required. Information, including personal information, may be subject to publication or disclosure in accordance with the Freedom of Information Act (FOIA) 2000. In our handling of information, we will act in accordance with our obligations under the Data Protection Act (DPA) 1998.

We will comply with relevant statutory duties when considering whether to disclose any information.

Prosecution of firms and/or individuals

- Respondents' Views

One stakeholder sought clarification on situations when Ofgem would pursue business and/or individuals for REMIT offences

- Ofgem's response

We can pursue a firm or an individual or both under our REMIT powers. We will consider all the relevant circumstances in deciding the appropriate action to take and while such factors may be common to individuals and firms in respect of a particular matter, the position of each person (firm and individual) will be considered specifically. For us to pursue a criminal prosecution, we must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge.