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By email to: [prosecution.consultation@ofgem.gov.uk](mailto:prosecution.consultation@ofgem.gov.uk)

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Dear Andrew,

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

EDF Energy is one of the UK's largest energy companies with activities throughout the energy chain. Our interests include nuclear, coal and gas-fired electricity generation, renewables, and energy supply to end users. We have over five million electricity and gas customer accounts in the UK, including residential and business users.

We welcome the opportunity to respond to Ofgem's proposed prosecution policy statement. Our comments are set out below and relate to the policy statement in the context of REMIT.

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

Yes. We note at paragraph 3.2 the draft policy says that "in most cases" the decision to prosecute will be made after the investigation is complete and after all the evidence has been reviewed. This will particularly be the case for REMIT investigations recognising the low threshold for launching such investigations. Because of this, we would expect REMIT investigations to begin as civil investigations.

We anticipate Ofgem exercising caution in the use of its criminal prosecution powers, both in the context of the comparative lack of experience of the market abuse offences under REMIT, which remain untested in terms of enforcement action and decisions, and more generally recognising that criminal prosecutions should be reserved for the most serious market abuse cases.

In terms of deciding whether a criminal prosecution is in the public interest, the harm caused to "victims" and the impact on the community will require a broad consideration given REMIT's primary focus on wholesale energy markets.

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

To the extent that the additional factors listed are also factors that are more likely to result in a financial penalty and/or restitution order under Ofgem's civil REMIT penalties statement, they appear relevant and appropriate.

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

No.

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

We know that paragraphs 3.10 and 3.11 of the draft policy statement set an expectation that Ofgem will not normally pursue both a civil enforcement action and a criminal prosecution for the same REMIT matter. However, paragraph 3.12 then says in cases where criminal proceedings have begun or will begin, Ofgem will consider whether to also take civil action over the same or related matter, including a sanction under the REMIT Enforcement Regulations.

In this regard, we note by comparison the FCA's policy position that it will not impose a sanction for the civil offence of market abuse where a person is being prosecuted for criminal market misconduct, or has been finally convicted or acquitted of market misconduct in a criminal prosecution arising from substantially the same allegation. Similarly, the FCA will not commence a criminal prosecution for market misconduct where it has brought or is seeking to bring disciplinary proceedings for market abuse arising from substantially the same allegations (section 12.10 of the FCA's Enforcement Guide).

Given the very close similarities between REMIT market abuse and financial market abuse, and recognising that market abuse under REMIT could involve behaviour in respect of financial energy derivatives (under the jurisdiction of the FCA), we believe Ofgem should adopt the same policy position as the FCA.

Should you wish to discuss any of the issues raised in our response or have any queries, please contact Ian George on 01452 654498, or myself.

Yours sincerely

A handwritten signature in blue ink that reads "Paul Delamare".

**Paul Delamare**  
**Head of Customers Policy and Regulation**