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## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (OJ No L 326, 08.12.2011, p1) (“REMIT”) imposes obligations and prohibitions in relation to trading in wholesale energy products within the European Union. “Wholesale energy products” are contracts and derivatives relating to electricity and gas, as defined in Article 2(4) of REMIT.

Article 18 of REMIT requires member States to put in place rules on penalties for failures to comply with REMIT.

Article 13 of REMIT provides that enforcement of REMIT requirements is the responsibility of “national regulatory authorities”; for Great Britain that is the Gas and Electricity Markets Authority (“the Authority”). (Article 2(10) of REMIT defines national regulatory authority by reference to designation in accordance with other EU legislation; the Authority is designated by section 3A(1) of the Utilities Act 2000 (c. 27), which was inserted by regulation 22 of the Electricity and Gas (Internal Markets) Regulations 2011 (S.I. 2011/2704).)

Article 13 of REMIT requires member States to ensure that national regulatory authorities have the necessary investigatory and enforcement powers.

Article 14 of REMIT requires member States to ensure that a person affected by a decision of the Authority has a right of appeal.

These Regulations give effect to Articles 13, 14 and 18 of REMIT, and make related provision, so far as obligations and prohibitions in REMIT apply; they give effect to Articles 13, 14 and 18 in respect of Article 3 (prohibition of insider trading), Article 4 (obligation to publish inside information), Article 5 (prohibition of market manipulation) and Article 15 (obligations of persons professionally arranging transactions) (collectively, “REMIT requirements”, defined in regulation 4). (The obligations in Article 8 (data collection) and Article 9 (registration of market participants) do not yet apply: see Article 22 of REMIT.)

Part 3 of these Regulations imposes an obligation on specified persons to record and retain records (regulation 8), provides the Authority with powers to require information (regulations 9 and 11), and generally enables the Authority to conduct investigations (regulations 10 to 19). The Authority’s investigatory powers include power to summon and hear (regulation 12), power to require the production of reports by skilled persons (regulation 13) and power to enter premises under a warrant (regulation 16). Regulation 20 makes provision for failure to comply with Part 3 requirements.

Part 4 of these Regulations makes provision for injunctions (in Scotland, interdicts) – for example, to restrain a person who a court (High Court or Court of Session) is satisfied is failing to comply with a REMIT requirement (regulation 21). Part 4 also makes provision for restitution if a person has accrued profits or caused loss or other adverse effect by failing to comply with a REMIT requirement. Restitution may be ordered by the court on the application of the Authority (regulation 22) or may be required by the Authority (regulations 23 to 25).

Part 5 of these Regulations makes provision in respect of penalties. It enables the Authority to impose either a penalty or a statement of censure if a person has failed to comply either with a REMIT requirement or regulation 8 of these Regulations (regulation 26). The Authority must produce and publish a statement of policy with respect to penalties to which it must have regard when exercising its regulation 26 power (regulations 27 and 29). Until the Authority has published such a statement of penalty policy, Schedule 3 makes transitory provision as to the policy to which the Authority

*Status: This is the original version (as it was originally made).*

must have regard. The statement of policy referred to in paragraph 4 of Schedule 3 is published at <http://www.ofgem.gov.uk/About%20us/Documents1/Utilities%20Act%20-%20Statement%20of%20policy%20with%20respect%20to%20financial%20penalties.pdf>. Regulation 32 also enables the court to impose a penalty, when the Authority has applied for an injunction or restitution order.

Part 6 of these Regulations provides further details on the notices that must be given by the Authority when exercising either its power to require restitution or its power to impose a penalty or statement of censure (regulations 35 to 38, building on regulations 24, 25, 30 and 31), and on the Authority's procedures in respect of those notices (regulations 42 and 43). Regulation 39 makes provision in relation to the publication of notices (and details concerning them). Part 6 also confers rights on third parties who may be prejudiced by warning or decision notices given by the Authority (regulation 40) and provides for access to Authority material (regulation 41).

Regulations 25 (restitution), 31 (penalty) and 40 (third party) confer rights of appeal ("reference") to the Upper Tribunal. Part 7 makes provision in respect of those references. This includes amendments to regulations made under section 9 of the Legal Aid (Scotland) Act 1986 (s. 47), extending assistance by way of representation in Scotland to references against penalty decisions under these Regulations (regulation 47). (No amendment is required for England and Wales: section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10) (which provides for civil legal services in exceptional cases) applies.)

Schedule 1 to these Regulations provides for the application of these Regulations to the Crown. Schedule 2 makes provision as to service of notices. Part 2 imposes a duty on the Authority to advise and assist the Secretary of State in relation to REMIT and these Regulations. Part 8 makes provision as to the application of the offences created by regulations 20 and 46 of these Regulations. (Regulation 50(4) and (5) makes no provision in relation to Scotland because sections 70 and 141 of the Criminal Procedure (Scotland) Act 1995 (c. 46) apply.) Part 9 makes miscellaneous provision as to the disclosure and protection of information.

Regulation 53 (also Part 9) requires the Secretary of State to review the operation and effect of these Regulations and publish a report within five years after they come into force and within every five years after that. Following a review it will fall to the Secretary of State to consider whether the Regulations should remain as they are, or be revoked or be amended. A further instrument would be needed to revoke the Regulations or to amend them.

A full regulatory impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sectors is foreseen.