

**2013 No. 1389**

**ELECTRICITY**

**GAS**

**The Electricity and Gas (Market  
Integrity and Transparency)  
(Enforcement etc.) Regulations  
2013**

*Made - - - -*

*4th June 2013*

*Laid before Parliament*

*6th June 2013*

*Coming into force - -*

*29th June 2013*



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The Secretary of State is designated<sup>(a)</sup> for the purposes of section 2(2) of the European Communities Act 1972<sup>(b)</sup> in relation to energy and energy sources.

The Secretary of State makes the following Regulations in exercise of the powers conferred by section 2(2) of that Act.

**PART 1**

**General**

**Citation, commencement and extent**

**1.**—(1) These Regulations may be cited as the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 and come into force on 29th June 2013.

(2) These Regulations do not extend to Northern Ireland.

**Interpretation**

**2.** In these Regulations—

“the Authority” means the Gas and Electricity Markets Authority;

“chief executive”, in relation to a body corporate, means an employee of that body who, alone or jointly with one or more others, is responsible under the immediate authority of the directors, for the conduct of the whole of the business of that body;

“director”, in relation to a body corporate, includes—

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<sup>(a)</sup> S.I. 2010/761.

<sup>(b)</sup> 1972 c. 68; section 2(2) was amended by section 27(1)(a) of the Legislative and Regulatory Reform Act 2006 (c. 51) and by section 3(3) of, and Part 1 of the Schedule to, the European Union (Amendment) Act 2008 (c. 7).

(a) a person occupying in relation to it the position of a director (by whatever name called);  
and

(b) a person in accordance with whose directions or instructions (not being advice given in a professional capacity) the directors of that body are accustomed to act;

“documents” includes information recorded in any form and, in relation to information recorded otherwise than in legible form, references to its production include references to producing a copy of the information in legible form, or in a form from which it can readily be produced in visible and legible form;

“investigation” means an investigation conducted in accordance with regulation 10;

“premises” has the same meaning as in section 23 of the Police and Criminal Evidence Act 1984<sup>(a)</sup>;

“regulated person” has the meaning given in regulation 3;

“REMIT” means Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency<sup>(b)</sup>;

“REMIT requirement” has the meaning given in regulation 4;

“the Tribunal” means the Upper Tribunal;

“wholesale energy market” has the same meaning as in REMIT.

### **Regulated person**

3.—(1) “Regulated person” means any person who is—

(a) a market participant; or

(b) a person subject to an obligation imposed by Article 15 of REMIT.

(2) In this regulation, “market participant” has the same meaning as in REMIT.

### **REMIT requirement**

4. “REMIT requirement” means a requirement imposed by any of the following Articles of REMIT—

(a) Article 3(1) and (5) (prohibition of insider trading);

(b) Article 4(1), (2) and (3) (obligation to publish inside information);

(c) Article 5 (prohibition of market manipulation);

(d) Article 15 (obligations of persons professionally arranging transactions).

### **Application to the Crown etc**

5. Schedule 1 (application to the Crown etc) has effect.

### **Service of notices**

6. Schedule 2 (service of notices) has effect.

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(a) 1984 c. 60; section 23 was amended by section 103(2) of the Energy Act 2004 (c. 20).

(b) OJ No L 326, 08.12.2011, p1.

## PART 2

### Functions of the Authority

#### Authority's general functions

7. It shall be the duty of the Authority, where either it considers it expedient or it is requested by the Secretary of State to do so, to give information, advice and assistance to the Secretary of State with respect to any matter in respect of which any of the Authority's functions under REMIT or these Regulations is exercisable.

## PART 3

### Information and Investigations

#### Obligation to record and retain records

#### Obligation to record and retain records

8.—(1) This regulation applies to any person ("RP") who is a regulated person except a person—

- (a) who is an individual; and
- (b) who is acting in the course of employment by another regulated person.

(2) In this regulation, "relevant communication" means any telephone conversation or electronic communication made for the direct or indirect purpose of entering into any transaction in wholesale energy products, where—

- (a) "electronic communication" includes any communication made by way of fax, email or instant messaging device; and
- (b) "wholesale energy products" has the same meaning as in REMIT.

(3) RP must take reasonable steps to ensure—

- (a) that any relevant communication is recorded; and
- (b) that a copy of any relevant communication is retained in accordance with paragraph (4).

(4) A copy of any relevant communication is to be retained—

- (a) for a period of at least six months from the date the record was created; and
- (b) in a medium that allows the storage of information in a way that is accessible for future reference by the Authority when the Authority is exercising the powers conferred on it by regulation 9, 11, 14 or 16.

(5) In paragraph (4), the obligation to ensure that storage is accessible for future reference by the Authority includes that—

- (a) the Authority must be able to access the record readily;
- (b) the Authority must be able to easily ascertain—
  - (i) if any correction or other amendment has been made to a record, and
  - (ii) the content of any record prior to such correction or amendment; and
- (c) it must not be possible for any record to be otherwise manipulated or altered.

(6) RP must take reasonable steps to prevent the making, sending or receiving of any relevant communication (including on privately-owned equipment)—

- (a) that it cannot ensure is recorded, or
- (b) if it cannot ensure that a copy is retained in accordance with paragraph (4).

(7) The Authority may, by notice in writing, require RP to ensure that any specified relevant communication is retained beyond the period required by paragraph (4)(a) and until a specified date.

(8) If the Authority no longer requires RP to ensure that any specified relevant communication is retained in accordance with paragraph (7) it must notify RP in writing.

(9) In paragraphs (7) and (8), “specified” means specified in the notice.

Power to require information: regulated persons etc

### **Authority’s power to require information: regulated persons etc**

**9.—**(1) This regulation applies only to information and documents reasonably required by the Authority in connection with monitoring the integrity and transparency of the wholesale energy market.

(2) The Authority may, by notice in writing, require any regulated person—

- (a) to provide specified information or information of a specified description; or
- (b) to produce specified documents or documents of a specified description.

(3) The information or documents must be provided or produced—

- (a) before the end of such reasonable period as may be specified; and
- (b) at such place as may be specified.

(4) The Authority may require any information provided under this regulation to be provided in such form as it may reasonably require.

(5) The Authority may require—

- (a) any information provided, whether in a document or otherwise, to be verified in such manner, or
- (b) any document produced to be authenticated in such manner,

as it may reasonably require.

(6) The powers conferred by paragraph (2) may also be exercised to impose requirements on a person who is connected with a regulated person.

(7) In this regulation, “regulated person” includes a person who was at any time a regulated person but who has ceased to be a regulated person.

(8) In paragraphs (2) and (3), “specified” means specified in the notice.

(9) For the purposes of this regulation, a person is connected with a regulated person (“RP”) if the person is or has at any relevant time been—

- (a) a member of RP’s group;
- (b) a controller of RP;
- (c) any other member of a partnership of which RP is a member; or
- (d) in relation to RP, a person mentioned in Part I of Schedule 15 to the Financial Services and Markets Act 2000<sup>(a)</sup> (the “2000 Act”) (reading references in that Part to the authorised person as references to RP).

(10) In paragraph (9)—

- (a) “group” has the same meaning as in section 421 of the 2000 Act<sup>(b)</sup> (reading references in that section to A as references to RP);

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<sup>(a)</sup> 2000 c. 8.

<sup>(b)</sup> Section 421 was amended by paragraph 212 of Schedule 1 to the Companies Act 2006 (Consequential Amendments etc) Order 2008 (S.I. 2008/948).

- (b) “controller” has the same meaning as in section 422 of the 2000 Act<sup>(a)</sup> (reading references in that section to B as references to RP).

## Investigations

### Power of Authority to investigate

**10.**—(1) The Authority may conduct an investigation if it appears to the Authority that there are circumstances suggesting that a person—

- (a) may have failed to comply with a REMIT requirement;
- (b) may have failed to comply with a requirement imposed by or under regulation 8; or
- (c) may be guilty of an offence under regulation 20.

(2) For the purposes of an investigation under paragraph (1)(a) or (c) the Authority has the powers conferred by regulations 11 to 19.

(3) For the purposes of an investigation under paragraph (1)(b) the Authority has the powers conferred by regulations 11 to 15.

### Authority’s power to require information

**11.**—(1) The Authority may, by notice in writing, require any person—

- (a) to provide specified information or information of a specified description; or
- (b) to produce specified documents or documents of a specified description,

which appear to the Authority to relate to any matter relevant to the investigation.

(2) The information or documents must be provided or produced—

- (a) before the end of such reasonable period as may be specified; and
- (b) at such place as may be specified.

(3) The Authority may require any information provided under this regulation to be provided in such form as it may reasonably require.

(4) The Authority may require—

- (a) any information provided, whether in a document or otherwise, to be verified in such manner; or
- (b) any document produced to be authenticated in such manner,

as it may reasonably require.

(5) In paragraphs (1) and (2), “specified” means specified in the notice.

### Authority’s power to summon and hear

**12.**—(1) Paragraphs (2) and (3) apply if the Authority considers that any person (“P”) is or may be able to give information which is or may be relevant to the investigation.

(2) The Authority may require P to attend before a person authorised by the Authority at a specified time and place and answer questions.

(3) The Authority may also otherwise require P to give the Authority all assistance in connection with the investigation which P is reasonably able to give.

(4) In paragraph (2), “specified” means specified in a notice in writing.

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(a) Section 422 was amended by Schedule 3 to the Financial Services and Markets Act 2000 (Controllers) Regulations 2009 (S.I. 2009/534).

**Reports by skilled persons**

13.—(1) This regulation applies where the Authority has required or could require a person to whom paragraph (2) applies (“the person concerned”) to provide information or produce documents with respect to any matter (“the matter concerned”).

(2) This paragraph applies to—

- (a) any regulated person (“RP”);
- (b) any other member of RP’s group;
- (c) a partnership of which RP is a member; or
- (d) a person who has at any relevant time been a person falling within sub-paragraph (a), (b) or (c),

who is, or was at the relevant time, carrying on a business.

(3) In paragraph (2), “group” has the same meaning as in section 421 of the Financial Services and Markets Act 2000 (reading references in that section to A as references to RP).

(4) The Authority may either—

- (a) by notice in writing given to the person concerned, require the person concerned to provide the Authority with a report on the matter concerned, or
- (b) itself appoint a person to provide the Authority with a report on the matter concerned.

(5) When acting under paragraph (4)(a), the Authority may require the report to be in such form as may be specified in the notice.

(6) The Authority must give notice of an appointment under paragraph (4)(b) to the person concerned.

(7) The person appointed to make a report—

- (a) must be a person appearing to the Authority to have the skills necessary to make a report on the matter concerned, and
- (b) where the appointment is to be made by the person concerned, must be a person nominated or approved by the Authority.

(8) It is the duty of—

- (a) the person concerned, and
- (b) any person who is providing (or who has at any time provided) services to the person concerned in relation to the matter concerned,

to give the person appointed to prepare a report all such assistance as the appointed person may reasonably require.

(9) The obligation imposed by paragraph (8) is enforceable, on the application of the Authority, by an injunction or, in Scotland, by an order for specific performance under section 45 of the Court of Session Act 1988(a).

**Information and documents: supplemental provisions**

14.—(1) If the Authority has power under this Part to require a person to produce a document but it appears to the Authority that the document is in the possession of a third person, that power may be exercised in relation to the third person.

(2) If a document is produced in response to a requirement imposed under this Part, the Authority may—

- (a) take copies or extracts from the document; or

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(a) 1988 c. 36.

(b) require the person producing the document, or any relevant person, to provide an explanation of the document.

(3) A document so produced may be retained for so long as the Authority considers that it is necessary to retain it (rather than copies of it) for the purposes for which the document was requested.

(4) If the Authority has reasonable grounds for believing—

(a) that the document may have to be produced for the purposes of any legal proceedings, and

(b) that it might otherwise be unavailable for those purposes,

it may be retained until the proceedings are concluded.

(5) If a person (“FP”) who is required under this Part to produce a document fails to do so, the Authority may require FP to state, to the best of FP’s knowledge and belief, where the document is.

(6) A lawyer may be required under this Part to furnish the name and address of the lawyer’s client.

(7) If a person claims a lien on a document, its production under this Part does not affect the lien.

(8) In paragraph (2), “relevant person”, in relation to a person who is required to produce a document, means a person who—

(a) has been or is proposed to be a director or controller of that person;

(b) has been or is an auditor of that person;

(c) has been or is an actuary, accountant or lawyer appointed or instructed by that person; or

(d) has been or is an employee of that person.

### **Admissibility of statements**

**15.—**(1) A statement made to the Authority by a person in compliance with an information requirement is admissible in evidence in any proceedings, so long as it also complies with any requirements governing the admissibility of evidence in the circumstances in question.

(2) But in criminal proceedings in which that person is charged with an offence to which this subsection applies or in proceedings in relation to action against that person under regulation 26—

(a) no evidence relating to the statement may be adduced, and

(b) no question relating to it may be asked,

by or on behalf of the prosecution or (as the case may be) the Authority, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person.

(3) Paragraph (2) applies to any offence other than one—

(a) under regulation 20(6);

(b) under section 5 of the Perjury Act 1911<sup>(a)</sup> (false statements made otherwise than on oath); or

(c) under section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995<sup>(b)</sup> (false statements made otherwise than on oath).

(4) In paragraph (1), “information requirement” means a requirement imposed by the Authority under regulation 11, 12 or 14.

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(a) 1911 c. 6 (1 & 2 Geo 5).

(b) 1995 c. 39.



Investigations: Power to enter premises for the purposes of an investigation under regulation 10(1)(a) or (c)

**Power to enter premises under a warrant**

16.—(1) A justice of the peace may issue a warrant under this regulation if satisfied on information on oath given by a person authorised by the Authority that there are reasonable grounds for believing that the first or second set of conditions is satisfied.

(2) The first set of conditions is—

- (a) that a person on whom a requirement under regulation 11 has been imposed has failed (wholly or in part) to comply with it; and
- (b) that on the premises specified in the warrant—
  - (i) there are documents which have been required; or
  - (ii) there is information which has been required.

(3) The second set of conditions is—

- (a) that the premises specified in the warrant are premises of a regulated person;
- (b) that there is on the premises any document or information in relation to which a requirement under regulation 11 could be imposed; and
- (c) that if such a requirement were to be imposed—
  - (i) it would not be complied with; or
  - (ii) the document or information to which it related would be removed, tampered with, concealed or destroyed.

(4) A warrant under this regulation is a warrant authorising a person authorised by the Authority who is named in it (“AP”)—

- (a) to enter and search the premises specified in it;
- (b) to take such other persons with AP as the Authority considers are needed to assist AP in doing anything that AP is authorised to do under the warrant;
- (c) to take possession of any documents or information appearing to be documents or information of a kind in respect of which a warrant under this regulation was issued (“the relevant kind”), or to take any other steps which appear to be necessary for preserving, or preventing interference with, any such information or documents;
- (d) to take copies of, or extracts from, any documents or information appearing to be of the relevant kind;
- (e) to require any person on the premises to provide an explanation of any document or information appearing to be of the relevant kind or to state where it may be found;
- (f) to use such force as may be reasonably necessary.

(5) In the application of this regulation to Scotland—

- (a) for the reference to a justice of the peace substitute reference to a justice of the peace or a sheriff; and
- (b) for the reference to information on oath substitute reference to evidence on oath.

**Search warrants: safeguards**

17.—(1) A warrant under regulation 16 shall authorise an entry on one occasion only unless it specifies that it authorises multiple entries.

(2) If it specifies that it authorises multiple entries, it must also specify whether the number of entries authorised is unlimited, or limited to a specified maximum.

(3) A warrant—

- (a) shall specify—

- (i) the name of the person who applies for it;
  - (ii) the date on which it is issued;
  - (iii) that it is issued under these Regulations; and
  - (iv) each set of premises to be searched; and
- (b) shall identify, so far as is practicable, the documents or information to be sought.

### **Execution of search warrant**

**18.**—(1) Entry and search under a warrant under regulation 16 must be within one month of the date of its issue.

(2) No premises may be entered or searched for the second or subsequent time under a warrant which authorises multiple entries unless a member of the Authority has in writing authorised that entry to those premises.

(3) Entry and search under a warrant under regulation 16 must be at a reasonable hour unless it appears to the Authority that the purpose of a search may be frustrated on an entry at a reasonable hour.

(4) AP must produce—

- (a) the warrant; and
- (b) documentary evidence that AP is authorised by the Authority,

for inspection by the occupier of the premises or anyone acting on the occupier’s behalf.

(5) If there is no person present who appears to AP to be in charge of the premises, AP shall leave a copy of the warrant in a prominent place on the premises.

(6) AP must make a written record of—

- (a) the date and time of AP’s entry on the premises;
- (b) the number of persons (if any) who accompanied AP on to the premises and the names of any such persons;
- (c) the period for which AP (and any such persons) remained on the premises;
- (d) what AP (and any such persons) did while on the premises; and
- (e) any document or information of which AP took possession while there.

(7) AP must give a copy of the record to the occupier of the premises or someone acting on the occupier’s behalf.

(8) Unless it is not reasonably practicable to do so, AP must before leaving the premises comply with the requirements of paragraphs (6) and (7).

(9) On leaving any premises which AP has entered by virtue of a warrant under regulation 16, AP must, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured as AP found them.

### **Retention of documents taken under regulation 16**

**19.**—(1) Any document of which possession is taken under regulation 16 (“a seized document”) may be retained so long as it is necessary to retain it (rather than copies of it) in the circumstances.

(2) A person claiming to be the owner of a seized document may apply to a magistrates’ court or (in Scotland) the sheriff for an order for the delivery of the document to the person appearing to the court or sheriff to be the owner.

(3) If on an application under paragraph (2) the court or (in Scotland) the sheriff cannot ascertain who is the owner of the seized document the court or sheriff (as the case may be) may make such order as the court or sheriff thinks fit.

(4) An order under paragraph (2) or (3) does not affect the right of any person to take legal proceedings against any person in possession of a seized document for the recovery of the document.

(5) Any right to bring proceedings (as described in paragraph (4)) may only be exercised within 6 months of the date of the order made under paragraph (2) or (3).

## Offences

### Offences

**20.**—(1) If a person fails to comply with a requirement to which paragraph (2) applies the Authority may certify that fact in writing to the court.

(2) This paragraph applies in relation to a requirement imposed under regulation 9, 11, 12, 13 or 14, except a requirement imposed by regulation 13(8).

(3) If the court is satisfied that the defaulter (“DP”) failed without reasonable excuse to comply with the requirement, it may deal with DP (and in the case of a body corporate, any director or officer) as if DP (or the director or officer) were in contempt; and “officer”, in relation to a limited liability partnership, means a member of the limited liability partnership.

(4) The jurisdiction conferred by paragraphs (1) to (3) is exercisable by the High Court and the Court of Session.

(5) A person (“OP”) who knows or suspects that an investigation is being or is likely to be conducted under this Part is guilty of an offence if—

- (a) OP falsifies, conceals, destroys or otherwise disposes of a document which OP knows or suspects is or would be relevant to such an investigation; or
- (b) OP causes or permits the falsification, concealment, destruction or disposal of such a document,

unless OP shows that OP had no intention of concealing facts disclosed by the documents from the Authority.

(6) A person (“OP”) who, in purported compliance with a requirement imposed on OP under this Part—

- (a) provides information that OP knows to be false or misleading in a material particular; or
- (b) recklessly provides information which is false or misleading in a material particular,

is guilty of an offence.

(7) A person guilty of an offence under paragraph (5) or (6) is liable—

- (a) on summary conviction—
  - (i) in England and Wales, to imprisonment for a term not exceeding three months or a fine not exceeding the statutory maximum, or both; and
  - (ii) in Scotland, to imprisonment for a term not exceeding three months or a fine not exceeding £5,000, or both; or
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both.

(8) Any person who intentionally obstructs the exercise of any rights conferred by a warrant under this Part is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 5 on the standard scale, or both.

## PART 4

### Injunctions and Restitution

#### Injunctions

##### **Injunctions**

**21.**—(1) Paragraphs (3) and (4) apply if, on the application of the Authority, the court is satisfied—

- (a) that there is a reasonable likelihood that any person will fail to comply with a REMIT requirement; or
- (b) that any person is failing or has failed to comply with a REMIT requirement and that there is a reasonable likelihood that the failure to comply will continue or be repeated.

(2) Paragraph (3) also applies if, on the application of the Authority, the court is satisfied—

- (a) that there is a reasonable likelihood that any person will fail to comply with a requirement imposed by or under regulation 8; or
- (b) that any person is failing or has failed to comply with a requirement imposed by or under regulation 8 and that there is a reasonable likelihood that the failure to comply will continue or be repeated.

(3) The court may make an order restraining (or in Scotland an interdict prohibiting) the failure to comply.

(4) The court may make an order imposing on that person a temporary prohibition of professional activity.

(5) If, on the application of the Authority, the court is satisfied—

- (a) that any person (“FP”) is failing or has failed to comply with—
  - (i) a REMIT requirement; or
  - (ii) a requirement imposed by or under regulation 8, and
- (b) that there are steps which could be taken for remedying the failure to comply;

the court may make an order requiring FP to take such steps as the court may direct to remedy it.

(6) Paragraph (7) applies if, on the application of the Authority, the court is satisfied that any person—

- (a) may be failing to comply with a REMIT requirement; or
- (b) may have failed to comply with a REMIT requirement.

(7) The court may make an order restraining (or in Scotland an interdict prohibiting) the person concerned (“FP”) from disposing of, or otherwise dealing with, any assets of FP which it is satisfied that FP is reasonably likely to dispose of, or otherwise deal with.

(8) The jurisdiction conferred by this regulation is exercisable by the High Court and the Court of Session.

(9) In paragraph (5), references to remedying any failure to comply with a requirement include references to mitigating its effect.

#### Restitution

##### **Restitution orders**

**22.**—(1) The court may, on the application of the Authority, make an order under paragraph (2) if it is satisfied that a person (“FP”) has failed to comply with a REMIT requirement, and

- (a) that profits have accrued to FP as a result of the failure to comply; or

(b) that one or more persons have suffered loss or been otherwise adversely affected as a result of the failure to comply.

(2) The court may order FP to pay to the Authority such sum as appears to the court to be just having regard—

- (a) in a case within paragraph (1)(a), to the profits appearing to the court to have accrued;
- (b) in a case within paragraph (1)(b), to the extent of the loss or other adverse effect;
- (c) in a case within both paragraph (1)(a) and (b), to the profit appearing to the court to have accrued and to the extent of the loss or other adverse effect.

(3) Any amount paid to the Authority in pursuance of an order under paragraph (2) must be paid by it to such qualifying person or distributed by it among such qualifying persons as the court may direct.

(4) In paragraph (3), “qualifying person” means a person appearing to the court to be someone—

- (a) to whom the profits mentioned in paragraph (1)(a) are attributable; or
- (b) who has suffered the loss or adverse effect mentioned in paragraph (1)(b).

(5) On an application under paragraph (1) the court may require FP to supply it with such accounts or other information as it may require for any one or more of the following purposes—

- (a) establishing whether any and, if so, what profits have accrued to FP as mentioned in paragraph (1)(a);
- (b) establishing whether any person or persons have suffered any loss or adverse effect as mentioned in paragraph (1)(b) and, if so, the extent of that loss or adverse effect; and
- (c) determining how any amounts are to be paid or distributed under paragraph (3).

(6) The court may require any accounts or other information supplied under paragraph (4) to be verified in such manner as it may direct.

(7) The jurisdiction conferred by this regulation is exercisable by the High Court and the Court of Session.

(8) Nothing in this regulation affects the right of any person other than the Authority to bring proceedings in respect of the matters to which this regulation applies.

### **Power of Authority to require restitution**

**23.**—(1) The Authority may exercise the power in paragraph (2) if it is satisfied that a person (“FP”) has failed to comply with a REMIT requirement, and

- (a) that profits have accrued to FP as a result of the failure to comply; or
- (b) that one or more persons have suffered loss or been otherwise adversely affected as a result of the failure to comply.

(2) The power referred to in paragraph (1) is a power to require FP, in accordance with such arrangements as the Authority considers appropriate, to pay to the appropriate person or distribute among the appropriate persons such amount as appears to the Authority to be just having regard—

- (a) in a case within paragraph (1)(a), to the profits appearing to the Authority to have accrued;
- (b) in a case within paragraph (1)(b), to the extent of the loss or other adverse effect;
- (c) in a case within both paragraph (1)(a) and (b), to the profits appearing to the Authority to have accrued and to the extent of the loss or other adverse effect.

(3) In paragraph (2), “appropriate person” means a person appearing to the Authority to be someone—

- (a) to whom the profits mentioned in paragraph (1)(a) are attributable; or
- (b) who has suffered the loss or adverse effect mentioned in paragraph (1)(b).

### **Warning notices**

24.—(1) If the Authority proposes to exercise the power under regulation 23(2) in relation to a person, it must give the person concerned a warning notice.

(2) A warning notice under this regulation must specify the amount which the Authority proposes to require the person concerned to pay or distribute as mentioned in regulation 23(2).

### **Decision notices**

25.—(1) If the Authority decides to exercise the power under regulation 23(2), it must give a decision notice to the person in relation to whom the power is exercised.

(2) The decision notice must—

- (a) state the amount that the person is to pay or distribute as mentioned in regulation 23(2);
- (b) identify the person or persons to whom that amount is to be paid or among whom that amount is to be distributed; and
- (c) state the arrangements in accordance with which the payment or distribution is to be made.

(3) If the Authority decides to exercise the power under regulation 23(2), the person in relation to whom it is exercised may refer the matter to the Tribunal.

## **PART 5**

### **Penalties**

#### **Power of Authority to impose penalty**

26.—(1) If the Authority is satisfied that a person (“FP”)—

- (a) has failed to comply with a REMIT requirement; or
- (b) has failed to comply with a requirement imposed by or under regulation 8,

it may impose on FP a penalty of such amount as it considers appropriate.

(2) If the Authority is entitled to impose a penalty on FP under this regulation it may, instead of imposing a penalty on FP, publish a statement to the effect that FP has failed to comply with a REMIT requirement or a requirement imposed by or under regulation 8 (as the case may be).

#### **Statement of policy**

27.—(1) The Authority must prepare and issue a statement of its policy with respect to the imposition of penalties under regulation 26 and the determination of their amount.

(2) The Authority’s policy in determining what the amount of the penalty should be must include having regard to—

- (a) the seriousness of the failure in question in relation to the nature of the requirement not complied with;
- (b) the behaviour of the person, including—
  - (i) the extent to which the behaviour was deliberate or reckless;
  - (ii) whether the person believed, on reasonable grounds, that the behaviour did not fall within regulation 26(1)(a) or (b);
  - (iii) whether the person took all reasonable precautions and exercised due diligence to avoid behaving in a way which fell within regulation 26(1)(a) or (b); and
- (c) whether the person on whom the penalty is to be imposed is an individual.

(3) A statement issued under this regulation must include an indication of the circumstances in which the Authority is expected to regard a person (“FP”) as—

- (a) having a reasonable belief that FP's behaviour did not amount to a failure to comply with a REMIT requirement or a requirement imposed by or under regulation 8; or
  - (b) having taken reasonable precautions and exercised due diligence to avoid failing to comply with a REMIT requirement or a requirement imposed by or under regulation 8.
- (4) The Authority may at any time alter or replace a statement issued under this regulation.
- (5) If a statement issued under this regulation is altered or replaced, the Authority must issue the altered or replacement statement.
- (6) In exercising, or deciding whether to exercise, its power under regulation 26 in the case of any particular behaviour, the Authority must have regard to any statement published under this regulation and in force at the time when the behaviour concerned occurred.
- (7) A statement issued under this regulation must be published by the Authority in the way appearing to the Authority to be best calculated to bring it to the attention of the public.
- (8) The Authority must, without delay, give the Secretary of State a copy of any statement which it publishes under this regulation.

**Statement of policy: transitory provision**

28. Schedule 3 (transitory provision) has effect.

**Statement of policy: procedure**

29.—(1) Before issuing a statement of policy under regulation 27, the Authority must publish a draft of the proposed statement in the way appearing to the Authority to be best calculated to bring it to the attention of the public.

(2) Paragraph (1) may be satisfied by publication of a draft statement before, as well as by publication after, this regulation comes into force.

(3) The draft must be accompanied by notice that representations about the proposal may be made to the Authority within a specified time.

(4) Before issuing the proposed statement, the Authority must have regard to any representations made in accordance with paragraph (3).

(5) If the Authority issues the proposed statement, the Authority must publish an account, in general terms, of—

- (a) the representations made to it in accordance with paragraph (3); and
- (b) its response to them.

(6) If the statement differs from the draft published under paragraph (1) in a way which is, in the opinion of the Authority, significant, the Authority must (in addition to complying with paragraph (5)) publish details of the difference.

(7) This regulation also applies to a proposal to alter or replace a statement.

**Warning notices**

30.—(1) If the Authority proposes to take action against a person under regulation 26, it must give the person concerned a warning notice.

(2) A warning notice about a proposal to impose a penalty must state the amount of the proposed penalty.

(3) A warning notice about a proposal to publish a statement must set out the terms of the proposed statement.

**Decision notice and right to refer to Tribunal**

31.—(1) If the Authority decides to take action against a person under regulation 26, it must give the person concerned a decision notice.

- (2) A decision notice about the imposition of a penalty must state the amount of the penalty.
- (3) A decision notice about the publication of a statement must set out the terms of the statement.
- (4) If the Authority decides to take action against a person under regulation 26, that person may refer the matter to the Tribunal.

#### **Power of court to impose penalty**

**32.**—(1) The Authority may on an application to the court under regulation 21 or 22 request the court to consider whether the circumstances are such that a penalty should be imposed on the person to whom the application relates.

(2) The court may, if it considers it appropriate, make an order requiring the person concerned to pay to the Authority a penalty of such amount as it considers appropriate.

#### **Effect on transactions**

**33.** The imposition of a penalty under these Regulations does not make any transaction void or unenforceable.

#### **Penalties**

**34.** Any sums received by the Authority by way of penalty under these Regulations shall be paid into the Consolidated Fund.

## **PART 6**

### **Notices**

#### **Warning notices**

#### **Warning notices**

- 35.**—(1) A warning notice must—
- (a) state the action which the Authority proposes to take;
  - (b) be in writing;
  - (c) give reasons for the proposed action; and
  - (d) describe the effect of regulation 41 and state whether any secondary material exists to which the person concerned must be allowed access under it.
- (2) A warning notice must specify a reasonable period (which may not be less than 14 days) within which the person to whom it is given may make representations to the Authority.
- (3) The Authority may extend the period specified in the notice.
- (4) The Authority must then decide, within a reasonable period, whether to give the person concerned a decision notice.

#### **Decision notices**

#### **Decision notices**

- 36.**—(1) A decision notice must—
- (a) be in writing;
  - (b) give the Authority's reasons for the decision to take the action to which the notice relates;



- (c) describe the effect of regulation 41 and state whether any secondary material exists to which the person concerned must be allowed access under it; and
- (d) give an indication of—
  - (i) any right to have the matter referred to the Tribunal which is given by these Regulations; and
  - (ii) the procedure on such a reference.

(2) The action to which a decision notice relates must be action under the same regulation as the action proposed in the preceding warning notice.

(3) The Authority may, before it takes the action to which a decision notice (“the original notice”) relates, give the person concerned a further decision notice which relates to different action in respect of the same matter.

(4) The Authority may give a further decision notice as a result of paragraph (3) only if the person to whom the original notice was given consents.

(5) If the person to whom a decision notice is given under paragraph (3) had the right to refer the matter to which the original decision notice related to the Tribunal, the person has that right as respects the decision notice under paragraph (3).

### Conclusion of proceedings

#### Notices of discontinuance

**37.**—(1) If the Authority decides not to take—

- (a) the action proposed in a warning notice, or
- (b) the action to which a decision notice relates,

it must give a notice of discontinuance to the person to whom the warning notice or decision notice was given.

(2) A notice of discontinuance must identify the proceedings which are being discontinued.

#### Final notices

**38.**—(1) If the Authority has given a person a decision notice and the matter was not referred to the Tribunal within the time required by the Tribunal Procedure Rules, the Authority must, on taking the action to which the decision notice relates, give the person concerned and any person to whom the decision notice was copied a final notice.

(2) If the Authority has given a person a decision notice and the matter was referred to the Tribunal, the Authority must, on taking action in accordance with any directions given by—

- (a) the Tribunal, or
- (b) a court on an appeal against the decision of the Tribunal,

give that person and any person to whom the decision notice was copied the notice required by paragraph (3).

(3) The notice required by this paragraph is—

- (a) in a case where the Authority is acting in accordance with a direction given by the Tribunal under regulation 44(4)(b), or by the court on an appeal from a decision by the Tribunal under regulation 44(4), a further decision notice, and
- (b) in any other case, a final notice.

(4) A final notice about a statement must—

- (a) set out the terms of the statement;
- (b) give details of the manner in which, and the date on which, the statement will be published.

(5) A final notice about a penalty must—

- (a) state the amount of the penalty;
- (b) state the manner in which, and the period within which, the penalty is to be paid;
- (c) give details of the way in which the penalty will be recovered if it is not paid by the date stated in the notice.

(6) A final notice about a requirement to make a payment or distribution in accordance with regulation 23(2) must state—

- (a) the persons to whom,
- (b) the manner in which, and
- (c) the period within which,

it must be made.

(7) The period stated under paragraph (5)(b) or (6)(c) may not be less than 14 days beginning with the date on which the final notice is given.

(8) If all or any of the amount of a penalty payable under a final notice is outstanding at the end of the period stated under paragraph (5)(b), the Authority may recover the outstanding amount as a debt due to it.

(9) If all or any of a required payment or distribution has not been made at the end of a period stated in a final notice under paragraph (6)(c), the obligation to make the payment is enforceable, on the application of the Authority, by injunction or, in Scotland, by an order under section 45 of the Court of Session Act 1988.

## Publication

### Publication

**39.—**(1) In the case of a warning notice given under regulation 30—

- (a) neither the Authority nor a person to whom it is given or copied may publish the notice,
- (b) a person to whom the notice is given or copied may not publish any details concerning the notice unless the Authority has published those details, and
- (c) after consulting the persons to whom the notice is given or copied, the Authority may publish such information about the matter to which the notice relates as it considers appropriate.

(2) In the case of a warning notice given under regulation 24, neither the Authority nor a person to whom it is given or copied may publish the notice or any details concerning it.

(3) A person to whom a decision notice is given or copied may not publish the notice or any details concerning it unless the Authority has published the notice or those details.

(4) A notice of discontinuance must state that, if the person to whom the notice is given consents, the Authority may publish such information as it considers appropriate about the matter to which the discontinued proceedings related.

(5) A copy of a notice of discontinuance must be accompanied by a statement that, if the person to whom the notice is copied consents, the Authority may publish such information as it considers appropriate about the matter to which the discontinued proceedings related, so far as relevant to that person.

(6) The Authority must publish such information about the matter to which a decision notice or final notice relates as it considers appropriate.

(7) But the Authority may not publish information under this regulation if publication of it would, in its opinion, be—

- (a) unfair to the person with respect to whom the action was taken (or was proposed to be taken),
- (b) prejudicial to the interests of consumers, or
- (c) detrimental to the stability of the wholesale energy market.

(8) Information is to be published under this regulation in such manner as the Authority considers appropriate.

(9) “Notice of discontinuance” means a notice given under regulation 37.

### Third party rights and access to evidence

#### **Third party rights**

**40.**—(1) If any of the reasons contained in a warning notice given under these Regulations relates to a matter which—

- (a) identifies a person (“TP”) other than the person to whom the notice is given, and
- (b) in the opinion of the Authority, is prejudicial to TP,

a copy of the notice must be given to TP.

(2) Paragraph (1) does not require a copy to be given to TP if the Authority—

- (a) has given TP a separate warning notice in relation to the same matter; or
- (b) gives TP such a notice at the same time as it gives the warning notice which identifies TP.

(3) The notice copied to TP under paragraph (1) must specify a reasonable period (which may not be less than 14 days) within which TP may make representations to the Authority.

(4) If any of the reasons contained in a decision notice given under these Regulations relates to a matter which—

- (a) identifies a person (“TP”) other than the person to whom the decision notice is given, and
- (b) in the opinion of the Authority, is prejudicial to TP,

a copy of the notice must be given to TP.

(5) If the decision notice was preceded by a warning notice, a copy of the decision notice must (unless it has been given under paragraph (4)) be given to each person to whom the warning notice was copied.

(6) Paragraph (4) does not require a copy to be given to TP if the Authority—

- (a) has given TP a separate decision notice in relation to the same matter; or
- (b) gives TP such a notice at the same time as it gives the decision notice which identifies TP.

(7) Neither paragraph (1) nor paragraph (4) requires a copy of a notice to be given to TP if the Authority considers it impracticable to do so.

(8) Paragraphs (9) to (11) apply if the person to whom a decision notice is given has a right to refer the matter to the Tribunal.

(9) A person (“TP”) to whom a copy of the notice is given under this regulation may refer to the Tribunal—

- (a) the decision in question, so far as it is based on a reason of the kind mentioned in paragraph (4); or
- (b) any opinion expressed by the Authority in relation to TP.

(10) The copy must be accompanied by an indication of TP’s right to make a reference under paragraph (9) and of the procedure on such a reference.

(11) A person (“TP”) who alleges that a copy of the notice should have been given to TP, but was not, may refer to the Tribunal the alleged failure and—

- (a) the decision in question, so far as it is based on a reason of the kind mentioned in paragraph (4); or
- (b) any opinion expressed by the Authority in relation to TP.

(12) Regulation 41 applies to TP as it applies to the person to whom the notice to which this regulation applies was given, in so far as the material to which access must be given under that regulation relates to the matter which identifies TP.

(13) A copy of a notice given to TP under this regulation must be accompanied by a description of the effect of regulation 41 as it applies to TP.

(14) Any person to whom a warning notice or decision notice was copied under this regulation must be given a copy of a notice of discontinuance applicable to the proceedings to which the warning notice or decision notice related.

### **Access to Authority material**

**41.—**(1) If the Authority gives a person (“NP”) a warning notice or a decision notice under these Regulations, it must—

- (a) allow NP access to the material on which it relied in taking the decision which gave rise to the obligation to give the notice;
- (b) allow NP access to any secondary material which, in the opinion of the Authority, might undermine that decision.

(2) But the Authority does not have to allow NP access to material under paragraph (1) if the material is a protected item (as defined in regulation 52(2)) or it—

- (a) relates to a case involving a person other than NP; and
- (b) was taken into account by the Authority in NP’s case only for the purposes of comparison with other cases.

(3) The Authority may refuse NP access to particular material which it would otherwise have to allow NP access to if, in its opinion, allowing NP access to the material—

- (a) would not be in the public interest; or
- (b) would not be fair, having regard to—
  - (i) the likely significance of the material to NP in relation to the matter in respect of which NP has been given a warning notice or decision notice; and
  - (ii) the potential prejudice to the commercial interests of a person other than NP which would be caused by the material’s disclosure.

(4) If the Authority does not allow NP access to material because it is a protected item, it must give NP written notice of—

- (a) the existence of the protected item; and
- (b) the Authority’s decision not to allow NP access to it.

(5) If the Authority refuses under paragraph (3) to allow NP access to material, it must give NP written notice of—

- (a) the refusal; and
- (b) the reasons for it.

(6) “Secondary material” means material, other than material falling within paragraph (1)(a), which—

- (a) was considered by the Authority in reaching the decision mentioned in that paragraph; or
- (b) was obtained by the Authority in connection with the matter to which the warning notice or decision notice relates but which was not considered by it in reaching that decision.

### The Authority’s procedures

#### **The Authority’s procedures**

**42.—**(1) The Authority must determine the procedure that it proposes to follow in relation to the following—

- (a) a decision which gives rise to an obligation for it to give a warning notice or decision notice, and
  - (b) a decision under regulation 39(1)(c) to publish information about the matter to which a warning notice relates.
- (2) That procedure must be designed to secure, amongst other things, that—
- (a) a decision falling within paragraph (1)(a) is taken—
    - (i) by a person not directly involved in establishing the evidence on which the decision is based, or
    - (ii) by 2 or more persons who include a person not directly involved in establishing that evidence,
  - (b) a decision falling within paragraph (1)(b) is taken—
    - (i) by a person other than the person by whom the decision was first proposed, or
    - (ii) by 2 or more persons not including the person by whom the decision was first proposed, and
  - (c) a decision falling within paragraph (1)(b) is taken in accordance with a procedure which is, as far as possible, the same as that applicable to a decision which gives rise to an obligation to give a warning notice and which falls within paragraph (1)(a).
- (3) The Authority must issue a statement of the procedure.
- (4) The statement must be published in the way appearing to the Authority to be best calculated to bring it to the attention of the public.
- (5) The Authority must, without delay, give the Secretary of State a copy of the statement.
- (6) When giving a warning notice or a decision notice, the Authority must follow its stated procedure.
- (7) If the Authority changes the procedure in a material way, it must publish a revised statement.
- (8) The Authority's failure in a particular case to follow its procedure as set out in the latest published statement does not affect the validity of a notice given in that case.
- (9) But paragraph (8) does not prevent the Tribunal from taking into account any such failure in considering a matter referred to it.

**Statements under regulation 42: consultation**

- 43.—**(1) Before issuing a statement of procedure under regulation 42, the Authority must publish a draft of the proposed statement in the way appearing to the Authority to be best calculated to bring it to the attention of the public.
- (2) The draft must be accompanied by notice that representations about the proposal may be made to the Authority within a specified time.
- (3) Before issuing the proposed statement of procedure, the Authority must have regard to any representations made to it in accordance with paragraph (2).
- (4) If the Authority issues the proposed statement of procedure, it must publish an account, in general terms, of—
- (a) the representations made to it in accordance with paragraph (2); and
  - (b) its response to them.
- (5) If the statement of procedure differs from the draft published under paragraph (1) in a way which is, in the opinion of the Authority, significant, the Authority must (in addition to complying with paragraph (4)) publish details of the difference.
- (6) This regulation also applies to a proposal to revise a statement of policy.

## PART 7

### Hearings and appeals

#### **Proceedings before Tribunal: general provisions**

**44.**—(1) This regulation applies in the case of a reference to the Tribunal under regulation 25 (restitution), 31 (penalty) or 40 (third party).

(2) Tribunal Procedure Rules may make provision for the suspension of a decision of the Authority which has taken effect, pending determination of the reference.

(3) The Tribunal may consider any evidence relating to the subject-matter of the reference, whether or not it was available to the Authority at the material time.

(4) In the case of a reference under regulation 25 or a reference under regulation 40(9), the Tribunal must determine the reference by either—

- (a) dismissing it; or
- (b) remitting the matter to the Authority with a direction to reconsider it and reach a decision in accordance with the findings of the Tribunal.

(5) The findings mentioned in paragraph (4)(b) are limited to findings as to—

- (a) issues of fact or law;
- (b) the matters to be, or not to be, taken into account in making the decision; and
- (c) the procedural or other steps to be taken in connection with the making of the decision.

(6) In the case of a reference under regulation 31 or a reference under regulation 40(11), the Tribunal—

- (a) must determine what (if any) is the appropriate action for the Authority to take in relation to the matter; and
- (b) on determining the reference, must remit the matter to the Authority with such directions (if any) as the Tribunal considers appropriate for giving effect to the determination.

(7) The Authority must act in accordance with the determination of, and any direction given by, the Tribunal.

(8) An order of the Tribunal may be enforced—

- (a) as if it were an order of a county court; or
- (b) in Scotland, as if it were an order of the Court of Session.

#### **Proceedings before Tribunal: decision notices etc**

**45.**—(1) In determining in accordance with regulation 44(6) a reference made as a result of a decision notice given by the Authority, the Tribunal may not direct the Authority to take action which it would not, as a result of regulation 36(2), have had the power to take when giving the notice.

(2) The Authority must not take the action specified in a decision notice—

- (a) during the period within which the matter to which the notice relates may be referred to the Tribunal; and
- (b) if the matter is so referred, until the reference, and any appeal against the Tribunal's determination, has been finally disposed of.

(3) The Tribunal may, on determining a reference in respect of a decision of the Authority, make recommendations as to the Authority's regulating provisions or its procedures.

#### **Offences**

**46.**—(1) This regulation applies in the case of proceedings before the Tribunal under these Regulations.

- (2) A person (“OP”) is guilty of an offence if OP, without reasonable excuse—
- (a) refuses or fails—
    - (i) to attend following the issue of a summons by the Tribunal; or
    - (ii) to give evidence; or
  - (b) alters, suppresses, conceals or destroys, or refuses to produce a document which OP may be required to produce for the purposes of proceedings before the Tribunal.
- (3) A person guilty of an offence under paragraph (2)(a) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.
- (4) A person guilty of an offence under paragraph (2)(b) is liable—
- (a) on summary conviction—
    - (i) in England and Wales, to a fine not exceeding the statutory maximum; and
    - (ii) in Scotland, to a fine not exceeding £5,000; or
  - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both.

#### Legal assistance before the Tribunal

#### **Assistance by way of representation: Scotland**

47. Regulation 5A(d) of the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003(a) (which applies Part II of the Legal Aid (Scotland) Act 1986 (c. 47) to assistance by way of representation in relation to proceedings before the Upper Tribunal) is amended as follows—

- (a) omit “or” at the end of paragraph (ix);
- (b) omit “and” and insert “or” at the end of paragraph (x);
- (c) after paragraph (x) insert the following paragraph—
  - “(xi) regulation 31 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013(b); and”.

## PART 8

### Offences

#### **Offences by bodies corporate etc**

- 48.—(1) If an offence under these Regulations committed by a body corporate is shown—
- (a) to have been committed with the consent or connivance of an officer; or
  - (b) to be attributable to any neglect on the officer’s part,
- the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.
- (2) If the affairs of a body corporate are managed by its members, paragraph (1) applies in relation to the acts and defaults of a member in connection with the member’s functions of management as if the member were a director of the body.
- (3) If an offence under these Regulations committed by a partnership is shown—
- (a) to have been committed with the consent or connivance of a partner; or

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(a) S.S.I. 2003/179; regulation 5A was inserted by regulation 4(4) of the Advice and Assistance and Civil Legal Aid (Transfer of Tribunal Functions) (No. 2) (Scotland) Regulations 2010 (S.S.I. 2010/239).

(b) S.I. 2013/1389.

(b) to be attributable to any neglect on the partner's part, the partner as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly.

(4) In paragraph (3), "partner" includes a person purporting to act as a partner.

(5) "Officer", in relation to a body corporate, means—

(a) a director, member of the committee of management, chief executive, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity; and

(b) an individual who is a controller of the body.

(6) If an offence under these Regulations committed by an unincorporated association (other than a partnership) is shown—

(a) to have been committed with the consent or connivance of an officer of the association or a member of its governing body; or

(b) to be attributable to any neglect on the part of such an officer or member,

that officer or member as well as the association is guilty of the offence and liable to be proceeded against and punished accordingly.

### **Proceedings for offences**

**49.**—(1) In this regulation, "offence" means an offence under these Regulations.

(2) Proceedings for an offence may be instituted only—

(a) by the Authority or the Secretary of State; or

(b) by or with the consent of the Director of Public Prosecutions.

(3) In exercising its power to institute proceedings for an offence, the Authority must comply with any conditions or restrictions imposed in writing by the Secretary of State.

### **Jurisdiction and procedure in respect of offences**

**50.**—(1) A fine imposed on an unincorporated association on its conviction of an offence is to be paid out of the funds of the association.

(2) Proceedings for an offence alleged to have been committed by an unincorporated association must be brought in the name of the association (and not in that of any of its members).

(3) Rules of court relating to the service of documents are to have effect as if the association were a body corporate.

(4) In proceedings for an offence brought against an unincorporated association, section 33 of the Criminal Justice Act 1925<sup>(a)</sup> and Schedule 3 to the Magistrates' Courts Act 1980<sup>(b)</sup> (procedure) apply as they do in relation to a body corporate.

(5) In England and Wales, summary proceedings for an offence may be taken—

(a) against a body corporate or unincorporated association at any place at which it has a place of business;

(b) against an individual at any place where the individual is for the time being.

(6) In this regulation, "offence" means an offence under these Regulations.

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(a) 1925 c. 86 (15 & 16 Geo 5); section 33 was amended by Schedule 6 to the Magistrates' Courts Act 1952 (15 & 16 Geo 6 & 1 Eliz 2 c 55), paragraph 19 of Schedule 8 to the Courts Act 1971 (c. 23) and paragraph 71 of Schedule 8 to the Courts Act 2003 (c. 39).

(b) 1980 c. 43; Schedule 3 was amended by section 25(2) to the Criminal Justice Act 1991 (c. 53), paragraph 13 of Schedule 1 to the Criminal Procedure and Investigations Act 1996 (c. 25) and paragraph 51 of Schedule 3 to the Criminal Justice Act 2003 (c. 44).



## PART 9

### Miscellaneous provisions

#### Protected disclosures

**51.**—(1) A disclosure which satisfies the following three conditions is not to be taken to breach any restriction on the disclosure of information (however imposed).

(2) The first condition is that the information or other matter—

- (a) causes the person making the disclosure (“the discloser”) to know or suspect, or
- (b) gives the discloser reasonable grounds for knowing or suspecting,

that another person has failed to comply with a REMIT requirement.

(3) The second condition is that the information or other matter disclosed came to the discloser in the course of the discloser’s trade, profession, business or employment.

(4) The third condition is that the disclosure is made to the Authority or to a nominated officer as soon as is practicable after the information or other matter comes to the discloser.

(5) A disclosure to a nominated officer is a disclosure which is made to a person nominated by the discloser’s employer to receive disclosures under this regulation, and is made in the course of the discloser’s employment and in accordance with the procedure established by the employer for the purpose.

(6) For the purposes of this regulation, references to a person’s employer include any body, association or organisation (including a voluntary organisation) in connection with whose activities the person exercises a function (whether or not for gain or reward) and references to employment must be construed accordingly.

#### Limitation on power to require documents

**52.**—(1) A person may not be required under these Regulations to produce, disclose or permit the inspection of protected items.

(2) “Protected items” means—

- (a) communications between a professional legal adviser (“LA”) and LA’s client or any person representing LA’s client which fall within paragraph (3);
- (b) communications between LA, LA’s client or any person representing LA’s client and any other person which fall within paragraph (3) (as a result of sub-paragraph (b) of that paragraph);
- (c) items which—
  - (i) are enclosed with, or referred to in, such communications;
  - (ii) fall within paragraph (3); and
  - (iii) are in the possession of a person entitled to possession of them.

(3) A communication or item falls within this paragraph if it is made—

- (a) in connection with the giving of legal advice to the client; or
- (b) in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings.

(4) A communication or item is not a protected item if it is held with the intention of furthering a criminal purpose.

#### Review

**53.**—(1) The Secretary of State must from time to time—

- (a) carry out a review of these Regulations;

- (b) set out the conclusions of the review in a report; and
  - (c) publish the report.
- (2) In carrying out the review the Secretary of State must, so far as is reasonable, have regard to how REMIT (which is implemented by means of these Regulations) is implemented in other member States.
- (3) The report must in particular—
- (a) set out the objectives intended to be achieved by the regulatory system established by these Regulations;
  - (b) assess the extent to which those objectives are achieved; and
  - (c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.
- (4) The first report under this regulation must be published before the end of the period of five years beginning with the day on which these Regulations come into force.
- (5) Reports under this regulation are afterwards to be published at intervals not exceeding five years.

4th June 2013

*Edward Davey*  
Secretary of State  
Department of Energy and Climate Change

## SCHEDULE 1 Regulation 5

### Application to the Crown etc

#### **Crown application**

- 1.**—(1) The Crown is not criminally liable as a result of any provision of these Regulations.
- (2) Sub-paragraph (1) does not affect the application of any provision of these Regulations in relation to persons in the public service of the Crown.
- 2.** The Crown is not liable for any penalty under any provision of these Regulations.
- 3.**—(1) Nothing in these Regulations affects Her Majesty in her private capacity.
- (2) Sub-paragraph (1) is to be interpreted as if section 38(3) of the Crown Proceedings Act 1947<sup>(a)</sup> (interpretation of references in that Act to Her Majesty in her private capacity) were contained in these Regulations.

#### **Entry to Crown premises**

- 4.**—(1) Regulation 16 does not apply in relation to land which is occupied by a government department, or otherwise for purposes of the Crown, unless the matter being investigated is conduct by the Crown or a person in the public service of the Crown.
- (2) In sub-paragraph (1) “conduct” includes suspected conduct.

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<sup>(a)</sup> 1947 c. 44 (10 & 11 Geo 6).

5.—(1) If the Secretary of State considers that in the interests of national security the power of entry that may be conferred by a warrant under regulation 16 must not be used in relation to particular Crown premises, the Secretary of State may certify that those powers must not be used in relation to those premises.

(2) In sub-paragraph (1) “Crown premises” means premises held by or used by or on behalf of the Crown.

## SCHEDULE 2

Regulation 6

### Service of notices

#### Interpretation

1.—(1) In this Schedule—

“appropriate person” means an individual to whom a relevant document may be given, in accordance with paragraph 3, in order to give that document to a person who is not an individual;

“business day” means any day except Saturday, Sunday or a bank holiday, where “bank holiday” includes Christmas Day and Good Friday;

“document” means a notice or document (as defined in regulation 2) of any kind;

“nominee”, in relation to any person to whom a document is to be given (“A”), means a person (“B”) who is authorised for the time being to receive relevant documents on behalf of A, to whom relevant documents may be given if A has notified the Authority in writing that B is so authorised;

“relevant document” means—

- (a) a document in relation to which a provision of these Regulations requires a document of that kind to be given;
- (b) where a provision of these Regulations authorises the imposition of a requirement, a document by which such a requirement is imposed.

(2) For the purposes of this Schedule, writing includes any means of electronic communication which may be processed to produce a legible text.

#### Methods of service

2.—(1) This paragraph has effect in relation to any relevant document given by the Authority to any person (“the recipient”).

(2) Any such document must be given by one of the following methods—

- (a) by delivering it to the recipient, the recipient’s nominee or the appropriate person;
- (b) by leaving it at the proper address of the recipient, the recipient’s nominee or the appropriate person, determined in accordance with paragraph 4;
- (c) by posting it to that address; or
- (d) by transmitting it by fax or other means of electronic communication to the recipient, the recipient’s nominee or the appropriate person, in accordance with paragraph 5.

(3) For the purposes of this paragraph, “posting” a relevant document means sending that document pre-paid by a postal service which seeks to deliver documents by post within the United Kingdom no later than the next working day in all or the majority of cases, and to deliver by post outside the United Kingdom within such a period as is reasonable in all the circumstances.

### **Appropriate person to be served**

3.—(1) A relevant document which is required to be given by the Authority to a person who is not an individual may—

- (a) where that person is a body corporate (other than a limited liability partnership), be given to the secretary or the clerk of that body, or to any person holding a senior position in that body;
- (b) where that person is a limited liability partnership, be given to any designated member, within the meaning given in section 8 of the Limited Liability Partnerships Act 2000(a);
- (c) where that person is a partnership (other than a limited liability partnership), be given to any partner;
- (d) where that person is an unincorporated association other than a partnership, be given to any member of the governing body of the association.

(2) For the purposes of this paragraph, persons holding a senior position in a body corporate include—

- (a) a director, the treasurer, secretary or chief executive, and
- (b) a manager of other officer of that body who, in either case, has responsibility for the matter to which the relevant document relates.

### **Proper address for service**

4.—(1) The proper address is any current address provided by that person as an address for service of relevant documents.

(2) In the case of any person who has not provided an address as mentioned in sub-paragraph (1), the proper address is the last known address of that person (whether of that person's residence, or of a place where that person carries on business or is employed), or any address under such of any of the following provisions as may be applicable—

- (a) in the case of a body corporate (other than a limited liability partnership), its secretary or its clerk, the address of its registered or principal office in the United Kingdom;
- (b) in the case of a limited liability partnership or any of its designated members, the address of its registered or principal office in the United Kingdom;
- (c) in the case of a partnership (other than a limited liability partnership) or any of its partners, the address of its principal office in the United Kingdom;
- (d) in the case of an unincorporated association other than a partnership, or its governing body, the address of its principal office in the United Kingdom.

(3) Where the address mentioned in sub-paragraph (1) is situated in a country or territory other than the United Kingdom, the Authority may give a relevant document by leaving it at, or posting it to, any applicable address of a place in the United Kingdom falling within paragraph (2).

### **Service by electronic means of communication**

5.—(1) The Authority may give a relevant document by fax only if the person to whom it is to be given ("the recipient") has indicated in writing to the Authority (and has not withdrawn the indication)—

- (a) that the recipient is willing to receive relevant documents by fax, and
- (b) the fax number to which such documents should be sent.

(2) If the Authority gives a relevant document by fax it must, by the end of the business day following the day on which it did so, send a copy of that document to the recipient by any method specified in paragraph 2 other than fax.

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(a) 2000 c. 12; section 8 was amended by paragraph 4 of Schedule 3 to the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 (S.I. 2009/1804).

(3) The Authority may give a relevant document by any other electronic means of communication only if the recipient—

- (a) has indicated in writing to the Authority (and has not withdrawn the indication) that the recipient is willing to receive relevant documents by those means, and
- (b) has provided, in writing to the Authority for this purpose, an email address, or other electronic identification such as an ISDN or other telephonic link number.

### **Deemed service**

6.—(1) A relevant document which is given by the Authority to any person in accordance with this Schedule is to be treated as having been received on the day shown in the table below.

<i>Method of giving</i>	<i>Deemed day of receipt</i>
Leaving the document at the proper address	The business day after the day on which it is left at the proper address
Post to an address in the United Kingdom	The second business day after posting
Post to an address in any EEA State (other than the United Kingdom)	The fifth business day after posting
Fax	The business day after the day on which the document is transmitted
Other electronic means of communication	The business day after the day on which the document is transmitted

(2) Where a relevant document is given by fax, that document is to be treated as having been received on the deemed day of receipt of the fax, determined in accordance with sub-paragraph (1), regardless of whether the Authority has sent a copy of that document in accordance with sub-paragraph (2) of paragraph 5.

### **Service on the Authority**

7.—(1) For the purposes of any provision under these Regulations which requires a person (“the sender”) to give a document to the Authority before the end of a specified period, the sender is to be regarded as having complied with that requirement (irrespective of the day on which the document is in fact received by the Authority if it is sent by post, fax or other electronic means) if the sender sends the document to the Authority in accordance with any applicable directions before the end of the specified period or, where no such directions apply, if the sender—

- (a) delivers the document to an employee of the Authority with responsibility for the matter to which the document relates before the end of the specified period;
- (b) leaves the document at the Authority’s published address before the end of the specified period, and obtains a time stamped receipt;
- (c) posts the document to the Authority’s published address before the final day of the specified period;
- (d) sends the document to the Authority by fax before the end of the specified period, provided that the sender has also sent or subsequently sends a copy of that document in accordance with sub-paragraph (2); or
- (e) sends the document to the Authority by other electronic means of communication before the end of the specified period, and obtains electronic confirmation of receipt.

(2) The sender may give a relevant document to the Authority by fax only if by the end of the business day following the day on which the sender did so, the sender sends a copy of that document to the Authority by any method other than fax.

(3) For the purposes of this paragraph—

- (a) “post” means—

- (i) where the sender is located in the United Kingdom, sending that document pre-paid by a postal service which seeks to deliver documents by post within the United Kingdom no later than the next working day in all or the majority of cases, and
  - (ii) where the sender is located outside the United Kingdom, sending that document pre-paid by a postal service which seeks to deliver documents by post in the fastest time which is reasonable in the circumstances;
- (b) “applicable direction” means any direction given by the Authority under these Regulations which specifies the manner in which the relevant document in question is to be given.

### **Electronic service on the Authority**

8. Where a relevant document which is to be given to the Authority is given by fax or other electronic means it must be sent to a fax number, email address or other electronic identification—

- (a) which has been notified to the sender by the Authority as the appropriate number, address or other electronic identification for the purpose of receiving relevant documents of the kind in question, or
- (b) in all other cases, which has been published by the Authority for the purpose of receiving relevant documents.

## SCHEDULE 3

Regulation 28

### Transitory provision

1. This Schedule has effect until the Authority has issued a statement under regulation 27.
2. In exercising, or deciding whether to exercise, its power under regulation 26 in the case of any particular behaviour, paragraphs 3 to 5 apply.
3. The Authority must have regard to—
  - (a) the seriousness of the failure in question in relation to the nature of the requirement not complied with;
  - (b) the behaviour of the person, including—
    - (i) the extent to which the behaviour was deliberate or reckless;
    - (ii) whether the person believed, on reasonable grounds, that the behaviour did not fall within regulation 26(1)(a) or (b);
    - (iii) whether the person took all reasonable precautions and exercised due diligence to avoid behaving in a way which fell within regulation 26(1)(a) or (b); and
  - (c) whether the person on whom the penalty is to be imposed is an individual.
4. The Authority must have regard to paragraphs 4.1 to 5.5 of the statement of policy published by the Authority under section 30B of the Gas Act 1986<sup>(a)</sup> and section 27B of the Electricity Act 1989<sup>(b)</sup> in October 2003 titled ‘Utilities Act Statement of policy with respect to financial penalties’ read with the modifications set out in paragraph 5.
- 5.—(1) For references to “licence holder” or “licensee” read “person concerned”.

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(a) 1986 c. 44; section 30B was inserted by section 95(1) of the Utilities Act 2000 (c. 27).

(b) 1989 c. 29; section 27B was inserted by section 59(1) of the Utilities Act 2000 (c. 27).

(2) For references to “relevant condition or requirement” or “standard of performance” read “REMIT requirement or requirement imposed by or under regulation 8”.

(3) References to the Authority’s principal objective and general statutory duties are to be disregarded.

(4) In the second sentence of paragraph 4.1 the words “The Acts make it clear that” are to be disregarded.

(5) The second sentence of paragraph 5.5 is to be disregarded.

## **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 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.







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