

EXPLANATORY MEMORANDUM TO
THE ELECTRICITY AND GAS (MARKET INTEGRITY AND TRANSPARENCY)
(ENFORCEMENT ETC.) (AMENDMENT) REGULATIONS 2015

2015 No. 862

1. This Explanatory Memorandum has been prepared by the Department of Energy and Climate Change and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The main purpose of this instrument is to update the existing civil enforcement and penalty regime for breaches of the EU Regulation on wholesale energy market integrity and transparency (REMIT), contained in the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 (S.I. 2013/1389) (“the 2013 Regulations”). The Government set out in its explanatory memorandum accompanying the 2013 Regulations that following the European Commission’s publication of requirements for data reporting and the registration of market participants under Articles 8 and 9 of REMIT the Government may need to amend those Regulations to accommodate arising requirements and obligations.

3. Matters of special interest to the JCSI

3.1 The Department has carefully considered the appropriate form of Parliamentary procedure for this instrument, given that it contains amendments to primary legislation and creates new criminal offences. It considers that the negative resolution procedure is appropriate on the grounds that the amendments made by this instrument to the Utilities Act 2000 are sufficiently minor and are not expected to be controversial, and the criminal offences created by this instrument are limited in their scope and are an extension of, or closely related to, existing criminal offences in section 105 of the Utilities Act 2000 and regulation 20 of the 2013 Regulations.

4. Legislative Context

4.1 REMIT imposes a number of obligations and prohibitions on participants in wholesale gas and electricity markets, including prohibitions on insider trading and market manipulation. It places an obligation on the Agency for the Cooperation of Energy Regulators (ACER) to monitor wholesale energy trades across the EU and requires national regulatory authorities (in the case of Great Britain, Ofgem) to enforce breaches of the Regulation.

4.2 The 2013 Regulations give Ofgem investigatory and enforcement powers in relation to breaches of most REMIT obligations and prohibitions. Those enforcement powers include the power to impose civil penalties on persons who fail to comply with REMIT requirements, and to apply to the court for an injunction or a restitution order.

4.3 This instrument amends the 2013 Regulations to extend Ofgem's investigation and enforcement powers to apply in relation to breaches of Articles 8 (data collection) and 9 (registration of market participants) of REMIT. The obligations in Articles 8 and 9 have not yet begun to apply. As provided for in Article 8, the Commission has recently adopted an implementing act supplementing that article's provisions (Commission Implementing Regulation (EU) No. 1348/2014 of 17 December 2014). This provides that the obligations in Article 8 to report transactions and provide certain other data are to apply to market participants from 7 October 2015 in some cases and from 7 April 2016 in other cases. Article 9 of REMIT requires market participants to register with national regulatory authorities before entering into a transaction which is required to be reported.

4.4 This instrument also revises the existing restrictions on information sharing and create a new restriction - creating an offence of disclosing information gathered pursuant to the REMIT enforcement regulations. This has been achieved by mirroring the provisions of s.105 Utilities Act 2000. Section 105 governs information gathered under Ofgem's principal regulatory powers. The offence will apply to Ofgem and to other public authorities or parties to whom information is disclosed under REMIT when it is not otherwise made available to the public.

4.5 The Secretary of State has also made separate Regulations, the Electricity and Gas (Market Integrity and Transparency) (Criminal Sanctions) Regulations 2015, to make the breach of some REMIT obligations a criminal offence. Those Regulations do not include any provisions about the obligations in Articles 8 and 9 of REMIT, and it is not proposed to make the breach of these obligations criminal offences.

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

6.1 Matthew Hancock, Minister of State at the Department of Energy and Climate Change, has made the following statement about Human Rights:

In my view the provisions of the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) (Amendment) Regulations 2015 are compatible with the Convention rights.

7. Policy background

7.1 REMIT prohibits abusive practices affecting wholesale gas and electricity markets, which are analogous to the prohibitions in EU financial regulations. The GB civil REMIT enforcement regulations came into force on 29 June 2013. Those Regulations give Ofgem the power to request any relevant information, carry out onsite inspections, and impose unlimited fines or seek restitution for breaches of the REMIT prohibitions.

7.2. The enforcement and penalty regime for wholesale energy markets provided for in the 2013 Regulations align, as much as possible, with the existing regime for

financial markets, including unlimited fines. The REMIT civil enforcement regime ensures that the UK regime for similar prohibitions in both the financial and energy sector are consistent in the medium term.

7.3 REMIT requires national regulators to provide certain REMIT related information to the Agency for Cooperation of Energy Regulators (“ACER”). It also requires that ACER establish mechanisms to share certain of that and other information with national regulators and to share certain information with other authorities. It further requires national regulators to cooperate with ACER and with each other for the purpose of carrying out their duties. Lastly, it allows, and in some circumstances requires, cooperation between national regulators, competent financial authorities and national competition authorities within a Member State, and requires certain further cooperation between national and EU energy, financial and competition authorities. This set of obligations sees ACER at the centre of REMIT information collection and transmission but with cooperation possible between a national regulator and certain other relevant public authorities both within the same Member State and in other Member States.

7.4 To facilitate this flow of information this instrument:

- Amends the disclosure gateways in section 105 of the Utilities Act 2000 to allow Ofgem to disclose REMIT related information covered by section 105 (such as that obtained under Ofgem’s monitoring powers in the Gas Act 1986 and Electricity Act 1989) to other bodies in the UK and Europe, such as other national regulatory authorities, for purposes related to REMIT.
- Creates an offence of disclosing information gathered pursuant to the 2013 Regulations in certain circumstances. This mirrors existing provision in relation to Ofgem’s other investigatory functions, particularly under section 105 of the Utilities Act 2000.
- Extends Ofgem’s civil enforcement powers under the 2013 Regulations to give Ofgem power to impose sanctions for breaches of regulation 39 of those Regulations, which prohibits the publication of certain notices and information relating to enforcement proceedings. This is intended to preserve the integrity of the investigation and enforcement process.

8. Consultation outcome

8.1 As REMIT is a directly applicable EU Regulation, the only implementing action required is to ensure that the regulatory authorities have the enforcement and penalty powers necessary to tackle market abuse, and these are set out in REMIT. As this leaves little scope for discretion, it was decided that no consultation was required.

9. Guidance

9.1 The 2013 Regulations require Ofgem to consult on and issue a statement of its policy on the imposition of financial penalties and on certain procedural matters relating to the use of its enforcement powers under REMIT. Ofgem has published such a statement, and has consulted on a revised version of that statement to take

account of the amendments made to the 2013 Regulations by this instrument. It intends to issue that version before these amendments come into force.

10. Impact

10.1 The impact of the regulations will fall largely on energy market participants and Ofgem.

10.2 It is not anticipated that the number of full investigations conducted under REMIT will exceed one per year. If there is full compliance with REMIT by industry, and no suspected breaches of the Regulation, investigatory costs will, of course, not arise. An impact assessment was not prepared for this instrument as it was considered to be a low cost measure.

11. Regulating small business

11.1 The instrument applies to all businesses which trade in wholesale energy markets. The nature of wholesale energy markets means that market manipulation can be carried out by any business, both small and large. Its effect can be significant regardless of the size of the business and so it is necessary for the regulations to apply to all wholesale energy market participants. Ofgem's regulatory regime will, however, take into consideration the principle of proportionality.

12. Monitoring & review

12.1 The Secretary of State for Energy will conduct a review of the 2013 Regulations within 5 years after the date they entered into force, which will include a review of the amendments made to the 2013 Regulations by this instrument. The conclusions of the review will be set out in a report assessing the extent to which the objectives of the 2013 Regulations (as amended by this instrument) have been achieved and whether those objectives remain appropriate.

13. Contact

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