

29 August 2013

The Office of Gas and Electricity Markets
9 Millbank
London SW1P 3GE

Via Email: andrew.macfaul@ofgem.gov.uk

Re: Consultation on proposed REMIT penalties statement and procedural guidelines

Dear Sirs,

The Global Financial Markets Association (GFMA)¹ is pleased to provide comments in response to Ofgem's Consultation on its proposed penalties statement and procedural guidelines under the Regulation on Wholesale Energy Markets Integrity and Transparency (REMIT).

Our responses to the questions raised by the Consultation are set out in Annex 1 to this letter.

We generally agree with the approach taken, however we believe that the following three areas could benefit from being considered further:

- the circumstances in which the Authority would exercise its power to publish information on warning notices (see our response to Question 4), especially bearing in mind that the FCA is still in the process of consulting on the circumstances in which it will use similar powers;
- alignment of regulatory approaches under REMIT and under the Market Abuse Directive / Market Abuse Regulation (see, in particular, our responses to Questions 5, 6 and 7); and
- additional details on proposed arrangements for regulatory cooperation (see, in particular, our response to Question 7).

¹ The Global Financial Markets Association (GFMA) brings together three of the world's leading financial trade associations to address the increasingly important global regulatory agenda and to promote coordinated advocacy efforts. The Association for Financial Markets in Europe (AFME) in London and Brussels, the Asia Securities Industry & Financial Markets Association (ASIFMA) in Hong Kong and the Securities Industry and Financial Markets Association (SIFMA) in New York and Washington are, respectively, the European, Asian and North American members of GFMA. For more information, please visit <http://www.gfma.org>.

GFMA very much appreciates the opportunity to provide comments on the Consultation and trust that you find them helpful. We would, of course, be happy to discuss our response with you at your convenience.

Sincerely

A handwritten signature in black ink, appearing to read "David Strongin". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

David Strongin
Executive Director
GFMA

ANNEX 1

OFGEM CONSULTATION ON PROPOSED REMIT PENALTIES STATEMENT AND PROCEDURAL GUIDELINES

1. Do stakeholders agree that taking the approach described in the Consultation to the REMIT procedures and penalties documents is desirable?

We consider that this approach is appropriate. We understand that Ofgem (in its capacity as the Gas and Electricity Markets Authority) has a narrower range of penalty powers than the FCA, and therefore does not need to provide for the same complexities. The proposed approach has the added benefit of promoting, so far as possible, a consistent approach to Ofgem's enforcement in both the short and the long term.

2. Are the regulatory objectives that the Authority proposes to promote in the exercise of its REMIT powers appropriate? Should any other objectives be included?

The proposed objectives appear appropriate and consistent with Ofgem's objectives more generally.

It may be worth expanding slightly on the proposed objective of ensuring that no profits can be drawn from market abuse. We agree with this as a general objective (and as a factor to be considered when determining the kind and level of penalty to impose), provided the Authority does not seek to apply it in determining whether or not there has been market abuse in the first place. We consider that the issue of whether or not someone has made a profit from the alleged misconduct is not a relevant test in determining whether market abuse has taken place under REMIT. Furthermore, it is no longer a relevant test under the general market abuse regime (although we note that the FCA does take this into account when considering whether to impose a financial penalty or public censure). We understand that this is also the view taken by the Authority, and believe that it would be helpful if this point could be made more clearly in the guidelines.

3. Are the factors that we propose to consider in deciding whether to launch REMIT investigations appropriate? Should any other factors be included?

The proposed factors appear appropriate and consistent with Ofgem's objectives more generally.

The proposed factors also appear broadly consistent with those used by the FCA.

4. Does the proposed process for REMIT investigations strike an appropriate balance between fairness to those being investigated and ensuring the effectiveness of the Authority's investigations (bearing in mind particularly the requirements of DECC's regulations in relation to warning and decision notices)?

The proposed process appears to be broadly analogous to that followed by the FCA, and appears to be appropriate.

However, we consider that some further clarification would be helpful in connection with the Authority's power to publish information on warning notices:

- This power mirrors the equivalent power of the FCA under the Financial Services Act 2012. However, the FCA is also subject to statutory restrictions on its power to disclose information that it has received in the course of the exercise of its supervisory functions (under s. 348 of the Financial Services and Markets Act 2000). Accordingly, any publication of information on a warning notice should not include confidential or commercially sensitive information about a firm. It is not currently clear that the Authority or Ofgem are subject to similar restrictions. In our view, a similar restriction should apply to the publication of information in relation to warning notices by the Authority, and this should be clarified in the guidance on publication.
- We note that the FCA's power to publish information on warning notices is a new power, and the FCA is still in the process of consulting on the circumstances in which it will use this power. The FCA has committed not to use the power until the consultation process is complete (which may not be until Q3 2013 or later), as concerns were raised regarding the potential for significant reputational damage to firms where a warning notice is published, even if the investigation does not ultimately lead to any finding of wrongdoing. It would be helpful for Ofgem / the Authority to align their exercise of this power with the FCA, and commit not to use the power until all the concerns about its exercise and the potential impact on firms under investigation have been fully considered.

5. Are the criteria that the Authority proposes to consider in deciding whether to impose a financial penalty appropriate? Should any other criteria be included?

The proposed criteria and factors appear to be appropriate and are broadly consistent with the criteria that the FCA would apply when taking enforcement action for breaches of the general market abuse regime.

6. Are the factors that the Authority proposes to consider in determining the amount of a financial penalty appropriate? Should any other factors be included?

The proposed criteria and factors appear to be appropriate and are broadly consistent with the criteria that the FCA would apply when taking enforcement action for breaches of the general market abuse regime.

7. Does the statement provide sufficient clarity about the factors that the Authority will take into account in relation to imposing financial penalties on individuals?

The criteria for opening an investigation (in section 4 of the proposed procedural guidelines) mention that the Authority will consider whether it is the regulatory body best placed to take action, and that it will consider whether action has already been taken by another body to remedy the situation.

However, given the specific carve-outs in REMIT for behaviour which is already covered by the Market Abuse Directive and the potential for double jeopardy, additional clarity on the following points would be helpful:

- guidance as to which regulators and/or NRAs the Authority will speak to before launching an investigation; and
- a confirmation that the Authority will not impose sanctions for behaviour which is covered by the Market Abuse Directive, as we understand that such behaviour is outside the Authority's regulatory remit (irrespective of whether or not another body is already taking action in relation to the conduct in question).

We therefore consider that it would be useful if the Authority would refer in its proposed guidelines to regulatory co-operation, and the circumstances in which it will co-ordinate with other regulators (including other NRAs under REMIT and any financial market authorities such as the UK FCA).