



Department for  
Business, Energy  
& Industrial Strategy

# CONSULTATION ON PROPOSED CHANGES TO OFGEM'S ENFORCEMENT POWERS UNDER THE EU REMIT REGULATION

Government Response

1 February 2018

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# Contents

Executive Summary _____	1
<b>GOVERNMENT RESPONSE _____</b>	<b>2</b>
Introduction _____	2
Background to the Consultation Proposals _____	2
Consultation Questions _____	4
Stakeholder Views _____	4
Decision _____	6
Next steps _____	6

# Executive Summary

1. The then Department of Energy and Climate Change published a consultation paper on 18 December 2015 seeking views on changes to Ofgem's enforcement powers under gas and electricity legislation and under the Regulation on Energy Market Integrity and Transparency Regulation (REMIT). This response relates to comments received on changes proposed under the REMIT regulation only. The other measures would require primary legislation and we will take a decision on these at a later date.
2. This response sets out a broad summary of responses received. These summaries are intended to provide a representative overview of the feedback received and to explain why final decisions were taken. All responses received as part of the consultation have been considered in developing final policy positions and we would like to thank all those who responded.

# Government Response

## Introduction

3. Ofgem is the executive office of the Gas and Electricity Markets Authority, the independent regulator of gas and electricity markets. Ofgem mainly regulates energy businesses through administering and enforcing the rules set out in licence conditions and energy regulations. It has powers to enforce compliance and, where appropriate, impose penalties and/or obtain redress for consumers.
4. Ofgem's enforcement activity has revealed some limitations with their existing powers which make it more difficult to investigate problems thoroughly. These limitations undermine the potential effectiveness of the regulatory regime and the Government consulted<sup>1</sup> on proposals to address these limitations by introducing:
  - A flexible new power for Ofgem to investigate market abuse by allowing it to remove documents from premises and sift these elsewhere to establish whether they are relevant to an investigation; and
  - A new gateway for public authorities (in practice most likely to be the Competition and Markets Authority (CMA)) to disclose relevant information to Ofgem.

## Background to the Consultation Proposals

5. The Energy Market Integrity and Transparency Regulation (REMIT)<sup>2</sup>, which has been in force since 28 December 2011, prohibits insider trading and market manipulation in wholesale energy markets across the EU. The UK was the first to implement powers of investigation and civil sanctions under European REMIT legislation enabling Ofgem to enforce those prohibitions on market manipulation and insider dealing in wholesale gas and electricity.
6. The REMIT Enforcement Regulations<sup>3</sup> gave Ofgem the ability to impose unlimited financial penalties, access information and enter premises. To strengthen this regime and make it consistent with that for financial services, the Government

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<sup>1</sup> <https://www.gov.uk/government/consultations/strengthening-enforcement-in-gas-and-electricity-markets>

<sup>2</sup> 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>3</sup> The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc) Regulations 2013.

created new criminal offences of insider dealing in and the manipulation of wholesale energy markets in March 2015<sup>4</sup>.

7. One aspect in which the energy and financial services regimes differ is in respect of the powers (under warrant) to inspect premises. Under regulation 16(4) of the REMIT Enforcement Regulations, Ofgem has the power to remove documents appearing to be of the relevant kind when undertaking a search of premises under warrant. Whilst, in many cases, it should be possible for Ofgem to establish there and then whether or not documents are of the “relevant kind”, there may also be instances where the investigating officers are presented with a large volume of documents. Although this may include documents of the relevant kind, it may be impractical or even impossible to separate relevant from irrelevant documents on the premises. Documents stored electronically, for example, could present a particular challenge in this regard.
8. Under regulation 16 as it exists currently, Ofgem has no power to take away an entire body of documents in order to sift them off the premises. In such circumstances the availability of the power in section 50 of the Criminal Justice and Police Act 2001<sup>5</sup> would be helpful. In summary, this provides that if it is not “reasonably practicable” to undertake the separation of relevant from irrelevant documents on the premises, the material can be seized in order to carry out the examination and separation (or “sifting”) of the material elsewhere (offsite).
9. The Government therefore sought views through consultation on whether Ofgem powers should be strengthened to bring them into line with this provision. This would be done by allowing Ofgem, when conducting an investigation under regulation 16(4) of the REMIT Enforcement Regulations to remove documents from premises and sift these elsewhere to establish whether they are relevant to the investigation. The 2001 Act contains safeguards in relation to the power in section 50, including a right for a person whose property has been seized under that section to apply to the court for its return
10. In exercising its powers under the REMIT Enforcement Regulations, Ofgem will rely on intelligence relating to potential insider trading and market manipulation in wholesale energy markets. Although Ofgem has access to its own intelligence gathering, it would also help Ofgem enforce the REMIT regulation if the Competition and Markets Authority (CMA), for example, were able to disclose information to it that will support the enforcement of REMIT.
11. The Government also therefore sought views through consultation on the provision for a suitable gateway between the CMA and Ofgem. This order is made under Part 9 of the Enterprise Act 2002 (“the 2002 Act”), which restricts the disclosure by a public authority of information which it has obtained in connection with the

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<sup>4</sup> The Electricity and Gas (Market Integrity and Transparency) (Criminal Sanctions) Regulations 2015.

<sup>5</sup> <http://www.legislation.gov.uk/ukpga/2001/16/notes/division/3/2>

exercise of functions under certain Parts of the 2002 Act or other specified legislation (“specified information”). This change would permit a public authority to disclose to Ofgem specified information which is relevant to enforcement of REMIT.

## Consultation Questions

12. The Consultation launched in December 2015 asked the following questions relating to the proposals under REMIT:

**Question 14: Should Ofgem be given a “seize and sift” power in respect of REMIT similar to that contained in the Criminal Justice and Police Act?**

**Question 15: Should there be a gateway for the CMA to pass information to Ofgem?**

**Question 16: Do consultees consider that they might face increased costs as a result of these proposals? If so, can you provide us with estimates of these costs and explain them?**

**Question 17: What benefits do you think these changes might lead to? Please provide details.**

**Question 18: Do you agree with the costs and benefits as presented in the Impacts Assessment? Can you provide any further evidence which DECC should consider?**

## Stakeholder Views

1. There was broad support from stakeholders for the introduction of a gateway for the passing of information from the CMA to Ofgem, although there were some concerns that this might lead to unjustified investigations. It is not expected that providing Ofgem with these additional powers will lead to an increase in unwarranted investigations. Ofgem follow clear principles in their enforcement activities, which reflect best practice and the availability of good quality information can only improve the quality of investigations generally.
2. Stakeholder views on the proposed “seize and sift” powers were more polarised, with the majority of companies and representative groups arguing that these were disproportionate or unnecessary. For example, some stakeholders believed that Ofgem already has ‘strong powers in this space.’
3. Ofgem’s existing powers under r.16(4) of the REMIT Enforcement Regulation are not poorly defined or uncertain in scope. It is clear that they only allow Ofgem to take possession of documents or information if they appear to be of “the relevant kind”, i.e. within the scope of the search warrant. Without the Criminal Justice and Police Act 2001 section 50 power, it is clear that Ofgem would be acting unlawfully

if it took material off the premises without having first determined that it appears to be within the scope of the warrant.

4. Further, the power in section 50 of the Criminal Justice and Police Act 2001 is not unusual; it already applies in relation to a large number of other search and seizure powers, under all the legislation listed in Part 1 of Schedule 1 to the Criminal Justice and Police Act 2001, so by conferring the power on Ofgem in respect of REMIT investigations we are better aligning their powers with those of other investigatory bodies when investigating serious suspected offences or regulatory breaches.
5. Some stakeholders also felt that there was little evidence that this power would have benefitted Ofgem's search in previous investigations. We believe this power would allow OFGEM to undertake investigations more effectively and could ensure evidence was identified more quickly. Its potential for benefitting Ofgem investigations is therefore clear.
6. Some stakeholders also thought that any power should have tight conditions and controls attached with an appropriate oversight mechanism. We believe such oversight already exists and there are clear safeguards in place in the Criminal Justice and Police Act 2001. When Ofgem exercises the power in section 50, it will be under a statutory duty to sift information as soon as reasonably practicable after seizing it, and return anything which it was not entitled by the warrant to seize.<sup>6</sup> Additionally, a person who is the owner of a document can apply to the court for return of such material<sup>7</sup>, and Ofgem is required when seizing material under this power to give the occupier of the premises a notice informing the person of that right<sup>8</sup>. Further, the application process applies checks to this power and magistrates may refuse warrant applications.
7. Finally, stakeholders were concerned that allowing Ofgem to take papers off site has inherent commercial risk. It would also be likely to cause administrative and operational difficulties and could be costly.
8. Without powers to do effective investigation there will not be effective regulation. In practice, Ofgem are restricted in what can be removed and the proposed "Seize and Sift" powers are not a licence to take everything without reason - stakeholders would be appropriately safeguarded as explained above. Whilst there may be some costs to industry from this new process, overall the powers would enable Ofgem to conduct its investigation more efficiently. We therefore expect, with a company's support, investigations to be overall more efficient and therefore total costs for businesses are minimised..

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<sup>6</sup> Section 53(2) of the Criminal Justice and Police Act 2001.

<sup>7</sup> Section 59 of the Criminal Justice and Police Act 2001.

<sup>8</sup> Section 52(1) of the Criminal Justice and Police Act 2001.

### Decision

9. Our conclusion is that to ensure Ofgem can be as effective as possible in their important task of preventing market manipulation and insider trading, we believe there are clear benefits from bringing forward these additional powers for Ofgem to make the market work better for consumers overall. We will therefore proceed with introducing the powers as described through secondary legislation.

### Next steps

10. The proposed measures will require secondary legislation to implement and we will be taking this forward in tandem with publication of this Response.