

EXPLANATORY MEMORANDUM TO

THE ENTERPRISE ACT 2002 (PART 9 RESTRICTIONS ON DISCLOSURE OF INFORMATION) ORDER 2018

2018 No. 104

1. Introduction

- 1.1 This explanatory memorandum has been prepared by The Department for Business, Energy and Industrial Strategy (BEIS) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 Part 9 of the Enterprise Act 2002 (“the Act”) restricts the disclosure by a public authority of information which it has obtained under certain Parts of the Act or other specified legislation (“specified information”). This instrument permits a public authority to disclose specified information to the Gas and Electricity Markets Authority (“Ofgem”) for purposes related to the investigation by Ofgem of possible breaches of EU legislation on energy market integrity and transparency.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 Ofgem is the authority responsible for the monitoring and enforcement in Great Britain of obligations and prohibitions under Regulation (EU) No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency (“REMIT”). The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 and the Electricity and Gas (Market Integrity and Transparency) (Criminal Sanctions) Regulations 2015 (together, “the REMIT Enforcement Regulations”) give Ofgem powers to investigate suspected breaches of those obligations and prohibitions, and take enforcement action.
- 4.2 Section 237 of the Act prohibits the disclosure of specified information (as defined in section 238) about an individual or business, except in accordance with Part 9 of the Act. In practice, this prohibition principally applies to the Competition and Markets Authority (“CMA”). Section 241(3)(c) provides that a public authority may disclose specified information to another person for the purpose of facilitating the exercise by that person of any function under subordinate legislation specified by order for the purposes of that subsection.

4.3 This instrument specifies the REMIT Enforcement Regulations for the purposes of section 241(3)(c), and thereby enables the CMA (or other public authority holding specified information) to disclose specified information to Ofgem for the purpose of facilitating Ofgem’s exercise of its REMIT investigation and enforcement functions.

5. Extent and Territorial Application

5.1 The extent of this instrument is the United Kingdom.

5.2 The territorial application of this instrument is Great Britain.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

7.1 Part 9 of the Act allows disclosure of specified information under certain circumstances, to facilitate a public authority in fulfilling legislative functions.

7.2 REMIT prohibits insider trading and market manipulation in energy markets. Ofgem has a duty to investigate and enforce breaches of REMIT.

7.3 This instrument permits Ofgem to receive information that facilitates investigation and enforcement of breaches of REMIT.

Further background

7.4 In 2014 Ofgem referred the energy market to the Competition and Markets Authority (CMA) which later proposed remedies to the energy market¹. This instrument is among a number of changes intended to complement the CMA proposed remedies into energy markets by helping to bring about a more effective regulatory framework.

8. Consultation outcome

8.1 BEIS published a consultation paper in December 2015 seeking views on changes to Ofgem’s powers under gas and electricity legislation and the EU REMIT regulations. In total, 15 responses were received on this proposal, from a range of stakeholders.

8.2 9 respondents, including some industry representatives, supported the introduction of a gateway for the passing of information from the CMA to Ofgem. One respondent opposed the introduction on the basis of concerns that the additional information may risk additional, unwarranted investigations. Other responses were neutral.

8.3 However, the REMIT Enforcement Regulations specify the circumstances in which Ofgem may carry out investigations, and Article 13(1) of REMIT requires Ofgem to exercise its investigatory powers in a proportionate manner. BEIS considers that these provisions will ensure that the new proposed powers are used proportionately.

8.4 In light of the consultation responses, BEIS considers that the aim of the policy, to increase the effectiveness of enforcement of the REMIT Regulations, is met.

¹ <https://www.gov.uk/government/news/cma-publishes-final-energy-market-reforms>

8.5 A Government Response will be published on 1 February 2018.

9. Guidance

9.1 None necessary in relation to this instrument. Ofgem publishes general guidance on its approach to regulation and enforcement.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is largely on Ofgem, and will be positive.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses, but the impact is negligible.

12. Monitoring & review

12.1 The REMIT Enforcement Regulations require the Secretary of State to carry out a review of those Regulations at intervals not exceeding five years.

13. Contact

13.1 Chris Chown at the Department for Business, Energy and Industrial Strategy
Telephone: 0300 0068 6085 or email: chris.chown@beis.gov.uk can answer any queries regarding the instrument.