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**Guidance**  
**on the application**  
**of Regulation (EU) No 1227/2011 of the European**  
**Parliament and of the Council of 25 October 2011 on**  
**wholesale energy market integrity and transparency**

**3<sup>rd</sup> Edition**

**29-OCT-2013**

This Document contains the 3<sup>rd</sup> Edition of Guidance on the application of Regulation (EU) No 1227/2011 on Wholesale Energy Market Integrity and Transparency (REMIT), which the Agency may adopt pursuant to Article 16(1) of REMIT.

### Related Documents

- ACER Work Programme 2013,  
[http://www.acer.europa.eu/The\\_agency/Mission\\_and\\_Objectives/Documents/ACER%20Work%20Programme%202013.pdf](http://www.acer.europa.eu/The_agency/Mission_and_Objectives/Documents/ACER%20Work%20Programme%202013.pdf)
- 1<sup>st</sup> edition of ACER Guidance on the application of the definitions set out in Article 2 of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency  
[http://www.acer.europa.eu/remit/Documents/1st\\_edition\\_ACER\\_guidance.pdf](http://www.acer.europa.eu/remit/Documents/1st_edition_ACER_guidance.pdf)
- 2<sup>nd</sup> edition of ACER Guidance on the application of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency  
<http://www.acer.europa.eu/remit/Documents/2nd%20edition%20of%20ACER%20Guidance%20on%20the%20application%20of%20REMIT.pdf>
- REGULATION (EC) No 1227/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on wholesale energy market integrity and transparency  
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714/2009 of the European Parliament and of the Council  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:163:0001:0012:EN:PDF>

- DIRECTIVE 2003/6/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 28 January 2003 on insider dealing and market manipulation (market abuse),  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:096:0016:0016:EN:PDF>
- DIRECTIVE 2004/39/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 April 2004 on markets in financial instruments,  
<http://eur-lex.europa.eu/LexUriServ/site/en/consleg/2004/L/02004L0039-20060428-en.pdf>
- DIRECTIVE 2004/109/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:390:0038:0038:EN:PDF>
- DIRECTIVE 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation  
[http://www.esma.europa.eu/system/files/MADImpDir\\_2003\\_124.pdf](http://www.esma.europa.eu/system/files/MADImpDir_2003_124.pdf)
- DIRECTIVE 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:162:0070:0075:EN:PDF>
- Market Abuse Directive - Level 3 – first set of CESR guidance and information on the common operation of the Directive (Ref. CESR/04-505b)  
[http://www.esma.europa.eu/system/files/04\\_505b.pdf](http://www.esma.europa.eu/system/files/04_505b.pdf)
- Market Abuse Directive - Level 3 – second set of CESR guidance and information on the common operation of the Directive  
[http://www.esma.europa.eu/system/files/06\\_562b.pdf](http://www.esma.europa.eu/system/files/06_562b.pdf)
- Market Abuse Directive - Level 3 – third set of CESR guidance and information on the common operation of the Directive  
[http://www.esma.europa.eu/system/files/09\\_219.pdf](http://www.esma.europa.eu/system/files/09_219.pdf)

## **Preface by the Director on the 3<sup>rd</sup> edition**

One of the Agency's tasks under REMIT is to ensure that National Regulatory Authorities (NRAs) carry out their tasks under this Regulation in a consistent and coordinated way. For this purpose, the Agency publishes non-binding guidance, pursuant to Article 16(1) of REMIT.

The 1<sup>st</sup> edition of ACER Guidance on the application of REMIT was published on 21 December 2011, one week before the entry into force of REMIT. It focused on providing guidance to NRAs in what the Agency considered to be priority areas following the entry into force of REMIT, including the application of the definition of inside information and possible signals of insider trading and market manipulation. The 2<sup>nd</sup> edition of ACER Guidance was published on 22 September 2012. In the 2<sup>nd</sup> edition, the Agency provided its understanding of the application of the definitions of wholesale energy market, wholesale energy products and market participant, the application of the obligation to disclose inside information and the application and implementation of the prohibitions against market abuse.

Since the development of the 1<sup>st</sup> edition, the Agency has been working closely with NRAs in implementing REMIT. Taking into account the experience gained so far, including the feedback received from NRAs, market participants and other stakeholders, the Agency considers that the time has come to update the Guidance.

In this 3<sup>rd</sup> edition, our main objective is to provide guidance to NRAs concerning the registration of market participants and, in particular, the role of NRAs in the registration process. In addition, further clarifications have been introduced concerning the definitions of wholesale energy products and inside information, and concerning the obligation to effectively publish inside information. As for the previous editions, this Guidance is directed to NRAs and in no way provides a legally-binding interpretation of the application of REMIT.

The Agency will continue its work to assist NRAs in carrying out their activities under REMIT in a consistent and coordinated way. But we also want to make the implementation of REMIT as smooth as possible for market participants. The Agency will therefore continue to publish information on its website ([www.acer.europa.eu](http://www.acer.europa.eu)) to assist market participants and other stakeholders in fulfilling their obligations under REMIT.

Alberto Pototschnig  
*Director*  
*Agency for the Cooperation of Energy Regulators*

## **Preface by the Director on the 2<sup>nd</sup> edition**

The 1<sup>st</sup> edition of ACER Guidance on the application of REMIT definitions was published on 21 December 2011, one week before the entry into force of REMIT. It focused on providing guidance to NRAs in what the Agency considered to be priority areas following the entry into force of REMIT. The 1st edition of ACER Guidance was well received by stakeholders. Less than a year later, it is now time to publish an updated version, taking into account the experience gained so far, including through feedback from NRAs, energy market participants and other stakeholders. We are most grateful to all of them for their contribution.

In this 2<sup>nd</sup> edition of ACER Guidance on the application of REMIT, we have updated the Guidance on the application of the market abuse definitions, but also extended it to the scope of REMIT in relation to EU financial market legislation, the application of definitions of wholesale energy market, wholesale energy products and market participant, the application of the obligation to disclose inside information and the application and implementation of the prohibitions against market abuse.

As for the previous edition, this Guidance is directed to NRAs, pursuant to Article 16(1) of REMIT, and in no way provides an interpretation of the application of REMIT.

The Agency will continue its work to assist NRAs in carrying out their tasks under REMIT in a coordinated and consistent way. The Guidance will be updated in further editions on the basis of the experience gained by the Agency and NRAs in the application of REMIT, including through feedback from energy market participants and other stakeholders. For this purpose, a third edition of the Guidance is already foreseen for mid-2013.

In addition, we will also update, whenever appropriate, our Question and Answer (Q&A) document and our tools published on our website ([www.acer.europa.eu](http://www.acer.europa.eu)) to assist market participants and other stakeholders in fulfilling their obligations under REMIT.

Alberto Pototschnig  
*Director*  
*Agency for the Cooperation of Energy Regulators*

## **Preface by the Director on the 1<sup>st</sup> edition**

Following its publication in the Official Journal of the European Union on 8 December 2011, Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale market integrity and transparency (REMIT) will enter into force on 28 December 2011.

Whilst the obligations for wholesale energy market participants to register with the competent National Regulatory Authority (NRA) and to provide the Agency for the Cooperation of Energy Regulators (the Agency) with records of transactions and information related to the capacity and use of energy facilities will only come into force after the adoption of the implementing acts to be developed by the European Commission, the prohibitions of insider trading and market manipulation, the obligation to publish inside information and the obligations for persons professionally arranging transactions to establish and maintain effective arrangements and procedures to identify suspected breaches of the prohibitions of insider trading and market manipulation and to notify them to the competent NRA without further delay will apply as of 28 December 2011.

According to Article 16(1) of REMIT, the Agency shall aim to ensure that NRAs carry out their tasks under REMIT in a coordinated and consistent way. In this context, the Agency shall publish non-binding Guidance on the application of the definitions set out in Article 2 of REMIT, as appropriate. The entry into force of REMIT and of the aforementioned prohibitions and obligations is considered an appropriate moment to publish the First Edition of such Guidance. The Guidance will be updated in later editions on the basis of the experience gained by the Agency and NRAs in the implementation of REMIT, including through feedback from energy market participants and other stakeholders.

This Guidance is directed to NRAs and in no way provides an interpretation of the definitions set out in Article 2 of REMIT.

At the same time as publishing this Guidance, the Agency is making available on its website ([www.acer.europa.eu](http://www.acer.europa.eu)) information and tools to assist market participants and other stakeholders in fulfilling their obligations under REMIT. These tools include a form through which market participants and other stakeholders will be able to submit requests for clarification on issues related to the implementation of REMIT. We will aim at providing such clarifications through a Question and Answer (Q&A) document, which is also published on our website and which will be updated regularly.

I would like to thank all market participants and other stakeholders who, through their contributions, will help us ensure a smooth and effective implementation of REMIT.

Alberto Pototschnig  
*Director*  
*Agency for the Cooperation of Energy Regulators*

**Important Notice**

According to the second subparagraph of Article 16(1) of Regulation (EU) No 1227/2011 on Wholesale Energy Market Integrity and Transparency (REMIT), “*the Agency shall publish non-binding guidance on the application of the definitions set out in Article 2 [of REMIT], as appropriate*”. In addition, according to the first subparagraph of Article 16(1) of REMIT, “*the Agency shall aim to ensure that national regulatory authorities carry out their tasks under [that] Regulation in a coordinated and consistent way*”. For this purpose, the Agency may issue guidance both on the application of the definitions set out in Article 2 of REMIT and on other issues of application of REMIT.

Therefore the non-binding Guidance on the application of REMIT provided in this document is directed to National Regulatory Authorities (NRAs) to ensure the required coordination and consistency in their monitoring activities under REMIT. It is deliberately drafted in non-legal terms and made public for transparency purposes only.

The non-binding Guidance is updated from time to time to reflect changing market conditions and the experience gained by the Agency and NRAs in the implementation of REMIT, including through the feedback of market participants and other stakeholders.

The Guidance is without prejudice to Directives 2003/6/EC and 2004/39/EC applying to wholesale energy products which are financial instruments as well as to the application of European competition law to the practices covered by REMIT.



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## **1 Introduction**

This document contains the non-binding Guidance, directed to National Regulatory Authorities (NRAs), pursuant to Article 16(1) of 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>1</sup> (REMIT), on the application of REMIT.

This third edition of the Guidance further extends the scope of the Guidance also to cover registration of market participants pursuant to Article 9 of REMIT and the role of NRAs in the registration process, which is dealt with in Chapter 4. In addition, further clarifications have been introduced in Chapter 3, concerning the definition of wholesale energy products, in Chapter 5, concerning the definition of inside information, in Chapter 7, concerning the obligation to effectively publish inside information, and in Chapter 8, concerning the exemptions to the prohibition of insider trading.

For further guidance on general definitions stipulated in Article 2 of REMIT (e.g. final customer, consumption etc.) reference is made to the relevant definitions in Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009.

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<sup>1</sup> OJ L 326, 8.12.2011, p. 1.

## 2 Scope of the Regulation

According to Article 1(2) of REMIT, the Regulation applies to trading in wholesale energy products, whilst Articles 3 and 5 of this Regulation shall not apply to wholesale energy products which are financial instruments and to which Article 9 of Directive 2003/6/EC applies. In addition, Article 1(2) of REMIT stipulates that the Regulation is without prejudice to Directives 2003/6/EC and 2004/39/EC, as well as to the application of European competition law to the practices covered by REMIT.

Article 1(2) of REMIT therefore requires the definition of a borderline between the application of the market abuse prohibitions of Articles 3 and 5 of REMIT, on the one hand, and of the market abuse prohibitions of Directive 2003/6/EC (Market Abuse Directive - MAD), on the other hand. In any case, it can already be noted that Article 1(2) of REMIT does not affect the disclosure of inside information according to Article 4(1) of REMIT. Article 4(1) of REMIT therefore applies regardless of whether the wholesale energy product is a financial instrument or not.

According to Article 9(1) of MAD, the Directive applies to any financial instrument admitted to trading on a regulated market in at least one Member State, or for which a request for admission to trading on such a market has been made, irrespective of whether or not the transaction itself actually takes place on that market. According to Article 9(2) of MAD, Articles 2, 3 and 4 of MAD shall also apply to any financial instrument not admitted to trading on a regulated market in a Member State, but whose value depends on a financial instrument as referred to in Article 9(1) of MAD. Article 6(1) to (3) of MAD shall therefore not apply to issuers who have not requested the admission of their financial instruments to trading on a regulated market in a Member State or whose request has not been approved.

The list of financial instruments subject to MAD provisions as specified in Article 1(3) of MAD includes derivatives on commodities and any other instrument admitted to trading on a regulated market in a Member State or for which a request for admission to trading on such a market has been made.

Article 4(1), No 14, of Directive 2004/39/EC (Markets in Financial Instruments Directive – MiFID) defines regulated market as a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third party buying and selling interests in financial instruments in the system and in accordance with its nondiscretionary rules in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of Title III of MiFID.

Considering the above, any wholesale energy product which is a financial instrument, including those listed in Section C of Annex I of MiFID, but which is not admitted to trading on a regulated market in a Member State and for which a request for admission to trading on such a market has not been made would be covered by market abuse prohibitions of REMIT. In particular, a derivative on energy only admitted to trading at Multilateral Trading Facilities according to Article 4(1) No 15 of MiFID is not covered by the market abuse prohibitions of MAD, but by the market abuse prohibitions of REMIT.

This understanding applies until the scope of the financial instruments under MAD is extended and aligned with the MiFID scope as currently considered in the review of these directives. The Guidance will then be reviewed accordingly.

### **3 Application of the definitions of “wholesale energy products”, “wholesale energy market” and “market participant”**

#### **3.1 Introduction**

This chapter covers the Agency’s current understanding of the notions of wholesale energy products, wholesale energy market and market participant, according to Article 2 of REMIT.

#### **3.2 Wholesale energy products**

Article 2(4) of REMIT defines wholesale energy products as follows:

*“wholesale energy products” means the following contracts and derivatives, irrespective of where and how they are traded:*

- (a) contracts for the supply of electricity or natural gas where delivery is in the Union;*
- (b) derivatives relating to electricity or natural gas produced, traded or delivered in the Union;*
- (c) contracts relating to the transportation of electricity or natural gas in the Union;*
- (d) derivatives relating to the transportation of electricity or natural gas in the Union.*

Furthermore, Article 2(4), second subparagraph, states that:

*Contracts for the supply and distribution of electricity or natural gas for the use of final customers are not wholesale energy products. However, contracts for the supply and distribution of electricity or natural gas to final customers with a consumption capacity greater than the threshold set out in the second paragraph of point (5) shall be treated as wholesale energy products.*

For the purposes of REMIT, the definition of final customer draws on the relevant definition in Directives 2009/72/EC and 2009/73/EC. These directives define a final customer as meaning “a customer purchasing electricity or natural gas for his own use”.

Article 2(5) of REMIT clarifies the notion of “consumption capacity” relevant for the understanding of the notion of “wholesale energy products”:

*“consumption capacity” means the consumption of a final customer of either electricity or natural gas at full use of that customer’s production capacity. It comprises all consumption by that customer as a single economic entity, in so far as consumption takes place on markets with interrelated wholesale prices.*

*For the purposes of this definition, consumption at individual plants under the control of a single economic entity that have a consumption capacity of less than 600 GWh per year shall not be taken into account in so far as those plants do not exert a joint influence on wholesale energy market prices due to their being located in different relevant geographical markets;*

With regard to Article 2(5) of REMIT, the Agency understands “consumption [...] at full use of that customer's production capacity” to mean the maximum amount of energy (electricity or natural gas) that a final customer could consume in a year, i.e. if the customer were to run its consumption assets fully at all times throughout this year. It is this consumption capacity that market participants should consider whenever assessing whether the consumption capacity threshold of 600 GWh is exceeded. The consumption capacity comprises all consumption by that customer, i.e. of electricity or natural gas, as a single economic entity, in so far as consumption takes place on markets with interrelated wholesale prices. It is the Agency's understanding that final customers should calculate their consumption capacity of electricity and natural gas separately from each other, and not cumulate them, whenever assessing whether the threshold of 600 GWh is exceeded.

Within a single economic entity, consumption at individual plants below the threshold of 600 GWh are not taken into account in so far as those plants do not exert a joint influence on wholesale energy market prices due to their being located in different relevant geographical markets. However, individual plants that each has a consumption capacity below the threshold of 600 GWh, but that are located in the same geographical market, shall be taken into account whenever assessing whether the threshold of 600 GWh is exceeded.

As for the notion of “single economic entity”, guidance can be obtained from international practices of competition law and especially from the precedents of the European Court of Justice. Under the competition rules, the unified conduct on the market of two or more companies takes precedence over the formal legal structure of those companies. Therefore, the relevant question is not whether two given companies are separate legal persons, but rather whether they behave together as a single unit in the market. The following elements may be taken into consideration when assessing whether two or more companies form a single economic entity:

- Decision making powers, procedures and sharing of liability between the relevant companies;
- Ownership (e.g. majority shareholding);
- Ownership structure of the relevant companies, and
- Participating interests or influence over the relevant companies.

As regards the understanding of “markets with interrelated wholesale prices”, the Agency considers that wholesale energy markets are increasingly interlinked across the Union. There is already a high degree of interrelation of wholesale electricity and natural gas prices across the Union and there is an expectation of increased interrelation as the development of a single

European energy market continues to progress<sup>2</sup>. Having this in mind, the Agency considers it prudent for market participants to take into account the consumption capacity of all their plants across the Union when assessing whether the consumption capacity threshold of 600 GWh is exceeded.

In view of the definition of wholesale energy products in Article 2(4) of REMIT, the Agency considers contracts for the supply or transportation of electricity and natural gas traded intraday, within-day, day-ahead, two-day-ahead, week-end, long-term or any other time period generally accepted in the market as contracts for the supply or transportation of electricity or natural gas. Derivatives are understood as financial instruments as set out in points (4) to (10) of Section C of Annex I to Directive 2004/39/EC, as implemented in Articles 38 and 39 of Regulation (EC) No 1287/2006.

Conversely, the Agency considers contracts for green certificates and emission allowances not to be wholesale energy products, as they do not fulfil the requirements set out in Article 2(4) of REMIT. The Agency is aware that these contracts can have a significant price effect on wholesale energy markets. According to Article 10 of REMIT, trade repositories or competent authorities responsible for overseeing and collecting information on trading in emission allowances or derivatives thereof shall provide the Agency with access to records of transactions in such allowances and derivatives.

As the definition of wholesale energy products applies to contracts and derivatives “irrespective of how and where they are traded”, the Agency considers that intra-group transactions, i.e. over-the-counter (OTC) contracts entered into with another counterparty which is part of the same group, are considered to be wholesale energy products under REMIT.

### **3.3 Wholesale energy market**

Article 2(6) of REMIT defines a wholesale energy market as follows:

*“wholesale energy market“ means any market within the Union on which wholesale energy products are traded.*

According to Recital 5 of REMIT, wholesale energy markets encompass both commodity markets and derivative markets, which are of vital importance to the energy and financial markets, as price formation in both sectors is interlinked. They include, *inter alia*, regulated markets, multilateral trading facilities and over-the-counter (OTC) transactions and bilateral contracts, traded directly or through brokers.

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<sup>2</sup> For more information on the current status of market integration in EU wholesale electricity and gas markets, including the increasing price convergence across national and regional markets, see the “ACER/CEER Annual Report on the Results of Monitoring the Internal Electricity and Natural Gas Markets in 2011”.



The Agency's understanding is that the definition of wholesale energy markets furthermore includes, among others, but is not limited to:

- Balancing markets for the trading of electricity or natural gas with delivery in the Union;
- Intraday or within-day markets for the trading of electricity or natural gas with delivery in the Union;
- Day-ahead or two-day-ahead markets for the trading of electricity or natural gas with delivery in the Union, including week-end products;
- Physical markets for the trading of electricity or natural gas with delivery in the Union, including markets for physical forward contracts and non-standardised long-term contracts;
- Markets for the transportation capacities of electricity or natural gas in the Union;
- Derivatives markets relating to electricity or natural gas produced, traded or delivered in the Union, including financial OTC markets;
- Derivatives markets relating to the transportation of electricity or natural gas in the Union.

In addition, generation capacity markets and capacity remuneration mechanisms (CRM), where in place, shall be considered wholesale energy markets according to REMIT in so far as wholesale energy products are traded in such markets.

### **3.4 Market participant**

Article 2(7) of REMIT defines a market participant as follows:

*“market participant” means any person, including transmission system operators, who enters into transactions, including the placing of orders to trade, in one or more wholesale energy markets.*

The notion of a market participant is closely linked with the understanding of the notions of wholesale energy market and wholesale energy products.

The understanding of the notion of market participant is crucial for several reasons. Firstly, the obligation to disclose inside information according to Article 4(1) of REMIT lies with the market participant. Secondly, according to Article 8(1) of REMIT, being a market participant entails the obligation to provide the Agency (i) with a record of wholesale energy market transactions, including orders to trade, by the market participant itself or through a person or authority listed in points (b) to (f) of Article 8(4) of REMIT and (ii) with the information described in Article 8(5) of REMIT (fundamental data). Lastly, pursuant to Article 9(1) of REMIT, market participants have to register with the competent NRA if entering into transactions which are required to be reported to the Agency in accordance with Article 8(1) of REMIT.

In the light of the Agency's understanding of the notions of wholesale energy market and wholesale energy products, the Agency currently considers at least the following persons to be market participants under REMIT *if entering into transactions, including orders to trade, in one or more wholesale energy markets:*

- **Energy trading companies** in the meaning of ‘electricity undertaking’ pursuant to Article 2(35) of Directive 2009/72/EC carrying out at least one of the following functions: transportation, supply, or purchase of electricity, and in the meaning of ‘natural gas undertaking’ pursuant to Article 2(1) of Directive 2009/73/EC carrying out at least one of the following functions: transportation, supply or purchase of natural gas, including LNG;
- **Producers of electricity or natural gas** in the meaning of Article 2(2) of Directive 2009/72/EC and Article 2(1) of Directive 2009/73/EC, including producers supplying their production to their in-house trading unit or energy trading company;
- **Shippers of natural gas;**
- **Balance responsible entities;**
- **Wholesale customers** in the meaning of Article 2(8) of Directive 2009/72/EC and Article 2(29) of Directive 2009/73/EC;
- **Final customers** in the meaning of Article 2(9) of Directive 2009/72/EC and Article 2(27) of Directive 2009/73/EC, acting as a single economic entity, that have a consumption capacity of 600 GWh or more per year for gas or electricity. If the consumption of a final customer takes place in markets with interrelated prices, his total consumption capacity is the sum of his consumption capacity in all those markets (see Chapter 3.2 for further explanation of these concepts);
- **Transmission system operators (TSOs)** in the meaning of Article 2(4) of Directive 2009/72/EC and Directive 2009/73/EC;
- **Storage system operators (SSOs)** in the meaning of Article 2(10) of Directive 2009/73/EC;
- **LNG system operators (LSOs)** in the meaning of Article 2(12) of Directive 2009/73/EC, and
- **Investment firms** in the meaning of Article 4(1), No 1, of Directive 2004/39/EC.

The crucial criterion for the assessment of whether a company is a market participant is the entering into transactions, including the placing of orders to trade, in wholesale energy markets. For instance, SSOs and LSOs are explicitly mentioned as market participants in Article 3(4)(b) of REMIT and are therefore considered as market participants if entering into transactions in one or more wholesale energy market. LSOs may sell contracts which eventually lead to the feed in or extraction of gas from the gas network. In several markets, some SSOs conclude contracts for the supply of gas in cases where storage facilities experience operational problems, but despite the malfunction, seek to provide customers with gas and therefore acquire volumes over the spot market. As a result of this and for the purposes of REMIT, these LSOs and SSOs are market

participants and are required to publish inside information according to Article 4(1) of REMIT. Additionally, information related to the capacity and use of facilities for storage and the use of LNG facilities is required to be reported to the Agency according to Article 8(5) of REMIT. SSOs and LSOs seem to be best placed to fulfill this disclosure obligation and data reporting requirement under REMIT. Accordingly, the Agency considers it as best practice if SSOs and LSOs, even if not entering into transactions in wholesale energy products, facilitate publication of information in relation to Article 4(1) of REMIT on behalf of the potentially multiple market participants involved. The system operator is typically best placed to publish relevant REMIT related information and by doing so can avoid duplicate, and potentially misleading publications by individual market participants involved. Market participants however remain responsible for publication, and should have appropriate (back-up) arrangements in place, in case the system operator is not able to publish, for instance due to technical reasons, or where the system operator's publication of information is not deemed to meet the requirements for publication of information under Article 4(1) of REMIT.

### **3.5 Application of REMIT for market participants from non-EU and non-EEA countries**

The Agency also considers it necessary to give guidance on the application of the notion of market participant to market participants from non-EU and non-EEA countries.

According to Article 2(7) of REMIT, a market participant is any person who enters into transactions in one or more wholesale energy markets. This applies irrespective of the location of the person. Accordingly, also persons from non-EU and non-EEA countries are covered by REMIT provided that they enter into transactions in wholesale energy markets. Article 9(1) of REMIT confirms this understanding that REMIT also applies to market participants from non-EU and non-EEA countries as it requires market participants not established or resident in the Union entering into transactions which are required to be reported to the Agency in accordance with Article 8(1) of REMIT to register in a Member State in which they are active.

In the light of the above, the Agency considers that also non-EU and non-EEA market participants are covered by the notion of market participant according to Article 2(7) of REMIT if entering into transactions, including the placing of orders to trade, in one or more wholesale energy markets. Accordingly, **the obligations to register pursuant to Article 9(1) of REMIT with the competent NRA and to report data to the Agency according to Article 8(1) and (5) of REMIT also applies to such non-EU and non-EEA market participants. The same holds for the prohibitions of market abuse pursuant to Articles 3 and 5 of REMIT.**

## 4 Registration of market participants

### 4.1 Introduction

This Chapter illustrates the Agency's current understanding of the application of Article 9 of REMIT and is intended to provide guidance to NRAs concerning the registration process and their role in this process, in order to facilitate the harmonisation of practices across the Union. Accurate information in the national registers and the European register of market participants is a prerequisite for efficient and effective market monitoring.

### 4.2 Which market participants are obliged to register?

According to Article 9(1) of REMIT,

*Market participants entering into transactions which are required to be reported to the Agency in accordance with Article 8(1) shall register with the national regulatory authority [...].*

According to Article 2(7) of REMIT,

*“market participant” means any person, including transmission system operators, who enters into transactions, including the placing of orders to trade, in one or more wholesale energy markets.*

In Chapter 3.4 of this Guidance, the Agency provides its understanding of the notion of market participant as defined in Article 2(7) of REMIT.

It should however be highlighted that the obligation to register as a market participant under Article 9(1) of REMIT only applies to those market participants entering into transactions which are required to be reported to the Agency in accordance with Article 8(1).

The requirement to register under REMIT applies to *any* person, legal or natural, that enters into transactions which are required to be reported. Therefore, it is important to note that all market participants entering into transactions which are required to be reported to the Agency in accordance with Article 8(1) must register, even if a parent, subsidiary or other related undertaking is already registered or is registering. Provided they are not separate legal persons, branches of a market participant do not need to register as separate market participants.

A market participant may allow a third party to submit registration information on their behalf. In such case, the relevant NRA may require the third party to provide evidence of such permission.

#### **4.3 What information is market participants required to provide?**

Article 9(3) of REMIT requires the Agency, in cooperation with NRAs, to determine and publish, by 29 June 2012, the format in which NRAs should transmit registration information on market participants to the Agency.

On 26 June 2012, the Agency adopted a Decision determining the registration format to be used for the establishment of the European register of market participants<sup>3</sup>. The registration format consists of 5 sections:

- Section 1: Data related to the market participant
- Section 2: Data related to the natural persons linked to the market participant
- Section 3: Data related to the ultimate controller or beneficiary of the market participant
- Section 4: Data related to the corporate structure of the market participant
- Section 5: Data related to the delegated parties for reporting on behalf of the market participant

All market participants entering into transactions which are required to be reported to the Agency in accordance with Article 8(1) are required to provide this information.

#### **4.4 Establishment of national registers**

According to Article 9(2) of REMIT:

*Not later than 3 months after the date on which the Commission adopts the implementing acts set out in Article 8(2), national regulatory authorities shall establish national registers of market participants [...].*

Thus, each NRA shall establish a registration system by which market participants can provide registration information to that NRA no later than 3 months after the adoption of the implementing acts. NRAs can, if they wish, open the registration process to market participants earlier than this.

NRAs are free to use whatever system they deem most appropriate for their market. The Agency is developing a system to be used to establish the European register of market participants. This system will also be available to NRAs as a means of registering market participants in their own Member State.

NRAs should ensure that market participants are provided with information on how to register. For this purpose, and for the purpose of ensuring accuracy in the European register of market participants established by the Agency in accordance with Article 9(3) of REMIT, the Agency will

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<sup>3</sup> ACER Decision no 01/2012 relating to the registration format pursuant to Article 9(3) of Regulation (EU) No 1227/2011.

make available a Registration User Manual (RUM) to NRAs. The RUM will provide guidance on how the fields in the registration format should be populated. On the basis of the RUM, NRAs may provide guidance to market participants on how to register. The manual will be updated periodically, on the basis of the feedback from NRAs.

#### **4.5 With which NRA should market participants register?**

According to Article 9(1):

*Market participants entering into transactions which are required to be reported to the Agency in accordance with Article 8(1) shall register with the national regulatory authority in the Member State in which they are established or resident, or, if they are not established or resident in the Union, in a Member State in which they are active.*

According to settled case law of the Court of Justice of the European Union, a legal or natural person can be established in more than one Member State. The legal or natural person is established in the Member State(s) in which it pursues a professional activity on a stable and continuous basis<sup>4</sup>. If a market participant is established in more than one Member State, the Agency would normally expect market participants to register in the Member State in which they have their primary establishment.

For market participants not established or resident in the Union, it is the Agency's understanding that such market participants may choose in which Member State to register, as long as they are active in that Member State.

#### **4.6 When is the deadline for registration to be submitted?**

According to Article 9(4) of REMIT,

*Market participants (...) shall submit the registration form to the national regulatory authority prior to entering into a transaction which is required to be reported to the Agency in accordance with Article 8(1).*

Thus, market participants must submit the registration form before entering into any transaction which is required to be reported to the Agency. Consequently, market participants entering into a transaction which is required to be reported in accordance with Article 8(1) of REMIT prior to submitting the registration form may be in breach of Article 9 of REMIT. NRAs should encourage market participants to register well in advance of entering into a transaction which is required to be reported to facilitate a smooth registration process.

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<sup>4</sup> See Case C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, ECR [1995] p. I-04165, paragraph 24 and 25.

In accordance with the ACER Decision No 01/12, for practical reasons illustrated in Chapter 4.7, the registration process will be split into two phases for market participants registering before the Agency has published for the first time the list of market participants in the European register.

- In the first phase, such market participants shall provide information relating to Sections 1 (data related to the market participant), 2 (data related to the natural persons linked to the market participant), 3 (data related to the ultimate controller or beneficiary of the market participant) and 5 (data related to the delegated parties for reporting on behalf of the market participant) of the registration format. The Agency considers that any person who, after six months from the adoption of the implementing acts, enters into a transaction which is required to be reported to the Agency without having completed the first phase of the registration process may be in breach of Article 9 of REMIT.
- In the second phase, such market participants shall provide the information relating to Section 4 (data related to the corporate structure of the market participant) of the registration format. This information has to be completed within 3 months from the first publication of the European register. Any market participant who, after this deadline, enters into a transaction that is required to be reported to the Agency without having provided the information relating to Section 4 may be in breach of Article 9 of REMIT, even if the market participant has completed the first phase of the registration process and received an ACER code.

Any market participant registering after the Agency publishes for the first time the European register will be required to submit the information related to all the sections of the registration format before the registration form can be considered to be correctly submitted. This is likely to apply to persons that are not currently trading products required to be reported by the Commission's implementing acts, i.e. 'new' market participants.

#### **4.7 Issuance of the ACER code**

As required by Article 9(2) of REMIT, each market participant registered under REMIT will be issued with a unique identifier (the "ACER code"). The ACER code will enable market participants to report data under Article 8 of REMIT. Market participants will also need the list of ACER codes in order to provide information relating to Section 4 of registration format (data related to the corporate structure of the market participants).

According to Article 9(4) of REMIT, market participants shall submit the registration form prior to entering into transactions which are required to be reported to the Agency in accordance with Article 8(1) of REMIT. The ACER code will be issued upon the transmission for the first time of the information in the national registers to the Agency, in accordance with the ACER Decision No

01/12. According to Article 2 of this ACER Decision, NRAs should promptly<sup>5</sup> transmit the registration information to the Agency once it is submitted by the market participant, after which the Agency immediately issues the ACER code. Thus, NRAs should ensure that market participants receive the ACER code in a timely manner, and in any case before the transactions entered by the market participants are required to be reported to the Agency in accordance with Article 8(1) of REMIT. This will enable market participants to fulfill their reporting obligations under Article 8(1) of REMIT and an efficient and effective data collection by the Agency. The registration system will provide for automatic checks that will prevent incomplete registration forms to be submitted.

For market participants registering before the Agency for the first time publishes the European register, the ACER code will be issued upon the submission of those market participants' first phase information (relating to Sections 1, 2, 3 and 5) to the relevant NRA. However, such market participants should not consider the receipt of an ACER code as a confirmation that they have completed the registration process. In order to complete the process, such market participants still need to provide the information relating to Section 4 of the registration format within 3 months from the first publication of the European register, as described in Chapter 4.6.

For any market participant registering after the Agency for the first time publishes the European register, the ACER code will be issued upon the submission of all sections of the registration format to the relevant NRA (i.e. Sections 1, 2, 3, 4 and 5).

#### **4.8 Requirement to keep registration information up to date**

According to Article 9(5) of REMIT,

*Market participants [...] shall communicate promptly to the national regulatory authority any change which has taken place as regards the information provided in the registration form.*

It is important to recognise that registration is not a one-off event, but rather an ongoing requirement. REMIT not only requires market participants to register with an NRA prior to entering into a transaction, but also to update their registration form with *any change which has taken place as regards the information provided in the registration form* in accordance with Article 9(5) of REMIT. If a change of the mandatory registration information is not communicated promptly, the registration is to be considered incomplete. Market participants whose registration form is out-dated may be in breach of Article 9 of REMIT.

Although the responsibility to update the information provided to the national registers rests with the market participants, the Agency considers it best practice that NRAs set up regular reminders

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<sup>5</sup> According to Article 2 of the ACER Decision No 01/2012, NRAs shall provide *promptly* the Agency with the information in the national registers in electronic format, through a secure channel and using one of the following formats: CSV or XML.



(e.g. once a year) to market participants asking them to check that the information submitted is still correct and up to date.

#### **4.9 The role of NRAs in the registration process**

Having in mind that market participants are obliged to register at *national* level, and not directly with the Agency, registration of market participants under REMIT is first and foremost a national process. NRAs should be prepared to undertake three roles during the registration process.

The first role is to act as a source of support for market participants seeking to register with that NRA. Even for those NRAs that choose to use ACER's registration system, it is the NRAs that should provide users with support during the registration process. As referred to in Chapter 4.4 of this Guidance, the Agency will make available a Registration User Manual (RUM) to NRAs, that may use it when supporting market participants. However, the Agency recognises that ultimate responsibility to register successfully lies with market participants.

The second role of NRAs is to transmit the information in their national registers to the Agency. In accordance with Article 2 of the ACER Decision no 01/2012, NRAs should promptly transmit the registration information to the Agency once it is submitted by the market participant, after which the Agency immediately issues the ACER code.

The third role relates to the accuracy of registration information. NRAs, according to Article 9(2) of REMIT, shall establish registers of market participants which they shall keep up to date. Accurate information in the national and European registers of market participants is a prerequisite for an efficient and effective market monitoring system. The Agency considers it best practice that NRAs have systems in place to effectively check the registration information provided by market participants to identify omissions and obvious errors. Any errors detected by NRAs should be promptly notified to the Agency. The registration system developed by the Agency will provide for automatic checks that will prevent incomplete registration forms from being submitted by market participants.

Market participants are allowed to trade without breaching Article 9 as soon as they have submitted their complete registration forms to the relevant NRA, regardless of whether or not an ACER code has been issued to them. The Agency therefore aims at issuing the ACER code immediately upon receipt of the registration information from the NRA. However, the Agency also aims at ensuring a high level of accuracy in the European register of market participants. The Agency may therefore choose to delay the publication of the information transmitted by the NRAs to the Agency, while additional checks on the registration information submitted by market participants are conducted by the NRAs.

It is important to note that through the registration process, NRAs do not issue an authorisation or license to trade to the market participants. The completion of the registration process does not constitute a "know-your-customer" check or "fit-and-proper" assessment of the market participant.

#### 4.10 Conclusions

For a market participant starting the registration process before the Agency publishes for the first time the list of market participants in the European register, the registration process will include the following steps:

1. Before entering into a transaction required to be reported to the Agency in accordance with Article 8(1) of REMIT<sup>6</sup>, the market participant submits a registration form to the relevant NRA, providing information relevant to Sections 1, 2, 3 and 5 of ACER Decision No 01/2012. NRAs should encourage market participants to register in advance to facilitate a smooth registration process. It is the market participant's responsibility to provide correct and complete information for the registration;
2. The NRA promptly transmits the information in its national register to the Agency;
3. Immediately following the transmission of the information from the NRA to the Agency, the Agency issues a unique identifier (the "ACER code") for the market participant to the market participant and the relevant NRA;
4. The Agency establishes a European register of market participants, based on the information provided by NRAs. A list of market participants based on the European register is published;
5. The market participant completes the second phase of the registration process by submitting information relevant to Section 4 of the registration format. The deadline for the submission of this information is 3 months after the Agency publishes for the first time the European register of market participants.

Any market participant that is registering after the Agency for the first time publishes the European list of market participants must provide all relevant information, i.e. information relevant to Sections 1, 2, 3, 4, and 5, during its initial registration.

Market participants must transmit the registration form to the NRA prior to entering into a transaction which is required to be reported to the Agency in accordance with Article 8(1) of REMIT. It is however important that a clear and consistent message is given to market participants regarding registration under REMIT: the registration of market participants does not constitute any kind of authorisation or license to trade and is without prejudice to obligations to comply with applicable trading and balancing rules.

The Agency will announce early in advance when it intends to publish for the first time the European register of market participants.

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<sup>6</sup> The reporting requirement will apply starting six months after the adoption of the implementing acts by the European Commission.

## 5 Application of the definition of “inside information”

### 5.1 Introduction

This Chapter covers what the Agency currently considers to constitute “inside information” as defined by Article 2(1) of REMIT.

Article 2(1) of REMIT defines “inside information” as follows:

*“inside information” means*

- *information of a precise nature,*
- *which has not been made public,*
- *which relates, directly or indirectly, to one or more wholesale energy products and*
- *which, if it were made public, would be likely to significantly affect the prices of those wholesale energy products.*

The following paragraphs provide guidance on what the Agency currently considers as covered by the four above criteria<sup>7</sup>.

It should be noted that the criteria on information of a precise nature (see Chapter 5.2) and on significant price effect (see Chapter 5.4) are very much linked to each other and are therefore to be considered together. However, the Agency considers that it is possible to identify separately the factors which should be taken into account in respect of each criterion.

#### **Important Notice**

**The examples of types of practice set out in this document are deliberately described in non-legal technical terms and it is emphasised that the descriptions are not intended to affect the scope of interpretation of REMIT.**

### 5.2 Information and information of a precise nature

Article 2(1), second subparagraph, of REMIT clarifies what is meant by the term “information” as follows:

- (a) *information which is required to be made public in accordance with Regulations (EC) No 714/2009 and (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations;*

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<sup>7</sup> Concerning wholesale energy products which are financial instruments and to which Article 9 of Directive 2003/6/EC applies, please refer to the relevant CESR guidance and information on the Market Abuse Directive (See CESR/04-505b, CESR/06-562b and CESR /09-219 published under <http://www.esma.europa.eu/index.php>).

- (b) *information relating to the capacity and use of facilities for production, storage, consumption or transmission of electricity or natural gas or related to the capacity and use of LNG facilities, including planned or unplanned unavailability of these facilities;*
- (c) *information which is required to be disclosed in accordance with legal or regulatory provisions at Union or national level, market rules, and contracts or customs on the relevant wholesale energy market, insofar as this information is likely to have a significant effect on the prices of wholesale energy products; and*
- (d) *other information that a reasonable market participant would be likely to use as part of the basis of its decision to enter into a transaction relating to, or to issue an order to trade in, a wholesale energy product.*

However, Article 2(1), second subparagraph, of REMIT solely defines the notion of “information”. In order to consider an information as inside information, it still has to fulfil all four criteria of Article 2(1), first subparagraph, of REMIT mentioned above (see Chapter 5.1), i.e. that the information must be of a precise nature, that it has not been made public, that it relates, directly or indirectly, to one or more wholesale energy products and that, if made public, it would be likely to significantly affect the prices of those wholesale energy products.

#### **“Transparency information” versus “inside information”**

The concept of “transparency information” refers to all data that shall be published under the transparency obligation of Regulation (EC) No 714/2009 and (EC) No 715/2009, including applicable guidelines and network codes adopted pursuant to those Regulations. This includes information referred to in the Commission Regulation (EU) No 543/2013, which amends the guidelines annexed to Regulation (EC) No 714/2009. Transparency information is cited in Article 2(1)(a) of REMIT as a type of information that may constitute inside information.

The concept of “inside information” comprises, on the one hand, the transparency information that is likely to have a significant effect on the prices of wholesale energy products, but, on the other hand, goes further and also includes other information that a reasonable market participant would be likely to use as part of the basis of its decision to enter into a transaction relating to, or to issue an order to trade in, a wholesale energy product, insofar as this information is likely to have a significant effect on the prices of wholesale energy products.

This means that transparency information is normally periodic, structured data subject to Regulations (EC) No 714/2009 and (EC) No 715/2009 including information referred to in the Commission Regulation (EU) No 543/2013.

Inside information should normally be considered as an *ad hoc*, structured data that is likely to have a significant effect on price that has not been disclosed to the market. Such

a requirement goes beyond the periodic and regular publication of data under the above regulations and may be fulfilled by certain transparency information.

Therefore, inside information may relate to any item of information that is within the scope of the above regulations and which meets the relevant requirements, as well as the following further information insofar as this information is likely to have a significant effect on the prices of wholesale energy products:

- Information relating to the capacity and use of facilities for production of electricity or natural gas, including planned and unplanned unavailability of these facilities;
- Information relating to the capacity and use of facilities for storage of electricity or natural gas, including planned and unplanned availability of these facilities;
- Information relating to the capacity and use of facilities for consumption of electricity or natural gas, including planned and unplanned unavailability of these facilities;
- Information relating to the capacity and use of facilities for transmission, including planned or unplanned unavailability of these facilities;
- Information relating to the capacity and use of LNG facilities, including planned and unplanned unavailability of these facilities;
- Information required to be issued in accordance with legal or regulatory provisions at Union, or National level;
- Information required to be issued in accordance with Market Rules;
- Information required to be issued in accordance with Contracts;
- Information required to be issued in accordance with Customs on the market;
- other information that a reasonable market participant would be likely to use as part of the basis of its decision to enter into a transaction relating to, or to issue an order to trade in, a wholesale energy product.

According to Commission Regulation (EU) No 543/2013, information relating to planned unavailability of 100 MW or more of a consumption unit, generation unit or of interconnections and in the transmission grid shall be made available to the public through the ENTSO-E transparency platform. Having this in mind, the Agency has considered whether an indicative threshold could be provided for the purpose of the definition of inside information under REMIT.

Concerning markets for natural gas, the Agency recognises the difficulties of setting a single European threshold for inside information due to the wide differences in market sizes, structures and liquidity across Europe.

Regardless of whether indicative thresholds are applied by market participants, NRAs should ensure that market participants are aware that a planned or unplanned change in the capacity or output of any size at a facility for production, storage, consumption or transmission of natural gas or electricity may constitute inside information if it meets the criteria outlined in Article 2(1) of REMIT. It is up to market participants to judge whether information that they hold constitutes inside information and therefore needs to be made public.

The notion of “inside information” is likely to be subject to interpretation by national and European Courts. Rulings on the definition of inside information under MAD insofar as the same concepts are applied under this Directive (see for instance the ECJ ruling in case C-19/11 as regards the criterion of “precise information”) should also be relevant in this respect.

Article 2(1), third subparagraph, of REMIT provides indications as to what is meant by the term “information of precise nature” as follows:

*Information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence, or an event which has occurred or may reasonably be expected to do so, and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of wholesale energy products.*

The precise nature of the information is to be assessed by the holder of the information on a case-by-case basis and depends on what the information is and on the surrounding context.

According to Recital 12 of REMIT, information regarding the market participant’s own plans and strategies for trading should not be considered as inside information. The Agency currently considers “trading plans” as a systematic method for screening and evaluating wholesale energy products, determining the amount of risk that is or should be taken, and formulating short and long-term investment objectives. A successful trading plan will also involve details like the type of trading system to be used. Most plans require the use of various types of technical analysis tools. The Agency furthermore considers “trading strategies” as a set of objective rules designating the conditions that must be met for trade entries and exits to occur. A trading strategy includes specifications for trade entries, including trade filters and triggers, as well as rules for trade exits, money management, timeframes, order types, etc.

### **5.3 Made public**

In general, information is deemed to be public knowledge if such information has been made available to the broad trading public, i.e. an unspecified number of individuals. In this regard it is irrelevant who made the information public. No distinction is made as to whether the information were made public by the market participant or by any other party.

It is sufficient, but also required, that information is made available simultaneously to the broad trading public, ensuring equal access to the information since any interested market participant may apprise itself of the information (a concept referred to as “sectoral publicity”). This can be the case, for example, if a generally accessible electronic system for the dissemination of information is used, but does not require publication in the media. Hence, publishing information only to selected market participants, for example via an energy exchange information service or news board which is available exclusively to exchange members does not satisfy the requirement of informing the broad trading public.

In this context the Agency has considered real-time power data services, i.e. companies measuring real-time production at different power plants and selling these data to subscribers of the service. The Agency deems that the information provided through such services is considered to be publicly available as soon as the information is published by the provider. The Agency has not found any indication that these services are not available to everyone who wishes to subscribe to them. However, the Agency highlights that a market participant responsible for disclosing the information may be holding inside information even though part of the information is published through a real-time service. Any information such as the cause of the incident, the duration etc. which are not published by the provider of real-time services could still be considered as inside information (if that information is or subsequently becomes known to the market participant). Therefore market participants should not rely on such service providers to publish inside information on their behalf. The Agency's understanding of effective and timely public disclosure of inside information is provided in Chapter 7 of this Guidance.

#### **5.4 Likelihood of having a significant price effect**

Information is deemed to constitute inside information only if the circumstances on which the information is based would, if it became publicly known, likely have significant effect on the prices of a wholesale energy product. The Agency understands the criterion of significant price effect to narrow the wide notion of information down to that information which is crucial enough in order to have a potential to significantly affect prices.

According to Article 2(1) of REMIT, the likelihood to significantly affect the prices of wholesale energy products is sufficient in order for the information to be qualified as inside information. Hence, no actual price effect is required.

The concept of likelihood requires an assessment of the extent to which such circumstances would affect the price of a wholesale energy product if they were made public. Such an assessment has to take into consideration the anticipated impact of the information in light of the related market participant's activity, as well as the market situation, including specificities of the market (size of the market, balance of demand and supply, steepness of the relevant offer curve - correlated with demand, but also with already existing production limitations, information on supply variation already published, time of day - e.g. weekday/weekend, office hours/out of office hours, etc.) and any other market variables likely to affect the price of the related wholesale energy product in the given circumstances.

Ex-post information may be used to check the presumption that the information has a significant price effect, but should not be used by NRAs to take action against someone who drew reasonable conclusions from such presumption.

The Agency currently considers that the following should be taken into consideration as useful indicators of whether information is likely to have a significant price effect:

- the type of information is the same as information which has, in the past, had a significant effect on prices;

- pre-existing analysts research reports, price reporter publications and opinions indicate that the type of information in question has effects on prices;
- the market participant itself has already treated similar events as inside information;
- another reasonable market participant has already treated similar events as inside information.

It should be emphasised that these factors are only indicators. They should not be treated as definitive in terms of meaning that the information in question will necessarily have a significant price effect.

### **5.5 REMIT examples of inside information**

REMIT itself gives the following examples of inside information in its Recitals 12 and 15:

- (12) *The use or attempted use of inside information to trade either on one's own account or on the account of a third party should be clearly prohibited. Use of inside information can also consist in trading in wholesale energy products by persons who know, or ought to know, that the information they possess is inside information. Information regarding the market participant's own plans and strategies for trading should not be considered as inside information. Information which is required to be made public in accordance with Regulation (EC) No 714/2009 or Regulation (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations, may serve, if it is price-sensitive information, as the basis of market participants' decisions to enter into transactions in wholesale energy products and therefore could constitute inside information until it has been made public.*
- (15) *The disclosure of inside information in relation to a wholesale energy product by journalists acting in their professional capacity should be assessed taking into account the rules governing their profession and the rules governing the freedom of the press, unless those persons derive, directly or indirectly, an advantage or profits from the dissemination of the information in question or when disclosure is made with the intention of misleading the market as to the supply of, demand for, or price of wholesale energy products.*

### **5.6 Conclusions**

The Agency considers that, in view of the current limited experiences with the application of the definition of inside information in the wholesale energy market, the notion of “inside information” should currently be primarily understood in relation to:

- information which is required to be made public in accordance with Regulations (EC) No 714/2009 and (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations, including information referred to in the Commission Regulation (EU) No 543/2013;



- information relating to the capacity and use of facilities for production, storage, consumption or transmission of electricity or natural gas or related to the capacity and use of LNG facilities, including planned or unplanned unavailability of these facilities, and
- information which is required to be disclosed in accordance with other legal or regulatory provisions at Union or national level, insofar as this information is likely to have a significant effect on the prices of wholesale energy products.

Experience will show which kind of other information is likely to have a significant effect on the prices of one or more wholesale energy products if made public.

These considerations apply until more experience is gained about the notion of inside information in wholesale energy markets. The Agency believes that respect of the aforementioned transparency requirements is currently essential to avoid breaches of inside information rules.

Further guidance on this subject will be provided by the Agency as soon as more experience on the application of REMIT is gained, as the definition of inside information will evolve over time. For instance, any adoption of Commission guidelines on fundamental data transparency may automatically alter the understanding of the definition of inside information and applicable disclosure mechanisms. The Agency will constantly review its guidance on inside information and publish a revised version of this non-binding guidance as soon as considered appropriate.

## 6 Application of the definition of “market manipulation”

### 6.1 Introduction

This Chapter is aimed at providing NRAs with examples of the types of market activities which, in the view of the Agency, would fulfil the definition of market manipulation stipulated in Article 2(2) and (3) of REMIT. The guidance and accompanying examples are intended to help NRAs to develop a common understanding of what constitutes market manipulation<sup>8</sup>.

The guidance and examples could also facilitate the identification of relevant variables (diagnostic flags or signals of market manipulation) that could be monitored by competent authorities and by market participants within the limits of their sphere of activity in order to detect or avoid engaging in market manipulation.

#### **Important Notice**

**The examples of types of practice set out in this document are deliberately described in non-legal technical terms and it is emphasised that the descriptions are not intended to affect the scope of interpretation of REMIT.**

### 6.2 REMIT definition of market manipulation

Article 2(2) of REMIT distinguishes four different categories of market manipulation. These are market manipulation through (1) false/misleading transactions, (2) price positioning, (3) transactions involving fictitious devices/deception and (4) dissemination of false and misleading information. They are defined as follows:

*(a) entering into any transaction or issuing any order to trade in wholesale energy products which:*

*(i) gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of wholesale energy products;*

*(ii) secures or attempts to secure, by a person, or persons acting in collaboration, the price of one or several wholesale energy products at an artificial level, unless the person who entered into the transaction or issued the order to trade establishes that his reasons for doing so are legitimate and that that transaction or order to trade conforms to accepted market practices on the wholesale energy market concerned; or*

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<sup>8</sup> Concerning wholesale energy products which are financial instruments and to which Article 9 of Directive 2003/6/EC applies, please refer to the relevant CESR guidance and information on the Market Abuse Directive (See CESR/04-505b, CESR/06-562b and CESR /09-219 published under <http://www.esma.europa.eu/index.php>).

*(iii) employs or attempts to employ a fictitious device or any other form of deception or contrivance which gives, or is likely to give, false or misleading signals regarding the supply of, demand for, or price of wholesale energy products;*

*or*

*(b) disseminating information through the media, including the internet, or by any other means, which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of wholesale energy products, including the dissemination of rumours and false or misleading news, where the disseminating person knew, or ought to have known, that the information was false or misleading.*

*When information is disseminated for the purposes of journalism or artistic expression, such dissemination of information shall be assessed taking into account the rules governing the freedom of the press and freedom of expression in other media, unless:*

*(i) those persons derive, directly or indirectly, an advantage or profits from the dissemination of the information in question; or*

*(ii) the disclosure or dissemination is made with the intention of misleading the market as to the supply of, demand for, or price of wholesale energy products.*

In the same way, Article 2(3) of REMIT defines attempted market manipulation as:

*(a) entering into any transaction, issuing any order to trade or taking any other action relating to a wholesale energy product with the intention of:*

*(i) giving false or misleading signals as to the supply of, demand for, or price of wholesale energy products;*

*(ii) securing the price of one or several wholesale energy products at an artificial level, unless the person who entered into the transaction or issued the order to trade establishes that his reasons for doing so are legitimate and that that transaction or order to trade conforms to accepted market practices on the wholesale energy market concerned; or*

*(iii) employing a fictitious device or any other form of deception or contrivance which gives, or is likely to give, false or misleading signals regarding the supply of, demand for, or price of wholesale energy products;*

*or*

*(b) disseminating information through the media, including the internet, or by any other means with the intention of giving false or misleading signals as to the supply of, demand for, or price of wholesale energy products.*

It is noted that according to the wording of REMIT, the “acceptable market practice” argument can only be used by market participants in respect to the category stipulated in Article 2(2), lit. (a)(ii), and (3), lit. (a)(ii) (price positioning). No such argument can be used in respect to the other categories.

### **6.3 REMIT examples of market manipulation**

REMIT itself gives the following examples of market manipulation and of attempts to manipulate the market in its Recitals 13 and 14:

- (13) *Manipulation on wholesale energy markets involves actions undertaken by persons that artificially cause prices to be at a level not justified by market forces of supply and demand, including actual availability of production, storage or transportation capacity, and demand. Forms of market manipulation include placing and withdrawal of false orders; spreading of false or misleading information or rumours through the media, including the internet, or by any other means; deliberately providing false information to undertakings which provide price assessments or market reports with the effect of misleading market participants acting on the basis of those price assessments or market reports; and deliberately making it appear that the availability of electricity generation capacity or natural gas availability, or the availability of transmission capacity is other than the capacity which is actually technically available where such information affects or is likely to affect the price of wholesale energy products. Manipulation and its effects may occur across borders, between electricity and gas markets and across financial and commodity markets, including the emission allowances markets.*
- (14) *Examples of market manipulation and attempts to manipulate the market include conduct by a person, or persons acting in collaboration, to secure a decisive position over the supply of, or demand for, a wholesale energy product which has, or could have, the effect of fixing, directly or indirectly, prices or creating other unfair trading conditions; and the offering, buying or selling of wholesale energy products with the purpose, intention or effect of misleading market participants acting on the basis of reference prices. However, accepted market practices such as those applying in the financial services area, which are currently defined by Article 1(5) of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) and which may be adapted if that Directive is amended, could be a legitimate way for market participants to secure a favourable price for a wholesale energy product.*

### **6.4 Examples of the various types of practice which could constitute market manipulation**

The following examples of types of practices could constitute market manipulation, or attempts thereof, and are currently considered notably relevant for wholesale energy markets, in particular in the context of continuous trading of wholesale energy products:

#### **6.4.1 False/misleading transactions**

- a) Wash trades: This is the practice of entering into arrangements for the sale or purchase of a wholesale energy product where there is no change in beneficial interests or market risk, or where the transfer of beneficial interest or market risk is only between parties who are acting in concert or collusion. The Agency recognises that certain more specific practices, such as crossing/pre-arranged trades, could be considered accepted market practices, and thus do not constitute market manipulation, provided that they are undertaken according to the rules of the relevant trading venue. But in most of such cases, conduct of the practice in conformity with the rules of the trading venue would be sufficient in itself to promote market integrity and therefore the question of giving the practice accepted market practice status does not arise.
- b) Improper matched orders: These are transactions where both buy and sell orders are entered at or nearly at the same time, with the same price and quantity by different but colluding parties. These transactions constitute market manipulation unless they are legitimate trades carried out in conformity with the rules of the relevant trading platform (e.g. crossing trades).
- c) Placing orders with no intention of executing them: This involves the entering of orders, especially into electronic trading systems, which are higher/lower than the previous bid/offer of the market participant concerned. The intention is not to execute the order but to give a misleading impression that there is demand for or supply of the wholesale energy product at that price. The orders are then withdrawn from the market before they are executed. (A variant of this type of market manipulation is to place a small order to move the bid/offer price of the wholesale energy product, being prepared for that order to be executed if it cannot be withdrawn in time.)

#### **6.4.2 Price positioning**

- a) Marking the close: This practice involves deliberately buying or selling wholesale energy products at the close of the market in an effort to alter the closing price of the wholesale energy product. This practice may take place on any individual trading day, but is particularly associated with dates such as future/option expiry dates or quarterly/annual portfolio or index reference/valuation points.
- b) Abusive squeeze (also known as “market cornering”): This involves a party or parties with a significant influence over the supply of, or demand for, or delivery mechanisms for a wholesale energy product and/or the underlying product of a derivative contract exploiting a decisive position in order materially to distort the price at which others have to deliver, take delivery or defer delivery of the instrument/product in order to satisfy their obligations. (It should be noted that the proper interaction of supply and demand can and often does lead to market tightness, but that this is not of itself market manipulation. Nor does having a significant influence over the supply of, demand for, or delivery mechanisms for a wholesale energy product by itself constitute market manipulation.)

- c) Cross-market-manipulation: Trading on one market to improperly position the price of a wholesale energy product on a related market. This practice involves undertaking trading in one market with a view to improperly influencing the price of the same or a related wholesale energy product in another market. An example might be the trading in the underlying product of a wholesale energy derivative to distort the price of the derivative contract. (Transactions to take legitimate advantage of differences in the prices of wholesale energy derivatives or underlying products as traded in different locations - “arbitrage” - would not constitute manipulation.)
- d) Actions undertaken by persons that artificially cause prices to be at a level not justified by market forces of supply and demand, including actual availability of production, storage or transportation capacity, and demand (“physical withholding”): This is for example the practice where a market participant decides not to offer on the market all the available production, storage or transportation capacity, without justification and with the intention to shift the market price to higher levels, e.g. not offering on the market, without justification, a power plant whose marginal cost is lower than the spot prices, misusing infrastructure, transmission capacities, etc., that would result in abnormal high prices.

#### **6.4.3 Transactions involving fictitious devices/deception**

- a) Dissemination of false or misleading market information through media, including the internet, or by any other means (in some jurisdictions this is known as “scalping”): This is done with the intention of moving the price of a wholesale energy product in a direction that is favourable to the position held or a transaction planned by the person disseminating the information.
- b) Pump and dump: This practice involves taking a long position in a wholesale energy product and then undertaking further buying activity and/or disseminating misleading positive information about the wholesale energy product with a view to increasing the price of the wholesale energy product. Other market participants are misled by the resulting effect on price and are attracted into purchasing the wholesale energy product. The manipulator then sells out at the inflated price.
- c) Circular trading: The process of executing a sell order with the knowledge that an offsetting buy order is being placed at the exact same time. The action is considered illegal because it excludes competition.
- d) Pre-arranged trading: The practice of two commodity dealers trading with each other at prices upon which they have agreed in advance. Pre-arranged trading is designed to exclude other dealers from the market, to gain a tax advantage, or both. As a result, pre-arranged trading is illegal. The Agency considers that certain more specific practices, such as crossing/pre-arranged trades, could be considered accepted market practices, and thus do not constitute market manipulation, provided that they are undertaken according to the rules of the relevant trading venue applicable to their conduct. But in most of such cases, conduct

of the practice in conformity with the rules of the trading venue would be sufficient in itself to promote market integrity and therefore the question of giving the practice accepted market practice status does not arise.

#### **6.4.4 Dissemination of false and misleading information**

This type of market manipulation involves dissemination of false and misleading information without necessarily undertaking any accompanying transaction. This could include creating a misleading impression by failing to properly disclose a price sensitive piece of information which should be disclosed. For example, a market participant with information which would meet the Regulation's definition of "inside information" fails to properly disclose that information with the result that the market is likely to be misled.

- a) Spreading false/misleading information through the media: This involves behaviour such as posting information via internet or issuing a press release which contains false or misleading statements about a wholesale energy product which is admitted to trading on an organised market. The person spreading the information knows or ought to have known that it is false or misleading and is disseminating the information in order to create a false or misleading impression. Spreading false/misleading information through an officially recognised channel for disseminating information to users of an organised market is particularly serious as it is important that market participants are able to rely on information dissemination via such official channels.
- b) Other behaviour designed to spread false/misleading information: This type of market manipulation would cover a course of conduct designed to give a false and misleading impression through means other than the media. An example might be the movement of physical commodity stocks to create a misleading impression as to the supply or demand for a commodity or the deliverable into a commodity futures contract.

#### **6.5 Conclusions**

The aforementioned examples of the various types of practices which could constitute market manipulation are inspired by the NRAs' own experiences and the experiences in financial markets made by financial market authorities, with whom the Agency and NRAs will closely cooperate in the implementation of REMIT. The examples can therefore currently be taken as an indication for possible signals of market manipulation in wholesale energy markets according to REMIT.

These considerations apply until more experience is gained about market manipulation in wholesale energy markets.

More generally, the Agency considers that market participants' behaviour must be coherent with their technical and economic constraints in a way to comply with competition law, especially concerning market power exercise. The cooperation of the Agency and NRAs with the competition authorities, as foreseen by REMIT, must be understood in this respect.

The Agency will constantly review its guidance on market manipulation and publish a revised non-binding guidance if considered appropriate.



## **7 Application of the obligation to disclose inside information**

### **7.1 Introduction**

This chapter covers the Agency's current understanding of the application of the obligation to disclose inside information in accordance with Article 4 of REMIT.

According to Article 4(1) of REMIT,

*Market participants shall publicly disclose in an effective and timely manner inside information which they possess in respect of business or facilities which the market participant concerned, or its parent undertaking or related undertaking, owns or controls or for whose operational matters that market participant or undertaking is responsible, either in whole or in part. Such disclosure shall include information relevant to the capacity and use of facilities for production, storage, consumption or transmission of electricity or natural gas or related to the capacity and use of LNG facilities, including planned or unplanned unavailability of these facilities.*

The obligation to disclose inside information lies with the market participant according to Article 4(1) of REMIT. The disclosure obligation relates not only to inside information in respect of the market participant's own business or facilities, but also to inside information of the market participant's parent undertaking or related undertaking. In addition, the disclosure obligation is not only related to inside information in respect of business or facilities which the market participant or the respective undertakings own(s) or control(s), but also in respect of business or facilities for whose operational matters the market participant or respective undertaking is responsible, either in whole or in part. The obligation to disclose inside information does not apply to a person or a market participant who possesses inside information in respect of another market participant's business or facilities, in so far as that owner of this inside information is not a parent or related undertaking. Notwithstanding this, persons holding information in such circumstances will need to consider their compliance with Article 3 and in particular whether they hold such information as one of the persons listed in Article 3(2).

Article 4(3) of REMIT extends the disclosure obligation of Article 4(1) of REMIT to a person employed by, or acting on behalf of, a market participant when that person discloses inside information to any other person in the normal course of the exercise of their employment, profession or duties as referred to in Article 3(1)(b) of REMIT. In such a case, that market participant or person shall ensure simultaneous, complete and effective disclosure of that information. However, the disclosure obligation of Article 4(3) of REMIT does not apply if the person receiving the information has a duty of confidentiality, regardless of whether such duty derives from law, regulation, articles of association or contracts.

## 7.2 Disclosure of inside information in an effective manner

### 7.2.1 Disclosure mechanisms

In general, inside information should be disclosed in a manner ensuring that it is capable of being disseminated to as wide a public as possible. This is why the Agency believes that the disclosure of inside information through platforms has its merits and why, in the following understanding by the Agency of effective and timely disclosure, this disclosure mechanism is considered effective.

As regards disclosing inside information *effectively*, the Agency, currently and at least for an interim phase, considers the following dual approach for disclosure mechanisms to meet this requirement:

- if platforms for the disclosure of inside information exist, for instance operated by Transmission System Operators<sup>9</sup> (TSOs) (e.g. RTE-UFE transparency initiative) or energy exchanges (e.g. Nord Pool Spot, EEX Transparency platform etc.), or if transparency platforms exist in accordance with Regulations (EC) No 714/2009, (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations, including Commission Regulation (EC) No 543/2013, market participants should use such platforms, if not otherwise specified in relevant rules and regulations, or by the competent NRA. According to Article 4(4) of REMIT, such publication of inside information, including in aggregated form, in accordance with Regulation (EC) No 714/2009 or (EC) No 715/2009, or guidelines and network codes adopted pursuant to those Regulations, constitutes simultaneous, complete and effective public disclosure.

Concerning the disclosure of inside information through platforms, the Agency considers that the notion of *effective* disclosure requires that the platform used by the market participant fulfils the minimum quality requirements listed in Chapter 7.2.2.

A simultaneous publication on the market participant's website is not necessary if a platform is used which discloses inside information in a timely manner. The possibility of using only the platform will decrease the organisational burden on the market participant. In addition, the Agency believes that the use of platforms leads to easier access to information for all market participants.

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<sup>9</sup> It should be noted that according to Article 2(7) of REMIT, TSOs are market participants themselves.

- if adequate platforms do not yet exist or simultaneously to a publication through a platform for the disclosure of inside information, market participants may, at least for an interim period and unless otherwise specified, publish inside information which they possess on their own website. However, where such a disclosure mechanism is chosen, it is important that disclosure of inside information enhances the level of transparency across the EU and does not distort the dissemination of information. Information shall therefore be disclosed in a manner ensuring that it is capable of being disseminated to as wide a public as possible, including the media. Social media shall only be used as additional sources not replacing website publications.

Concerning the disclosure of inside information through company websites, the Agency considers that the notion of *effective* disclosure requires that the market participant fulfils the minimum quality requirements listed in Chapter 7.2.2.

In this context, it should be mentioned that as part of a market participant's registration with the relevant NRA, market participants are required to provide information on where they publish inside information. This information will be published by the Agency as part of the European register of market participants.

#### 7.2.2 Minimum quality requirements for effective disclosure of inside information

The following minimum IT requirements shall be fulfilled in order to ensure an effective disclosure of inside information:

- Inside information shall be disclosed to the public on a non-discriminatory basis and free of charge;
- Inside information shall be made available via an RSS feed specific for the disclosure of inside information, allowing easy and fast access by the public;
- Inside information shall be kept available for the public for a period of at least 2 years;
- The information should be published in the official language(s) of the relevant Member State and in English or in English only;
- Minimal unavailability consistent with market expectations shall be ensured; and
- Effective administrative arrangements designed to prevent conflicts of interest with market participants shall be ensured (applicable only for platforms).

While market participants are responsible for the disclosure of inside information, the Agency understands that they do not have influence on the operation of platforms. Therefore, the Agency believes that market participants are not responsible for temporary technical problems of such platforms fulfilling the above-mentioned minimum quality requirements. If the information was transmitted to the platform in time and there were temporary technical problems, the market participant should therefore not be charged for having breached the obligation to disclose inside information. If technical problems persist, however, market participants have to use other platforms or their own website instead. Where disclosure is delayed in such circumstance the market participant will need to consider their compliance with the prohibition in Article 3 prior to the information actually being disclosed to the market.

Furthermore, regardless of whether the information is published on a transparency platform or on the market participant's website and without prejudice to Article 1(2) of REMIT, the publication should contain the following information:

<b>Caption: "Publication according to Article 4(1) of REMIT – Urgent Market Message"</b>
A subject heading that summarises the main content of the publication
The time and date of the publication
The time and date of the relevant incident
If applicable, the name and location of the asset concerned
If applicable, the market area concerned
If applicable, the affected capacity of the asset concerned
If applicable, the available capacity of the asset concerned
If applicable, the fuel concerned
If applicable, the estimated time at which the assets concerned will be partly/or wholly available again
If applicable, the reasons for the unavailability of the asset concerned. If the reason(s) for the unavailability is/are not known, regular updates should be provided until the reason(s) is/are confirmed
If applicable, a history of prior publications regarding the same event, e.g. if a prognosis is updated or an unplanned outage becomes a planned outage
Any other information necessary for the reader to understand the relevant information

The obligation to disclose inside information is without prejudice to the application of European competition law (see also Chapter 9.2 of this Guidance concerning the Accepted Market Practices (AMPs) regime).

Each publication should be as short and as specific as reasonably possible. Therefore, publications should not include statements by company executives, any form of advertisement or any other irrelevant information. For the same reason, the Agency discourages the use of disclaimers. If disclaimers are used, they should be clearly separated from the main body.

If the publication requires a prognosis, e.g. regarding the duration of an outage, the Agency understands that such prognosis contains an element of uncertainty. Therefore, the Agency believes that market participants fulfil their publication requirements if the prognosis is based on all available data and has been prepared with reasonable effort. If a prognosis changes over time, the publication should be updated accordingly.

It is the Agency's understanding that the disclosure of inside information in an incomplete or incorrect manner would be considered as a non-effective disclosure and thus be in breach of Article 4(1) of REMIT.

### **7.3 Disclosure of inside information in a timely manner**

As regards the notion of *timely* disclosure of inside information, the Agency currently considers that:

- if the inside information has to be published in accordance with Regulations (EC) No 714/2009 and (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations, and Commission Regulation (EU) No 543/2013, which amends the guidelines annexed to Regulation (EC) No 714/2009, the publishing according to these rules and regulations, including in aggregated form, is considered simultaneous, complete and effective public disclosure (Article 4(4) of REMIT). However, it has to be stressed that even if Article 4(4) of REMIT states that the publication of inside information, including in aggregated form, in accordance with the above-mentioned Regulations, constitutes simultaneous, complete and effective public disclosure, it does not necessarily constitute disclosure in a timely manner and the inside information has to be published, in any case, before trading in wholesale energy products to which that information relates or recommending another person to trade in wholesale energy markets to which that information relates.
- if the inside information does not have to be made public in accordance with Regulations (EC) No 714/2009 and (EC) No 715/2009 and Commission Regulation (EU) No 543/2013, the Agency currently considers that there is no reason for applying a different reasonable timeframe for the disclosure of information than stated in the above-mentioned Regulations. Such information should therefore normally be published as soon as possible, but at the latest within one hour if not otherwise specified in applicable rules and regulations. But in any case the inside information has to be published before trading in wholesale energy products to which that information relates or recommending another person to trade in wholesale energy markets to which that information relates.

The Agency considers that market participants should develop a clear compliance plan towards real time or close to real time disclosure of inside information, beyond compliance with existing Third Package transparency obligations.

### **7.4 Delayed disclosure of inside information**

According to Article 4(2) of REMIT, a market participant may exceptionally delay the public disclosure of inside information. According to Article 4(2):

*“A market participant may under its own responsibility exceptionally delay the public disclosure of inside information so as not to prejudice its legitimate interests provided that such omission is not likely to mislead the public and provided that the market participant is able to ensure the confidentiality of that information and does not make decisions relating to trading in wholesale energy products based upon that information. In such a situation the market participant shall without delay provide that information, together with*

*a justification for the delay of the public disclosure, to the Agency and the relevant national regulatory authority having regard to Article 8(5)."*

The decision to exceptionally delay the public disclosure of inside information in accordance with Article 4(2) is for market participants to make. It is not the role of the Agency or NRAs to pre-approve the application of Article 4(2) to a specific set of circumstances. In any instance where a market participant chooses to delay disclosure, it must ensure that such a delay is not likely to mislead the public, that it does not make trading decisions on that information and that the information remains confidential. As Article 4(2) requires that the market participant does not make trading decisions based on that inside information, the Agency underlines that the application of Article 4(2) cannot coincide with the application of Article 3(4)(b) of REMIT. Whether a market participant rightly or falsely applied Article 4(2) can only be determined ex-post. As soon as the legitimate interests cease to exist, the market participant must disclose the inside information in accordance with Article 4(1).

In order to assist those market participants who are subject to the obligation to report information on the delay of the public disclosure of inside information to the Agency and the NRA according to Article 4(2) of REMIT, the Agency has developed a standard notification format, based on the experience in financial markets, and recommends its adoption by all NRAs. The relevant electronic format is published on the Agency's website.

## **7.5 Exemption in Article 4(7)**

According to Article 4(7) of REMIT,

*"Paragraphs 1 and 2 [of Article 4] are without prejudice to the right of market participants to delay the disclosure of sensitive information relating to the protection of critical infrastructure as provided for in point (d) of Article 2 of Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection, if it is classified in their country"*

Article 4(7) is only relevant to "critical infrastructure" as defined in Article 2(a) of Council Directive 2008/114/EC, i.e. an asset, system or part thereof located in Member States which is essential for the maintenance of vital societal functions, health, safety, security, economic or social well-being of people, and the disruption or destruction of which would have a significant impact in a Member State as a result of the failure to maintain those functions.

If a market participant holds inside information about such a piece of critical infrastructure that it, or its parent undertaking or related undertaking owns or controls or for whose operational matters that market participant or undertaking is responsible and that information also constitutes "sensitive critical infrastructure protection related information" as defined in Article 2(d) of Council Directive 2008/114/EC, i.e. facts about a critical infrastructure, which if disclosed could be used to plan and act with a view to causing disruption or destruction of critical infrastructure installations, then the market participant can delay the publication of inside information.

However, it should be emphasised that market participants are not allowed to use this exemption for all inside information relating to critical infrastructure. If a market participant possesses inside information that does not constitute “sensitive critical infrastructure protection related information”, the obligation to publish this information remains.

## **8 Application of the market abuse prohibitions and possible signals of suspected insider dealing or market manipulation**

### **8.1 Introduction**

This Chapter is intended to provide guidance to NRAs as to the application of the market abuse prohibitions and as to indications of transactions which may involve inside information or market manipulation as defined in Article 2(1) to (3) of REMIT, also in relation to the obligation imposed on persons professionally arranging transactions by Article 15 of REMIT.

### **8.2 Application of market abuse prohibitions**

The market abuse prohibitions of REMIT are based on those in the Market Abuse Directive, but tailored to the gas and electricity markets. Market abuse means insider dealing and market manipulation, which have become explicitly prohibited with the entry into force of REMIT.

#### **8.2.1 Types of market abuse**

The following seven types of behaviour may amount to market abuse, the first three of which constitute insider trading, the last four constitute market manipulation, including attempted market manipulation:

1. Insider trading – when an insider trades, or tries to trade, in wholesale energy products on the basis of inside information relating to that wholesale energy product, Article 3(1)(a) of REMIT. The Agency considers that the market participant holding inside information is also obliged to refrain from any amendment or selective withdrawal of the order placed (“hands-off approach”) in order to comply with the prohibition of insider trading.
2. Improper disclosure of inside information – where an insider improperly discloses inside information to another person, unless such disclosure is made in the normal course of the exercise of their employment, profession or duties, Article 3(1)(b) of REMIT.
3. Recommending on the basis of inside information – where an insider is recommending or inducing, on the basis of inside information, another person to acquire or dispose of wholesale energy products to which that information relates, Article 3(1)(c) of REMIT.
4. False/misleading transactions - trading, or placing orders to trade, which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of wholesale energy products, Article 2(2)(a)(i) and (3)(a)(i) of REMIT.
5. Price positioning - trading, or placing orders to trade, which secures or attempts to secure, by a person, or persons acting in collaboration, the price of one or several wholesale energy products at an artificial level, unless the person who entered into the transaction or issued the order to trade establishes that his reasons for doing so are legitimate and that that transaction or order to trade conforms to accepted market



practices on the wholesale energy market concerned, Article 2(2)(a)(ii) and (3)(a)(ii) of REMIT.

6. Transactions involving fictitious devices/deception - trading, or placing orders to trade, which employs fictitious devices or any other form of deception or contrivance, Article 2(2)(a)(iii) and (3)(a)(iii) of REMIT.
7. Dissemination of false and misleading information - giving out information that conveys a false or misleading impression about a wholesale energy product where the person doing this knows or ought to have known the information to be false or misleading, Article 2(2)(b) and (3)(b) of REMIT.

### **8.2.2 Application of the prohibition of insider trading**

Whilst the prohibition of market manipulation applies to any engagement in, or attempt to engage in, market manipulation on wholesale energy markets by any person, the application of the prohibition of insider trading is limited to the following persons who possess inside information in relation to a wholesale energy products (“insider”):

1. members of the administrative, management or supervisory bodies of an undertaking;
2. persons with holdings in the capital of an undertaking;
3. persons with access to the information through the exercise of their employment, profession or duties;
4. persons who have acquired such information through criminal activity;
5. persons who know, or ought to know, that it is inside information.

Article 3(5) of REMIT clarifies that where the person who possesses inside information in relation to a wholesale energy product is a legal person, the prohibitions laid down in Article 3(1) of REMIT shall also apply to the natural persons who take part in the decision to carry out the transaction for the account of the legal person concerned.

The prohibition of insider dealing also contains elements of attempted behaviour. Article 3(1)(a) of REMIT not only prohibits using inside information by acquiring or disposing of wholesale energy products to which that information relates, but also prohibits using inside information by trying to acquire or dispose of wholesale energy products to which that information relates.

### **8.2.3 Exemptions from the prohibition of insider trading**

Paragraphs 3 and 4 of Article 3 of REMIT stipulate exemptions from the prohibition of insider trading. However, it should be stressed that the exemptions may only apply for the prohibition of insider trading and are without prejudice of the obligation to publish inside information according

to Article 4(1) of REMIT. This section is intended to provide guidance to NRAs concerning the use of these exemptions in order to ensure a consistent understanding on the circumstances in which these exemptions may be applied.

Article 3(3) of REMIT stipulates:

*Points (a) and (c) of paragraph 1 of this Article shall not apply to transmission system operators when purchasing electricity or natural gas in order to ensure the safe and secure operation of the system in accordance with their obligations under points (d) and (e) of Article 12 of Directive 2009/72/EC or points (a) and (c) of Article 13(1) of Directive 2009/73/EC.*

The Agency underlines that the exemption of Article 3(3) of REMIT does not apply to point (b) of paragraph 1 of this Article. Therefore, when purchasing electricity or natural gas in order to ensure the safe and secure operation of the system in accordance with their above-mentioned obligations under Directives 2009/72/EC and 2009/73/EC, TSOs shall be prohibited from disclosing inside information to any other person unless such disclosure is made in the normal course of the exercise of their employment, profession or duties.

The Agency is aware that the market models of some Member States provide for specific tasks for certain market participants, similar to those of TSOs as regards their responsibility to ensure the safe and secure operation of the system. As a result, these market participants hold information which, alone or in aggregate, can constitute insider information. In the exercise of the duties in connection with these specific tasks, those market participants carry out transactions in the name and on behalf of one or more other market participants. While there is an explicit exemption from the prohibition of insider trading in Article 3(3) of REMIT for TSOs as their duties are defined by EU law and are as such similar in all Member States, national particularities as described above cannot be subsumed under the exemption in REMIT. With respect to the possible differences in national market models and the legal design of principal-agent-relations in different Member States, the Agency is of the opinion that any such particularity needs to be assessed by the competent national authorities on a case-by-case basis.

According to Article 3(4) of REMIT, the prohibitions of insider trading in Article 3 shall not apply to:

*(a) transactions conducted in the discharge of an obligation that has become due to acquire or dispose of wholesale energy products where that obligation results from an agreement concluded, or an order to trade placed, before the person concerned came into possession of inside information;*

*(b) transactions entered into by electricity and natural gas producers, operators of natural gas storage facilities or operators of LNG import facilities the sole purpose of which is to cover the immediate physical loss resulting from unplanned outages, where not to do so would result in the market participant not being able to meet existing contractual obligations or where such action is undertaken in agreement with the transmission*

*system operator(s) concerned in order to ensure safe and secure operation of the system. In such a situation, the relevant information relating to the transactions shall be reported to the Agency and the national regulatory authority. This reporting obligation is without prejudice to the obligation set out in Article 4(1);*

*(c) market participants acting under national emergency rules, where national authorities have intervened in order to secure the supply of electricity or natural gas and market mechanisms have been suspended in a Member State or parts thereof. In this case the authority competent for emergency planning shall ensure publication in accordance with Article 4.*

Concerning the exemption of Article 3(4)(a) of REMIT, the Agency considers that it also applies under the Market Abuse Directive and particularly applies to transactions in derivatives contracts conducted in the discharge of an obligation that has become due to acquire or dispose of wholesale energy products where that obligation results from an agreement concluded, or an order to trade placed, before the person concerned came into possession of inside information. Since the exemption also applies to orders to trade placed before the person concerned came into possession of inside information, the Agency considers that the market participant is obliged to refrain from any amendment or selective withdrawal of the order placed (“hands-off approach”) in order to comply with the prohibition of insider trading.

Concerning the exemption in Article 3(4)(b) of REMIT, the Agency considers that, since the exemption is limited in scope to the market participants mentioned therein, any unplanned outage under the exemption of Article 3(4)(b) may only relate to production, storage or LNG import facilities. It furthermore considers that the exemption may only be applied for unplanned outages, i.e. outages which are not ex-ante known by the primary owner of the data, and that any physical loss needs to be caused immediately and solely by that unplanned outage. The aforementioned market participants can only use this exemption to enter into transactions to cover the immediate physical loss. Any further trading that goes beyond covering the immediate physical loss does not fall under the scope of this exemption.

The exemption in Article 3(4)(b) of REMIT may only be applied by the aforementioned market participants for transactions as described above in the following two instances:

- where not to do so would result in the market participant not being able to meet existing contractual obligations; or
- where such action is undertaken in agreement with the TSO(s) concerned in order to ensure safe and secure operation of the system.

Regarding the first instance, the Agency considers that the contractual obligations referred to must exist ex-ante of the immediate physical loss resulting from unplanned outages. The existing contractual obligations must relate to the relevant period of the unplanned outage.

The Agency considers a market participant “not being able” to meet such existing contractual obligations only if the market participant has no other own assets available to cover the physical

loss. The application of exemption in Article 3(4)(b) of REMIT cannot coincide with the application of Article 4(2) concerning delayed disclosure of inside information, as Article 4(2) requires that the market participant does not make decisions based upon the relevant inside information.

As regards the second instance, the Agency considers that the criterion “to ensure the safe and secure operation of the system” may apply in cases of Article 3(4)(c) of REMIT.

If a market participant applies the exemption in Article 3(4)(b), the relevant information relating to the transactions shall be reported to the Agency and the NRA. In order to assist those market participants who are subject to the obligation to report information to the Agency and NRAs according to Article 3(4)(b), the Agency has developed a standard notification format, based on the experience in financial markets, and recommends its adoption by all NRAs. The relevant electronic format is published on the Agency’s website.

With regard to the exemption of Article 3(4)(c) of REMIT, the Agency considers that it will normally coincide with the exemption of Article 4(2) of REMIT and that in such case the authority competent for emergency planning shall ensure publication in accordance with Article 4(1) of REMIT. If a market participant is required by national emergency rules to enter into transactions, any such transactions entered into whilst in possession of inside information will not be in breach of Article 3 of REMIT.

#### **8.2.4 Application of the prohibition of market manipulation**

REMIT does not only prohibit market manipulation, but also applies the concept of attempted market manipulation. Proving market manipulation would require a regulator to demonstrate that either a manipulative order was placed or a manipulative transaction was executed. However, there are situations where a person takes steps towards a manipulative behaviour and there is clear evidence of an intention to manipulate the market, but either an order is not placed or a transaction is not executed. The Regulation expressly prohibits attempts at market manipulation. This prohibition will enhance market integrity.

### **8.3 Indications of possible suspicious transactions**

The following examples of signals are neither conclusive nor comprehensive and should only be regarded as a starting point when considering whether a transaction gives rise to indications of possible suspicious behaviour. Moreover, they are to be applied using judgement rather than necessarily being interpreted literally. It is recognised that transactions meeting the signals listed below may be legitimate and hence not give reasonable grounds for suspicion.

#### **8.3.1 Possible signals of insider dealing**

The following events may be considered as signals of potential insider trading situations:

- a) significant trading by major market participants before the announcement of information having a significant price effect;
- b) transactions resulting in sudden and unusual changes in the volume of orders and prices before the announcement of information having a significant price effect.

### **8.3.2 Possible signals of market manipulation**

The following non-exhaustive list of signals, which should not necessarily be deemed in themselves sufficient to determine market manipulation, may be taken into account when transactions or orders to trade are examined by persons professionally arranging transactions related to false or misleading signals and to price securing<sup>10</sup>:

- a) the extent to which orders to trade given or transactions undertaken represent a significant proportion of the daily volume of transactions in the relevant wholesale energy product on the trading venue concerned, in particular when these activities lead to a significant change in the price of the wholesale energy product;
- b) the extent to which orders to trade given or transactions undertaken by persons with a significant buying or selling position in a wholesale energy product lead to significant changes in the price of the wholesale energy product or a related wholesale energy product admitted to trading on a trading venue;
- c) whether transactions undertaken lead to no change in beneficial ownership of a wholesale energy product admitted to trading on a trading venue;
- d) the extent to which orders to trade given or transactions undertaken include position reversals in a short period and represent a significant proportion of the daily volume of transactions in the relevant wholesale energy product on the trading venue concerned, and might be associated with significant changes in the price of a wholesale energy product admitted to trading on a trading venue;
- e) the extent to which orders to trade given or transactions undertaken are concentrated within a short time span in the trading session and lead to a price change which is subsequently reversed;
- f) the extent to which orders to trade given change the representation of the best bid or offer prices in a wholesale energy product admitted to trading on a trading venue, or more generally the representation of the order book available to market participants, and are removed before they are executed;

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<sup>10</sup> Concerning wholesale energy products which are financial instruments, see Article 4 of implementing Directive 2003/124/EC on the Market Abuse Directive.

- g) the extent to which orders to trade are given or transactions are undertaken at or around a specific time when reference prices, settlement prices and valuations are calculated and lead to price changes which have an effect on such prices and valuations;
- h) the extent to which persistent execution of trades that on a stand-alone basis would be uneconomic and counterintuitive triggering a manipulation by deliberately lowering or increasing the market price and enabling a market participant to subsequently profit to a much greater degree through separate trading activity via a larger connected accrued position.

The following non-exhaustive list of signals, which should not necessarily be deemed in themselves to constitute market manipulation, may be taken into account when transactions or orders to trade are examined by persons professionally arranging transactions related to the employment of fictitious devices or any other form of deception or contrivance<sup>11</sup>:

- a) whether orders to trade given or transactions undertaken by persons are preceded or followed by dissemination of false or misleading information by the same persons or persons linked to them;
- b) whether orders to trade are given or transactions are undertaken by persons before or after the same persons or persons linked to them produce or disseminate research or recommendations which are erroneous or biased or demonstrably influenced by material interest.

#### **8.4 Method of reporting suspicious transactions**

Any person professionally arranging transactions in wholesale energy products who reasonably suspects that a transaction might breach Article 3 or 5 of REMIT shall notify the competent NRA without further delay of all relevant information available. Where not all the relevant information is available at the time of notification, the notification shall include at least the reasons why the notifying persons suspect that the transaction might constitute insider dealing or market manipulation. All remaining information shall be provided to the competent authority as soon as it becomes available.

Notification to the competent authority can be effected by mail, electronic mail, telecopy or telephone, provided that in the latter case, written confirmation is made available upon request by the competent authority. The Agency considers that it would assist those subject to the obligation to report suspicious transactions if there were a standard reporting format for doing so. The Agency, based on the experiences in financial markets, therefore recommends using the format published on the Agency's website and urges NRAs to adopt it for suspicious transaction

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<sup>11</sup> Concerning wholesale energy products which are financial instruments, see Article 5 of implementing Directive 2003/124/EC on the Market Abuse Directive.

reporting to NRAs, the notification of which has to be forwarded to the Agency without delay pursuant to Article 16(2) of REMIT.

## **8.5 The obligations of persons professionally arranging transactions**

Persons making suspicious transaction reports do not need to have all the required information before contacting the competent authority. If the case is one for which (the persons subject to the reporting obligation consider that) there is a need to alert the competent authority urgently, then the Agency would expect that NRAs receive notifications as soon as possible, even before all aspects of the transaction and all related information become known. This contact may take place by telephone if appropriate, giving the basic details and reasons for suspicion. The other information can be supplied subsequently.

### **8.5.1 The duty to establish and maintain effective arrangements and procedures**

Article 15 of REMIT requires that *“any person professionally arranging transactions in wholesale energy products who reasonably suspects that a transaction might breach Articles 3 or 5 shall notify the NRA without further delay. Persons professionally arranging transactions in wholesale energy products shall establish and maintain effective arrangements and procedures to identify breaches of Articles 3 or 5”*. The regulation and its implementing measures do not deal with the steps which the persons subject to this requirement need to take to identify such transactions. Those who are subject to the requirement clearly need to ensure that they comply with this obligation. The following guidance draws on experiences in financial markets as to what might constitute effective arrangements to identify breaches of the prohibitions of market abuse and signals of a suspicious transaction.

The duty to establish and maintain effective arrangements and procedures to identify breaches of Articles 3 or 5 of REMIT is on any person professionally arranging transactions in wholesale energy products. These include at least trading venues like energy exchanges and brokers.

Concerning gas hubs, the Agency considers that normally the TSO operates the gas hub, but it might be the case that gas hubs operate separately from the TSO.

At gas hubs transfer of title (ownership) takes places, which can be considered a transaction. Thus the person owning the gas hub can be considered as a person professionally arranging transactions according to Article 15 of REMIT. It should be noted that the depth of data available to hubs varies on a hub-by-hub basis. Certain hubs will be unable to conduct surveillance (for example, a hub receiving highly aggregated data without price details), with market monitoring being conducted elsewhere (e.g. at an Exchange).

TSOs or persons acting on their behalf may have to be regarded as being persons professionally arranging transactions insofar as they are arranging balancing markets.

The Agency currently considers independent market surveillance departments in the case of energy exchanges and compliance officers in the case of brokers as best practices of effective

arrangements to identify breaches of the prohibitions of market abuse. Applicable rules for market surveillance and compliance in the EU financial market legislation may serve as a guidance to establish and maintain such mechanisms.

### **8.5.2 The duty to notify suspicious transactions**

It should be emphasised that the notification regime laid down by REMIT requires that persons subject to it decide on a case-by-case basis where there are reasonable grounds for suspicion concerning the relevant transaction. The indications given above are therefore neither exhaustive (a particular transaction may be suspicious even if it matches none of the indications) nor determinative (a transaction may not necessarily be suspicious simply because it matches one or more of the indications).



## **9 Application of the implementation of prohibitions of market abuse**

### **9.1 Introduction**

According to Article 13(1), first subparagraph, of REMIT, NRAs shall ensure that the prohibitions set out in Articles 3 and 5 and the obligation set out in Article 4 thereof are applied. Although the prohibition of market abuse and the obligation to disclose inside information apply with the entry into force of REMIT, NRAs were to be given investigatory and sanctioning powers only by 29 June 2013. In the interim phase until data collection according to Article 8 of the Regulation applies and in case the investigatory and enforcement powers are not yet implemented at national level according to Articles 13(1) of the Regulation, NRAs should make use of their existing powers, in particular those powers conferred to them with the national implementation of the Third Energy Package, to ensure that market integrity and transparency of wholesale energy markets are aimed at with the entry into force of REMIT.

### **9.2 Accepted Market Practices (AMPs) regime**

According to Recital 27 of REMIT, the Agency's guidance should address, *inter alia*, the issue of accepted market practices.

Article 2(2)(a)(ii) and (3)(a)(ii) of REMIT stipulate that accepted market practices such as those applying in the financial services area, which are currently defined by Article 1(5) of the Market Abuse Directive and which may be adapted if that Directive is amended, could be a legitimate way for market participants to secure a favourable price for a wholesale energy product.

According to Article 1(5) of the Market Abuse Directive, 'Accepted market practices' means practices that are reasonably expected in one or more financial markets and are accepted by the competent authority in accordance with guidelines adopted by the Commission in accordance with the procedure laid down in Article 17(2) of the same Directive. Under the Market Abuse Directive, the concept of accepted market practices may either apply in relation to market manipulation according to Article 1(2) of that Directive, or in relation to the information which users of commodity derivatives markets would expect to be made public concerning commodity derivatives according to Article 1(1) of the same Directive.

The Agency concludes the following as regards Accepted Market Practices (AMPs) under REMIT:

Firstly, the AMPs accepted by competent authorities according to the Market Abuse Directive may also apply under REMIT, but AMPs under REMIT are not limited to these accepted market practices. Accordingly, new AMPs may be established under REMIT, in particular concerning wholesale energy commodity markets.

Secondly, in the same way as financial market authorities have consistently made a distinction between practices and activities, also the Agency will distinguish between practices and activities carried out in wholesale energy markets. "Activities" would cover different types of operations or

strategies that may be undertaken such as arbitrage, hedging and short selling. “Market practices” would cover the way these activities are handled and executed in the market.

“Activities” are considered too broad to qualify for the status of AMPs. An “activity” such as hedging could be undertaken in different ways. If the activity is carried out in a way which does not constitute market manipulation, then the question of giving it accepted market practice status does not arise. On the other hand, if the “activity” is carried out in a way which would constitute market manipulation, it is unlikely that a competent authority would be prepared to accept it as an AMP. Hence to give an “activity” a blanket AMP status would neither be meaningful nor desirable.

Thirdly, the Agency agrees with financial market authorities on their considerations of the issue of whether certain more specific practices, such as crossing/pre-arranged trades or gross bidding, should be given accepted market practice status, subject to the condition that these practices should be undertaken according to the rules of the relevant organised market place applicable to their conduct. As in most of such cases, conduct of the practice in conformity with the rules of the organised market place would be sufficient in itself to promote market integrity and therefore the question of giving the practice accepted market practice status would not arise.

Lastly, the decision on whether a process constitutes an AMP is a matter of national or regional specificities. AMPs, therefore, are primarily the responsibility of individual NRAs and so a practice which one competent authority considers is an AMP may not be viewed as such by another. However, each NRA has a duty to consult, both nationally and with other relevant NRAs, and to coordinate with the Agency prior to disclosing any market practices that they have accepted. There is also an obligation on the Agency to coordinate and publish the AMPs on its website. These will be published in a standard ACER format and a link provided to the national legal text once they have been recognised and have undergone the requisite national and European consultation process.

The following non-exhaustive list of factors shall be taken into account by competent authorities when assessing particular practices in wholesale energy markets:

- The level of transparency of the relevant market practice to the whole market: Transparency of market practices by market participants is crucial for considering whether a particular market practice can be accepted by competent authorities. The less transparent a practice is, the more likely it is not to be accepted. However, practices on non-regulated markets might for structural reasons be less transparent than similar practices on regulated markets. Such practices should not be in themselves considered as unacceptable by competent authorities;
- the need to safeguard the operation of market forces and the proper interplay of the forces of supply and demand: Market practices inhibiting the interaction of supply and demand by limiting the opportunities for other market participants to respond to transactions can create higher risks for market integrity and are, therefore, less likely to be accepted by competent authorities;

- the degree to which the relevant market practice has an impact on market liquidity and efficiency: Market practices which enhance liquidity and efficiency are more likely to be accepted than those reducing them;
- the degree to which the relevant practice takes into account the trading mechanism of the relevant market and enables market participants to react properly and in a timely manner to the new market situation created by that practice;
- the risk inherent in the relevant practice for the integrity of, directly or indirectly, related markets, whether regulated or not, in the relevant wholesale energy product within the whole Union;
- the outcome of any investigation of the relevant market practice by any competent authority, in particular whether the relevant market practice breached rules or regulations designed to prevent market abuse, or codes of conduct, be it on the market in question or on directly or indirectly related markets within the Union;
- the structural characteristics of the relevant market including whether it is regulated or not, the types of wholesale energy products traded and the type of market participants.

Overriding principles to be observed by competent authorities to ensure that accepted market practices do not undermine market integrity, while fostering innovation and the continued dynamic development of wholesale energy markets, includes:

- new or emerging accepted market practices should not be assumed to be unacceptable by the competent authority simply because they have not been previously accepted by it;
- practising fairness and efficiency by market participants is required in order not to create prejudice to normal market activity and market integrity.

Competent authorities should analyse the impact of the relevant market practice when assessing whether such practice constitutes an AMP.

The Agency currently considers the application of the AMPs regime primarily in relation to the information which users of wholesale energy markets would expect to be made public concerning wholesale energy products for the following incidents and possibly in coordination with the competent national financial market authority:

- Disclosure of inside information through regional or national inside information platforms fulfilling the minimum quality requirements listed by the Agency in Chapter 7.2.2 of this Guidance, if nominated by the competent NRA(s) following a public consultation and notified to the Agency. NRAs should aim at regional platforms agreed on with relevant NRAs for relevant markets;

- Disclosure of inside information in an aggregated/anonymised way in order to comply with competition law and notified to the Agency if considered necessary at national level and agreed upon by the national NRA with the national competition authority and notified to the Agency.

Experience will show whether the AMPs regime may also be applicable in relation to other types of market practices.

The NRAs shall notify to the Agency any constraints imposed on market participants by national competition authorities in relation to their fulfilment of REMIT.

### **9.3 Compliance regime**

The Agency is of the opinion that market participants should develop a clear compliance regime towards real time or close to real time disclosure of inside information and the further REMIT requirements, beyond compliance with existing Third Package transparency obligations. NRAs should consider the following best practice example of such compliance regime for market participants, but taking into account the market participant's size and trading capacity:

- Compliance culture: the creation of a corporate culture to comply with REMIT requirements,
- Compliance objectives: the compliance with REMIT requirements, namely the registration, disclosure and reporting obligations and the market abuse prohibitions,
- Compliance organisation: the definition of roles and responsibilities in the internal organisation (e.g. responsibilities for the REMIT requirements (centralised vs. decentralised), internal vs. external reporting lines, internal vs. external interfaces, provision of resources: human / technical (IT Systems) resources),
- Compliance risks: the identification / assessment of concrete compliance risks,
- Compliance programme: the identification of concrete actions to define compliant/non-compliant behaviour,
- Communication: the communication of the rules and regulations to be observed:
  - o internal communication and training concept (raising the awareness of employees);
  - o external communication and reporting to the Agency/NRAs;
  - o reporting processes: internal reports on compliance, reporting of infringements, status of current processes, etc.
- Monitoring improvements: internal controls, audits, etc.; reporting lines for monitoring results; documentation of processes and actions.

#### **9.4 Penalty regimes**

According to Article 18 of REMIT, Member States should have laid down the rules on penalties applicable to infringements of REMIT by 29 June 2013. In order to ensure an effective implementation of REMIT, the Agency considers it important that penalties are put in place for all potential infringements of REMIT, which may consist of breaches of the market abuse prohibitions of Articles 3 and 5 of the Regulation, but also of breaches of the obligation to notify the relevant information to the Agency and the competent NRA in situations according to Article 3(4)(b) of the Regulation, the obligation to disclose inside information according to Article 4(1) of the Regulation, the obligation to notify the Agency and the competent NRA of delayed disclosure of inside information according to Article 4(2) of the Regulation, the obligation to provide the Agency with a record of wholesale energy market transactions, including orders to trade, according to Article 8(1) of the Regulation, the obligation to register with the competent NRA according to Article 9(1) of the Regulation, and the obligations of persons professionally arranging transactions according to Article 15 of the Regulation.



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