European Union Agency for the Cooperation of Energy Regulators

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

6.1st Edition

18 December 2024

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The European Union Agency for the Cooperation of Energy Regulators ('the Agency' or 'ACER') is the European Union agency created by the Third Energy Package to achieve the Internal Energy Market (IEM).

According to REMIT (Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency), the Agency is responsible for monitoring wholesale energy markets to detect market abuse. National Regulatory Authorities (NRAs) are in charge of investigating suspicious cases of market abuse and enforcing REMIT within their national legal framework. Regulation (EU) 2024/1106 of the European Parliament and of the Council of 11 April 2024', amending Regulations (EU) No 1227/2011 and (EU) No 2019/942 as regards improving the Union's protection against market manipulation on the wholesale energy market, which entered into force on 7 May 2024, complemented National Regulatory Authority ("NRA") powers with investigatory powers for ACER over certain cross-border REMIT breaches.

The second subparagraph of Article 16(1) of REMIT provides that the Agency shall publish non-binding guidance on the application of the definitions set out in Article 2 of REMIT[1]. In addition, according to the first subparagraph of 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. 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 related to the application of REMIT.

Therefore, the non-binding Guidance on the application of REMIT provided in this document is aimed at helping NRAs, to ensure the required coordination and consistency in their activities under REMIT. It is deliberately drafted in non-legal terms and made public for transparency purposes only. It is updated as needed to reflect relevant changes in the legislation, the changing market conditions and the experience gained by the Agency and NRAs in the implementation and application of REMIT, including through the feedback of market participants and other stakeholders.

This ACER Guidance is without prejudice to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation - MAR), Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFID II) and Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFIR) 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.

More information on the Agency:

www.acer.europa.eu

More information on the Agency's activities under REMIT:

https://www.acer.europa.eu/en/remit/Pages/default.aspx

The Agency's REMIT Portal:

https://www.acer-remit.eu/portal/home

[1] Regulation (EU) 2024/1106 of the European Parliament and of the Council of 11 April 2024 amends this provision to include, as appropriate, the establishment of a non-exhaustive list of relevant intermediate steps in a protracted process in those cases where, by itself, the information meets the criteria laid down in Article 2, point (1); and on non-exhaustive indicators and examples of market behaviour relating to insider trading and market manipulation set out in Articles 3 and 2(2) respectively.

Related Documents

- 1st 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

  https://www.acer.europa.eu/sites/default/files/documents/Other%20Documents/1st%20edition%20ACER%20guidance%20111220%20final_0.pdf

- 2nd 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

  https://www.acer.europa.eu/sites/default/files/REMIT/Guidance%20on%20REMIT%20Application/ACER%20Guidance%20on%20REMIT/2nd_edition_of_ACER_Guidance_on_the_application_of_REMIT.pdf

- The updated 2nd 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

  https://www.acer.europa.eu/en/remit/Documents/Updated%202nd%20Edition%20of%20ACER%20Guidance%20(REMIT)_22042013.pdf

- 3rd 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

  https://www.acer.europa.eu/en/remit/Documents/REMIT%20ACER%20Guidance%203rd%20Edition_FINAL.pdf

- The updated 3rd 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

  https://www.acer.europa.eu/Media/Pages/3rd%20Edition%20ACER%20Guidance%20REMIT%20(2).pdf

- 4th 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

  https://www.acer.europa.eu/sites/default/files/REMIT/Guidance%20on%20REMIT%20Application/ACER%20Guidance%20on%20REMIT/4th%20Edition%20ACER%20Guidance%20REMIT.pdf

- 5th 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

  https://www.acer.europa.eu/sites/default/files/REMIT/Guidance%20on%20REMIT%20Application/ACER%20Guidance%20on%20REMIT/5th-Edition-ACER-Guidance.pdf

- The updated 5th 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

  https://www.acer.europa.eu/sites/default/files/REMIT/Guidance%20on%20REMIT%20Application/ACER%20Guidance%20on%20REMIT/202105_5th-Edition-ACER-Guidance-Update2.pdf

- 6th 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 https://acer.europa.eu/sites/default/files/documents/en/remit/Documents/ACER_Guidance_on_REMIT_application_6th_Edition_Final.pdf

- ACER Guidance Note 1/2017 on the application of Article 5 of REMIT on the prohibition of market manipulation to wash trades – 19 June 2017

  https://www.acer.europa.eu/sites/default/files/REMIT/Guidance%20on%20REMIT%20Application/ACER%20Guidance%20on%20REMIT/Guidance%20Note%20v6.0._published%20on%2019_06_2017.pdf

- ACER Guidance Note 1/2018 on the application of Article 5 of REMIT on the prohibition of market manipulation to transmission capacity hoarding – 22 March 2018

  https://www.acer.europa.eu/sites/default/files/REMIT/Guidance%20on%20REMIT%20Application/ACER%20Guidance%20on%20REMIT/Guidance%20Note%20-%20Transmission%20Capacity%20Hoarding.pdf

- ACER Guidance Note 1/2019 on the application of Article 5 of REMIT on the prohibition of market abuse to layering and spoofing – 22 March 2019

  https://www.acer.europa.eu/sites/default/files/REMIT/Guidance%20on%20REMIT%20Application/ACER%20Guidance%20on%20REMIT/Guidance%20Note_Layering%20v7.0%20-%20Final%20published.pdf

- Market Abuse Directive - Level 3 – first set of COMMITTEE OF EUROPEAN SECURITIES REGULATORS (CESR) guidance and information on the common operation of the Directive to the Market (Ref. CESR/04-505b)

  https://www.esma.europa.eu/sites/default/files/library/2015/11/04_505b.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

  https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0109&from=EN

- REGULATION (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003

  https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R0714&from=EN

- REGULATION (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005

  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0036:0054:EN:PDF

- REGULATION (EC) No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency

  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:326:0001:0016:en:PDF

- COMMISSION REGULATION (EU) No 543/2013 of 14 June 2013 on submission and publication of data in electricity markets and amending Annex I to Regulation (EC) No 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 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0050&from=DE

- DIRECTIVE 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFID II) and amending Directive 2002/92/EC and Directive 2011/61/EU (recast)

  https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065&from=EN

- REGULATION (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) (MAR) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC

  https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0596&from=EN

- Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (MiFIR)

  https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0600&from=EN

- COMMISSION IMPLEMENTING REGULATION (EU) No 1348/2014 on data reporting implementing Article 8(2) and Article 8(6) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency

  http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R1348&rid=1

- COMMISSION DELEGATED REGULATION (EU) 2016/522 of 17 December 2015 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council as regards an exemption for certain third countries public bodies and central banks, the indicators of market manipulation, the disclosure thresholds, the competent authority for notification of delays, the permission for trading during closed periods and types of notifiable managers' transactions

  https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0522&from=EN

- MAR Guidelines - Information relating to commodity derivatives markets or related spot markets for the purpose of the definition of inside information on commodity derivatives

  https://www.esma.europa.eu/sites/default/files/library/esma-2016-1480_mar_guidelines_on_commodity_derivatives.pdf

- COMMISSION DELEGATED REGULATION (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive

  https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0565&from=EN

- Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse

  https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0057

- REGULATION (EU) 2019/942 establishing a European Union Agency for the Cooperation of Energy Regulators (recast)

  https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0942&from=EN

- Commission Delegated Regulation (EU) 2016/957 of 9 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures as well as notification templates to be used for preventing, detecting and reporting abusive practices or suspicious orders or transactions

https://eur-lex.europa.eu/eli/reg_del/2016/957/oj

- Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014

  https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R1011

- Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity

  https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0943&from=EN

- Overview of market abuse decisions (breaches of Articles 3 and 5 of REMIT) imposing sanctions by National Regulatory Authorities on market participants:

  http://www.acer.europa.eu/nl/remit/Paginas/Overview-of-the-sanction-decisions.aspx

- Regulation (EU) 2024/1106 of the European Parliament and of the Council of 11 April 2024', amending Regulations (EU) No 1227/2011 and (EU) No 2019/942 as regards improving the Union's protection against market manipulation on the wholesale energy market

  https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L_202401106

Preface by the Director on the 6.1st edition

Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency (REMIT) is a tailor-made legislative framework in the EU energy sector that plays a major role in ensuring transparency, integrity and efficient price formation at wholesale level. REMIT is the guarantee of well-functioning, transparent and trustworthy EU wholesale electricity and gas markets that can bring to life the benefits from the market design and market integration efforts.

In 2023, amid the energy crisis and the substantial increase in energy prices and market volatility that had started in 2021, the Commission and the EU co-legislators engaged in revising REMIT as part of a broader reform of the EU's electricity market design. Regulation (EU) 2024/1106 of the European Parliament and of the Council of 11 April 2024, which entered into force on 7 May of 2024 and amended REMIT, further enhanced transparency in the EU energy markets by making data collection more complete and by improving the National Regulatory Authorities (NRAs) and ACER's ability to monitor the markets to better protect them against market abuse. Notably, the scope of REMIT was expanded to cover additional products and markets; improvements were made regarding data quality and reporting under REMIT; the legal framework was further aligned with the EU financial markets framework where necessary; the level of the fines imposed under REMIT at national level was harmonised; and the market abuse regime was strengthened for certain cross-border cases by granting ACER new investigatory powers.

In this context, the application of REMIT in a consistent and coordinated way across Europe represents a major challenge for the Agency. The issuance of Guidance on the application of REMIT pursuant to Article 16(1) of REMIT to the NRAs constitutes a key instrument used by the Agency to overcome it.

Over the last 10 years, six editions of the Guidance have been published (as well as several updates and three Guidance Notes on topical issues):

The 1st edition of ACER Guidance on the application of REMIT, which was published on 21 December 2011, focused on the areas which the Agency considered as priorities 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 2nd edition, which was published on 28 September 2012 and updated for the last time on 22 April 2013, developed the understanding on 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 of the market abuse prohibitions.

The 3rd edition, published on 29 October 2013 and updated for the last time on 3 June 2015, provided guidance to NRAs by elaborating on their role in the registration of market participants. It also provided further clarifications concerning the definitions of wholesale energy products and inside information, and concerning the obligation to publish inside information.

In the 4th edition, published on 17 June 2016 and updated for the last time on 15 October 2019, the Agency provided more detailed guidance to NRAs concerning the supervision of the obligations imposed on persons professionally arranging transactions by Article 15 of REMIT.

In the 5th edition, published on 8 April 2020 and updated for the last time on 11 May 2021, the Agency provided more detailed guidance on the definitions of information and inside information under REMIT.

In the 6th edition, published on 21 July 2021 and marking the 10th anniversary of the first publication of the 1st Edition of the ACER Guidance, the Agency made significant changes to the document: its structure was fully revisited to make it more intuitive, and additional content was provided on the scope of REMIT and on the core prohibitions of insider trading and market manipulation.

In this 6.1st Edition, the Agency has reviewed the entirety of the Guidance to reflect the changes brought by the REMIT revision and the recast Gas Regulation 2024/1789[2]. This includes updating definitions; reflecting the enlargement of the scope of the application of REMIT; acknowledging the enhanced investigatory powers granted to ACER where necessary; adjusting the wording; and correcting outdated references.

The Agency will continue its work to assist NRAs in carrying out their activities under REMIT in a consistent and coordinated way. In order to make the implementation of REMIT as smooth as possible for market participants and stakeholders, the Agency will also keep publishing and updating all relevant documentation on the Agency's REMIT Portal (https://www.acer-remit.eu/portal/home).

Christian Zinglersen

Director

European Union Agency for the Cooperation of Energy Regulators

[2] Regulation (EU) 2024/1789 of the European Parliament and of the Council of 13 June 2024 on the internal markets for renewable gas, natural gas and hydrogen**, amending Regulations (EU) No 1227/2011, (EU) 2017/1938, (EU) 2019/942 and (EU) 2022/869 and Decision (EU) 2017/684 and repealing Regulation (EC) No 715/2009 (recast),** incorporating hydrogen into the scope of REMIT under Article 83.

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1. Introduction

(1) This document contains the 6.1st edition of the non-binding Guidance on the application of REMIT, as amended by Regulation 2024/1106 ('REMIT revision')[3], directed at 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 transparency4 (REMIT).

(2) It provides guidance regarding the following topics: the scope of REMIT, including the definitions of 'wholesale energy products', 'wholesale energy market' and 'market participant' (Chapter 2); the concept of 'inside information' (Chapter 3); the obligation to disclose inside information (Chapter 4), the prohibition of insider trading (Chapter 5); the prohibition of market manipulation (Chapter 6); the obligation on the notification of algorithmic trading and direct electronic access (Chapter 7); the registration of market participants (Chapter 8); the obligations of persons professionally arranging or executing transactions (Chapter 9); and best practices on compliance and penalty regimes (Chapter 10).

(3) For further guidance on general definitions provided in Article 2 of REMIT (e.g. final customer, consumption, etc.), reference is made to the relevant definitions in the Third Energy Package legislation5.

(4) In particular, this 6.1.st edition of the Guidance conducts a revision of the text to reflect the changes brought by the REMIT revision and the recast Gas Regulation as follows:

- Introducing new definitions and updating old ones;
- Amending the text to reflect the enlargement of the scope in the application of REMIT to new products and markets;
- Updating the text to reflect new provisions and obligations impacting NRAs and other market players;
- Adjusting the wording and correcting any outdated reference.

[3] Regulation (EU) 2024/1106 of the European Parliament and of the Council of 11 April 2024', amending Regulations (EU) No 1227/2011 and (EU) No 2019/942 as regards improving the Union's protection against market manipulation on the wholesale energy market.

[4] OJ L 326, 8.12.2011, p. 1.

[5] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity which will be completely repealed by Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 as of 21 December 2020; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas; Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity which was repealed by Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity; and Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks.

2. REMIT scope

2.1. Introduction

(5) Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency (REMIT) established a sector-specific framework for the monitoring of wholesale energy markets, with the objective of detecting and deterring insider trading and market manipulation. REMIT was originally seen by the legislators as a "*basic tailor-made market abuse framework in the energy sector legislation for all electricity and gas products not covered by the Market Abuse Directive"* (the predecessor of MAR and CS MAD).[6,7]

(6) The scope of REMIT was therefore specifically designed to accommodate the operational complexity of physical energy markets and specificities of the energy sector (electricity and natural gas) and to appropriately complement the market abuse legislation covering the financial sector.

(7) The REMIT revision[8] updated the scope of the original REMIT Regulation, adapting it to the evolving market circumstances.

(8) In addition, Article 83 of the recast Gas Regulation[9] amended REMIT directly to include hydrogen in certain Articles where the term 'electricity or natural gas' is mentioned.

(9) This chapter intends to provide guidance to the NRAs on the scope of REMIT, including the enlarged scope introduced by the REMIT revision, by presenting the Agency's understanding of the notions of wholesale energy products ('WEP') and wholesale energy markets ('WEM') as defined by Article 2 of REMIT.[10] Subchapter 2.2 identifies the products and markets that fall in the general scope of REMIT; Subchapter 2.3 provides guidance on the geographical scope of REMIT application; Subchapter 2.4 specifies the type of natural or legal persons that can fall into the scope of REMIT; and finally, Subchapter 2.5 explains the interactions between REMIT and the financial legislation as laid down in Article 1(2) of REMIT.

2.2. Products and markets in scope

2.2.1. Wholesale energy products ('WEP')

(10) Article 1(2) of REMIT establishes that REMIT applies to wholesale energy products. The concept of WEPs is further defined in Article 2(4) of REMIT as follows:

"Wholesale energy products means the following contracts and derivatives, irrespective of where and how they are traded:

[6] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive).

[7] European Commission proposal for a regulation of the European Parliament and of the Council on energy market integrity and transparency (COM (2010) 726 final).

[8] Regulation (EU) 2024/1106 of the European Parliament and of the Council of 11 April 2024', amending Regulations (EU) No 1227/2011 and (EU) No 2019/942 as regards improving the Union's protection against market manipulation on the wholesale energy market.

[9] Regulation (EU) 2024/1789 of the European Parliament and of the Council of 13 June 2024 on the internal markets for renewable gas, natural gas and hydrogen, amending Regulations (EU) No 1227/2011, (EU) 2017/1938, (EU) 2019/942 and (EU) 2022/869 and Decision (EU) 2017/684 and repealing Regulation (EC) No 715/2009.

[10] The explanation of which WEPs are reportable to the Agency and in which formats is out of the scope of this chapter. For more information, please consult the Agency's REMIT reporting user package available here: https://documents.acer-remit.eu/category/remit-reporting-user-package/.

(a) *contracts for the supply of electricity, hydrogen*[11][12] *or natural gas, including LNG, where delivery is in the Union;*

(b) *contracts for the supply of electricity which may result in delivery in the Union as a result of single day-ahead and intraday coupling;*

(c) *derivatives relating to electricity, hydrogen*[13] *or natural gas produced, traded or delivered in the Union*

(d) *derivatives relating to electricity which may result in delivery in the Union as a result of single day-ahead and intraday coupling;*

(e) *contracts relating to the transportation of electricity, hydrogen or natural gas in the Union;*

(f) *derivatives relating to the transportation of electricity, hydrogen or natural gas in the Union;*

(g) *contracts relating to the storage*[14] *of electricity, hydrogen or natural gas in the Union;*

(h) *derivatives relating to the storage of electricity, hydrogen or natural gas in the Union"*

(11) In addition to wholesale energy products, Article 2(4), second subparagraph, adds that:

"Contracts for the supply and distribution of electricity, hydrogen or natural gas for the use of final customers are not wholesale energy products. However, contracts for the supply and distribution of electricity, hydrogen or natural gas to final customers with a consumption capacity greater than (…) [600 GWh] (…) shall be treated as wholesale energy products."

(12) In view of the definition of wholesale energy products in Article 2(4) of REMIT, the Agency considers contracts for the supply, transportation or storage of electricity, hydrogen and natural gas traded in balancing markets, intraday, within-day, day-ahead, two-day-ahead, week-end, week, monthly, quarterly, yearly, long-term or during any other time period generally accepted in the market as contracts for the supply, transportation or storage of electricity, hydrogen or natural gas. Wholesale energy products which are derivatives can be financial instruments as well if they fall under points (5), (6), (7) or (10) of Annex I Section C of MiFID II. More detailed information on the interactions between REMIT and the financial market Regulation can be found in Subchapter 2.5.

(13) As the definition of wholesale energy product applies to contracts and derivatives '*irrespective of how and where they are traded*', the Agency considers that this definition covers contracts and derivatives that are arranged or executed by persons professionally arranging or executing transactions (the concept of PPAETs is further detailed in Chapter 9 of the Guidance), therefore also including contracts traded bilaterally or over the counter (OTC). The Agency also considers that intra-group transactions, i.e. contracts entered into with another counterparty which is part of the same group, are considered to be wholesale energy products under REMIT. Following the same reasoning, contracts for the supply of electricity and any derivative related to electricity resulting from generation capacity markets, capacity remuneration mechanisms, and flexibility markets[15] where applicable, shall be considered wholesale energy products according to REMIT.

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[11] Article 83 of the recast Gas Regulation (EU) 2024/1789 amends Regulation (EU) No 1227/2011 (REMIT) as follows: in Article 2, point (1)(b) and points (4) and (5), Article 3(3) and (4), point (c), Article 4(1) and Article 8(5), the term 'electricity or natural gas' is replaced by the term 'electricity, hydrogen or natural gas'; (2) in Article 6(2), points (a) […] in Article 6(2), points (a) and (b), the term 'electricity and gas markets' is replaced by the term 'electricity, hydrogen and natural gas markets'.

[12] Further details regarding the reporting of hydrogen contracts are expected to be addressed with the revision of the Commission Implementing Regulation (EU) No 1348/2014.

[13] Further details regarding the reporting of derivatives relating to hydrogen are expected to be addressed with the revision of the Commission Implementing Regulation (EU) No 1348/2014.

[14] Further details regarding the reporting of contracts relating to storage are expected to be addressed with the revision of the Commission Implementing Regulation (EU) No 1348/2014.

[15] Where contracts between Distribution System operators ('DSOs') and flexibility providers are concluded.

(14) Concerning the contracts and derivatives for the supply of electricity which may result in delivery in the Union as a result of single day-ahead and intraday coupling, the Agency considers that all contracts derived from coupled markets fall within the scope of the definition, as an order placed in such a market has the potential for delivery in the Union. The coupled markets function in a way that orders to trade placed by a market participant on a market located outside of the EU may result in a contract for the supply of electricity with delivery in the Union, due to the market coupling.

(15) Concerning the contracts for the supply of natural gas, pursuant to Article 2(28) of Directive (EU) 2024/1788 (Recast Gas Directive) 2009/73/EC[16], 'supply' means the sale, including resale, of natural gas, including liquefied natural gas ('LNG'), or hydrogen in the form of liquid organic hydrogen carriers or liquid hydrogen to customers […]. Accordingly, it is without doubt that contracts for the supply of LNG, or hydrogen in the form of liquid organic hydrogen carriers or liquid hydrogen with delivery in the European Union ('EU') are wholesale energy contracts pursuant to Article 2(4)(a) of REMIT.

(16) Regarding contracts or derivatives relating to the storage of electricity, hydrogen or natural gas in the Union, 'storage' means energy storage and energy from a storage facility, including a hydrogen storage facility[17], as respectively defined in Article 2 points (59) and (60) of Directive 2019/944, and in Article 2 point (5) of the Recast Gas Directive.

(17) Furthermore, pursuant to the Recast Gas Directive, the rules established for natural gas, including LNG and hydrogen, shall also apply in a non-discriminatory way to biogas and gas from biomass or other types of gas, in so far as such gases can technically and safely be injected into, and transported through, the natural gas system. Therefore, if biogas can technically and safely be injected into, and transported through, the natural gas system, (i) it will meet all criteria to be treated as natural gas and (ii) REMIT will apply for the biogas and the renewable gas supply/transportation/storage contracts.

(18) Regarding the contracts for green certificates and emission allowances, it is the Agency's understanding that they are not wholesale energy products, as they do not fulfil the requirements set out in Article 2(4) of REMIT.[18]

(19) As explicitly mentioned in REMIT, contracts for the supply and distribution of electricity, hydrogen or natural gas for the use of final customers are not wholesale energy products either. However, if these contracts involve final customers with a consumption capacity[19] greater than 600 GWh per year, these contracts will fall within the scope of REMIT wholesale energy products.

The concept of final customers with a consumption capacity greater than 600 GWh/y

For the purposes of REMIT, the definition of 'final customer' draws on the relevant definition in the Directive (EU) 2019/944[20], and the Recast Gas Directive concerning common rules for the internal market in natural gas. These Directives define a final customer as a customer purchasing electricity or natural gas or hydrogen for his own use.[21]

Article 2(5) of REMIT clarifies the notion of 'consumption capacity' relevant for the understanding of the scope of REMIT: *'Consumption capacity' means the consumption of a final customer of either electricity,*

[16] Directive (EU) 2024/1788 of the European Parliament and of the Council of 13 June 2024 on common rules for the internal markets for renewable gas, natural gas and hydrogen, amending Directive (EU) 2023/1791 and repealing Directive 2009/73/EC (recast).

[17] Article 2, point (5) of the recast Gas Directive (EU) 2024/1788.

[18] 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.

[19] The Agency provides several examples on the calculation of the 'consumption capacity' in the Q&A on REMIT (available here: https://documents.acer-remit.eu/category/qas-and-faq-on-remit/).

[20] Article 2(3) of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity.

[21] Art. 2(50) of the Recast Gas Directive, (EU) 2024/1788.

hydrogen 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, hydrogen or natural gas) that a final customer could consume in a year, i.e. if the customer was to run their consumption assets fully at all times throughout the year (technical capability to consume). It is this consumption capacity that final consumers should consider whenever assessing whether the consumption capacity threshold of 600 GWh is exceeded. The consumption capacity comprises all consumption of electricity, hydrogen or natural gas by that customer 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, hydrogen 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 is not taken into account, in so far as those plants do not exert a joint influence on wholesale energy market prices due to them being located in different relevant geographical markets. However, individual plants that each have 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 Court of Justice of the European Union. 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 interrelation is expected to increase with the introduction of hydrogen and as the development of a single European energy market continues to progress.[22] Having this in mind, the Agency considers it prudent for market

[22] For more information on the 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 Reports on the Results of Monitoring the Internal Electricity and Natural Gas Markets available here: https://www.acer.europa.eu/electricity/market-monitoring-report

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.

(20) The table below provides some examples of the Agency's understanding of different types of products and shows whether they fall under the scope of REMIT:

	In scope of REMIT	
	Yes	**No**
Contracts for the supply of electricity, hydrogen or natural gas[23] with delivery in the EU: balancing, intraday, within-day, day-ahead, two-day-ahead, week-end, week, monthly, quarterly, yearly and long-term or any other time period generally accepted in the market as contracts for the supply of electricity, hydrogen or natural gas	X	
Contracts for the supply of electricity which may result in delivery in the Union as a result of single day-ahead and intraday coupling	X	
Transportation contracts in the Union of electricity, hydrogen or natural gas traded: balancing, intraday, within-day, day-ahead, two-day-ahead, week-end, week, monthly, quarterly, yearly and long-term or any other time period generally accepted in the market as contracts for the transportation of electricity, hydrogen or natural gas	X	
Gas or hydrogen transport capacity contracts in the Union related to upstream pipeline networks	X	
Contracts relating to the transportation of electricity, hydrogen or natural gas including at least one location or bidding zone in the Union concluded as a result of a primary explicit capacity allocation by or on behalf of the TSO, specifying physical or financial capacity rights or obligations (PTRs/FTRs)	X	
Contracts relating to the transportation of electricity, hydrogen or natural gas including at least one location or bidding zone in the Union concluded between market participants on secondary markets, specifying physical or financial capacity rights or obligations (PTRs/FTRs), including resale and transfer of such contracts	X	
Contracts relating to the storage of electricity, hydrogen or natural gas in the Union;	X	
Derivatives relating to electricity, hydrogen or natural gas produced, traded or delivered in the Union	X [24]	
Ammonia and ethanol commodities		X

[23] Including LNG, biogas and renewable gas supply contracts.

[24] Derivatives of contracts for the supply can be financial instruments if they fall under points (5), (6), (7) or (10) of Annex I Section C of MiFID II.

Derivatives relating to contracts for the supply of electricity which may result in delivery in the Union as a result of single day-ahead and intraday coupling	**X**	
Derivatives of the transportation contracts of electricity, hydrogen or natural gas in the Union	**X** [25]	
Derivatives relating to the storage of electricity, hydrogen or natural gas in the Union	**X**	
Intra-group transactions of electricity, hydrogen and natural gas for delivery in the Union[26]	**X**	
Contracts for the provision of demand response services or flexibility in the Union	**X**	
Contracts for the supply of electricity and any derivative related to electricity traded in generation capacity markets[27] **and through capacity remuneration mechanisms in the Union**	**X**	
Contracts for the supply of electricity, hydrogen or natural gas for the use of final customer with a consumption capacity greater than 600 GWh/year[28] **in the Union**	**X**	
Contracts for green certificates and emission allowances		**X**
Production of electricity, hydrogen or gas by a production unit which is consumed within the same production facility		**X**

2.2.2. Wholesale energy markets (‘WEM’)

(21) The wholesale energy products that broadly constitute the scope of REMIT are traded in the so-called wholesale energy markets (‘WEM’). Article 2(6) of REMIT defines these markets as follows:

“‘Wholesale energy market’ means any market within the Union on which wholesale energy products are traded.”

(22) 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 is interlinked. They include, *inter alia*, regulated markets, multilateral trading facilities, organised trading facility and OTC transactions and bilateral contracts, traded directly or through brokers.

(23) It is therefore the Agency’s understanding that the definition of wholesale energy markets includes, but is not limited to:

[25] Ibid.

[26] Intra-group transactions means over-the-counter (‘OTC’) contracts entered into with another counterparty which is part of the same group. They can cover supply, transportation or storage.

[27] In most EU Member States (not all), the contracts in the generation capacity markets include obligations to remain available during the delivery period but also to offer the supply of energy and, therefore, qualify as wholesale energy products.

[28] Details on the calculation of the threshold of 600 GWh/year are clarified in Subchapter 2.2.1 describing the concept of final customers with a consumption capacity greater than 600 GWh.

- balancing markets[29] for the trading of electricity, hydrogen[30] or natural gas with delivery in the EU;
- redispatching and countertrading mechanisms[31], in so far as wholesale energy products are traded there;
- intraday or within-day markets for the trading of electricity, hydrogen or natural gas with delivery in the EU;
- coupled markets for trading electricity single day-ahead and intraday which may result in delivery in the EU;
- day-ahead or two-day-ahead markets for the trading of electricity, hydrogen or natural gas with delivery in the EU, including week-end products;
- physical markets[32] for the trading of electricity, hydrogen or natural gas with delivery in the EU, including markets for physical forward contracts and non-standardised long-term contracts;
- markets for the transportation capacities of electricity, hydrogen or natural gas in the EU;
- derivatives markets relating to electricity, hydrogen or natural gas produced, traded or delivered in the EU, including financial OTC markets;
- derivatives markets relating to coupled markets for trading electricity day-ahead and intraday which may result in delivery in the EU;
- derivatives markets relating to the transportation of electricity, hydrogen or natural gas in the EU;
- markets for the storage of electricity, hydrogen or natural gas in the EU;
- derivatives markets relating to the storage of electricity, hydrogen or natural gas in the EU;
- generation capacity markets and capacity remuneration mechanisms, in so far as wholesale energy products are traded there; and
- local flexibility markets for electricity[33], in so far as wholesale energy products are traded there.

2.3. Geographical scope

(24) This subchapter identifies the geographical scope of REMIT. This scope is solely determined by the geographical delimitation of the concept of wholesale energy products defined under Article 2(4) of REMIT (and products treated in an equivalent way) and not by the geographical location of the legal or natural person trading these products or by the geographical location of the place of trading or of the legal or natural person managing the place of trading.

[29] See the reference to 'new balancing markets' in Recital 12 of (EU) Regulation 2024/1106. I.e. MARI, PICASSO, TERRE, etc.

[30] Article 83 of the Recast Gas Regulation (EU) 2024/1788 amends Regulation (EU) No 1227/2011 (REMIT) directly to include hydrogen in certain Articles where the term 'electricity or natural gas' is mentioned.

[31] This includes transactions that TSOs are entering into in order to carry out their redispatching and countertrading obligations. Rules for the redispatching and countertrading are laid down in Article 35 of CACM Regulation: "[…] Each TSO may redispatch all available generation units and loads in accordance with the appropriate mechanisms and agreements applicable to its control area, including interconnectors. […] The relevant generation units and loads shall give TSOs the prices of redispatching and countertrading before redispatching and countertrading resources are committed".

[32] Physical markets implies the physical delivery of the product traded.

[33] The local flexibility markets include transactions between TSOs/other market participants and DSOs. TSOs and DSOs act as single buyers of energy volumes and are therefore counterparts in every trade. The execution of every transaction therefore remains subject to the TSO/DSO. TSOs/DSOs are also responsible for the financial remuneration of the flexibility providers.

(25) Therefore, although the geographical scope of wholesale energy products is anchored in the concepts of delivered, produced, traded, transported and/or facilities located in the EU[34], non-EU persons are also covered by REMIT provided that they enter into transactions in wholesale energy products.

(26) Article 9(1) of REMIT confirms this understanding, as it requires persons not established or resident in the EU entering into transactions which are required to be reported to the Agency in accordance with Article 8(1) of REMIT, to (i) designate a representative in a Member State where they are active on the wholesale energy markets, and (ii) register themselves in that Member State. Accordingly, the obligations to register with the competent NRA pursuant to Article 9(1) and to report data to the Agency according to Article 8(1) and (5) of REMIT also applies to such non-EU persons. The same holds for the prohibitions of market abuse pursuant to Articles 3 and 5 of REMIT, and the Article 4 obligation to publish inside information. Such prohibitions and obligations therefore apply irrespective of the location of the person involved in a potential breach of REMIT.

(27) Regarding the place of trading, REMIT does not define any geographical limitation. Provided that the wholesale energy product meets the definition of wholesale energy products under Article 2(4) of REMIT, it is irrelevant where such a product is traded. Even if it is traded outside the EU, it will still qualify as a wholesale energy product if it meets the definition, and therefore fall under the scope of REMIT.

(28) Pursuant to Article 2(4) of REMIT, depending on the typology of the contract, six criteria for the geographical delimitation of the scope of REMIT are relevant:

- ‘Delivered in the EU’, for wholesale energy products defined under Article 2(4)(a);
- 'May be delivered in the EU’, for wholesale energy products defined under Article 2(4)(a) and 2(4)(b);
- ‘Produced, traded or delivered in the EU’, for wholesale energy products defined under Article 2(4)(b);
- ‘Relating to transportation in the EU’, for wholesale energy products defined under Articles 2(4)(c) and 2(4)(d);
- ‘Relating to storage in the EU’, for wholesale energy products defined under Article 2(4)(e) and 2(4)(f); and
- consumption in the EU, for contracts for the supply and distribution to final customers with a consumption greater than 600 GWh/year.

2.3.1. Delivered in the Union - for supply contracts under Article 2(4)(a) of REMIT

(29) Concerning the contracts for the supply of electricity, hydrogen or natural gas under Article 2(4)(a) of REMIT, the key element of the geographical scope is that a delivery point of such electricity, hydrogen or natural gas must be in the EU.

(30) As a consequence, contracts for the supply of electricity, hydrogen or natural gas produced/generated in the EU but delivered outside of its borders will not be within the scope of REMIT, as they don’t fulfil the criteria included in the definition of wholesale energy products under Article 2(4)(a) of REMIT. The same applies for contracts for the supply of electricity, hydrogen or natural gas produced/generated and delivered outside of the EU. On the contrary, contracts for the supply of electricity, hydrogen or natural gas produced/generated outside the EU but delivered within the EU borders will be under the scope of REMIT.

[34] According to Article 9 of the Protocol on Ireland/Northern Ireland to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, certain provisions of Union law governing wholesale electricity markets listed in Annex 4 to this Protocol, including REMIT, shall apply, under the conditions set out in that Annex, to and in the United Kingdom in respect of Northern Ireland.

Example: Contract for LNG supply where the contractual delivery is in the EU

Situation: Bilateral over-the-counter contract for the delivery of LNG at the OLT offshore LNG terminal of Toscana (Italy).

Assessment: This contract is a wholesale energy product pursuant to Article 2(4)(a) of REMIT, as it fulfils all relevant criteria:

- It is a *contract for the supply of natural gas* – as explained in Subchapter 2.2.1, 'supply' means the sale, including resale of natural gas, including liquefied natural gas (LNG), to customers. The form of the contract (in this case bilateral, OTC) is irrelevant for the qualification of it as a wholesale energy product.
- The *product is delivered in the EU* – the LNG is delivered in EU territorial waters (Italian territorial waters - EU member state). It is not relevant for the qualification of the delivery as being in the EU if it is on an offshore or on onshore facility. As far as the contracts for the LNG supply are concerned, the Agency considers any delivery or offloading of LNG in any LNG facility (including flanges that connect the LNG vessel to the LNG terminal) as 'delivery in the EU' as long as the delivery of the product takes place in the EU.

Considerations: Reload-contracts at a regasification terminal or at a vessel where the delivery of the LNG product is not the EU will not qualify as 'delivery in the EU' and therefore will not qualify as a wholesale energy product under Article 2(4)(a) of REMIT.

2.3.2. May be delivered in the EU – for supply contracts and related derivatives under Articles 2(4)(a) and 2(4)(b)

(31) Concerning the contracts for the supply of electricity that may result in the delivery in the union, as a result of single day-ahead and intraday coupling[35] under Article 2(4)(a) and 2(4)(b) of REMIT, within the system, orders to trade entered by market participants for continuous matching in one country can be matched by orders submitted by market participants in any other country included in the coupling. Therefore, the key element of the geographical scope is that the coupled markets referred to must include at least one Member State to which a potential delivery can occur.

Example: Contract for electricity supply resulting from single intraday coupling

Situation: A market participant acting on the Norwegian market submits an offer for electricity on a centralized European platform with a zonal model, capable of simultaneously allocating ("coupling") the energy flow and the transmission capacity. On the same platform, a market participant acting on the Italian market submits a bid for electricity which could be matched with the offer on the Norwegian market, provided there is available transportation capacity.

Assessment: This contract is a wholesale energy product pursuant to Article 2(4)(a) of REMIT, as it fulfils all relevant criteria:

- It is a *contract for the supply of electricity* – both market participants have submitted bids/offers for electricity. Any contract concluded will be a contract for electricity.
- The *product may be delivered in the EU as a result of coupling* – The situation described does not let us know whether the Norwegian offer and the Italian bid are matched or not, however, this is not necessary because the fact that they are made on the same platform and have the potential to be matched (and thus for the delivery to happen in the EU) is enough for this product to be considered as having the potential to be delivered in the EU.

[35] As defined in Article 2 (26) and (27) of the COMMISSION REGULATION (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (CACM).

Considerations: The scope of this criterion covers ‘contracts’, however, all bids and offers placed within a coupled market are to be reported to the Agency within the scope of organised market places reporting details of their orderbook(s) as provided in Article 8(1a) of REMIT.

2.3.3. Produced, traded or delivered in the EU - for derivatives under Article 2(4)(b) of REMIT

(32) As for the derivative contracts relating to electricity, hydrogen or natural gas, Article 2(4)(b) of REMIT establishes that they must relate to electricity, hydrogen or natural gas produced, traded or delivered in the EU.

(33) The geographical scope of REMIT for these types of contracts therefore extends beyond the one foreseen in Article 2(4)(a) of REMIT (i.e. delivered in the EU). It also includes derivative contracts relating to electricity, hydrogen or natural gas produced or traded in the EU. Such contracts are wholesale energy products irrespective of whether the related electricity, hydrogen or natural gas is delivered in the EU.[36]

(34) Under Article 2(4)(b) of REMIT, it is also clear that if the underlying contract(s) for electricity, hydrogen or natural gas is not produced, traded or delivered in the EU, such a derivative contract will not qualify as a wholesale energy product and will therefore fall outside the scope of REMIT.

Example: Derivative contract traded in the EU relating to electricity for delivery outside of the EU but whose underlying contract is also traded in the EU

Situation: A market participant is trading, on a platform based in Germany, a derivative contract that has an underlying electricity spot contract for delivery in the United Kingdom. That spot contract is also traded on that same EU platform.

Assessment: This contract is a wholesale energy product pursuant to Article 2(4)(b) of REMIT, as it fulfils all relevant criteria:

- It is a ‘*derivative’* – the contract qualifies as a derivative of the electricity spot contract.
- It is related to ‘*electricity*’ ‘*traded in the Union*’ – the derivative contract relates to the electricity spot contract that is traded at an organised marketplace located in the EU (Germany).

Considerations: This contract is not reportable to the Agency under REMIT as per the first sentence of Article 3(1)(a) of Implementing Regulation.[37]

2.3.4. Transported in the EU - for transportation contracts under Article 2(4)(c) and derivative contracts under Article 2(4)(d) of REMIT

[36] The scope of REMIT and its prohibitions (e.g. prohibition of insider trading or market manipulation) and obligations (e.g. obligation to publish inside information) is wider than the scope of the reporting obligation under 8(1) of REMIT in connection with the Implementing Regulation. The first sentence of Article 3(1)(a) of Implementing Regulation limits the scope of reporting to the contracts that are wholesale energy products in relation to the supply of electricity or natural gas ‘with delivery in the EU’. Therefore, only those derivatives of contracts related to electricity/natural gas (a) produced, (b) traded or (c) delivered in the EU that also relate to the supply of electricity/natural gas with delivery in the EU shall be reported to the Agency pursuant to Article 3(1)(a)(viii) of Implementing Regulation.

[37] Commission Implementing Regulation (EU) No 1348/2014 of 17 December 2014 on data reporting implementing Article 8(2) and Article 8(6) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency.

(35) Concerning transportation contracts under Article 2(4)(c) of REMIT, it is required that they relate to the transportation of electricity, hydrogen or natural gas in the EU. The same geographical scope applies for derivative contracts under 2(4)(d) of REMIT, as they must relate to the transportation of electricity, hydrogen or natural gas in the EU.

(36) The concept of 'transportation of electricity, hydrogen or natural gas' in the EU shall be interpreted by NRAs as including at least one bidding zone/delivery point located inside the EU:

- all transportation of electricity, hydrogen or natural gas (including LNG) between bidding zones or specific delivery points that are (totally or partially) geographically located in the EU territory;
- all transportation of electricity, hydrogen or natural gas (including LNG) from a bidding zone or point that is geographically located outside of the EU to a bidding zone or delivery point located (totally or partially) inside the EU; and
- all transportation of electricity, hydrogen or natural gas (including LNG) from a bidding zone or delivery point that is geographically located inside of the EU (totally or partially) to a bidding zone or delivery point located outside the EU.

(37) The contracts or derivatives related to the transportation of electricity, hydrogen or natural gas (including LNG, biogas and renewable gases) involving the transportation of electricity, hydrogen or natural gas between bidding zones or points totally located outside of the EU are outside the geographical scope of REMIT.

Example: Gas transportation contract for delivery of natural gas at the EU border

Situation: A market participant bought yearly firm transportation capacity of natural gas so that it can import natural gas from Norway into the EU (the contract stipulates that the entry point is in a Norwegian location and the delivery point is at a receiving terminal in Germany).

Assessment: This contract is a wholesale energy product pursuant to Article 2(4)(c) of REMIT, as it fulfils all relevant criteria:

- It is a *contract for the transportation of natural gas* – this contract involves the transportation of natural gas from Norway to Germany.
- It is *related to transportation in the EU* – the delivery point of the natural gas to be transported is in Germany (as Germany is an EU Member State while Norway is not).

2.3.5. Stored in the EU – for contracts relating to the storage of electricity, hydrogen or natural gas in the Union

(38) Concerning storage contracts under Article 2(4)(e) of REMIT, it is required that they relate to the storage of electricity, hydrogen or natural gas in the EU. The same geographical scope applies for derivative contracts under 2(4)(f) of REMIT, since they also must relate to the storage of electricity, hydrogen or natural gas in the EU.

Example: Contract for gas storage where the contractual delivery is in the EU

Situation: The same market participant as in the example for section 2.3.4 has bought long-term storage capacity for the storage of natural gas at the gas storage facility Bergermeer (the Netherlands) where the market participant now wants to store the natural gas.

Assessment: This contract is a wholesale energy product pursuant to Article 2(4)(e) of REMIT, as it fulfils all relevant criteria:

- It is a *contract for the storage of natural gas* – the contract involves the storage of natural gas in the EU.

- The *product is stored in the EU* – the storage is located in the Netherlands.

Considerations: The origin of the natural gas (in this case Norway) is irrelevant.

2.3.6. Consumption in the EU - for contracts for the supply and distribution to final customers with a consumption greater than 600 GWh/year

(39) In line with Article 2(5) of REMIT, contracts for the supply and distribution to final customers with a consumption greater than 600 GWh/year shall be treated as wholesale energy products.

(40) Therefore, the geographical scope of contracts under Article 2(4)(a) of REMIT is also applicable to the contracts for the supply and distribution of electricity, hydrogen or natural gas to final customers with a consumption greater than 600 GWh/year.

(41) As the electricity, hydrogen or natural gas delivered under the contract for the supply and distribution to final customers is required to be delivered in the EU, the final customer's consumption must also be located inside the EU. Contracts for the supply and distribution of electricity or natural gas to final customers whose consumption is located outside the EU are not within the geographical scope of REMIT.

2.4. Legal and natural persons in scope

(42) This subchapter identifies the type of natural or legal persons that can fall within the scope of REMIT for different provisions.

(43) In general terms, it can be stated that any person (legal or natural) can fall within the overall scope of REMIT and not only market participants (the concept of 'market participant' is explained in the box at the end of this subchapter). That being said, it is important to note that not all REMIT prohibitions or obligations apply to the same array of persons. Some provisions have a broader scope while others a more restricted one.

(44) This subchapter sets out the personal scope of the prohibitions and obligations defined in REMIT towards legal and natural persons for which NRAs are responsible for investigating and/or enforcing:

(i) prohibition of insider trading under Article 3(1) of REMIT;
(ii) obligation to publish inside information under Article 4(1) of REMIT;
(iii) prohibition of market manipulation under Article 5 of REMIT;
(iv) obligation to notify and to have effective systems and risk controls for the use of algorithmic trading and direct electronic access under Article 5a of REMIT;
(v) obligation to report LNG data under Article 7c of REMIT of REMIT;
(vi) obligation to report REMIT data under Article 8 of REMIT;
(vii) obligation to register under Article 9(1) of REMIT; and
(viii) obligations to notify and to maintain effective arrangements, systems and procedures to identify market abuse by persons professionally arranging or executing transactions under Article 15 of REMIT.

(45) The list below indicates the persons covered by the above REMIT prohibitions and obligations:

(i) Prohibition of insider trading

(46) The prohibition of insider trading under Article 3(1) of REMIT only applies to the limited number of persons listed in Article 3(2) of REMIT:

- members of the administrative, management or supervisory bodies of an undertaking;
- natural or legal persons with holdings in the capital of an undertaking;

- natural or legal persons with access to the information through the exercise of their employment, profession or duties;
- natural or legal persons who have acquired such information through criminal activity;
- natural or legal persons who know, or ought to know, that it is inside information.

More detailed information on the personal scope of the prohibition of insider trading can be found in Subchapter 5.4.

(ii) Obligation to publish inside information

(47) The obligation to publish inside information under Article 4(1) of REMIT applies to market participants who possess inside information 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.

(48) Market participants[38] who possess inside information in respect of business or facilities of other market participants are not covered by the personal scope of obligation to publish inside information of Article 4(1) of REMIT. However, in relation to such inside information, they still need to comply with the prohibition of insider trading.

(49) More detailed information on the personal scope of the obligation to publish inside information can be found in Subchapter 4.1.

(iii) Market manipulation

(50) The prohibition of market manipulation or attempted market manipulation applies to any person, or persons acting in collaboration. Article 2(8) of REMIT lays down that person means any natural or legal person.

(51) Therefore, the prohibition of market manipulation (and attempted market manipulation) under Article 5 of REMIT applies to any natural or legal person and represents the widest personal scope of REMIT application. More information on the personal scope of the prohibition of market manipulation is provided in Subchapter 6.4.1.

(iv) Obligation to notify and to have effective systems and risk controls for the use of algorithmic trading and direct electronic access

(52) The obligation to notify the use of algorithmic trading applies to market participants who engage in algorithmic trading. They shall notify this engagement to the NRA of the Member State where they are registered pursuant to Article 9(1) of REMIT, and to the Agency. Doing so via the Agency's CEREMP system will enable the market participants to notify both the relevant NRA and the Agency concomitantly. Please note that market participants registered in Italy, Romania and Slovenia will have to notify the relevant NRA directly, and by doing so they will be considered to have notified also the Agency.

(53) The obligation to notify if a market participant provides direct electronic access (DEA) to an organised market place applies to a market participant that allows another person to use its trading code so that person may electronically transmit and place orders to trade relating to a wholesale energy product directly to the organised market place. The direct electronic access provider shall notify this engagement to the NRA of the Member State where it is registered pursuant to Article 9(1) of REMIT and to the Agency. Doing so via the Agency's CEREMP system will enable the market participants to notify both the relevant NRA and the Agency concomitantly. Please note that market participants registered in Italy, Romania and Slovenia will have to notify the relevant NRA directly, and by doing so they will be considered to have notified also the Agency. The market participant providing the direct electronic access is the DEA provider and the person using the direct electronic access is the DEA client.

[38] The concept of 'market participants' is further explained at the end of the current Subchapter 2.4.

(54) In addition to the notification obligations, market participants who engage in algorithmic trading and market participants who are DEA providers also have the obligation to have effective systems and risk controls in place as well as five years record keeping obligations which allow the NRAs to inquire, on an ad-hoc basis, about the market participants algorithmic trading strategies, details of the trading parameters or limits to which the trading system is subject, and key compliance and risk controls that are in place.

(v) Obligation to report LNG data

(55) The obligation to report LNG data under Article 7c of REMIT[39] applies to LNG market participants. According to Article 2(25) of REMIT, an LNG market participant means any natural or legal person, irrespective of that person's place of incorporation or domicile, who engages in LNG trading.

(56) Such market participants shall submit daily to the Agency the LNG market data as defined in Article 2(24) of REMIT and in accordance with the requirements under Article 7c as well as the LNG market data quality requirements under Article 7d of REMIT.

(vi) Data reporting obligation

(57) The data reporting obligation laid down in Article 8 of REMIT applies to the groups of entities specified in Article 8(4) and Article 8(5) of REMIT, that report either transaction and/or fundamental data.

(58) In addition, Article 8(1a) states that organised marketplaces shall make available to the Agency the data relating to the order book(s), thereby fulfilling the market participants reporting obligations.

(59) The Implementing Regulation provides more details on the reporting of transaction and fundamental data under REMIT. More detailed information on the data reporting obligation can be found in the Manual of Procedures on Data Reporting ('MoP')[40] and Transaction Reporting User Manual (TRUM).[41]

(60) As indicated in Article 8(1) of REMIT, irrespectively of the entities affected by the data reporting obligation, the information referred to Article 8(1) shall be provided through RRMs.

(vii) Registration of market participants

(61) The registration obligation defined in Article 9(1) of REMIT applies to market participants entering into transactions which are required to be reported to the Agency in accordance with Article 8(1). More details on the registration obligation are provided in Chapter 8.

(viii) Obligations of persons professionally arranging or executing transactions

(62) The obligations to notify and to have arrangements in place to identify breaches of Article 3, 4 and 5 under Article 15 of REMIT apply to persons professionally arranging or executing transactions (PPAETs). The delimitations of the concept of PPAETs are provided in Subchapter 9.2.

The concept of 'market participant'

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

"'Market participant' means any person, including transmission system operators, distribution system operators, storage system operators and LNG system operators, who enters into transactions, including the placing of orders to trade, in one or more wholesale energy markets ."

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

[39] Article 3(2)(b) of REMIT specifies that *"Article 1, point (10), as regards Articles 7a to 7e of Regulation (EU) No 1227/2011, shall apply from 1 January 2025;"*

[40] https://documents.acer-remit.eu/category/remit-reporting-user-package/manual-of-procedures-mop-on-data-reporting/.

[41] https://documents.acer-remit.eu/category/remit-reporting-user-package/transaction-reporting-user-manual-trum/.

participant. Secondly, according to Article 8(1) of REMIT, market participants have the obligation to provide the Agency (i) with a record of wholesale energy market transactions, including orders to trade, executed 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, including placing orders to trade, which are required to be reported to the Agency in accordance with Article 8(1) of REMIT, as well as designate a representative in such Member State in case the market participant is established or resident in a 3rd country (see section 8.6).

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(57) of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU[42] carrying out at least one of the following functions: transportation, supply, or purchase of electricity,; in the meaning of 'natural gas undertaking' pursuant to Article 2(15) of Directive 2024/1788/EC of the European Parliament and of the Council of 13 June 2024 on common rules for the internal markets for renewable gas, natural gas and hydrogen, amending Directive (EU) 2023/1791 and repealing Directive 2009/73/EC, carrying out at least one of the following functions: transportation, supply or purchase of natural gas, including liquefied natural gas ('LNG')[43]; and in the meaning of 'hydrogen undertaking' pursuant to Article 2(14) of Directive 2024/1788/EC of the European Parliament and of the Council of 13 June 2024 on common rules for the internal markets for renewable gas, natural gas and hydrogen, amending Directive (EU) 2023/1791 and repealing Directive 2009/73/EC, carrying out at least one of the following functions: transportation, supply or purchase of hydrogen[44];

- **Producers of electricity, hydrogen or natural gas** in the meaning of Article 2(38) of 2 of the Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast)

[42] Cf. Art. 2(57) of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (hereafter 'Directive 2019/944'), recasting Directive 2009/72/EC, where the 'electricity undertaking' is defined as a natural or legal person who carries out at least one of the following functions: generation, transmission, distribution, aggregation, demand response, energy storage, supply or purchase of electricity, and who is responsible for the commercial, technical or maintenance tasks related to those functions, but does not include final customers.

[43] Cf. Art. 2(15) of Directive 2024/1788/EC Directive 2009/73/EC of the European Parliament and of the Council of 13 June 2024 on common rules for the internal markets for renewable gas, natural gas and hydrogen, amending Directive (EU) 2023/1791 and repealing Directive 2009/73/EC (recast), where the 'natural gas undertaking' is defined as a natural or legal person that carries out production, transmission, distribution, supply, purchase or storage of natural gas, including LNG, and which is responsible for the commercial, technical or maintenance tasks related to those functions, excluding final customers.

[44] Cf. Art. 2(14) of Directive 2024/1788/EC Directive 2009/73/EC of the European Parliament and of the Council of 13 June 2024 on common rules for the internal markets for renewable gas, natural gas and hydrogen, amending Directive (EU) 2023/1791 and repealing Directive 2009/73/EC (recast), where the 'hydrogen undertaking' is defined as a natural or legal person that carries out at least one of the following functions: production, transport, supply, purchase or storage of hydrogen or operation of a hydrogen terminal, and that is responsible for the commercial, technical or maintenance tasks related to those functions, excluding final customers.

[45] and Article 2(14) and 2(15) of Directive 2024/1788/EC**,** including producers supplying their production to their in-house trading unit or energy trading company;

- Shippers of natural gas or hydrogen;

- Balance responsible entities;

- **Wholesale customers** in the meaning of Article 2(2) of the Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) [46] and Article 2(51) of Directive 2024/1788/EC;

- **Final customers** in the meaning of Article 2(3) of Directive (EU) 2019/944/EC[47] and Article 2(50) of Directive 2024/1788/EC, acting as a single economic entity having a consumption capacity of 600 GWh or more per year for gas, hydrogen or electricity. If the consumption of a final customer takes place in markets with interrelated prices, the total consumption capacity of that customer is the sum of their consumption capacity in all those markets (see Subchapter 2.2.1 for further explanation of these concepts);

- **Transmission system operators ('TSOs')** in the meaning of Article 2(35) of Directive (EU) 2019/944/EC [48] and Article 2(18) of Directive 2024/1788/EC;

- **Hydrogen network operators** in the meaning of Article 2(25) of Directive 2024/1788/EC[49];

- **Distribution system operators ('DSOs')** in the meaning of Article 2(29) of Directive (EU) 2019/944/EC[50] and Article 2(20) of Directive 2024/1788/EC;

[45] Cf. Art. 2(38), Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) , where the 'producer' is defined as a natural or legal person who generates electricity.

[46] Cf. Art. 2(2) Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast), where 'wholesale customer' is defined as a natural or legal person who purchases electricity for the purpose of resale inside or outside the system where that person is established;

[47] Cf. Art. 2(3), ibid, where 'final customer' is defined as a customer who purchases electricity for own use.

[48] Cf. Art. 2(35), ibid,Where 'transmission system operator' is defined as a natural or legal person who is responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity.

[49] Cf. Art. 2(25), of Directive 2024/1788/EC, where 'hydrogen network operator' means a natural or legal person that carries out the function of hydrogen transport and is responsible for operating, ensuring the maintenance of and, if necessary, developing the hydrogen network in a given area and, where applicable, its interconnections with other hydrogen networks, and for ensuring the long-term ability of the system to meet reasonable demands for the transport of hydrogen..

[50] Cf. Art. 2(29), ibid, where 'distribution system operator' is defined as a natural or legal person who is responsible for operating, ensuring the maintenance of and, if necessary, developing the distribution system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the distribution of electricity

- Storage system operators ('SSOs') in the meaning of Article 2(59) of Directive 2019/944/EC[51] and Article 2(6) and 2(32) of Directive 2024/1788/EC[52];

- LNG system operators ('LSOs') in the meaning of Article 2(34) of Directive 2024/1788/EC[53];

- Investment firms in the meaning of Article 4(1), No 1, of MiFID II.

The crucial criterion for the assessment of whether a company is a market participant is entering into transactions, including placing orders to trade, in one or more wholesale energy markets.

2.5. Interaction between REMIT and financial legislation

(63) Today, there is a comprehensive regulatory framework at EU level for the identification, investigation and enforcement of market abuse in the EU energy markets (natural gas, electricity, and hydrogen). On the one hand, REMIT creates a tailored-made market abuse framework for the trading of wholesale energy products (WEPs). On the other hand, the Market Abuse Regulation[54] (MAR) provides a regulatory framework on market abuse involving financial instruments, which in some cases are also WEPs.

(64) Considering that some WEPs are also financial instruments, there is a partial overlap between REMIT and MAR for some potential market abuse cases and the obligation to publish inside information (Article 3, 4, 5 of REMIT and Articles 14, 15 and 17 of MAR)[55]. Since some inside information and market manipulation behaviours may concern multiple types of products, including WEPs that are both financial instruments and non-financial instruments, it is paramount to identify which products fall under what category. Such exercise will allow to determine whether only REMIT applies, or whether MAR also applies concurrently, and what type of cooperation obligations the different entities involved may have.

(65) In this context, the REMIT and MAR market abuse legal frameworks have been designed to ensure an appropriate level of cooperation between the different responsible authorities. Article 1(3) of REMIT, Article 25(3) of MAR and Article 10(2) of the Commission Implementing Regulation 2020/1406 establish the fundamental, high-level principles in relation to the generic cooperation and coordination provisions.

(66) Moreover, Article 1(2) of REMIT provides that REMIT is without prejudice to MAR, MiFIR, EMIR and MiFID II, as well as to the application of EU competition law to the practices covered by REMIT. More detailed information on the interaction between REMIT and EU competition law relating to market manipulation can be found in Subchapter 6.4.2.

[51] Cf.Art. 2(59) of Directive 2019/944/EC, where 'energy storage' is defined as, in the electricity system, deferring the final use of electricity to a moment later than when it was generated, or the conversion of electrical energy into a form of energy which can be stored, the storing of such energy, and the subsequent reconversion of such energy into electrical energy or use as another energy carrier;

[52] Cf.Art. 2(6) of Directive 2024/1788/EC, where 'hydrogen storage operator' means a natural or legal person that carries out the function of storage of hydrogen and is responsible for operating a hydrogen storage facility.

Cf.Art 2(32) ibid, where 'natural gas storage system operator' is defined as a natural or legal person that carries out the function of storage of natural gas and is responsible for operating a natural gas storage facility.

[53] Cf.Art 2(34) ibid, where 'LNG system operator' is defined as a natural or legal person that carries out the function of liquefaction of natural gas, or the importation, offloading and re-gasification of LNG and is responsible for operating a LNG facility

[54] REGULATION (EU) No 596/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

[55] A partial overlap also exists for PPAET notification obligations under Article 15 of REMIT and 16 of MAR, as well for the obligations to notify the use of algorithmic trading under Article 5a of REMIT and under Article 17 of MiFID II.

(67) Below are a set of examples of a WEP that is not a financial instrument and to which Articles 3 and 5 of REMIT apply, as well as of a WEP that is also a financial instrument and to which both Articles 14 and 15 of MAR and Articles 3 and 5 of REMIT apply.

Example: WEP that is not a financial instrument (derivative carved out of MiFID II) and to which Articles 3 and 5 of REMIT apply

Situation: Potential market manipulation was identified in Market Area A. It involves orders and transactions traded on the organised trading facility ('OTF') market segment of an organised marketplace, in the product 'Market Area A Power Base Q1 OTF Future' for the year 2024.

The NRA responsible for the application of REMIT in the Market Area A is assessing whether this potential breach of the prohibition of market manipulation falls under REMIT or MAR.

Product characteristics: The product 'Market Area A Power Base Q1 OTF Future' had the following characteristics:

- *Underlying*: The day-ahead electricity price of Market Area A.
- *Final settlement price:* The determination of the final settlement price is based on an index corresponding to the mean value of all auction prices of the hourly day-ahead contracts traded for Market Area A, and for the delivery time Base load, of the respective delivery period (every delivery day of the first quarter of 2024).
- *Fulfilment:* Behind this contract is the delivery or acceptance of delivery of electricity with a constant output of 1 MW into the maximum voltage level of Market Area A during the delivery time (from 00:00 until 24:00) on every delivery day during the delivery period (every calendar day of the first quarter of 2024). The contract specifications indicate that this future must be physically settled, by taking/making a delivery of the electricity and that there is no possibility of a cash settlement.
- *Counterparty risk*: The organised marketplace is responsible for the risk management of this arrangement (ensuring that the initial margins and maintenance margins are respected).

Assessment: This future product is a derivative, since its final settlement price is based on the value of another product (the underlying), i.e.: the day-ahead electricity price of Market Area A.

As a derivative relating to electricity traded and delivered in the EU, this contract is a wholesale energy product pursuant to Article 2(4)(b) of REMIT.

According to Annex I Section C(6) of MiFID II, financial instruments are 'options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, a MTF, or an OTF, **except for wholesale energy products traded on an OTF that must be physically settled**' (bold added to highlight the so-called 'REMIT carve-out').

Since this future product must be physically settled and was traded on an OTF, it is carved out of the definition of financial instrument in MiFID II.

In conclusion, this quarterly future product is not a financial instrument, therefore Articles 14 and 15 of MAR do not apply. Instead, only the prohibitions of insider trading and market manipulation under Articles 3 and 5 of REMIT are fully applicable to transactions in this product.

Example: WEP that is not a financial instrument (not a derivative) and to which Articles 3 and 5 of REMIT apply

Situation: Broker X sent a suspicious transaction or order report (STOR) to NRA A under Article 15 of REMIT, pointing at a potential manipulative A-B-A wash trade by two of its clients. The suspicious transaction involved a product called '2024 yearly gas forward' for physical delivery in Market Area A.

The NRA responsible for the application of REMIT in Market Area A is assessing whether this potential breach of the provision of market manipulation falls under REMIT or MAR.

Product characteristics: The product '2024 yearly gas forward' had the following characteristics:

- *Underlying*: There is no underlying for this contract.
- *Final settlement price:* The determination of the final settlement price is based on the agreed price at the time of the transaction.
- *Fulfilment:* This forward product must be physically settled, by taking/making a delivery of the gas. There is no possibility of a cash settlement. Behind this forward contract is the obligation for the seller to physically make a delivery of 5 MW of gas into Market Area A on each delivery day of the year 2024 and for the buyer to take the delivery of this gas.
- *Counterparty risk*: The parties are responsible for the risk management of this arrangement (the broker is not responsible for managing the counterparty risk – there is no margining service in place).

Assessment: This physically settled forward contract is equivalent to a spot product, with a delivery differed to a period (year) generally accepted in this commodity market as a standard delivery period. Its final settlement price is not based on the value of another product (an underlying), but rather on the price decided by the market participants when entering into the transaction. Consequently, this contract is not an electricity or natural gas derivative and is not covered by the definitions of financial instruments in Section C of Annex I of MiFID II..

Indeed, according to MAR Article 3(15), a spot commodity contract means a contract for the supply of a commodity traded on a spot market which is promptly delivered when the transaction is settled, and a contract for the supply of a commodity that is not a financial instrument, including a physically settled forward contract. Article 3(16) of MAR additionally specifies that spot markets encompass other non-financial markets, such as forward markets for commodities.

As a contract for the supply of natural gas in the EU, this contract is a wholesale energy product pursuant to Article 2(4)(a) of REMIT.

Therefore, regardless of the venue where it is traded (broker MTF or OTF), this yearly forward product is not a financial instrument and only the prohibitions of insider trading and market manipulation under Articles 3 and 5 of REMIT are fully applicable to transactions in this product while Articles 14 and 15 of MAR are not applicable.

Example: WEP that is a financial instrument and to which both Articles 14 and 15 of MAR and Articles 3 and 5 of REMIT apply

Situation: Potential insider trading was identified on the regulated market segment of an organised marketplace. Notably, the behaviour relates to transactions in the product 'Market Area A Power Base Year Future' for the year 2024.

The NRA responsible for the application of REMIT in Market Area A is assessing whether this potential breach of the prohibition of insider trading (insider dealing) falls under REMIT or MAR.

Product characteristics: The product 'Market Area A Power Base Year Future' had the following characteristics:

- *Underlying*: The day-ahead electricity price of Market Area A.
- *Final settlement price:* The determination of the final settlement price is based on an index corresponding to the mean value of all auction prices of the hourly day-ahead contracts traded for Market Area A and for the delivery time Base load of the respective delivery period (every delivery day of 2024).
- *Fulfilment:* Behind this contract is the delivery or acceptance of delivery of electricity with a constant output of 1 MW into the maximum voltage level of Market Area A during the delivery time (from 00:00 until 24:00) on every delivery day during the delivery period (every calendar day of the year 2024). No physical delivery is to take place. Instead, a cash settlement is performed. The seller (buyer) is obliged to settle, in cash and on the day of the execution, the difference between the agreed price and the higher (lower) final settlement price.
- *Counterparty risk*: The organised marketplace is responsible for the risk management of this arrangement (ensuring that the initial margins and maintenance margins are respected).

Assessment: This product (future) is a derivative, since its final settlement price is based on the value of another product (the underlying), i.e.: the day-ahead electricity price of Market Area A.

No physical delivery of the electricity is to take place; the parties to the contract are instead obliged to settle, in cash and on the day the contract is executed, the difference between the agreed price and the final settlement price.

As a derivative relating to electricity traded and delivered in the EU, this contract is a wholesale energy product pursuant to Article 2(4)(b) of REMIT.

Additionally, as a cash-settled derivative traded on a regulated market, this future product is also a financial instrument according to the list in Annex I Section C of MiFID II.

As a financial instrument admitted to trading on a regulated market, this future falls in the scope of Article 2 of MAR.

According to Article 1(2) of REMIT, Articles 3 and 5 of REMIT do apply to this suspicious transaction. At the same time, the suspicious transaction also falls in the scope of Articles 14 and 15 of MAR.

Considerations: In the situation above, both the NRA and the relevant competent financial authority are competent to assess the case. In such context of overlapping jurisdictional competences, and for the sake of an efficient and effective allocation of public resources, as well as to ensure the respect of the 'ne bis in idem' principle, REMIT, MAR and the Commission Implementing Regulation 2020/1406 provide for several cooperation mechanisms between NRAs, competent financial authorities, ESMA and ACER.[56].

[56] See Recitals 22 and 29, Articles 1(3), 10(1), 10(2), 16(1), 16(3)(a), 16(4)(c) of REMIT.

3. Application of the definition of ‘inside information’

3.1. Introduction

(68) This chapter covers what the Agency currently considers ‘inside information’ under REMIT.

(69) Qualifying a specific fact[57] as ‘inside information’ under REMIT requires a two-step approach. Firstly, it must be determined whether there is a piece of information (according to at least one of (a) to (d) criteria defined in Article 2(1), second subparagraph of REMIT). Secondly, it must be ascertained whether it fulfils the four cumulative conditions established in Article 2(1), first subparagraph of REMIT (i.e., it is precise, not public, related to one or more wholesale energy products, and likely to significantly affect prices).

(70) The remainder of this chapter is structured along the two-step approach by providing guidance on what the Agency considers ‘information’ under REMIT (Subchapter 3.2) and on the definition of ‘inside information’, including the application of the four cumulative conditions that qualify information as ‘inside information’ (Subchapter 3.3)[58].

3.2. The concept of ‘information’ under REMIT

(71) Article 2(1), second subparagraph, of REMIT specifies the meaning of the term ‘information’ as follows:

(a) “information which is required to be made public in accordance with Regulations (EU) 2019/943 and (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations;

(b) information relating to the capacity and use of facilities for production, storage, consumption or transmission of electricity, hydrogen[59] 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;

(ca) *information which is conveyed by a market participant, or by other persons acting on the market participant’s behalf, to a service provider trading on the market participant’s behalf and relating to the market participant’s pending orders in wholesale energy products, which is of a precise nature and relates directly or indirectly to one or more 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.”*

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[57] Facts can be circumstances, events, incidents, data, elements, or any other type of information.

[58] Concerning wholesale energy products which are financial instruments and to which Article 2 of MAR applies. See the relevant ESMA guidance and information on the MAR https://www.esma.europa.eu/sites/default/files/library/esma-2016-1480_mar_guidelines_on_commodity_derivatives.pdf

[59] Article 83 of the recast Gas Regulation (EU) 2024/1789 amends Regulation (EU) No 1227/2011 (REMIT) as follows: in Article 2, point (1)(b) and points (4) and (5), Article 3(3) and (4), point (c), Article 4(1) and Article 8(5), the term ‘electricity or natural gas’ is replaced by the term ‘electricity, hydrogen or natural gas’; (2) in Article 6(2), points (a) […] in Article 6(2), points (a) and (b), the term ‘electricity and gas markets’ is replaced by the term ‘electricity, hydrogen and natural gas markets’.

(72) Article 2(1)(a) of REMIT states that all information which is required to be disclosed under Regulations (EC) No 2019/943[60] and (EC) No 715/2009[61] establishing the conditions for access to the network for cross-border exchanges in electricity and access to natural gas transmission networks (including applicable guidelines and network codes adopted pursuant to those Regulations) is also considered 'information' under REMIT.

(73) The concept of 'information' under REMIT also encompasses information related to all planned or unplanned changes[62] in the capacity or output of any size at a facility for production, storage, consumption or transmission of natural gas, hydrogen or electricity (Article 2(1)(b) of REMIT). This specifically holds true for any fact related to:

- the capacity and use of facilities for production of electricity, hydrogen or natural gas, including planned and unplanned unavailability of these facilities;
- the capacity and use of facilities for storage of electricity, hydrogen or natural gas, including planned and unplanned availability of these facilities;
- the capacity and use of facilities for consumption of electricity, hydrogen or natural gas, including planned and unplanned unavailability of these facilities;
- the capacity and use of facilities for transmission, including planned or unplanned unavailability of these facilities; and
- the capacity and use of LNG facilities, including planned and unplanned unavailability of these facilities.

(74) Article 2(1)(c) of REMIT explains that the concept of 'information' under REMIT also covers facts[63] that are required to be disclosed in accordance with:

- legal or regulatory provisions at national level;
- legal or regulatory provisions at the European Union level;
- market rules;
- contracts; and
- the customs on the market.

(75) In that respect, it is important to highlight the regulatory provisions at the European Union level included in Regulation (EC) 543/2013[64] on the submission and publication of data in electricity markets (usually referred to as 'transparency information'). It establishes a multitude of different obligations to publish facts that would also constitute 'information' according to Article 2(1)(c) of REMIT.

[60] Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity repealed Regulation (EU) 714/2009 and Regulation (EU) 2024/1789 on the internal markets for renewable gas, natural gas and hydrogen

[61] Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks.

[62] This includes changes in the availability but also in the unavailability.

[63] Insofar as, they are likely to have a significant effect on the prices of wholesale energy products.

[64] Commission Regulation (EU) No 543/2013 of 14 June 2013 on submission and publication of data in electricity markets and amending Annex I to Regulation (EC) No 714/2009 of the European Parliament and of the Council.

(76) Article 2(1)(ca) of REMIT covers facts related to an exchange of information on pending orders (including all orders that are pending execution regardless of whether they were just issued, amended, or cancelled), between the market participant or someone acting on its behalf and the service provider.[65]

(77) Finally, Article 2(1)(d) of REMIT establishes that any 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 a wholesale energy product, or its decision to issue an order to trade in a wholesale energy product, should be considered ‘information’ under REMIT.

The concept of the reasonable market participant

The Agency recommends that NRAs use the ‘reasonable market participant test’ to help determine whether a given fact qualifies as ‘information’ under REMIT, but only when such facts is not already covered by Articles 2(1)(a), (b),(c) and (ca) of REMIT.

It is the Agency’s understanding that the concept of the ‘reasonable market participant’ may encompass different profiles of market participants (e.g. beginner, average, informed, professional market participant) with different trading strategies (e.g. portfolio optimisation, arbitrage, speculative) covering short-term and/or long-term products.

The concept of ‘reasonability’ is rather related to the use of cognitive elements by the market participant in its trading decisions (at least partially). By contrast, a market participant that makes trading decisions based on non-cognitive elements, such as instinct or mood, should not be considered reasonable.

To qualify a fact as information under REMIT, it is enough that at least one of these profiles is likely to use the fact as part of the basis of their decision to enter into a transaction relating to a wholesale energy product, or their decision to issue an order to trade in a wholesale energy product.

When using the ‘reasonable market participant test’, the NRAs may take into consideration, as indicators, that:

- the concept of ‘would be likely to use’ should be distinguished from the concept of ‘would like to use’ – the test is not about whether there is a wish on the part of the reasonable market participant to use some type of information. Rather, the test is used to assess whether it is reasonable for a market participant to have a legitimate expectation that such information is available.
- therefore, the concept of ‘would be likely to use’ should be interpreted based on what can be reasonably expected to be published (for example, the fact that a market participant would like to use its competitors’ trading plans for its own trading strategy does not mean that these plans are ‘information’ under REMIT, as they are not information that ‘can reasonably be expected to be published’ and that would likely be used by a reasonable market participant).
- the fact that a market participant used comparable facts (for example, at a different moment in time) as the basis for its trading decisions, could be considered a proxy to further assess with an *ad hoc* analysis if the fact is information that would be likely to be used by a ‘reasonable market participant’.

[65] This provision introduced by the Regulation 2024/1106 refers to information characteristically involved in the behaviour of front-running or pre-positioning. For more detailed information on front-running or pre-positioning behaviour see section 5.3.2 of this Guidance.

(78) The box below presents some facts and assesses them as per the REMIT criteria for information:

Examples of information under REMIT

1. Information on the TSO's available transfer capacity

- The estimates of TSOs A and B of the available transfer capacity for each day and the available transfer capacity already reserved in the electricity interconnector between bidding zones C and D.

  Assessment: These facts are information under REMIT because as specified in Article 2(1)(a) of REMIT, they relate to information required to be disclosed in accordance with Regulation (EC) No 2019/943. According to Article 50(3) thereof, TSOs shall publish estimates of available transfer capacity for each day, indicating any available transfer capacity already reserved.

2. Information on the annual maintenance of generation units

- Market participant A plans to perform annual maintenance on its electricity generation unit XPTO, with a total capacity of 50 MW from 01/02/2025 to 01/04/2025.

  Assessment: This fact is information under REMIT as it constitutes information relating to the capacity and use of facilities for the production of electricity as specified in Article 2(1)(b) of REMIT. The fact that the unavailable capacity is below the 100 MW threshold included in Regulation (EC) No 543/2013 is relevant for the assessment of whether it constitutes information under Article 2(1)(c) of REMIT but not under Articles 2(1)(a), (b), (ca) and (d) of REMIT.

3.3. The definition of 'inside information'

(79) Pursuant to Article 2(1), second subparagraph of REMIT, information qualifies as 'inside information' if it fulfils the four cumulative conditions included in Article 2(1), first subparagraph, of REMIT i.e.,

"'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."*

(80) The application of each of these four conditions will be further explained in Subchapters 3.3.1, 3.3.2, 3.3.3, and 3.3.4.

(81) It is the responsibility of market participants to ascertain whether the information they hold a) potentially constitutes 'inside information' according to the above-mentioned four cumulative conditions, and, b) therefore, needs to be made public according to Article 4(1) of REMIT. In order to have an appropriate framework for the assessment of information, it is recommended that market participants have clear internal compliance rules that are adapted to their activities and to the specificities of the information they use and have access to.

(82) The best practices for internal compliance rules may include:

- a framework for the assessment of whether the facts at hand can be qualified as inside information. This may include, for example, measures on how to identify inside information, appropriately tested thresholds[66], etc.;
- an adequate workflow of information compliant with the presence of inside information. This may include, for example, a mapping of the flow of information, measures on how to handle inside information, etc.; and
- a list of insiders and/or mechanisms in place to identify insiders[67].

(83) The internal compliance rules should be consistent with a market participant's organisational structure and trading strategies.

3.3.1. Information of a precise nature

(84) Article 2(1), third subparagraph of REMIT describes what is meant by the term information of a 'precise nature' as follows:

"Information shall be considered 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 occur, 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. Information may be considered to be of a precise nature if it relates to a protracted process that is intended to bring about, or that results in, particular circumstances or a particular event, including future circumstances or future events, and also if it relates to the intermediate steps of that process which are connected with bringing about or resulting in those future circumstances or future events.

An intermediate step in a protracted process shall be considered to be inside information if it, by itself, satisfies the criteria of inside information as referred to in the first subparagraph of this point.*"*

(85) The precise nature of the information is to be assessed by the information holder on a case-by-case basis and depends on what the information is, as well as on the surrounding context. In that assessment, the holder of the information may, among other things, take into consideration:

(i) that there is a realistic prospect that a fact will occur;

(ii) that the estimation of the potential price effect of information disclosure is irrelevant for the assessment of the precise nature; and

(iii) that intermediate steps in a protracted processes may be precise information.

(86) Each of these considerations will be further explained below along with non-exhaustive examples.

(i) It is enough that there is a realistic prospect that the fact will occur to make the information related to that event precise

(87) Information is precise as long as there is a realistic prospect that the circumstances or events it refers to will come into existence/occur, considering all the factors existing at the time of the assessment[68].

[66] For example, qualitative and quantitative (econometrical) analysis to test the likelihood of a significant price effect.

[67] By 'insider', the Agency means a person who has access to inside information relating, directly or indirectly, to the market participant, whether on a regular or occasional basis.

[68] This is consistent with the Court of Justice of the European Union understanding in the financial sector judgment in *Geltl*, CJEU, Case C 19/11 (2012), as regards the criterion of 'precise information'.

Examples of the application of the concept of realistic prospect

1. Information on strikes provided to the market participant impacting workers relevant for the normal operation of a generation unit

   - Such information on strikes can be seen as having a realistic prospect of happening due to, for example, the existence of historical records of this information resulting in effective strikes impacting the production of this unit. Therefore, it can be considered that there is a realistic prospect of a strike happening, considering all the factors existing at the time of the assessment.
   - This information on strikes would then qualify as precise information. This is despite the fact that the strike can still be cancelled and/or that there may be some uncertainty about the overall duration of the strike or other elements.
   - Any further developments of the situation (cancellation of the strike, update on the dates of the strike, scope of workers affected etc.) may make the prospect of the strike less realistic. However, as long as they occur after the market participant assessed whether the information was precise, they should not be taken into consideration by the NRA when assessing whether the information was precise at the time the market participant received the information. In any case, the market participant should provide updates to the public on the evolution of the information.

2. Information/request by the nuclear safety authority to the market participant of possible security tests to be run at an electricity generation unit during the first half of the year

   - Such information can be seen as having a realistic prospect of happening due to, for example, the existence of previous information of the same type that resulted in effective security tests impacting the production and/or availability of the unit, episodes reflecting the planning of the nuclear safety authority, or previous expressions of concerns with the operation of the unit.
   - Therefore, it can be considered that there is a realistic prospect of the security tests impacting the production and/or availability to happen considering all factors existing at the time of the assessment.
   - It is to be noted that in some Member States there is an obligation deriving from the national legislation for the nuclear safety authority to publish this information on possible security tests.

(ii) The estimation of the potential price effect of information disclosure is irrelevant for the assessment of the precise nature

(88) The calculation of the potential effect of the information on the prices of wholesale energy products is not an element to be taken into consideration in the assessment of the precise nature of the information[69]. However, the likelihood of a significant price effect should be assessed to determine if the information is inside information under REMIT (more information on this assessment in Subchapter 3.3.4).

(89) More specifically, in order for the information to have a precise nature, it is not necessary to be able to infer from that information, with a sufficient degree of probability, that, once it is made public, its potential effect on the prices of the relevant wholesale energy products in a particular direction.

(iii) Intermediate steps in a protracted process may be precise information

[69] This is consistent with the Court of Justice of the European Union understanding in the financial sector judgment in *Lafonta*, CJEU, Case C-628/13 (2015).

(90) Intermediate steps in a protracted process that are connected to bringing about future circumstances or events may be regarded as precise information. The knowledge of such steps could constitute an advantage that could undermine the spirit and objective protected by REMIT, which is to place market participants on an equal footing and enhance market integrity in terms of information symmetry.

(91) Intermediate steps connected to bringing about future circumstances or events shall be specific enough to enable conclusions to be drawn as to the likely effect of that set of circumstances or events on the prices of wholesale energy products.

Examples of the application of the concept of intermediate steps

1. Commissioning of new plants/Re-commissioning of mothballed power plants

- The process leading to the commissioning of new plants or re-commissioning of mothballed power plants is a protracted and complex process. Its major milestones (for example: management board approvals, regulatory approvals, licence granting, etc.) constitute intermediate steps in this process.

Assessment: Some facts generated by the intermediate steps leading to the commissioning or re-commissioning of a power plant would qualify as precise information under REMIT, as they constitute a set of circumstances which exist or may reasonably be expected to come into existence and impact the realistic prospect of energy being produced from a certain point in time onwards.

In order to decide whether these facts qualify as inside information, the three other criteria covered in Subchapters 3.3.2 to 3.3.4 also need to be met.

2. Planned unavailability on existing electricity interconnector due to expansion works in the existing interconnector's infrastructure

- The process leading to the expansion of capacity in an electricity interconnector is a protracted and complex process. Its major milestones (for example: market participant's management board decisions, regulatory approvals, licence granting, decisions from the interconnector's operational centre to proceed with the unavailability) constitute intermediate steps.

Assessment: In this context, a management board decision (for example, on the unavailability on the existing interconnectors to allow the expansion of the existing infrastructure during a specific period), despite being an intermediate step (that can still be subject to other approvals - for example by regulatory or operational centre), fulfils the criteria of precise nature under REMIT. Indeed, the management board decision to approve or disapprove a planned maintenance during a specific period is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or events on the prices of wholesale energy products.

In order to decide whether the management board decision can qualify as inside information, the three other criteria covered in Subchapters 3.3.2 to 3.3.4 also need to be met.

3.3.2. Information that has not been made public

(92) Inside information is information that has not been shared with the public and, as a consequence, creates information asymmetries between market participants. Effective disclosure to the public of market participants is the criterion that transforms non-public information into public information. Once the information becomes public, it enhances the integrity and transparency of the market, as envisaged by Recital 2 of REMIT.

(93) In general, information is deemed to be public knowledge if such information has been made, by any party, available to the public, i.e. to an unspecified number of market participants. In this regard, it is irrelevant who made the information public. No distinction is made as to whether the information was made public by a market participant[70] or by any other party.

(94) It is sufficient, but also required, that information is made available to the entire public of market participants simultaneously, ensuring equal access to the information, since any interested market participant may appraise the information. This can be the case, for example, if a generally accessible electronic system for the dissemination of information, that qualifies as an Inside Information Platform is used (see Chapter 4 for more details). Hence, publishing information only to selected market participants, for example via an e-mail channel or news board which is available exclusively to exchange members, does not satisfy the requirement of informing the public.

(95) The Agency's understanding of effective and timely public disclosure of inside information is provided in Chapter 4 of this Guidance.

3.3.3. Information that relates to wholesale energy product(s)

(96) The definition of 'inside information' in Article 2(1) of REMIT requires the relevant information to relate, directly or indirectly, to one or more wholesale energy products.

(97) 'Wholesale energy products' are defined under Article 2(4) of REMIT and further explained under Subchapter 2.2 of this Guidance.

(98) The penultimate paragraph of Article 2(1) of REMIT stipulates that information that has a possible effect on the demand, supply and/or prices of a wholesale energy product, or on the expectations of the demand, supply and/or prices of a wholesale energy product, shall be considered as directly or indirectly related to the wholesale energy product.

(99) In this context, if the information is likely to have a significant effect on the prices of wholesale energy products, it is necessarily related to these products. Therefore, it is enough for the NRAs to assess the likelihood of a significant effect on the prices to establish whether the information relates to wholesale energy products. That assessment is explained in Subchapter 3.3.4.

3.3.4. Likelihood of having a significant price effect on wholesale energy products

(100) Information is deemed to constitute inside information only if, were it made public, it would be likely to have a significant effect on the prices of related wholesale energy product. Based on the condition of a significant price effect, the Agency narrowed the wide notion of information down to the information that is crucial enough to have the potential to significantly affect the prices of wholesale energy products, and therefore to information that is relevant for trading.

(101) It is important, however, to note that if the information would be likely to have a significant price, that effect is enough to meet this condition and that no actual price effect is required.

[70] It shall be noted that publication by any party other than the market participant is a factor that has to be taken in account for the qualification of inside information only. When information is still qualified as inside information, the obligation to publish is on the market participant according to Article 4(1) of REMIT.

(102) The assessment of the likelihood of price effect has to be performed by a market participant on a case-by-case basis. The market participant should take into consideration the anticipated effect of the information in light of the nature of the information, as well as the specificities of the market and the market situation at the time of the assessment. A non-exhaustive list of factors that are typically relevant for this assessment are provided below:

- the characteristics of the market (size, timeframe, market design, liquidity, type of participants etc.);
- the size of the event;
- the already published information on supply or demand situation;
- availability and unavailability of transmission facilities, storage or network constraints;
- the time of day (e.g. weekday/weekend, office hours/out of office hours);
- the existence of announcements on non-regular events (for example, the commissioning of new power plant, the re-commissioning of mothballed power plant, etc.);
- TSO announcements related to the system (imbalances, security of supply, technical constrains etc.); and
- any other market variables likely to affect the price of the related wholesale energy product in the given circumstances (e.g. weather conditions, CO2, fuel prices, news on political and geopolitical developments etc.).

(103) As referred to in Subchapter 3.3, in this context, market participants are advised to have a systematic framework for the assessment of whether particular information is likely to have a significant price effect, i.e. clear internal compliance rules that reflect this non-exhaustive list of factors and are adapted both to their activities and to the specificities of the information they handle.

(104) As the assessment of the likelihood of the price effect has to be performed by the market participant *ex ante*, i.e. before the information is published and used by the market participant, NRAs can use *ex post* information to check the presumption but should take no action against persons who drew reasonable conclusions from *ex ante* information available to them.

(105) The last subparagraph of Article 2(1) of REMIT stipulates that 'information which, if it were made public, would be likely to significantly affect the prices of the wholesale energy products means information that a reasonable market participant would be likely to use as part of the basis of his or her decision concerning trading with wholesale energy products;'

(106) In order to evaluate whether a market participant's assessment on the likelihood of some information having a significant price effect is consistent with what would be expected from a reasonable market participant, the NRAs could verify whether:

- 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; or
- a reasonable market participant would be likely to use it as part of its trading decisions[71].

[71] The use of this concept in this context is consistent with its use in the financial legislation. See Article 7(4) of MAR.

Example of an assessment on whether information is likely to significantly affect prices

<u>1 – Update on the status of an unplanned outage (previously announced) in a generation unit</u>

Market participant A (MP A) operating a power plant realises that its unplanned maintenance (previously disclosed) on a generation unit (100 MW unavailability) will have to be extended by 2 hours. The market liquidity is limited for the relevant wholesale electricity products. MP A needs to decide whether such information would be likely to have a significant price effect.

In order to make its decision, MP A should consider whether a reasonable market participant would be likely to use this information as part of the basis of its trading decision. In particular, it could take into consideration the following factors for its *ex-ante* assessment:

Possible factors	**Example of the MP A's *ex-ante* assessment**
Characteristics of the market	The intraday market is open. Two hourly products and eight 15-minute products are directly affected by the extension of the outage. The order depth during the last hour was limited and therefore small changes on fundamentals may have an impact.
Size of the event	The size of the event is limited. Only two additional hours affected for 100 MWh.
Information on supply or demand situation already published	This unplanned outage is ongoing and there are no other outages announced.
Other constraints	Cross-border capacity is limited at this point in time in the only existing border with another bidding zone.
Time of day	Normal working hours.
Existence of announcements on non-regular events or TSO events	No additional announcements.
Any other market variables	No relevant changes in wind forecasts. Day-ahead price from the day before as a relevant starting point for intraday trading decisions. This price reflects all the available market fundamentals from the day before, which means all information on supply and demand.

Assessment: Based on the above factors (namely, the limited depth of the order book, the absence of relevant cross-border transmission capacity and the fact that this extension will change the information that was previously provided on the market), MP A can conclude that a reasonable market participant would be likely to use the information on this extension of an unplanned outage as part of the basis of its trading decision, and that such information would be likely to have a significant price effect. This is particularly the case for the hourly products and 15-minute products directly linked to the extension. This decision is also consistent with the previous decision from MP A to publish the unplanned outage in the initial momentum.

Example of an assessment on whether information is likely to significantly affect prices

2. TSOs' request to activate reserves

In some EU Member States without specific national requirements for the TSO to publish information on imbalances on real time (or close to real time), due to a potential system imbalance, 25 minutes before delivery time, the TSO requests a balancing responsible party to activate a generation unit for 200 MWh for a specified period in time. At this point, the intraday market is still open. The TSO needs to decide whether such information would be likely to have a significant price effect.

In order to make the decision, the TSO should consider whether a reasonable market participant would be likely to use this information as part of the basis of its trading decision. In particular, it could take into consideration the following factors for its *ex-ante* assessment:

Possible factors	Example of the MP A's *ex-ante* assessment
Characteristics of the market	The intraday market is open. The bid ask spread is low and the market depth is relatively high.
Size of the event	The size of the event is relevant given the proximity to the delivery period and that is the reason for the early announcement of the activation by the TSO.
Information on supply or demand situation already published	There are no other outages announced.
Other constraints	Cross-border transmission capacity is inexistent at this point in time.
Time of day	This information is issued very close to the delivery period.
Existence of announcements on non-regular events or TSO events	No additional announcements
Any other market variables	No relevant changes.

Assessment: Activation of balancing bids gives MPs valuable information regarding the direction of the system's imbalance. Based on the above elements, the TSO can conclude that a reasonable market participant would be likely to use the information on imbalances on real time (or close to real time) as part of the basis of its trading decision, and that, as such, the information would be likely to have a significant price effect on the intraday products.

3.3.5. Information on trading plans and strategies

(107) In their assessments, the NRAs should take into consideration Recital 12 of REMIT, which explicitly states that information regarding a market participant's own[72] plans and strategies for trading should not be considered as inside information.

(108) The Agency considers 'trading plans' as plans including a systematic method for evaluating the supply, demand, or price of wholesale energy products, determining the amount of risk that is or should be taken, and/or formulating short- and/or long-term investment targets that may guide the daily trading activity. The consequences of these short- and/or long-term investment targets, in terms of energy needs and resulting orders to trade, should be considered as being part of the trading plans of the market participant and therefore not constituting information under REMIT.

(109) The Agency considers 'trading strategies' as a set of objective rules designating the conditions that must be met for one or more trade entries and exits to occur. A trading strategy includes specifications for one or more order entries, that can include one or more filters and/or triggers, as well as rules for trade exits, order types, etc.

(110) Nonetheless, even if the details of the trading strategy (e.g. specific order submitted by a market participant) do not qualify as inside information under REMIT, the facts used to determine or change it can be inside information.

[72] In this respect, NRAs should take into consideration the particular case of trading plans and/or strategies passed on to persons authorised to execute the orders on their behalf (for example, brokers). It is the Agency's current understanding that a client's order to trade sent to their broker is part of the client's own trading strategy and does not constitute information under REMIT, as far as the client is concerned. On the contrary, a broker receiving their client's order comes into possession of information on their client's trading plans. If deemed to be inside information, the broker will be expected not to trade on their own account on the basis of this information in order to be compliant with Article 3(1) of REMIT. The broker can legitimately execute their client's order but not use the knowledge of the client's order to trade on their own account (which would amount to behaviour better known as 'front running').

Examples of facts that should not constitute inside information under REMIT

1. The details of the orders that a market participant intends to submit during the trading day

Market participant A sends an order with the following details:

Buy/Sell/indicator	Buy order
Initiator/Aggressor	Initiator
Order type	Flexible Hour: a specific order that can trade at any hour provided that the price and volume are matched.
Order conditions	Fill and Float: an order which will be killed immediately after matching with any available volume on the order book; if not filled at all, it stays in the market.
Order status	Active: the order has been activated by the system or participant and is visible in the active order book.
Minimum execution volume	1,500 MW
Price limit	40.5 euro
Order duration	Good Till Cancelled: an order which persists until the user cancels the order or it reaches the system maximum duration

Assessment: This fact is part of the trading strategy of the market participant and it therefore does not qualify as inside information under REMIT.

2. Decisions on changes in the risk optimisation strategy of a market participant

Market participant A makes a decision to change its portfolio optimisation strategy, i.e. how to source its supply needs. Such decision will change its strategy of how much of electricity is:

Purchased through standardized electricity products on the electricity exchange vis a vis through bilateral contracts;
Purchased in the different timeframes (e.g. % of weekly, monthly, yearly products).

Assessment: Decision on changes in the risk optimisation strategy of a market participant is usually part of its trading plan and it therefore does not qualify as inside information under REMIT.

4. Application of the obligation to disclose inside information

4.1. Introduction

(111) 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.

(112) According to Article 4(1) subparagraph 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, hydrogen[73] or natural gas or related to the capacity and use of LNG facilities, including planned or unplanned unavailability of these facilities''.

(113) 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). In relation to this, the Agency encourages persons holding such information to promptly inform the relevant market participant(s) in order to promote effective and timely compliance with Article 4(1) of REMIT.

(114) 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.

4.2. Disclosure of inside information in an effective manner

4.2.1. Disclosure mechanisms

(115) The transparency of the wholesale energy markets requires the disclosure of inside information in a manner that enables the dissemination of information to as wide a public as possible, granting easy and equal access to all users of this information.

(116) According to Article 4(1), subparagraph 2 of REMIT:

"Market participants shall disclose the inside information through IIPs. The IIPs shall ensure that the inside information is made public in a manner which enables prompt access to that information,

[73] See Article 83 of Regulation 2024/1789 (EU) on the internal markets for renewable gas, natural gas and hydrogen] amending Regulation (EU) No 1227/2011 (REMIT) directly to include hydrogen..

including through a website or a clear application programming interface, and a complete, correct and timely assessment of that information by the public".

(117) Article 2(17) of REMIT defines an Inside Information Platform or IIP as "a person authorised pursuant to this Regulation to provide the service of operating a platform for the disclosure of inside information and for the reporting of disclosed inside information to the Agency on behalf of market participants"'.

(118) According to Article 4(1) subparagraph 2 of REMIT, to achieve effective disclosure, the IIPs shall ensure that the inside information is made public in a manner which enables prompt access to that information, including through a website or a clear application programming interface, and a complete, correct and timely assessment of that information by the public.

(119) This Guidance does not cover the Agency's process for the authorisation and supervision of IIPs established in Article 4a of REMIT as such processes will be covered by a delegated act issued by the Commission[74].

(120) In order to facilitate the compliance with the disclosure obligation, a list of Inside Information Platforms available in Europe for the disclosure of inside information on wholesale energy markets is published on the Agency's REMIT Portal[75], following an assessment of IIPs' compliance with quality requirements listed in Subchapter 4.2.2, requirements for the reporting of inside information to the Agency described in the REMIT Manual of Procedures on transaction data, fundamental data and inside information reporting (REMIT MoP) and the Guidance on the implementation of web feeds. Inside Information Platforms should apply to be listed by the Agency and will be listed if they comply with the requirements.

(121) From 2025, the Agency will be operating a platform serving as a sector-specific electronic access point for inside information disclosed pursuant to Article 4(1) of REMIT. Further information on this platform is provided on the Agency's website.

(122) Regarding the publication of inside information, including in aggregated form, in accordance with Regulation (EU) 2019/943[76] or (EC) No 715/2009, and with guidelines and network codes adopted pursuant to those Regulations, and Commission Regulation (EU) No 543/2013, this shall constitute, according to Article 4(4) of REMIT, effective disclosure, provided that the published information concerns the same event(s) and has the same content and format and conforms to the minimum quality requirements (see Subchapter 4.2.2) as the information required to be disclosed according to Article 4(1) of REMIT.

(123) A simultaneous publication on the market participant's website or through social media may be used as an additional source for publication. However, it cannot replace the disclosure on Inside Information Platforms.[77] In case additional means for publication are used, e.g. a market participant's website, the market participant must ensure that the published information is identical to the one published on the Inside Information Platform.

(124) The publication of inside information on IIPs facilitates access to information for all market participants and promotes the overall transparency of the market. Moreover, this solution decreases overall the technical and organisational burden for market participants. In this regard, in the registration process according to Article 9(5) of REMIT, market participants possessing inside information are required to promptly provide and regularly update information on the place of publication of inside information. This information is made publicly available by the Agency as part of the European Register of Market Participants (CEREMP).

[74] According to Article 4(a)(6) of REMIT, the European Commission shall adopt a delegated act by 12 months from the date of entry into force of Regulation (EU) 2024/1106, to supplement the provision on the authorisation and supervision of IIPs.

[75] https://www.acer-remit.eu/portal/list-inside-platforms.

[76] Regulation (EU) 2019/943 repealed Regulation (EC) No 714/2009.

[77] See Recital 15 of Regulation (EU) 2024/1106, stating that *"It should be mandatory to disclose inside information on dedicated IIPs to make the information easily accessible and to enhance transparency. Market participants may, only in addition, continue to use other channels, including market participants' websites, to disclose inside information."*

(125) According to Article 2(2) of Commission Implementing Regulation (EU) 2016/1055, emission allowance market participants required to disclose inside information in accordance with Article 4 of REMIT may use the technical means established for the purpose of disclosing inside information under REMIT for the disclosure of inside information under Article 17(2) of MAR, provided the inside information required to be disclosed has substantially the same content and the technical means used for the disclosure ensure that the inside information is communicated to the relevant media. The Agency believes that REMIT inside information disclosure through inside information platforms will allow market participants to meet these requirements, provided that the inside information platform fulfils the requirements of the MAR as well as the Commission Implementing Regulation (EU) 2016/1055.

4.2.2. Minimum quality requirements for effective disclosure of inside information

(126) Until the European Commission issues further delegated acts[78],the following minimum requirements shall be fulfilled by the Inside Information Platforms:

- inside information shall be made public in a manner which enables prompt access to that information, including through a website or a clear application programming interface, and a complete, correct and timely assessment of that information by the public[79];
- inside information shall be disclosed to as wide a public as possible on a non-discriminatory basis and shall be accessible free of charge, simultaneously throughout the affected energy market(s);
- electronic means shall be used to ensure that the completeness, integrity and confidentiality of the information provided by the market participants is maintained during its transmission, reception, storage and processing to the platform;
- inside information shall be made publicly available in a way that must have the ability to actively distribute the information with the goal to reach the public at large and specific for the disclosure of inside information;
- the platform shall facilitate active distribution of inside information by means of web feeds in a way that enables the Agency to collect[80] - and market participants to process - these data efficiently, in line with the Guidance on the implementation of web feeds and the REMIT MoP published on the REMIT Portal;
- the filtering of information, including historical information, by relevant data categories should be possible in order to promote its efficient use, including in a downloadable format;
- historical inside information, including any edited information, shall be kept available for the public for a period of at least 5 years after the termination of the corresponding event(s);

[78] According to Article 4(a)(8) of REMIT, the Commission shall adopt a delegated act on the authorisation and supervision on IIPs. In addition, pursuant to Article 6(1)(b), the Commission is empowered to adopt delegated acts to establish minimum thresholds for the identification of events which, if they were made public, would be likely to significantly affect the prices of wholesale energy products.

[79] Article 4(1) paragraph 2 of REMIT.

[80] Inside information disclosed by ENTSO-E and ENTSO-G through their transparency platforms will not be collected via web feeds by the Agency but, as part of the fundamental data collection, via the xml format described in Chapter 6 of the REMIT MoP. In order to avoid double reporting, this minimum requirement is therefore not applicable to these platforms. This does not hinder the possibility for ENTSO-E and ENTSO-G to provide web feeds in their platforms in order to facilitate the processing of this data efficiently by market participants.

- any history of prior publications regarding the same event shall be easily accessible and a functionality should be provided linking the previous publications to the new publication(s) in a comprehensible and easy-to-use manner;
- effective redundancy, backup and/or fallback solutions, as well as minimal delay of publication and unavailability of the service provided by a platform, shall be ensured;
- the information should either be published in the official language(s) of the relevant Member State and in English or in English only;
- effective administrative arrangements shall be designed by the platform provider to prevent conflicts of interest with market participants.

(127) 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 considered for having breached the obligation to disclose inside information. In such circumstances, market participants could also consider a backup solution, provided that it complies with same relevant minimum quality requirements listed above[81]. In this case, they should provide information on the backup solution in the process of registration according to Article 9(5) of REMIT. If technical problems persist, however, market participants should consider using other platforms to comply with the disclosure obligation. Where disclosure is delayed in such circumstance, the market participant will need to consider its compliance with the prohibition in Article 3 prior to the information actually being disclosed to the market.

(128) Furthermore, without prejudice to Article 1(2) of REMIT, the publication of inside information should be as concise and as specific as reasonably possible as well as precise and complete enough to allow a correct understanding of the underlying event(s) that might potentially affect the prices of wholesale energy products. Further to that inside information should be disclosed in a format that enhances the overall transparency and ensures a Union-wide level playing field for market participants. Each publication made in accordance with Article 4(1) of REMIT, in the form of Urgent Market Message – UMM, should include the information set, as described in the tables (respectively one for electricity, one for natural gas and one for other type of event/information) included in ANNEX VII of the REMIT MoP, as applicable. The information has to be provided according to the explanatory rules documented in the same ANNEX VII of the REMIT MoP. All relevant fields and allowed values listed in ANNEX VII of the REMIT MoP should be supported by the platform.

(129) Each publication 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.

(130) 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 as soon as the new information is available.

(131) The obligation to disclose inside information is without prejudice to the application of European Union competition law.

(132) 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.

[81] The relevant minimum quality requirements to be fulfilled by market participants' websites as backup solutions will be clarified in the REMIT Q&As document.

4.3. Disclosure of inside information in a timely manner

(133) As regards the notion of *timely* disclosure of inside information:

- if the inside information has to be published in accordance with Regulation (EU) 2019/943[82] and (EC) No 715/2009, or guidelines and network codes adopted pursuant to those Regulations, and Commission Regulation (EU) No 543/2013, Article 4(4) of REMIT clarifies that the publishing according to these rules and regulations, including in aggregated form, constitutes effective disclosure but not necessarily timely and public disclosure. 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.

- if the inside information does not have to be made public in accordance with Regulation (EU) 2019/943[83] 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.

(134) 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.

4.4. Delayed disclosure of inside information

(135) 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)."

(136) 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).

[83] Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast) .

(137) 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.

4.5. Exemption in Article 4(7)

(138) 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."

(139) 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.

(140) 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.

(141) 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.

5. Prohibition of insider trading

5.1. Introduction

(142) Article 3(1) of REMIT prohibits persons who possess inside information[84] to: (i) use it for trading (or trying to trade); (ii) disclose it to any other person; or (iii) recommend trading (or induce trading) based on it. This chapter intends to provide guidance to the NRAs on the application of these prohibitions.

(143) Subchapter 5.2 explains the concept of insider trading as laid down in Article 3(1) of REMIT, describing its different forms and exploring the relevant elements included in its definition. The subchapter also includes examples of relevance for the wholesale energy markets.

(144) In Subchapter 5.3, the Agency provides a list of indicators that can help NRAs identify potential insider trading. They include both simple signals and complex types of practices that typically combine different signals.

(145) Subchapter 5.4 draws on the analysis included in Subchapter 2.4 of the Guidance, identifying the type of legal or natural persons that fall in the scope of application of Article 3 of REMIT and that are specifically mentioned in Articles 3(2) and 3(5) of REMIT. Some practical examples of different types of entities covered by these provisions are provided.

(146) Finally, in Subchapter 5.5, the Agency explains the exemptions from the application of the prohibition of insider trading provided by Articles 3(3) and 3(4) of REMIT.

(147) In applying the principles set out in this chapter, NRAs should take into account the specific facts and circumstances of each case.

5.2. Definition of insider trading

(148) Article 3(1) of REMIT defines the prohibition of insider trading and distinguishes three different forms of this prohibition:

"Persons who possess inside information in relation to a wholesale energy product shall be prohibited from:

(a) using that information by acquiring or disposing of, or by trying to acquire or dispose of, for their own account or for the account of a third party, either directly or indirectly, wholesale energy products to which that information relates;

(b) disclosing that information to any other person unless such disclosure is made in the normal course of the exercise of their employment, profession or duties;

(c) recommending or inducing another person, on the basis of inside information, to acquire or dispose of wholesale energy products to which that information relates."

(149) The first form of this prohibition (included in Article 3(1)(a) of REMIT) includes two nuances: one is the use of inside information by acquiring or disposing of wholesale energy products, and the other is the use of that information by trying to acquire or dispose of wholesale energy products (attempted use of inside information to trade). This is further corroborated by Recital 12 of REMIT stating that, '*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*'.

[84] The concept of inside information is defined in Chapter 4.

(150) Only the first form of this prohibition (included in Article 3(1)(a) of REMIT) involves the use of inside information for trading or for trying to trade, and therefore constitutes an 'on-market' practice.[85] The other two forms (included in Article 3(1)(b) and 3(1)(c) of REMIT) involve the transmission of that inside information or recommendations based on that inside information, and are by nature 'off-market' practices (as opposed to order/transaction-based behaviour).

(151) The table below summarises the different forms that will be detailed in the following subchapters.

	Forms of insider trading	
	Attempted form	**Effect form**
On-market	**Using inside information by trying to acquire or dispose of wholesale energy products**	**Using inside information by acquiring or disposing of wholesale energy products**
Off-market		**Disclosing inside information[86]** **Recommending or inducing to acquire/dispose of wholesale energy products**

(152) The question of whether a person has infringed the prohibition on insider trading or has attempted insider trading should be analysed in the light of the purpose of REMIT, which is to protect the transparency and integrity of the wholesale energy market and to ensure a level-playing field for market participants. The possession of inside information results in an unfair informational advantage vis-à-vis other parties who are unaware of such information, and creates information asymmetries between market participants. Consequently, it undermines the transparency and integrity of wholesale energy markets, as well as market participants' confidence in them.

(153) According to the definition of insider trading under REMIT, the unfair advantage obtained from the asymmetric knowledge of information that may bring a benefit to the person involved in this practice, does not need to materialise into a financial benefit for the person involved in the insider trading in order to breach REMIT. In order to qualify a practice as insider trading and therefore a breach of REMIT, it is not necessary for the NRAs to determine whether the transactions concerned, information disclosed or recommendations given ensured a gain for any of the parties.

(154) The prohibition on using inside information applies from the moment when a legal or natural person comes into possession of such information. Consequently, the liability for insider trading shall therefore be established as soon as a person initiates trading, including placing an order, based on inside information, tries to trade based on inside information, discloses inside information or recommends/induces trading based on inside information.

(155) Whenever assessing a potential breach of Article 3(1) of REMIT, NRAs should also evaluate to what extent the person holding inside information is compliant with the obligations to publish inside information established in Article 4(1) of REMIT.

[85] 'On-market' refers to the placing of orders or the entering of transactions on the wholesale energy markets (including over-the-counter (OTC) markets). The concept of Wholesale energy market is defined in Article 2(6) of REMIT and explained in more detail in Subchapter 2.2.2 of this Guidance.

[86] Prohibition of insider trading in the form of disclosing the inside information to any other person under Article 3(1)(b) of REMIT is a different legal provision than obligation to publish inside information under Article 4 of REMIT.

(156) In addition, REMIT encompasses specific rules on the dissemination of information for the purposes of journalism or artistic expression. As a general principle, Article 3(6) recognises the freedom of press and freedom of expression in other media in relation to the dissemination of information for the purposes of journalism or artistic expression. However, the Agency points out that the misuse of the freedom of press and expression in the media is prohibited under Article 3(6) REMIT. Such misuse consists of situations when (i) the person is deriving an undue advantage or profit from the dissemination of the information, 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.

(157) The proper use of the freedom of press and expression requires that the person in question acts in good faith, with professionalism, and in accordance with the press codes, including the processes necessary for the verification of the accuracy and credibility of the information intended to be disseminated.

(158) As a result, news providers or, more generally, legal or natural persons delivering and/or disseminating information about wholesale energy market developments and analysis or forecasts on the supply, demand or prices of wholesale energy products may be breaching Article 3(6) of REMIT if they misuse the freedom of press and expression in the media.

5.2.1. Insider trading by using inside information

(159) The first form of insider trading (within the meaning of Article 3(1)(a) of REMIT) consists of “using [inside] information by acquiring or disposing of, or by trying to acquire or dispose of, for their own account or for the account of a third party, either directly or indirectly, wholesale energy products to which that information relates”.

(160) This form encompasses four relevant concepts, which will be further explained below:

- the acquisition or disposal of wholesale energy product(s) (or attempt thereof);
- for one’s own account or for the account of a third party;
- directly or indirectly; and
- the information being related to wholesale energy products.

Acquiring or disposing of wholesale energy product (or trying to do so)

(161) The concept of ‘*acquiring or disposing of’* shall be interpreted as encompassing all types of actions that are either related to orders and transactions or are part of the processes of issuing orders or entering into transactions in one or more wholesale energy markets. This includes, for example, the issuance of new orders, the amendment/modification of existing orders, the cancellation of orders, the establishment of links or dependencies between orders, or any other action relating to entering into transactions or issuing orders in one or more wholesale energy markets.[87] The last paragraph of Article 3(1) further specifies that natural or legal persons shall refrain from any amendment or selective withdrawal of any order(s) (‘hands-off approach’) placed before having access to inside information:[88]

“The use of inside information by cancelling or amending an order, or any other trading action concerning a wholesale energy product to which the information relates, where the order was placed

[87] In certain circumstances requiring an assessment on a case-by-case basis, this can also include the non-issuance of orders based on inside information.

[88] Orders placed before a person possesses inside information should not be deemed insider trading. However, where a person comes into possession of inside information, there should be a presumption that any subsequent change relating that information to orders placed before the possession of such information, including the cancellation or amendment of an order, or an attempt to cancel or amend an order, constitutes insider trading. That presumption could, however, be rebutted if the person establishes that he or she did not use inside information when carrying out the transaction.

before the person concerned possessed the inside information, shall also be considered to be insider trading."

(162) The breach of the insider trading prohibition in the form of using inside information by 'acquiring or disposing of' wholesale energy products is not subject to any subjective conditions regarding the intention that inspired the material acts of the person(s) concerned. In other words, it is not relevant whether the person(s) concerned committed insider trading deliberately or recklessly. The insider trading prohibition consists of the purely material actions or absence of expected action resulting in the use of inside information '*by acquiring or disposing*' of wholesale energy products.

(163) In their assessments, NRAs should prove the use of inside information '*by acquiring or disposing of*' wholesale energy products, either with (i) tangible evidence of the possession of inside information chronologically preceding trading in the relevant wholesale energy product by the person(s) concerned or, in the absence of such tangible evidence, with (ii) a set of precise and consistent pieces of evidence (e.g. evidence of actions undertaken; absence of expected actions; absence of robust and well-documented controls of information flow processes; absence of proper Chinese walls between the area in possession of inside information and the trading area; etc.) establishing that only the use of such information in possession of the person(s) can explain their trading in the relevant wholesale energy product.

(164) The concept of '*trying to acquire or dispose of'* shall be interpreted as encompassing, in the attempted form, all types of the above-mentioned actions for the concept of '*acquiring or disposing of'* and relating to entering into transactions or issuing orders in one or more wholesale energy markets. As a result, a breach of the insider trading prohibition under Article 3(1)(a) of REMIT may also be established irrespective of a transaction.

(165) Article 3(1)(a) refers explicitly to the use of inside information '*by acquiring or disposing of*' a wholesale energy product or '*trying*' to do so. As a result, whenever a person, in possession of inside information, acquires or disposes of, or attempts to acquire or dispose of, for their own account or for the account of a third party, directly or indirectly, the wholesale energy product to which that information relates, it should be concluded that that person, unless otherwise proven, has used inside information.[89] Such a person is therefore accountable for a breach of Article 3(1)(a) of REMIT. That presumption is without prejudice to the rights of the defence.[90]

For one's own account or for the account of a third party

(166) Article 3(1)(a) of REMIT establishes that the acquisitions or disposals of wholesale energy products can be to the person's (i) own account or (ii) to the account of third parties.

(167) This extends the scope of the provision of insider trading to situations where the person holding inside information uses third party accounts (i.e. the account from another natural or legal person) and to situations where the eventual beneficiary of the insider trading activity is not necessarily the person who holds the inside information and is using it by trading.

[89] According to the jurisprudence from the Court of Justice of the European Union (CJEU). This principle of presumption is explicit, for example, in the case C45/08, CJUE, 23 December 2009, paragraph 54: *"It follows that the fact that a primary insider who holds inside information trades on the market in financial instruments to which that information relates implies that that person 'used that information' within the meaning of Article 2(1) of Directive 2003/6, but without prejudice to the rights of the defence and, in particular, the right to be able to rebut that presumption"*.

[90] It should be noted that an insider can always provide evidence that, in a specific case, the existence and possession of inside information were not linked to a decision on a respective transaction. In such a context, it is critical that the insider documents the reasons for his or her actions on the market accordingly.

(168) In the context of trading in the wholesale energy markets, the natural person using the information to acquire/dispose of wholesale energy products is often not doing so on their personal account, but rather on the account of the legal person (typically the legal account of their employer or of a related undertaking) on whose behalf they are acting (this situation is explicitly covered under Article 3(5) of REMIT). Some legal persons (mostly market participants) may also manage portfolios of other legal persons. In this case, the extent of the effects of their actions as insider traders include not only the transactions that they do on their own accounts, but also the ones they do on behalf of other market participants.

(169) The acquisition or disposal of a wholesale energy product for the account of a third party can also consist of an ‘interposition’ in the transaction, where the market participant acquires the wholesale energy product on behalf of its parent undertaking (or shareholder) or to fulfil obligations arising from the management agreement.

Directly or indirectly

(170) Using inside information by acquiring or disposing of (a) wholesale energy product(s) can be carried out either directly or indirectly.

(171) Direct acquisition/disposal of a wholesale energy product (or an attempt thereof) happens if the person possessing inside information acquires/disposes of a wholesale energy product itself (or attempts to do so).

(172) Indirect acquisition/disposal of a wholesale energy product (or an attempt thereof) happens when the person possessing inside information acquires/disposes of a wholesale energy product (or attempts to do so) through a third party (e.g. through a broker, a related undertaking, another market participant or another person). Indirect use can happen through a legal person’s parent undertaking, i.e. in a situation where the order/transaction is performed by the parent undertaking (or shareholder) and the legal person does not have any statutory management powers over that entity and therefore over the concerned operation.[91] Indirect use can also happen through a market participant executing an order/transaction on their own account after being instructed to do so by a parent undertaking (or shareholder) that holds inside information.

Wholesale energy products to which information relates

(173) The definition of ‘insider trading’ in Article 3(1)(a) of REMIT requires that inside information is used to acquire or dispose of, directly or indirectly, the wholesale energy product to which that inside information relates.

(174) In order to meet this condition, it is necessary to define to which wholesale energy product[92] the inside information relates.

(175) Inside information relates to the products that have at least part of the delivery during the time when events that constitute inside information take place (e.g. inside information on a one-hour outage could relate to the intraday product of this specific hour, while an outage of several weeks could relate to intraday, day-ahead, weekly, monthly, quarterly, and yearly forwards and futures including those weeks). Inside information also relates to the products whose prospects on the supply, demand and price are indirectly affected by the information (e.g. inside information on an unplanned one-hour outage could also relate to intraday products that are adjacent to this hour, as the information creates uncertainty about the possibility of potential delays in the resume of the normal operation of the generation unit).

[91] For example, a legal or natural person ‘indirectly’ uses inside information they hold by ordering a broker (i.e. a third party) to sell their wholesale energy product for the account of the latter’s shareholder company.

[92] Wholesale energy products are defined in Article 2(4) of REMIT and explained in more detail in Subchapter 2.2.1 of this Guidance.

(176) Furthermore, factors such as the size of the events that constitute inside information (e.g. outage), the technology affected by the event, and the reliability of a given power plant are also relevant to establishing the scope of potential wholesale energy product(s) to which that inside information relates. For example, a large-volume outage at a power plant recently involved in several unexpected outages, even for a short duration, will have a larger probability of being relevant for longer time frames than a smaller outage (e.g. a small one-hour outage might probably only impact the product of this actual hour, while a large one-hour outage might impact the day-ahead products as well as the products with later delivery).

(177) Below, and in accordance with Article 16(1)(b) of REMIT[93], the Agency provides examples of the application of Article 3(1)(a) of REMIT using the four elements explained above.

Example: Using inside information by entering into transactions - Lack of timely updates on an urgent market message

Situation: Market participant ('MP') A owns and operates a gas storage facility with a daily withdrawal capacity of 100 MWh. The storage facility is going through a planned two-week maintenance period without any possibility of withdrawing or injecting gas in this period. MP A published this maintenance through an urgent market message ('UMM') on an inside information platform. Five days before the planned end of maintenance (D-5), the following situation takes place:

– *D-5 07:00* - MP A receives information that the maintenance is finished ahead of schedule and that withdrawal of natural gas will be possible as of the end of the day (at 24:00). MP A decides to withdraw the gas and sell it on the within-day market from D-4 onwards. MP A is aware that the liquidity in the within-day market of the bidding zone ('BZ') in which the storage facility is located ('BZ A') is rather low and therefore decides to sell the gas on the within-day market of BZ B, a larger neighbouring market.

– *D-5 18:00* - MP A informs the TSO dispatch centre on the updated details of the storage operation schedule for D-5 from 24:00 onwards. The information is not made public, as the TSO is not required to publish it in D-5.

– *D-5 21:00 to 24:00* - MP A acquires 100 MWh of within-day transmission capacity (hourly within-day products covering the following period: D-4 00:00 to D 00:00) from BZ A to B. At the same time, MP A sells its natural gas of 100 MWh in the within-day market of BZ B (hourly within-day products covering the following period: D-4 00:00 to D 00:00).

– *D-4 12:00* - MP A updates the original UMM and informs the market of an earlier-than-expected finalisation of its maintenance from D-4 00:00 onwards. The market prices react downwardly.

Assessment: MP A used inside information to acquire, directly for its own account, several wholesale energy products to which this information is related. The practice of MP A qualifies as insider trading and it amounts to a breach of Article 3(1)(a) of REMIT, covering all elements foreseen in that provision:

– *Inside information:* At D-5 07:00 MP A received the information on an early finalisation of maintenance of its storage facility. MP A decided to restart withdrawing gas from the storage from D-4 00:00. This information became precise at D-5 7:00, which is supported by the fact that at D-5 18:00 MP A informed the TSO dispatch centre on the updated operation schedule for D-4. Such information was precise, not public, related to the wholesale energy product, and likely to significantly affect the price of an intraday wholesale energy product. Therefore, it meets the criteria of inside information.

[93] Article 16(1)(b) of REMIT stipulates that in order to ensure that NRAs carry out their tasks under this Regulation in a coordinated and consistent way, the Agency shall, as appropriate, publish non-binding guidance on non-exhaustive indicators and examples of market behaviour relating to insider trading set out in Article 3.

- *Acquiring or disposing of a wholesale energy product:* MP A acquired transmission capacity from BZ A to B and sold its natural gas from the storage facility in BZ B, in the within-day markets.
- *For its own account/account of a third party:* MP A used its own account for these transactions.
- *Directly or indirectly:* MP A directly acquired the transmission capacity from BZ A to B and also directly sold the gas in the intraday market of BZ B.
- *Wholesale energy products to which that information relates:* This inside information is related to at least the following wholesale energy products:

  (i) contracts for the supply of within-day gas transmission capacity from BZ A to B (also from BZ B to A) at least for the hourly contracts between D-4 00:00 to D 00:00;

  (ii) contracts for the supply of day-ahead gas transmission capacity from BZ A to B (also from BZ B to A) at least for the daily contracts between D-4 to D-1 (inclusive);

  (iii) contracts for the supply of natural gas within day on BZ B's and BZ A's for at least the hourly contracts between D-4 00:00 to D 00:00; and

  (iv) contracts for the supply of natural gas day ahead on BZ B's and BZ A's for at least the daily contracts between D-4 to D-1 (inclusive).

Considerations: This practice also represents a breach of the obligation to publish inside information under Article 4(1) of REMIT.

Example: Using inside information by trading - Front running

Situation: On 27 December, Market participant ('MP') A signed a new contract for the one-year supply of 100 MWh of electricity baseload for the following year to an end consumer. MP A wants to cover half of this supply (50 MWh) by buying electricity n the wholesale energy market (a yearly physical forward). MP A decides to acquire this amount through a PPAT, so it informs the PPAT that this represents a major shift on its activity and that all this quantity (50 MWh) should be procured in the next few minutes in order to hedge its position (without providing further details).

Taking into consideration the existing market circumstances, the PPAT selected by MP A expects that the short time given for the execution of the transactions will lead to an increase in the market prices of the yearly product. This would not happen if the client had given a longer time span for execution. Prior to introducing the client's order, the PPAT introduces other buy orders for this yearly physical forward on its own account, in order to buy at the best ask. Once these orders are executed, the PPAT introduces buy orders on behalf of MP A. This leads to a significant increase in the price of the yearly product, which results in other market participants improving their bids. At this point, the PPAT sells the electricity bought on its own account, securing a gain.

Assessment: The PPAT used inside information to acquire, for its own account, the wholesale energy product to which that information relates. The 'front running' carried out by the PPAT qualifies as insider trading and a breach of Article 3(1)(a) of REMIT, covering all elements foreseen in that provision:

- *Inside information:* The information on MP A's need to execute a buy order of 50 MWh in the yearly physical forward market in a short period of time does not constitute inside information for MP A, as it is part of its own trading strategy. Therefore, MP A is not obliged to publish such inside information. But, from the PPAT's perspective, this information is inside information related to MP A's activity, as it is precise, not public, related to a wholesale energy product, and likely to significantly affect the price of a wholesale energy product.
- *Acquiring or disposing of a wholesale energy product:* The PPAT entered into a yearly contract for the supply of electricity where delivery is in the Union (yearly physical forward).
- *For its own account/account of a third party:* With front running, the PPAT acquired electricity for its own account.
- *Directly or indirectly:* Electricity was acquired directly by the PPAT.
- *Wholesale energy products to which that information relates:* The inside information is the buy order for yearly contracts for the supply of electricity and it is therefore directly and clearly related to those contracts.

Considerations:

- Article 2(1)(ca) of REMIT considers that "*information which is conveyed by a market participant, or by other persons acting on the market participant's behalf, to a service provider trading on the market participant's behalf and relating to the market participant's pending orders in wholesale energy products (…)*" qualifies as information under REMIT.
- In that context, if, on the one side, a client's order to trade is part of the client's own trading strategy and does not constitute inside information under REMIT, as far as the client is concerned, on the other side, the communication of that information to the PPAT is to be considered inside information if it is precise, and relates directly or indirectly to one or more wholesale energy products. Notwithstanding, the PPAT does not have to publish such information, as Article 4(1) of REMIT requires that inside information is published only 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.

- In a situation (different from the one explained in the example above) where the order from the client to the PPAT is based on inside information, the responsibility for the breach of insider trading under Article 3(1)(a) of REMIT lies with the client and not the PPAT (in this case it is the client that is acquiring a wholesale energy product, on its own account, indirectly, i.e. through a PPAT). In case the PPAT is aware that the client's order is based on inside information (even in situations where the PPAT is not aware of the exact content of that information), the PPAT is required to comply with their obligations under Article 15 of REMIT and notify the relevant NRA about the suspicious order or transaction.

5.2.2. Insider trading by disclosing inside information

(178) The second form of insider trading (within the meaning of Article 3(1)(b) of REMIT) consists of "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".

(179) This form encompasses two relevant concepts whose application will be further explained below:

- the disclosure of (inside) information to any other person; and
- the disclosure is not made in the normal course of the exercise of employment, profession or duties.

Disclosure of (inside) information to any other person

(180) The concept of disclosure under Article 3(1)(b) of REMIT should not be confused with the one of public disclosure of inside information laid down in Article 4(1) of REMIT. Article 3(1)(b) of REMIT aims exactly at forbidding the disclosure of inside information before it is published in an effective and timely manner as requested by Article 4(1).

(181) For the purpose of applying Article 3(1)(b) of REMIT, the concept of 'disclosing information' includes any inside information that was not yet disclosed under Article 4(1) of REMIT, using any form of disclosure (including formal or informal mechanisms), and/or the use of any possible means of communication to transmit and/or transfer information.

(182) Furthermore, this prohibition is applicable to disclosure to any other person. Whether the dissemination of inside information reaches a single or multiple persons is not relevant in order to qualify that disclosure as a breach of Article 3(1)(b) of REMIT. In fact, the qualifying element for a breach of Article 3(1)(b) REMIT is the absence of 'normality' in the disclosure (see below the concept of normal course).

(183) It is also to be noted that in order to establish a breach of Article 3(1)(b) of REMIT, it is not relevant whether anyone received inside information and/or used it for trading, since it is the disclosure itself that is forbidden.

(184) In their assessments, NRAs can prove the disclosure of inside information to any other person either with (i) tangible evidence of communication(s) between the parties involved in the unlawful disclosure of information or, in the absence of such tangible evidence, with (ii) a set of precise and consistent pieces of evidence (e.g. evidence on the links between the person owning inside information, the third party, and ownership of inside information by the third party, etc.) establishing that only an unlawful disclosure of inside information could have occurred.

The disclosure is not made in the normal course of the exercise of employment, profession or duties

(185) Article 3(1)(b) of REMIT provides an exemption to the prohibition of disclosure of inside information to any other person. The disclosure of inside information to any other person is not considered insider trading if it is done in the normal course of the exercise of the employment, profession or duties of a legal or natural person.[94] This is in line with the obligation to publish inside information defined in Article 4(1) REMIT, ensuring symmetry of information among all natural and legal persons active in the wholesale energy markets.

(186) The disclosure of inside information in the normal course of the exercise of employment relationship, profession or duties should be interpreted in a strict manner. In particular, while assessing whether disclosure occurred in the 'normal course', NRAs may take into consideration whether the disclosure (i) followed a pre-defined workflow based on the 'need-to-know' principle, or (ii) was included in the contract governing the person's duties.

(187) Whenever information is disseminated pursuing a personal objective (i.e. a benefit to the natural person), it should always be concluded that the disclosure is not made in the normal course of the exercise of employment, profession or duties.

Example: Insider trading by disclosing inside information

Situation: Power plant ('PP') A with a production capacity of 700 MW is located in bidding zone B, which has a total of 5,000 MW installed capacity.

According to the operational procedures, the head of technical operations is responsible for the PP A's planned maintenances. In a morning management meeting, the head updates the PP A director about a planned maintenance scheduled for the following year for a period of 4 months. This information has not been shared with anyone else before and the PP A's compliance officer will be requested to publish it at 15:00.

One hour after the management meeting, the PP A's director attends the PP A's trade union meeting. One of the agenda points includes a plan of social activities organised by the trade union for the staff and their families for next year. The timing of an important social activity coincides with the scheduled maintenance. During the lunch break, the PP A's director talks informally to the trade union representative, mentioning the maintenance plan for next year and a potential coincidence of this maintenance with their social activity.

Assessment*:* Disclosure of inside information from the PP A's director to the trade union representative was not realised in the normal course of the exercise of their employment relationship, profession or duties. Therefore, such disclosure represents an improper disclosure of inside information and it amounts to a breach of Article 3(1)(b) of REMIT.

- *Inside information*: Information on the long-term maintenance meets the criteria of inside information (precise, not public, relates to the wholesale energy product and likely to affect the wholesale energy product prices).
- *Disclosing [inside] information to any other person:* The director fulfils the definition of person possessing inside information under Article 3(2)(a) of REMIT. The disclosure of inside information by the director to the trade union representative qualifies as disclosure of inside information to other person specified in Article 3(1)(b) of REMIT.

[94] This concept is further explained in Subchapter 4.1.

- *Unless such disclosure is made in the normal course of the exercise of their employment relationship, profession or duties:* The disclosure of inside information by the head to the director was done in line with a pre-defined workflow based on the 'need-to-know' principle between the operational staff and the management of PP A. Therefore, it meets the criterion of being made in the normal course of the exercise of their duties and does not present a breach of Article 3(1)(b) of REMIT. However, the disclosure of inside information by the PP A's director to the trade union representative, before this information became public, was not done in line with a pre-defined workflow based on the 'need-to-know' principle and therefore does not meet the criterion of being made in the normal course of the exercise of their duties.

5.2.3. Insider trading by recommending or inducing trading on the basis of inside information

(188) The third form of insider trading (within the meaning of Article 3(1)(c) of REMIT) consists of "recommending or inducing another person, on the basis of inside information, to acquire or dispose of wholesale energy products to which that information relates".

(189) In this context, the term 'recommending or inducing' should be interpreted as encompassing any action undertaken by the holder of inside information in order to provide to another person (also called the 'tippee')[95] one or more direct or indirect signals relevant for trading on one or more wholesale energy markets that are related to that inside information.

(190) Article 3(1)(c) of REMIT does not require the transmission of inside information to another person, but solely the transmission of a signal on the trading of wholesale energy products. In the same way, Article 3(1)(c) of REMIT does not require any action from the beneficiary of the recommendation, i.e. it is irrelevant whether the person that received the recommendation used that information for trading or did not trade at all.

(191) The fact that the holder of inside information transgressed their obligation to refrain from making any recommendation to acquire or dispose of a wholesale energy product is sufficient to constitute a breach of Article 3(1)(c) of REMIT.[96]

[95] Person receiving a tip or recommendation.

[96] In situations where inside information is transmitted together with a recommendation and the beneficiary of the recommendation trades or is trying to trade a wholesale energy product to which this information is linked, the tippee is also liable for a breach of insider trading within the meaning of Article 3(1)(a) of REMIT.

Example: Insider trading by recommending or inducing trading on the basis of inside information

Situation: Market participant ('MP') A owns and operates five power plants with a combined capacity of 2,000 MW (each power plant has the production capacity of around 400 MW). The chief technology officer ('CTO') of MP A is informed that a component of the turbine used in all their power plants is defective and must be replaced in the near future (the replacement, which is expected to take ten days, is not urgent but should be carried out in the next quarter), i.e. all power plants will need to have an early maintenance. Based on that knowledge, the CTO recommends to their friend, an energy trader at Company B, to buy electricity forwards for the next quarter as soon as possible.

Assessment: The recommendation made by the CTO qualifies as a breach of Article 3(1)(c) of REMIT because:

- *Inside information:* The information held by the CTO on MP A's power plants needing future maintenance constitutes inside information because it is precise, non-public, relates to wholesale energy products and is likely to affect their prices.
- *Recommending or inducing on the basis of that information:* The CTO recommended Company B's trader to buy the wholesale energy product to which that information is related (next quarter). The recommendation is therefore more likely than not based on the inside information regarding the maintenance of MP A's power plants.

5.3. Indicators of insider trading

(192) In order to identify potential insider trading under REMIT, NRAs shall take into account the non-exhaustive list of indicators[97] included in Subchapters 5.3.1 and 5.3.2, which shall not necessarily be deemed, by themselves, to constitute insider trading.

(193) The list is organised into simple signals (e.g. relevant variables, actions, or diagnostic flags) and more complex types of practices that typically combine different signals.

5.3.1. Possible signals

(194) The following examples of signals are neither conclusive nor comprehensive and should only be regarded as a starting point when considering whether or not a behaviour gives rise to indications of a possible REMIT breach in the form of insider trading. Therefore, they are to be applied based on a case-by-case analysis.

a) **Relevant and/or sudden changes in the traded volumes** of (a) wholesale energy product(s) before the publication or occurrence of a fact that qualifies as inside information. This can happen, for example, if:

- transactions and/or orders to trade from a particular market participant or a set of market participants are concentrated in a short time span of the trading session before the publication or occurrence of a fact that qualifies as inside information; or
- before information on an unplanned outage on a market participant's own assets or the assets it is operating is published, there is a relevant volume of transactions and/or orders to trade from that market participant on the wholesale energy products whose prices may be affected by that information.

[97] Article 16(1)(b) of REMIT stipulates that in order to ensure that NRAs carry out their tasks under this Regulation in a coordinated and consistent way, the Agency shall, as appropriate, publish non-binding guidance on non-exhaustive indicators and examples of market behaviour relating to insider trading set out in Article 3.

b) **Relevant and/or sudden changes in the prices** of (a) wholesale energy product(s) before the publication (e.g. through urgent market messages) or occurrence of a fact that qualifies as inside information. This can happen, for example, in a setting where:

- the speed or magnitude of the changes in prices cannot be explained by the existing information available to the market and market fundamentals; or
- the relevant and/or sudden change in prices occurs before the publication or occurrence of a fact that qualifies as inside information.

c) **Changes in the trading behaviour** of a market participant in a wholesale energy product before the publication (e.g. through urgent market messages) or occurrence of a fact that qualifies as inside information. This can happen, for example, in a setting where a market participant:

- exhibits an unusual trading profile (e.g. a substantially larger market share on orders or trades on one side of the order book) in a related wholesale energy product before the publication or occurrence of a fact that qualifies as inside information;
- cancels/modifies orders and/or trades in a short time span, which represent a significant proportion of its daily volume. This indicator gains even further relevance if the cancelled/modified orders are associated with significant changes in the price of a wholesale energy product; or
- reverses its positions in a short period. This indicator gains even further relevance if the reversals represent a significant proportion of the volume of orders or transactions of the market participant in a wholesale energy product.

d) **(Potential) profit increase or change** for a market participant, as a result of the change of its position on specific wholesale energy products and/or on a financial instrument before the publication or occurrence of a fact that qualifies as inside information.

e) **The lack of compliance with other REMIT obligations on inside information** is also an indication of the possibility of insider trading. This can be the case when a market participant:

- is at least sporadically in breach of the obligations of Article 4 of REMIT by not disclosing information either effectively or in a timely manner;
- misuses the exemption of Article 3(4)(b) of REMIT, for example by:
  - not being one of the types of market participants eligible for the use of the exemption;
  - not using its own available assets to cover the immediate physical loss;
  - issuing orders/entering into transactions that go well beyond the strict need to cover the immediate physical loss; or
  - trading for its own account when also trading on behalf of the asset owner under the exemption.

5.3.2. Types of practices

(195) The following examples of types of practices could constitute insider trading, and are currently considered relevant for the wholesale energy markets[98]:

a) **Front running or pre-positioning** - This is a type of practice where a person or an associated person ('agent') that executes an order to buy or sell a wholesale energy product has material, non-public market information concerning an imminent order/transaction in that wholesale energy product or a related wholesale energy product prior to when that information concerning or related to the order/transaction is made publicly available or otherwise becomes stale or obsolete.

(196) Article 2(1)(ca) of REMIT refers to "information which is conveyed by a market participant, or by other persons acting on the market participant's behalf, to a service provider trading on the market participant's behalf and relating to the market participant's pending orders in wholesale energy products, which is of a precise nature and relates directly or indirectly to one or more wholesale energy products" as part of the list of information which could constitute inside information. This type of information is characteristically involved in the behaviour of front-running or pre-positioning."

(197) A typical example of this prohibited behaviour is when an agent (e.g. a specific PPAT) receives their client's order that meets the criteria of inside information and then trades on their own account on the basis of this information.[99] In order to be compliant with Article 3(1) of REMIT, the agent is expected not to use the knowledge of the client's order to trade on their own agent's account before executing the client's order.[100] The combination of the following signals can point to this type of practice:

- **The time proximity between the agent and client's order:** an agent's order entered shortly ahead of their client's order (potentially suggesting that the agent may have received the client's unexecuted order prior to placing their personal trade);
- **The better agent order:** an agent's order may be placed at a price which is the same or better than their client's order;
- **Potential profit by the agent:** Front running often ends with the reversal of the agent's initial order after the execution of the client's order by selling (resp. buying) at a higher (resp. lower) price than the initial order, although this is not a necessary condition for front-running; and
- **Repetition:** Recurrent front-running trades are more suspicious and less likely to be genuine coincidences.

b) **Double Printing** – This type of practice includes several trades being made when only one is necessary to execute the order. For instance, a market participant acting as an agent receives an instruction from their client to execute an order and uses this information to trade on their own behalf in the following way: the agent does not directly execute the order on the client's behalf, even though the

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[98] Article 16(1)(b) of REMIT stipulates that in order to ensure that NRAs carry out their tasks under this Regulation in a coordinated and consistent way, the Agency shall, as appropriate, publish non-binding guidance on non-exhaustive indicators and examples of market behaviour relating to insider trading set out in Article 3.

[99] This behaviour can also consist of pre-hedging, i.e. if a broker were to use the information received from the client to trade on for its own account, including potentially trading against the client.

[100] In line with Recital 12 of REMIT, the client's order does not qualify as inside information from the client's perspective as it is information pertaining to its own trading plans and strategies. However, the client's order can still present inside information from the agent's perspective provided that such an order meets the criteria for inside information. Therefore, the agent will need to comply with the prohibition of insider trading under Article 3(1)(a) of REMIT. At the same time, it is important to point out that the obligation to publish inside information under Article 4(1) only applies to market participants and *'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'*. The same does not apply to the agent having access to inside information on the client's order. Therefore, the agent is not required to publish this information under Article 4(1) of REMIT.

situation on the market would allow it, but executes it on their own behalf and then executes (an) additional trade(s) between themselves and the client so that the price difference is captured by the agent to the detriment of the client.[101]

(198) Double-printing transactions are usually performed on a market place. This behaviour can possibly be detected through trades of similar price and/or quantity, where the agent acting as principal, buys (sells) from (to) another market participant and sells (buys) to (from) the client.

5.4. Scope of the provision

(199) According to Article 3(2) of REMIT, the prohibition of insider trading applies to five categories of natural and legal persons who possess inside information in relation to wholesale energy products. Such persons are known as 'insiders'.[102]

(200) The five categories of insiders listed in Article 3(2) of REMIT are:

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

(201) A non-exhaustive list of examples of the five categories of insiders is provided in the box below:

[101] The concept of double printing should not be applied in the context of sleeve arrangements.

[102] In contrast, the prohibition of market manipulation under Article 5 of REMIT applies to any natural or legal person.

Some examples of insiders

Categories of insiders	Non-exhaustive list of examples
Members of the administrative, management or supervisory bodies of an undertaking	- Chief executive officer or other members of the management of an undertaking who are exposed to facts that can qualify as inside information; - Managers of the control centre of a TSO/DSO deciding on the rescheduling of planned outages; - Procurement managers responsible for the purchase/service contracts of the critical parts of a power plant; - Members of the supervisory board who are exposed to facts that can qualify as inside information.
Persons with holdings in the capital of an undertaking	- Shareholders (natural or legal persons) of the market participant who may be informed about the company's non-public information; - The legal person which possesses information with respect to business or facilities which its parent undertaking or related undertaking owns or controls or for whose operational matters that legal person or undertaking is responsible, either in whole or in part.
Persons with access to information through the exercise of their employment, profession or duties	- A market participant which possesses information with respect to businesses or facilities which it owns or controls or for whose operational matters that market participant or undertaking is responsible, either in whole or in part; - A natural person, acting on behalf of the market participant, which possesses information with respect to businesses or facilities which the market participant, 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; - Persons professionally arranging transactions introducing and/or executing orders in the wholesale energy markets on behalf of their clients.
Persons who have acquired such information through criminal activity	- IT hackers stealing information from the IT system of the market participant or the IT system of the PPAT used by the market participant; - Market participant competitors that may have had access to that information through industrial espionage.
Persons who know, or ought to know, that it is inside information	- Administrative staff that deals with the administrative processes regarding power plant unavailability; - The spouse, partner or friend of an employee of the market participant which typically possesses information with respect to businesses or facilities which the market participant, 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), and that are aware or should be aware of the type of activity for which the employee is responsible and the sensitivity of the information with which he/she deals.

(202) From these categories, it can be concluded that the concept of persons who possess inside information included in REMIT goes well beyond the one of market participants or natural persons acting on their behalf.

(203) It is also explicitly acknowledged in Article 3(5) of REMIT that where the person who possesses inside information 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. This puts a particular responsibility on the traders acting on behalf of market participants, and invites market participants to have proper compliance measures in place to ensure an appropriate workflow for the inside information handled (see more on this in Subchapter 9.4).

Example: The responsibility of natural and legal persons

Situation: Trader X works for market participant A (MP A). MP A is an electricity producer owning and operating several power plants. Accidentally, trader X listens to a conversation of two operational workers who are discussing details of the unplanned outage of one of MP A's power plants. Such information meets the criteria of inside information.

Trader X, expecting that the price of electricity is likely to increase due to the circumstances that led to the unplanned outage, decides to buy electricity on the wholesale energy market on behalf of the MP A and sell it later with a profit.

Assessment: Trader X, as a natural person, is in breach of Article 3(1)(a) of REMIT as they meet the criteria of a person who ought to know that the information qualifies as inside information. Furthermore, Article 3(5) of REMIT explicitly acknowledges that the prohibitions of insider trading in Article 3(1)(a) 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.

MP A could also be responsible for the breach of Article 3(1)(a) of REMIT, as trader X is trading on its behalf based on inside information that is held by employees of MP A.

Considerations: In this example, MP A is also responsible for a potential breach of Article 4(1) of REMIT, as the inside information was not published effectively. This is demonstrated by the fact that certain details regarding the unplanned outage were not provided to the market but seem to be price-relevant based on the trader behaviour.

(204) Article 3(2)(e) of REMIT extends the scope of the provision to persons who know, or ought to know, that some item of information is inside information. Through this provision, a special responsibility is laid down for legal or natural persons that may be more indirectly related to the processes that generate or manage inside information or that are in contact, for personal or professional reasons, with persons dealing with inside information and may be at some point in time exposed to such information.

(205) This significantly expands the scope of the application of the provision of insider trading. When applying Article 3(2)(e) of REMIT, NRAs should consider, on a case-by-case basis, what a person knows or should have known about the business of a legal/natural person in the circumstances of each case of potential insider trading. Furthermore, the NRAs should consider if, given the professional experience of the person concerned and the transaction concluded, the person concerned should have known that the information qualifies as inside information under REMIT.

5.5. Exemptions

(206) Articles 3(3) and 3(4) of REMIT provide exemptions from the application of the prohibition of insider trading.[103]

(207) This subchapter provides guidance to the NRAs concerning the use of these exemptions in order to ensure a consistent understanding of the circumstances under which these exemptions may be applied.

5.5.1. Exemption under Article 3(3) of REMIT

(208) Article 3(3) of REMIT provides that:

"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

[103] It is important to note that these exemptions only apply to the prohibition of insider trading and not to the obligation to publish inside information according to Article 4(1) of REMIT, as specified in Chapter 4 of this Guidance.

accordance with their obligations under points (d) and (e) of Article 12 of Directive 2009/72/EC[104] or points (a) and (c) of Article 13(1) of Directive 2009/73/EC."

(209) The Agency underlines that the exemption from Article 3(3) of REMIT only applies to points (a) and (c) of Article 3(1) of REMIT. Point (b) of Article 3(1) and the other provisions of Article 3 of REMIT remain applicable. 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 Directive (EU) 2019/944[105] of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU ('Directive (EU) 2019/944') and Directive 2009/73/EC[106] of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas ('Directive 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.

(210) The exemption from Article 3(3) of REMIT should only apply to the TSOs when acting in line with their tasks under points (d) and (e) of Article 40(1) of Directive (EU) 2019/944 or points (a) and (c) of Article 13(1) of Directive 2009/73/EC, and not when performing other tasks laid down in the above-mentioned Directives. For example, under point (d) of Article 40(1) of Directive (EU) 2019/944s, TSOs can purchase electricity in order to ensure a secure, reliable and efficient electricity system (ensuring the necessary ancillary services)[107] without breaching the prohibition of insider trading under Article 3(1)(a) and (c) of REMIT. However, the sole purpose of these transactions must be the safe and secure operation of the system.

(211) 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 to 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 inside information.

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[104] Directive 2009/72/EC was repealed by Directive (EU) 2019/944. Points (d) and (e) of Article 12 of Directive 2009/72/EC were replaced by points (d) and (e) of Article 40(1) of Directive (EU) 2019/944.

[105] Points (d) and (e) of Article 40(1) of Directive 2019/944: Each transmission system operator shall be responsible for:

(d) managing electricity flows on the system, taking into account exchanges with other interconnected systems. To that end, the transmission system operator shall be responsible for ensuring a secure, reliable and efficient electricity system and, in that context, for ensuring the availability of all necessary ancillary services, including those provided by demand response and energy storage facilities, insofar as such availability is independent from any other transmission systems with which its system is interconnected; and

(e) providing to the operator of other systems with which its system is interconnected sufficient information to ensure the secure and efficient operation, coordinated development and interoperability of the interconnected system.

[106] Points (a) and (c) of Article 13 of Directive 2009/73: Each transmission, storage and/or LNG system operator shall:

(a) operate, maintain and develop under economic conditions secure, reliable and efficient transmission, storage and/or LNG facilities to secure an open market, with due regard to the environment, ensure adequate means to meet service obligations; and

(c) provide any other transmission system operator, any other storage system operator, any other LNG system operator and/or any distribution system operator, sufficient information to ensure that the transport and storage of natural gas may take place in a manner compatible with the secure and efficient operation of the interconnected system.

[107] In line with Article 2(48) of Directive 2019/944, 'ancillary service' means a service necessary for the operation of a transmission or distribution system, including balancing and non-frequency ancillary services, but not including congestion management. Furthermore, Article 2(49) of Directive 2019/944 defines 'non-frequency ancillary service' means a service used by a transmission system operator or distribution system operator for steady state voltage control, fast reactive current injections, inertia for local grid stability, short-circuit current, black start capability and island operation capability.

(212) 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, given that 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 Article 3(3) of REMIT. With respect to the possible differences in national market models and the legal design of principal-agent-relations in different Member States, any such particularity needs to be assessed by the competent national authorities on a case-by-case basis.

5.5.2. Exemption under Article 3(4) of REMIT

(213) 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."

(214) Concerning the exemption from Article 3(4)(a) of REMIT, the Agency acknowledges that it also applies under MAR and especially to transactions in derivative 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 placed order related to this inside information ('hands-off approach') in order to comply with the prohibition of insider trading.

(215) 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 (i.e. within the day) physical loss does not fall under the scope of this exemption.

(216) In addition, 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 a safe and secure operation of the system.

(217) Regarding the first instance, the Agency considers that the referenced contractual obligations 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 as 'not being able' to meet such existing contractual obligations only for situations that would lead to actual contractual breaches[108] and only if the market participant has no other own assets available to fulfil the obligation. The application of exemption in Article 3(4)(b) of REMIT cannot coincide with the application of Article 4(2) of REMIT concerning delayed disclosure of inside information, as Article 4(2) requires that the market participant does not make decisions relating to trading in wholesale energy products based on the relevant inside information.

(218) As regards the second instance of exemption in Article 3(4)(b) of REMIT, the Agency considers that the criterion '*to ensure the safe and secure operation of the system'* may apply in cases when market participants are, following an agreement with the TSO, acting on their behalf so that TSOs can ensure the safe and secure operation of the system in line with their obligations laid down in Article 40(1)(d) and (e) of Directive (EU) 2019/944 and Article 13(1)(a) and (c) of Directive 2009/73/EC.

(219) Under such circumstances, and in the same way as foreseen in Article 3(3) when TSOs are acting directly, the sole purpose of the market participant transactions must be to ensure the safe and secure operation of the system. As a result, this exemption should also only apply to market participants when they act on behalf of TSOs, under a specific agreement, and at the ancillary services markets, excluding all other wholesale energy markets.

(220) Concerning the time frame allowed to be covered under the exemption in Article 3(4)(b), the Agency considers it valid for as long as a causal link between the outage and the amount to be covered under the strict exemptions is in place. Therefore, the Article 3(4)(b) exemption may only be applied for the duration of '*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'*.

(221) If a market participant uses the exemption in Article 3(4)(b), the relevant information on the transactions shall be reported to the Agency and to the NRA. This notification should take place as soon as possible, according to the market participant's best capacity. The Agency has established on its website a secure 'Notification Platform' (available at https://www.acer-remit.eu/np/home) which allows, inter alia, transactions to cover the immediate physical loss under Article 3(4)(b) to be simultaneously notified to both the Agency and the relevant national regulatory authority or authorities.

(222) With regard to the exemption from Article 3(4)(c) of REMIT, the Agency highlights that it should only be used when an official state of emergency is declared by the competent authority of the relevant Member State in order to secure the supply of electricity or natural gas and market mechanisms have been suspended in a Member State or parts thereof. Furthermore, the authority competent for emergency planning shall ensure the publication of inside information 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.

[108] Situations for which remedial actions or contractual arrangements exist are not considered as leading to an actual contractual breach in terms of Article 3(4)(b). For instance, becoming imbalanced due to unplanned outages is not considered a contractual breach as such.

6. Prohibitions of market manipulation and attempted market manipulation

6.1. Introduction

(223) Article 5 of REMIT prohibits 'any engagement in, or attempt to engage in, market manipulation on wholesale energy markets'. This chapter intends to provide guidance to NRAs on the application of this prohibition based on the definitions included in Articles 2(2) and 2(3) of REMIT.

(224) Subchapter 6.2 explains the concepts of market manipulation and attempted market manipulation describing their different forms and exploring each of the elements included in their definitions.

(225) In Subchapter 6.3, the Agency provides a list of indicators that can facilitate the identification of potential market manipulation and attempted market manipulation. They are organised into simple signals (e.g. relevant variables, actions, or diagnostic flags) and more complex types of practices that typically combine several different signals. More details on some of these types of practices can be found in the Guidance Notes published by the Agency, which constitute an integral part of this Guidance.[109]

(226) Subchapter 6.4 draws on the analysis included in Subchapter 2.4 of the Guidance, identifying the types of legal or natural persons that fall in the scope of application of Article 5 of REMIT.

(227) Finally, in Subchapter 6.5, the Agency explains the exemptions related to the concept of accepted market practices that apply to some of the provisions on market manipulation.

(228) In applying the principles set out in this chapter, NRAs should take into account the specific facts and circumstances of each case.

6.2. Definitions of market manipulation and attempted market manipulation

(229) Article 5 of REMIT prohibits market manipulation on the wholesale energy markets in a broad sense and Articles 2(2) and 2(3) of REMIT define two different forms for it to take place: 'market manipulation' and 'attempted market manipulation'.

(230) Article 2(2) of REMIT defines market manipulation as:

"(a) entering into any transaction or issuing, modifying or withdrawing any order to trade or engaging in any other behaviour relating to 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 is likely 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 such transaction or order to trade conforms to accepted market practices on the wholesale energy market concerned; or

(iii) employs 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

[109] ACER Guidance Notes are available at https://documents.acer-remit.eu/category/guidance-on-remit/.

(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

or

(c) transmitting false or misleading information or providing false or misleading input in relation to a benchmark where the person who made the transmission or provided the input knew or ought to have known that it was false or misleading, or engaging in any other behaviour which leads to the manipulation of the calculation of a benchmark.

Market manipulation may designate the conduct of a legal person, or, in accordance with Union or national law, of a natural person who participates in the decision to carry out activities for the account of the legal person concerned."

(231) 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."

(232) While the core element in the definition of 'market manipulation' (included in Article 2(2) of REMIT) is the effect or the likely effect that certain types of behaviour have on the demand, supply or prices of wholesale energy products, the core element in the definition of 'attempted market manipulation' (included in Article 2(3) of REMIT) is the intention behind the behaviour, even if the attempt is unsuccessful.

(233) Indeed, according to the definition of 'market manipulation', what matters is whether the behaviour gave or was likely to give false or misleading signals as to the supply of, demand for, or price of wholesale energy products (Articles 2(2)(a)(i), 2(2)(a)(iii) and 2(2)(b) of REMIT) and/or secured, or is likely to have secured the price of those products at an artificial level (Article 2(2)(a)(ii) of REMIT). That definition does not include any element of intent. In other words, whether the behaviour is intentional or not is irrelevant to qualify it as a breach of Article 5 of REMIT in the form of 'market manipulation'. As a result, a mere erroneous trading activity can end up being manipulative.

(234) According to Articles 2(2)(a)(i), 2(2)(a)(iii) and 2(2)(b) of REMIT, it is enough that the behaviour is likely to give false or misleading signals as to the demand, supply or price of a wholesale energy product to qualify it as a breach of Article 5 of REMIT in the form of market manipulation. In such cases, there is no need for the NRAs to demonstrate that false or misleading signals on the demand, supply or prices of wholesale energy products were actually sent. It is enough that, in the circumstances of a given case, the behaviour was likely to give these false or misleading signals.

(235) According to Article 2(2)(a)(ii) of REMIT, market manipulation is established when an artificial price level is secured by a person or persons acting in collaboration through suspicious orders or transactions, meaning that the price level of a wholesale energy product does not correspond to the one that would have emerged from a fair and competitive interplay between the supply and the demand in that particular market, reflecting market fundamentals.

(236) As a consequence, Article 2(2) of REMIT does not require the examination of the state of mind of the person suspected to be involved in market manipulation. It is therefore – under this Article[110] – not necessary to show that the suspected person knew that he/she was infringing REMIT.

(237) Instead, the definition of 'attempted market manipulation' included in Article 2(3) of REMIT is focused on the concept of intent. Situations where there is evidence of an intention to manipulate the market, but eventually no effects on the market, qualify as a breach of Article 5 of REMIT in the form of attempted market manipulation. There is no need for the NRAs to demonstrate that the attempt was successful to conclude a breach of Article 5 of REMIT. Such situations can for instance occur when, despite the manipulative intent, an order or transaction does not achieve the intended results.

(238) It is important to note that whether the legal/natural person indulging in a certain behaviour derives benefits from it is irrelevant to qualify the behaviour as market manipulation or attempted market manipulation.[111] This aspect can still be taken into account by NRAs (or the relevant national enforcement authorities) at the enforcement stage, notably when calculating the appropriate amount of the sanction, but should not influence the qualification of the behaviour as a breach of Article 5 of REMIT.

(239) Articles 2(2) and 2(3) of REMIT distinguish five main categories of behaviour as manipulative: (1) giving false or misleading signals; (2) securing the price at an artificial level; (3) using fictitious devices, deception or contrivance; (4) disseminating false or misleading information and (5) transmitting false or misleading information or providing false or misleading input in relation to a benchmark.

(240) For both manipulation and attempted market manipulation, the first three categories of behaviour (giving false/misleading signals, securing the price at an artificial level, using fictitious devices/deception/contrivance) involve the issuance of an order or the entering into a transaction. In that sense, they represent 'on-market' behaviours.[112]

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[110] To the exception of Article 2(2)(b) of REMIT, for the application of which it matters whether the person disseminating information knew, or ought to have known, that the information was false or misleading, as detailed under Subchapter 6.2.4.

[111] Only Article 2(2)(b)(i) of REMIT requires that a person disseminating information for the purposes of journalism or artistic expression derives, directly or indirectly, an advantage or profits from the dissemination (or has the intention of misleading the market according to Article 2(2)(b)(ii) of REMIT) to qualify the behaviour as market manipulation.

[112] 'On-market' refers to the placing of orders or the entering of transactions on the wholesale energy markets (including over-the-counter (OTC) markets). The concept of Wholesale energy market is defined in Article 2(6) of REMIT and explained in more detail in Subchapter 2.2.2 of this Guidance.

(241) The concepts of entering into any transaction or issuing any order to trade shall be interpreted as encompassing all types of actions related to orders and transactions or that are part of the processes of issuing orders or entering into transactions[113] on one or more wholesale energy markets. This includes, for example, the issuance of new orders, the amendment/modification of existing orders, the cancellation of orders, the establishment of links or dependencies between orders, or any other action relating to entering into transactions or issuing orders.[114]

(242) The fourth category of behaviour, which consists of disseminating false or misleading information, can happen 'off-market' (as opposed to order/transaction-based behaviours), using any communication channel or any other means to spread rumours or false news. No trading activity on the market is necessary for this type of manipulation to occur. Market manipulation or an attempt thereof can thus be derived from a broader set of circumstances and behaviours than the ones strictly related to the trading activity on the wholesale energy markets.

(243) The fifth category relates to transmitting false or misleading information or providing false or misleading input in relation to a benchmark where the person who made the transmission or provided the input knew or ought to have known that it was false or misleading, or engaging in any other behaviour which leads to the manipulation of the calculation of a benchmark. [115].

(244) In summary, market manipulation (and attempted market manipulation) can occur through 'on-market' or 'off-market' behaviours. It can be carried out on any type of wholesale energy market (continuous, auction, other). It can involve different products, markets and trading venues. It may occur across borders, between electricity and gas markets, and across financial and commodity markets.

(245) The table below summarises the different forms and categories of (attempted) market manipulation explained above, and Subchapters 6.2.1, 6.2.2, 6.2.3, and 6.2.4 provide more details on the application of these concepts.

<table>
<tr><th colspan="2" rowspan="2"></th><th rowspan="2">Intention</th><th colspan="2">Effect</th></tr>
<tr><th>Likely effect</th><th>Real effect</th></tr>
<tr><td rowspan="3">On-market</td><td>Giving false/misleading signals</td><td rowspan="5">Attempted market manipulation</td><td colspan="2" rowspan="5">Market manipulation</td></tr>
<tr><td>Securing artificial price</td></tr>
<tr><td>Using fictitious devices/deception/ contrivance</td></tr>
<tr><td>Off-market</td><td>Disseminating false or misleading information</td></tr>
<tr><td>Both[116]</td><td>Transmitting/providing false or misleading information/input in relation to a benchmark</td></tr>
</table>

[113] This understanding is consistent with Recital 13 of REMIT: '(…) forms of market manipulation include placing and withdrawal of false orders (…)'.

[114] In certain circumstances requiring an assessment on a case-by-case basis, this can also include the non-issuance of orders (when the market participant is expected to issue orders).

[115] Article 2(2)(c) of REMIT.

[116] Transmitting/providing false or misleading information/input in relation to a benchmark could be both on as well as off market, depending if the information/input is provided via on market orders/trades or otherwise disseminated off-market.

6.2.1. Giving, being likely to give or attempting to give false or misleading signals

(246) As mentioned above, entering into any transaction or issuing, modifying or withdrawing any order to trade, or engaging in any other behaviour[117][118] relating to wholesale energy products is considered a breach of the market manipulation prohibition under Article 5 of REMIT when these orders/transactions give, or are likely to give, false or misleading signals as to the supply, demand or price of wholesale energy products (market manipulation under Article 2(2)(a)(i) of REMIT). Similarly, orders placed and transactions entered into with the intention of giving false or misleading signals are prohibited as well (attempted market manipulation under Article 2(3)(a)(i) of REMIT).

(247) The false or misleading signals given by certain order(s)/transaction(s) can lead other market participants to make trading decisions based on false or misleading information on the supply, demand or prices and therefore act in a way they would not have considered in the absence of the manipulative behaviour. These order(s)/transaction(s), when perceived or suspected by other market participants, may also create mistrust in market integrity and, for instance, impact the liquidity in a negative way. Under some circumstances, they can also give false or misleading price signals to energy consumers/retailers whenever there are retail contracts indexed to the wholesale energy prices.[119]

(248) Giving signals to the market is inherent to any trading activity, in particular to the trading of wholesale energy products on market segments where the orders (despite being anonymised or aggregated) are visible in the order book to all market participants throughout the trading session, or are disclosed anonymously and/or in aggregate at the end of auctions or at different stages of an auction process.

(249) Taking that into consideration, when assessing market manipulation under Article 2(2)(a)(i) of REMIT, NRAs may identify suspicious orders/transactions. A further assessment of the suspicious orders/transactions, taking into account the context in which they were placed/entered into and the market participant's rationale for trading, will be a starting point for the NRAs to determine whether these orders/transactions can send false or misleading signals as to the supply, demand or price of a wholesale energy product.

(250) The NRAs may do so by identifying non-genuine orders/transactions. Indeed, certain orders/transactions might not result from a genuine interest in procuring/selling a wholesale energy product at the offered price, but might rather be used instrumentally to achieve another purpose or may simply result from a trading mistake.

(251) The following order(s)/transactions(s) (non-exhaustive list), examined in their context and in the light of the market participant trading strategy, could for instance end up being considered non-genuine[120]:

- orders placed or transactions executed at price levels that are uneconomical[121] for the market participant;

[117] E.g. manipulative physical capacity withholding, whereby actions are not necessarily undertaken by entering into any transaction or issuing, modifying or withdrawing any order, but rather in the form of not offering the available generation capacity at any price.

[118] E.g. 'printing' involves a broker communicating to its clients that a trade has been executed at a specified price and/or size when no such trade has taken place. Market participants are entitled to expect that the information provided to them by the broker represents actual activity in the market and any trading decisions which factor in this information, amongst other sources of data, may therefore be made on an incorrect view of the market.

[119] See the decision of the Lithuanian NRA, VERT, from 3 January 2020, in the case UAB Geros dujos, available at https://www.acer.europa.eu/remit/coordination-on-cases/enforcement-decisions.

[120] Article 16(1)(b) of REMIT stipulates that in order to ensure that NRAs carry out their tasks under this Regulation in a coordinated and consistent way, the Agency shall, as appropriate, publish non-binding guidance on non-exhaustive indicators and examples of market behaviour relating to market manipulation set out in Article 2(2).

[121] For example, orders/transactions or sequences of orders/transactions where the MP knows ex-ante that they will result in losses.

- orders/transactions which are erroneous and therefore do not reflect a real buying or selling interest at the price considered;
- orders/transactions which are not placed/entered into with a real interest in buying or selling energy but rather with other interests (e.g. influencing behaviour of others; influencing price settlements; influencing the price of other products; circumventing market rules; benefiting positions in other contracts; tax evasion; tax fraud; profit/loss sharing; circumventing accounting rules; transferring money between market participants …);
- orders placed with no intention to execute them; and/or
- buy orders with a volume that exceeds/falls short of the buying needs/interest or sell orders with a volume that exceeds/falls short of the selling needs/interest of the market participant, in the context of its asset-backed trading portfolio.

(252) In case the non-genuine orders/transactions send or are likely to send signals to the market, these signals are false or misleading and constitute a breach of the prohibition of market manipulation.

(253) When assessing attempted market manipulation under Article 2(3)(a)(i) of REMIT, NRAs should focus their assessment on whether the orders/transactions were intended to give false or misleading signals (regardless of whether they did give these signals), since the proof of intent is the key element for this type of breach.

(254) Taking into consideration that Articles 2(2)(a)(i) and 2(3)(a)(i) of REMIT cover different situations, the subchapters below explain the elements to be considered by NRAs when assessing whether:

- orders/transactions **gave** false or misleading signals; or
- orders/transactions **were likely to give** false or misleading signals; or
- orders/transactions **were intended to give** false or misleading signals.

(255) Assessing orders/transactions giving false or misleading signals

(256) In order to establish that suspicious orders/transactions sent false or misleading signals to the market, NRAs could consider the state of the market before and after the suspected orders/transactions, whether market developments can be imputed to them (or to other events that may have occurred), and assess the measurable effects of these suspicious orders/transactions on the market.

(257) The price level and the volume of the transactions following the suspicious activity needs to be considered, as well as the developments of the order book. Indeed, an assessment of the trading behaviour of other market participants with regard to the issuing and/or changing of their orders after the suspicious orders/transactions (e.g. by adapting the size and/or price thereof) may provide evidence in terms of the effect of the behaviour of the suspected market participant. It may demonstrate that other market participants were actually led to make trading decisions on the basis of the suspicious orders/transactions.

(258) When assessing the effects, NRAs may also take into consideration that the false or misleading signals can affect other market participants' behaviours not only in the market where those signals are sent, but also in related wholesale energy markets.

(259) It is to be noted that where such effects can be demonstrated, it is not necessary for the NRAs to also demonstrate that the suspicious orders/transactions were likely to send false or misleading signals. There might be situations where the suspicious orders/transactions were likely to give false or misleading signals and indeed had this effect, and situations where the suspicious orders/transactions might not have been likely to give false or misleading signals but nonetheless achieved this result. In both instances market manipulation can be established.

Example: Market manipulation by giving false or misleading signals to the market

Situation: Market participant ('MP') A is active on the intraday electricity market. On a given day, the market is characterised by limited trading activity and low liquidity.

MP A has only sell orders on the market, priced at 32 euro/MWh. The number of orders executed by MP A is very low given the low levels of liquidity.

At some point, MP A cancels its remaining sell orders and places 60 bid orders at increasing price levels (ranging from 32.1 euro/MWh to 32.7 euro/MWh). MP A knows that if these orders are executed, it will become imbalanced and will have to either reverse the position in the rest of the session (which may not be possible due to the reduced liquidity) or pay for imbalance charges.

Shortly after, other MPs start introducing new bids to the market at a higher price level. Subsequently, MP A cancels its 60 bid orders and then introduces multiple ask orders above the previously prevailing price level. After the period of low liquidity, an increase in trading activity on the market following MP A's behaviour allowed for the execution of MP A's ask orders.

Interpretation: This behaviour represents market manipulation in the form of giving false or misleading signals to the market (involving a type of practice usually known as 'momentum ignition'), given that:

(i) the 60 bid orders are non-genuine as they do not result from a genuine interest in procuring electricity, but are rather instrumental to create '*momentum*' on the buy side:
  - The economic interest of MP A is on the sell side of the order book. The 60 submitted bids were cancelled shortly after their introduction, unveiling a lack of interest to have these orders executed.
  - These bid orders, if executed, would be uneconomical for the market participant and could even create a need to rebalance its positions. In fact, MP A entered sell orders at prices that were lower compared to those of its subsequent 60 buy orders. Had the 60 buy orders been executed, the MP would have incurred a loss.

(ii) there are effects of the behaviour on other market participants:
  - The observed price increase after the cancellation of the 60 bid orders is linked to MP A's behaviour, since there is no other fundamental reason explaining its deviation.
  - MP A`s activity created market depth and higher liquidity. Prior to MP A`s activity, the market was characterised by low liquidity. This further liquidity is generated by other market participants. It follows that the activity of MP A resulted in a trading activity by other market participants that would not have happened without MP A's behaviour.

Considerations: Such behaviour is often linked to high-frequency trading (though it is not necessarily the case). Algorithms introducing and cancelling a large number of orders on one side of the order book may be designed to mislead other trading programs. Other MPs` systems may automatically react to the increased activity, interpreting it as growing demand or supply. When reacting to it, they can bid up the price, exacerbating the effect.

In cases where it can be concluded from the analysis of the code/design of the algorithm that the intention of the market participant was to manipulate the market, the mere fact that the algorithm is put to use on the market under such circumstances can constitute an attempted market manipulation.

This trading behaviour where at a specific point in time a market participant has an interest to sell but introduces buy orders to influence the materialisation of that selling interest (as in the example above) could occur in a setting of speculative trading as well as in a setting of asset based trading.

(260) Assessing orders/transactions being likely to give false or misleading signals

(261) Where suspicious orders/transactions do not seem to have had any effect on the market development and thus cannot be considered as having actually given false or misleading signals to the market, they can still be considered as manipulative if the NRA can establish that they were likely to do so. Indeed, Article 2(2)(a)(i) of REMIT does not only prohibit any trading activity which actually gives false or misleading signals, but also any trading activity which is likely to give false or misleading signals.

(262) The likelihood that a certain behaviour would give false or misleading signals to the market should be evaluated by taking into consideration:

- the circumstances existing at the time when the suspicious trading activity occurred; and
- the characteristics of the suspicious orders/transactions.

(263) Regarding the circumstances existing at the time when the suspicious trading activity occurred, NRAs would notably take into consideration the information available to market participants on the demand and supply (such as outages, weather conditions, congestion issues, grid use and availabilities, etc.), the liquidity[122] of the market, the price levels of the relevant product and of other relevant related products, and the order book composition at the relevant time.

(264) Regarding the characteristics of the suspicious orders/transactions, NRAs could, in order to conclude on their likelihood of giving false or misleading signals, take into consideration:

- their size (taking into consideration, for example:
  - the percentage of the average daily/hourly volumes traded/orders issued that the suspicious transactions/orders represent;
  - the volume comparisons with previous days or other relevant periods;
  - the average transaction size, etc.);
- their price (divergence from prevailing market prices); and
- their timing and/or recurrence.

(265) Suspicious orders/transactions (considered individually or in aggregated form) that are large, at diverging price levels, placed close to marking the reference periods or that are recurrent are more likely to give false or misleading signals.

(266) The views of other market participants and PPAETs present in the relevant market at the time of the suspicious behaviour may constitute relevant evidence that is likely to give false or misleading signals being given.

Example: Market manipulation by being likely to give false or misleading signals to the market

Situation: MP A is an industrial consumer of electricity that accepted an urgent order for its product at short notice. It participates in the intraday electricity market to cover its short position. The market on that day trades in a narrow range between 41 and 43 euro/MWh. The order book has a number of price levels with small volumes available on both the bid and ask side (i.e. a ‘deep order book’).

Based on the observed behaviour in previous intraday sessions, MP A expects that if it hits with small ask orders the best bids at multiple decreasing price levels until the price is below 40 euro/MWh, numerous resting ‘stop loss orders’ from other market participants will be triggered, further igniting the

[122] For example, carrying out multiple manipulative transactions on an illiquid market is likely to give false or misleading signals to the market (by creating an illusion of liquidity in the product), compared to the same manipulative transactions entered into on a very liquid market.

downward price pressure. In the past, this strategy led consistently to prices between 36 euro/MWh to 38 euro/MWh. At that point, MP A will be able to buy the volumes it needs at lower prices.

Based on this knowledge, MP A starts hitting the best bids at multiple decreasing price levels until the price is below 40 euro/MWh.

Interpretation: This behaviour represents market manipulation in the form of being likely to give false or misleading signals to the market, considering that:

(i) MP A's sell orders hitting the best bids at multiple decreasing price levels are non-genuine as they do not reflect a genuine interest in selling the electricity but are rather used instrumentally:

- These orders are uneconomic and are placed in a way that is inconsistent with the balancing responsibility of the market participant – the economic interest of MP A is on the buy side of the order book and not on the sell side. MP A expects to lose money with these orders (betting on a possible offsetting effect by the gains on the large buy orders). By executing these orders the MP is likely to increase its temporary imbalance.

- These orders are placed to try to improperly move the price.

(ii) The behaviour could be likely to give false or misleading signals to the market due to:

- the circumstances existing at the time of the suspicious trading activity: evidence from previous trading sessions shows that it is more likely than not that when the market on a certain day trades in a narrow range between 41 and 43 euro/MWh and there is a deep order book filled with small volume orders, hitting the best bids at multiple decreasing price levels until the price is below 40 euro/MWh, it will trigger additional sell orders igniting the downward price pressure;

- the characteristics of the suspicious orders/transactions: MP A placed subsequent small ask orders creating directional price movement. By trading in quick succession at a decreasing sequence of price levels breaking below 40 euro/MWh, MP A was likely to induce a short-term but large price movement compared to the regular intraday volatility.

Considerations: Transactions that break through a certain level – a perceived price floor or ceiling – are likely to have an influence on the behaviour of other market participants.

(267) Assessing an attempt to give false or misleading signals

(268) Orders/transactions which are placed/entered into the market with the intention of giving false or misleading signals will be considered manipulative under Article 2(3)(a)(i) of REMIT, regardless of whether they were likely to give these signals or actually did give them. An intended market manipulation which is unsuccessful can be characterised as an attempted market manipulation prohibited under REMIT.

(269) In order to prove the existence of a manipulative intent, NRAs may use evidence from communications (through any channel), documents including trading plans and strategies, instructions on the design or code of a trading algorithm, among many other possible pieces of evidence.

Example: Attempted market manipulation without effects

Situation: MP A is a trading firm active on the within-day gas market. It is using an algorithm that was recently redesigned to introduce ask orders in layers on one side of the order book and then one single large order on the bid side. The layered orders are then immediately cancelled. Next, the loop is repeated on the other side. The algorithm was designed based on the conviction that the layered orders will attract other market participants to adjust the prices of their orders on the same side, narrowing the bid ask spread and allowing for more profitable transactions.

On a specific day, through the algorithm, MP A inserts 10 sell orders at different descending price levels, followed by one buy order within the bid-ask spread. A few minutes later, all orders are cancelled. Next, it inserts 10 buy orders and one sell order in a similar manner at different ascending price levels and cancels them again within a few minutes. During the trading session, the complete cycle on the bid and ask side of the order book is repeated several times.

The liquidity on the market is very low and in that particular day no order is executed. Other market participants do not change their behaviour and no transaction occurs. The price level does not change following MP A's activity.

Interpretation: MP A is in breach of Article 5 of REMIT as it attempted to manipulate the market. It tried (using a type of practice usually known as 'layering') to give false or misleading signals as to the supply of, demand for, and price of the within day product and/or to secure the price of the product at an artificial level. Its strategy failed. Nevertheless, the algorithm used for trading was designed with an intention to influence the demand, supply and price of the wholesale energy product.

6.2.2. Securing or being likely to secure the price at an artificial level

(270) Entering into any transaction or issuing, modifying or withdrawing any order to trade or engaging in any other behaviour relating to wholesale energy products is considered a breach of the market manipulation prohibition under Article 5 of REMIT when this order/transaction secures or is likely to secure , the price of one or several wholesale energy products at an artificial level (market manipulation under Article 2(2)(a)(ii) of REMIT). Similarly, orders and transactions are also prohibited if they are entered with the intention of securing the price at an artificial level (attempted market manipulation under Article 2(3)(a)(ii) of REMIT).

(271) Market manipulation is thus established when an artificial price level is secured or where it is likely for that price to be secured by the suspicious orders or transactions. Attempted market manipulation is established when there is an intention to secure the price at an artificial level, regardless of whether the orders/transactions which are placed/entered into the market with the intention of securing the price at an artificial level did secure it at that artificial level.

(272) The term 'secure' refers to successfully setting/positioning the price of a wholesale energy product at a certain level. It implies that a price results at least partially from the actions (in this case orders and/or transactions) of a market participant.

(273) For a price-securing behaviour to be considered manipulative, the resulting price should be considered as set at an artificial level.

(274) The price-securing behaviour described herein may be conducted by a person or by persons acting in collaboration, and may concern one or several wholesale energy products.

(275) The term 'likely to secure' covers situations where the price was not set at an artificial price but the type of trading activity undertaken is more likely than not to set the price at an artificial price.

(276) The notion of 'artificiality' entails that the level of the price of a wholesale energy product does not correspond to the one that would have emerged from a fair and competitive interplay between the supply and the demand in that particular market, reflecting market fundamentals.

(277) A price resulting from particular orders/transactions will be considered artificial if it deviates from the price level without any manipulation (i.e. the counterfactual price). In other words, if it were not for the manipulative orders and/or transactions, other market participants would have been exposed to other price levels. An artificial price can in turn induce other market participants to place orders or enter into transactions at prices that differ from those that would prevail in the absence of the manipulative behaviour and may lead to a new price trend on the market.

(278) Whether the price is secured at a higher or lower level compared to the counterfactual price is irrelevant in the assessment of the artificiality. Also irrelevant in the assessment is the size of the deviation from the counterfactual price.[123]

(279) An artificial price is not to be confused with an abnormal price. A market price could evolve to extreme highs or lows (hence be abnormal compared to the usual on a certain market) and still be totally justified by market fundamentals (e.g. electricity generation shortage). In that sense an abnormally high or low price justified by market fundamentals is not necessarily artificial. Conversely, a price can be secured at an artificial level whilst still being within the bid/ask spread of previous transactions.

(280) Finally, a price can be established as secured at an artificial level irrespective of the duration of the deviation from the counterfactual price. In order for the price of a wholesale energy product to be considered to have been fixed at an artificial level, it is not necessary that the price maintains an artificial level for more than a certain duration.[124] Thus, even a very short-term artificial movement of the price is sufficient to be qualified as a breach of Article 5 of REMIT.

(281) Securing the price at an artificial level always qualifies as market manipulation unless the person who entered into the transaction or issued the order to trade establishes that their 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, as specified in Articles 2(2)(a)(ii) and 2(3)(a)(ii) of REMIT. It is to be underlined that the burden of proof lies on the suspected market participant, since it is expected from this person to establish the legitimacy and conformity to accepted market practices of the suspected behaviour.[125] More guidance on how NRAs should assess these exemptions is provided under Subchapter 6.5.

(282) Lastly, it is to be noted that it is possible that a behaviour securing the price of a wholesale energy product at an artificial level will also be sending (or be likely to send) false or misleading signals as to the price of this wholesale energy product, and would therefore also fall in the category of market manipulation detailed under Subchapter 6.2.1.

Example: Market manipulation by securing the price at an artificial level

Situation: MP A is a natural gas supply company. In its new bilateral contracts, it started to index the sales price to the reference price of the day-ahead product of the last trading day of the quarter preceding the delivery. The higher the reference price on that day is, the higher the contractual price is set.

On the last working day of a specific quarter, the day-ahead product on the gas trading venue was trading between 8 euro/MWh and 13 euro/MWh. The market was not liquid on that day. MP A inserted a sell order at 32 euro/MWh three minutes before the trading session ended. At the same time, and in agreement with MP A, MP B (another market participant) inserted a buy order for the same price and quantity. The ask and bid orders matched. This was the last transaction of the day for the day-ahead product.

[123] Except for the necessary consideration of the confidence interval, when the counterfactual price is estimated.

[124] Cf. the ruling of the European Court of Justice from 7 July 2011 relating to financial instruments, case C-445/09, IMC Securities BV, para. 30.

[125] Without prejudice to the national procedural rules applicable to the specific case.

As usual, after the trading session closed, the market operator calculated the day-ahead reference price. It took the weighted average price of the trades in the reference window. The reference price was set at 18 euro/MWh. Without MP A's trade, the reference price would have been 11 euro/MWh.

Interpretation: This behaviour (involving a type of practice usually known as 'marking the reference period') represents market manipulation by securing the price at an artificial level, taking into consideration that:

(i) MPs A and B secured the price, since:

- MP A and B marked the last trade of the market as well as the daily reference price at a significantly higher level than the one observed in the reference time window. This was only possible due to a previous agreement between MP A and MP B.

- In absence of the transaction between MP A and B, the reference price would have been 7 euro/MWh lower and other MPs would have been exposed to another reference price (11 euro/MWh).

(ii) The price was set artificially, since:

- MP A and B agreed via phone about the timing, volume and price. They executed the trade to set the last traded price and mark the reference price for the day. This pre-arranged trade was between MP A and B acting in collusion, which allowed MP A to profit indirectly via its benefitting position on bilateral contracts.

- The reference price for the day-ahead and the last price of the trading session do not correspond to the ones that would have emerged from a fair and competitive interplay between the supply and the demand (the counterfactual price would have been 11 euro/MWh in absence of this transaction). The price of the pre-arranged trade (32 euro/MWh) was outside the price range (trading between 8 euro/MWh and 13 euro/MWh) despite not reflecting any change of market fundamentals.

Considerations: Taking into consideration that the reference price may be used by price reporting agencies in their price assessments and may indirectly affect a multitude of contracts indexed to it, other MPs may have entered into transactions at prices that differ from those that would prevail in the absence of the manipulative behaviour and therefore it is possible that this behaviour not only positioned the price at an artificial level but also gave false or misleading signals on the price of other natural gas products.

This behaviour would also fulfil the criteria for attempted market manipulation, as the orders and the transaction entered by MP A and MP B at 32 euro/MWh had the intention to secure the price at an artificial level. Indeed, even if the market operator had excluded these orders and the transaction from the calculation of the day-ahead reference price, MP A and MP B would still be breaching Article 5 of REMIT in the form of attempted market manipulation.

Example: Market manipulation by securing the price at an artificial level

Situation: Since the opening of the electricity intraday market, the product for hour 12 (11:00-12:00) is trading at prices between 36 and 44 euro/MWh. All other intraday hours are trading below 45 euro/MWh. The conditions of supply and demand for hour 12 are similar to the ones of adjacent hours (hour 11 and 13).

In the last minute of the trading session of hour 12, MP A inserts 39 buy orders at 70 euro/MWh each for 1 MW. The orders were immediately matched with the already existing sell orders and this represented the last trades of the trading session.

The closing price for hour 12 was as a consequence set at 70 euro/MWh. In the absence of these transactions, it would have been 40 euro/MWh. The closing price for hours 11 and 13 was 38 euro/MWh and 39 euro/MWh, respectively.

Subsequently, MP A informed the energy exchange that its buy orders represent a manifest error resulting from a malfunction of its algorithm. Yet, this notification happened outside the time window for cancellation/annulment of the orders according to the rulebook of the market. The trades were upheld and the market participant suffered a financial loss due to the erroneous orders/trades that forced him to pay imbalance charges.

Interpretation: This behaviour involving erroneous orders represents market manipulation by securing the price at an artificial level, taking into consideration that:

(i) MP A set/positioned the price of a wholesale energy product:
- Due to MP A's behaviour, the hour 12 product traded at prices significantly higher than the prevailing price levels and at prices diverging from the trading prices of adjacent hours.
- The closing price of hour 12 was more than the double of the closing price for hours 11 and 13, which is a direct result of MP A's behaviour. Otherwise the closing price would have been similar to the one of hours 11 and 13.

(ii) The price was set artificially, since:
- MP A's orders were erroneously submitted by the algorithm and they misrepresented the demand side, unveiling an interest to buy at a price level that did not correspond to the market participant's needs or interests (in fact, they created an imbalance for the market participant).
- The closing price of hour 12 does not correspond to the one that would have emerged from a fair and competitive interplay between the supply and the demand on that particular market. If it was not for the manipulative orders and/or transactions, other MPs would have been exposed to a different settlement price (40 euro/MWh).
- MP A's order price levels were outside the price range observed for that particular product (between 36 euro/MWh and 44 euro/MWh) despite not reflecting any change on market fundamentals.

6.2.3. Employing a fictitious device/deception/contrivance

(283) Entering into any transaction or issuing, modifying or withdrawing any order to trade or engaging in any other behaviour relating to wholesale energy products employing a fictitious device, deception or contrivance which gives, or is likely to give, false or misleading signals regarding the supply, demand or price of wholesale energy products is considered a breach of the market manipulation prohibition under Article 5 of REMIT (Article 2(2)(a)(iii) of REMIT). Similarly, orders and transactions entered into with the intention of employing a fictitious device, deception or contrivance which gives or is likely to give false or misleading signals are prohibited as well (attempted market manipulation under Article 2(3)(a)(iii) of REMIT).

(284) Typically, this type of market manipulation does not focus exclusively on particular orders or transactions. It rather covers orders placed, or transactions entered into as part of a bigger scheme where the 'on-market' orders/transactions build on another, potentially 'off-market', part of the scheme. In that sense, the 'on-market' orders/transactions are employing a fictitious device, deception or contrivance.

(285) The 'off-market' part of the strategy can be the dissemination of false or misleading information as covered under Subchapter 6.2.4 below,[126] but also the undertaking of actions sending misleading signals.[127] It can also be trading recommendations which are erroneous or biased. Nevertheless, the rest of the scheme can also happen 'on-market' and involve other orders/transactions giving or likely to give false or misleading signals, or orders/transactions securing the market price at an artificial level (as covered under Subchapters 6.2.1 and 6.2.2).

(286) The other part of the scheme, whether it is 'off-market' or 'on-market', can either precede or follow the placing of orders or entering into transactions.

(287) For instance, a person engaging in or linked to such behaviour can either first disseminate false information/recommendations and then place orders or enter into transactions to benefit from the potential market developments induced by the dissemination, or, conversely, place orders/transactions first and then disseminate false information or recommendations. Instead of the 'off-market' dissemination of false information, the same market impact could, for instance, be achieved by a series of orders placed with no intention to execute them.

(288) The behaviour also covers the use of any other type of deception or contrivance that would give a fictitious representation of the market reality.

(289) This employment of a fictitious device, deception or contrivance will be considered market manipulation if it gives, or is likely to give, false or misleading signals to the market, and attempted market manipulation if it is intended to do so.

(290) The considerations indicated under Subchapter 6.2.1 concerning the way orders and transactions give or are likely to give false or misleading signals regarding the supply, demand or price of wholesale energy products are also fully applicable to this type of market manipulation, as is the explanation of the interactions between manipulative signals which are given, likely to be given and are intended to be given.

(291) In summary, market manipulation under Article 2(2)(a)(iii) or attempted market manipulation under Article 2(3)(a)(iii) of REMIT can happen in the following scenarios:

- if orders/transactions employing a fictitious device/deception/contrivance **give** false or misleading signals;
- if orders/transactions employing a fictitious device/deception/contrivance **are likely to give** false or misleading signals; or
- if orders/transactions employing a fictitious device/deception/contrivance **are intended to give** false or misleading signals.

[126] Cf. Decision of the British NRA (Ofgem) sanctioning InterGen (UK) Ltd, Coryton Energy Company Ltd, Rocksavage Power Company Ltd, Spalding Energy Company Ltd on 25 March 2020, for dissemination of false or misleading information and employment of a fictitious device:
https://www.acer.europa.eu/remit/coordination-on-cases/enforcement-decisions.

[127] For instance, not offering energy on the market can give an information on the availability of a plant.

Example: Market manipulation through the use of a fictitious device, deception, contrivance which gives false or misleading signals to the market

Situation: MP A owns and operates a power plant with a capacity of 300 MW with a very high capability of quickly ramping its electricity generation up and down.

MP A, outside of the balancing mechanism, notified the Transmission System Operator (TSO) that it would not be generating from the morning until noon next day. This period includes the hours of the morning peak demand.

In the meantime, MP A also entered into several transactions with other MPs, committing to deliver a large portion of its capacity for the same period (covered by its notification of non-production to the TSO).

With its capacity and technology, MP A is a relevant balancing service provider. So MP A participates in the balancing mechanism where companies indicate the price they want to receive for an increase or decrease in generation.

Following MP A's notification, the TSO expected a shortage in the system and took balancing action offering payment to MP A to generate during the morning peak.

Once the TSO committed to remunerate MP A via the balancing mechanism, MP A reversed its notification to indicate that, contrary to the previously indication, it would generate during the morning peak. In parallel to this, MP A changed its orders in the balancing mechanism accordingly.

Interpretation: This behaviour represents market manipulation by using a fictitious device/deception which gives false or misleading signals to the market, taking into consideration that:

a) The notification submitted to the TSO did not represent MP A's true expectation as to whether it would be generating. At the same time, MP A entered into transactions that it could not have fulfilled without running its power plant.
b) In reality, MP A knew or ought to have known that its power plant would in fact be generating. However, it informed the TSO that it would not generate. MP A was aware that this would create an imbalance in the system and therefore the need for the TSO to balance it. Indeed, as there was a shortage in the system, MP A predicted that given the characteristics of its facility, there was a very high probability that the TSO would require it to generate. By submitting false and misleading notification about its intention to generate, MP A induced the TSO to take balancing action and offer payment to MP A (that it would not have received if it had nominated the correct amount).
c) MP A manipulated the market by submitting false and misleading notifications which the orders issued in the balancing mechanism employed as a fictitious device/deception giving false or misleading signals regarding the supply of wholesale energy products.

6.2.4. Disseminating false or misleading information

(292) The dissemination, by any means, of information, including news or rumours, that gives, or is likely to give, false or misleading signals as to the supply, demand or price of wholesale energy products (market manipulation under Article 2(2)(b) of REMIT) is considered a breach of the market manipulation prohibition under Article 5 of REMIT. Similarly, the dissemination of information with the intention of giving false or misleading signals is prohibited as well (attempted market manipulation under Article 2(3)(b) of REMIT).

(293) For the purposes of Articles 2(2)(b) and 2(3)(b) of REMIT, the term 'information' is to be understood as any type of information specified in Subchapter 3.2 (regardless of whether the information is publicly known, confidential or inside information before the dissemination), including rumours, false or misleading news, and/or the wilful omission of material facts as well as the knowingly inaccurate reporting of information.

(294) The channel and means used to spread the information is irrelevant for the purpose of applying these provisions. REMIT specifies that the dissemination can take place through the media, including the internet, or by any other means (e.g. social media, chat rooms, etc.). Likewise, the number of persons to whom the information is spread is irrelevant.

(295) To establish market manipulation, the dissemination of information needs to give, or be likely to give, false or misleading signals as to the supply, demand or price of wholesale energy products. That (likely) effect on the supply, demand or price of wholesale energy products may result from the content of the information itself and/or from the circumstances under which such dissemination occurs (e.g. the role of the person that disseminates, the reputation of the disseminator, the specific circumstances of the market impacted by such dissemination, etc.).

(296) The likelihood of giving false or misleading signals by disseminating such information may be interpreted as the likelihood, on the balance of probabilities, that the spread of that information may have such an effect. There is no requirement to prove that the dissemination of the information has actually misled market participants. NRAs should therefore demonstrate that there is a direct link between the false or misleading information disseminated and elements of the demand, supply or price of wholesale energy products,[128] or that there is an indirect link where it is more probable than not that such dissemination can affect elements of the demand, supply or price of wholesale energy products.[129]

(297) In case of market manipulation (and not attempted market manipulation, which by nature involves the intention to mislead), the dissemination will be considered manipulative in cases where the disseminating person knew, or ought to have known, that the information was false or misleading. This means that NRAs can either prove that the person did know about the false or misleading nature of the information, or can infer from the position of the person in the company, his/her responsibilities, the experience and/or previous decisions taken by the person when assessing similar pieces of information, that the person could not be ignorant of the false or misleading nature or ought to have known that the information was false or misleading.

(298) Even though this type of market manipulation occurs ‘off-market’ and does not require placing any order or entering into any transaction, NRAs should also investigate in parallel the trading activity of persons disseminating false or misleading information, and of persons with a relationship with that person. Indeed, the trading activity which precedes or follows the dissemination of false information can reveal how the person is benefitting or intending to benefit from the market developments induced by the manipulative dissemination. Furthermore, the ‘off-market’ dissemination of false information might be coupled with other ‘on-market’ types of market manipulation (as described in Subchapters 6.2.1, 6.2.2, and 6.2.3) giving false or misleading signals to the market, or securing the market price at an artificial level.

(299) REMIT further specifies in its Article 2(2)(b) that when information is disseminated for the purposes of journalism or artistic expression it should be assessed taking into account the rules governing the freedom of the press and freedom of expression in other media, unless those persons directly or indirectly profit from the dissemination or this one is made with the intention of misleading the market.

(300) The application of this provision requires that the disseminating person acts in good faith, with professionalism and proceeds to the necessary verification of the accuracy and credibility of the information intended to be disseminated, following the principles set in press codes, especially when the information is likely to have an important impact on the market. Failure to do so would enable NRAs to question their professionalism and assess that absent any verification of the disseminated information, the person ought to have known that the information was false or misleading.

[128] For example, if the information disseminated is about the occurrence of an explosion on a natural gas storage facility, there is a direct link between the information and an element of the demand and supply of natural gas: the natural gas storage facility. This is the case because the ability to use the natural gas storage facility has an impact on the demand and supply of gas in the area (as some demand and supply would be delivered at this facility).

[129] For example, if the information disseminated is about a strike of the staff of a subcontractor that provides critical services (which, if not performed, will lead to the disruption of operations) for the gas storage area, there is only an indirect link between the information and an element on the demand and supply of natural gas: the natural gas storage facility.

(301) As a result, news providers or more generally legal or natural persons delivering and/or disseminating information about wholesale energy market developments and analysis, or forecasts on the supply, demand or prices of wholesale energy products may be manipulating the market by disseminating information which gives, or is likely to give, false or misleading signals.[130]

Example: Manipulative dissemination of false or misleading information

Situation: Company A is a specialised market information provider for electricity trading. It has published a newsflash on its website informing about an ongoing unannounced unavailability of unit 1 of the 'Nuclear Power plant B' corresponding to 1,000 MW of installed capacity. It represents an unexpected loss of 8 percent of the country`s total installed capacity.

This information contradicts the information made available by the market participant owning and operating the nuclear power plant, according to which the facility is operating normally. The information is also contradictory to the one hour delayed information published by the same market participant on its real generation. Company A failed to cross-check the information published with the other available sources.

In the next hours, the newsflash was shared in social media by several traders with comments of distress worrying about the tight supply situation and high prices. Two hours later, 'Nuclear Power plant B' published an UMM informing about uninterrupted operations as well as a rebuttal of any unannounced downtime on its website.

Company A removed the newsflash the next day, after several communication exchanges and pressure from 'Nuclear Power plant B'. Finally, it admitted to the fact that the newsflash was materially false.

Interpretation: This behaviour represents market manipulation by disseminating false and misleading information about the unavailability of a significant volume of electricity supply with a direct impact on the market, taking into consideration that:

a) Information about generation units availabilities fulfils the concept of 'information' under Article 2(1)(b) of REMIT.
b) This information was disseminated as it was published in a newsflash on the website of an information provider specialised in electricity trading.
c) This information is false as there is evidence, further corroborated by the owner of the facility and other available information, that the facility was not facing any unplanned unavailability.
d) There is a direct link between the disseminated false or misleading information and elements of the supply of electricity, as any unavailability of a generation unit will inevitably have an impact on the potential supply of electricity.

[130] Cf. the decision of the French financial regulator, AMF, from 11 December 2019, sanctioning Bloomberg LP EUR 5 million for disseminating information that it ought to have known to be false. The decision noted that the publication of the dispatches by Bloomberg, which began one minute after receiving the fraudulent news release, were not verified by the journalists of Bloomberg' Speed Desk. However, the news release, which contained several errors and was sent to Bloomberg during a trading session and reporting very serious information, suggested that a dramatic and immediate drop in the share price was likely. This should have required increased vigilance from the journalists. It also stressed that the protection enjoyed by journalists is subject to the condition that they act in good faith so as to provide information that is accurate and credible (paragraph 82 of the decision). This decision is under appeal and can be accessed at https://www.amf-france.org/sites/institutionnel/files/pdf/62197/en/The%20AMF%20Enforcement%20Committee%20fines%20Bloomberg%20LP%20for%20dissemination%20of%20false%20information%20.pdf?1585187789

e) The dissemination of the information was likely to give false signals as to the supply of electricity, taking into consideration the content of the information (unplanned outages on a power plant of a large size) and the circumstances under which such dissemination occurred (namely the reputation of the information provider). In fact, in this particular case the dissemination of the information gave false signals as to the supply and price of electricity as several traders commented their concerns about the tight supply situation and high prices.

f) Company A is a respected specialised firm that ought to have known that the information it published was false or misleading as there was relevant counter evidence to it. Company A's processes were not sufficiently robust to cross-check the published information.

Considerations: The application scope of Article 5 of REMIT is not restricted to market participants, but instead concerns 'any person', including – as in this example – information providers.

6.2.5. Transmitting false or misleading information or input on benchmarks

(302) As defined in Article 2(2)(c) of REMIT, transmitting false or misleading information or input in relation to a benchmark where the person who made the transmission or provided the input knew or ought to have known that it was false or misleading, or any other behaviour which leads to the manipulation of the calculation of a benchmark is considered a breach of the market manipulation prohibition under Article 5 of REMIT.

(303) For the purpose of Article 2(2)(c) the term 'benchmark' means any index by reference to which the amount payable under a wholesale energy product or contract, or the value of a wholesale energy product, can be determined, or an index that can be used to measure the performance of products or markets with the purpose of tracking their return or of defining the asset allocation of a portfolio or of computing the performance fees.[131]

(304) The extent to which the benchmark is used by market participants is irrelevant to establish whether the action to transmit or provide false or misleading information or input is market manipulation under REMIT.

(305) The transmission or provision of the false or misleading information or input can occur directly or indirectly to the entity that is responsible to compute the benchmark. What matters in that respect is whether the means of transmission and provision can ensure that the information and input can be received by the entity that produces the benchmark. That entity may be a private or public entity.

(306) The transmission or provision of the false or misleading information or input will be considered manipulative in cases where the transmitting person knew, or ought to have known, that the information or input was false or misleading. This means that NRAs can either prove that the person knew about the false or misleading nature of the information/input, or can infer from the position of the person in the company, his/her responsibilities, the experience and/or previous decisions taken by the person when assessing similar pieces of information, that the person could not be ignorant of the false or misleading nature or ought to have known that the information/input was false or misleading.

(307) Even though this type of market manipulation occurs primarily 'off-market' and may not require placing any order or entering into any transaction, NRAs should also investigate in parallel the trading activity of persons transmitting or providing false or misleading information or input for benchmarks. Indeed, the trading activity which precedes or follows that transmission can reveal how the person is benefitting or intending to benefit from the market developments induced by the manipulative transmission. Furthermore, the 'off-market' transmission of false information/input might be coupled with other 'on-market' types of market manipulation (as described in Subchapters 6.2.1, 6.2.2, and 6.2.3) giving false or misleading signals to the market, or securing the market price at an artificial level.

[131] This definition is consistent with the definition included in Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014.

Example: False information provided in the context of a benchmark calculation

Situation: MP A is required to provide data on LNG transactions to ACER that is tasked to produce an LNG benchmark daily.

On a certain day, the employee from MP A responsible to send information to ACER for the LNG benchmark didn't receive all the information regarding some LNG transactions that MP A entered on that day, in particular on the price.

The employee decided then to report the transactions with the same price of the previous day transactions.

The next day the employee received the missing information and realises that the reported price is different from the actual price.

Interpretation: This behaviour represents market manipulation by sending false information input in relation to a benchmark where the person who made the transmission or provided the input knew or ought to have known that it was false or misleading.

In order to take that conclusion, the following elements should be taken into consideration by the NRA:

a) Transmission – There is transmission of information between MP A and the entity that produces the benchmark on an element that is relevant for the calculation of the benchmark.

b) False or misleading information – the information provided on the price of the transaction is wrong as there is a difference between the price reported and the price at which the transaction was agreed.

c) Know or ought to have known that the information was false or misleading – The employee knows that the information that he/she is providing is not confirmed. The staff and consequently the MP A didn't take the adequate diligences to ensure that the information is accurate.

Considerations: The application scope of Article 5 of REMIT is not restricted to market participants, but instead concerns 'any person', including – as in this example – the staff member providing the wrong information.

For the assessment of whether there was a breach of Article 5 it is not relevant the assessment of the level of use of the benchmark by other participants. It is enough that the benchmark has the potential to be used as such.

6.3. Indicators of market manipulation

(308) In order to identify (attempted) market manipulation under REMIT, NRAs shall take into account the non-exhaustive list of indicators included in Subchapters 6.3.1 and 6.3.2[132], which shall not necessarily be deemed, by themselves, to constitute (attempted) market manipulation.

(309) The list is organised into simple signals (e.g. relevant variables, actions, or diagnostic flags) and more complex types of practices that typically combine different signals.

[132] Article 16(1)(b) of REMIT stipulates that in order to ensure that NRAs carry out their tasks under this Regulation in a coordinated and consistent way, the Agency shall, as appropriate, publish non-binding guidance on non-exhaustive indicators and examples of market behaviour relating to market manipulation set out in Article 2(2).

6.3.1. Possible signals

(310) The following examples of signals are neither conclusive nor comprehensive and should only be regarded as a starting point when considering whether or not a behaviour gives rise to indications of a possible REMIT breach in the form of (attempted) market manipulation. Moreover, they are to be used on a case-by-case basis.

(311) Signals of (attempted) market manipulation through (attempting to give) giving false or misleading signals or securing the price at an artificial level:

a) the extent to which issued orders to trade or realised transactions represent a significant proportion of the daily total volume of transactions and/or orders in a specific trading session of the relevant wholesale energy product, in particular when these orders/transactions lead to a significant change in the price of the wholesale energy product;

b) the extent to which issued orders to trade or realised transactions 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;

c) The extent to which issued orders to trade represent a significant proportion of the daily orders in a specific trading session of the relevant wholesale energy product, and those orders are not valid according to the market rules or, are cancelled after the orders' validation process of the market.

d) Whether realised transactions lead to no change in beneficial ownership of a wholesale energy product;

e) the extent to which issued orders to trade or realised transactions include position reversals in a short period and represent a significant proportion of the volume of transactions in a specific trading session of the relevant wholesale energy product, and might be associated with significant changes in the price of a wholesale energy product;

f) the extent to which issued orders to trade or realised transactions are concentrated within a short time span in a trading session and lead to a price change which is subsequently reversed;

g) the extent to which issued orders to trade change the representation of the best bid or offer prices in a wholesale energy product, or more generally the representation of the order book available to market participants, and are removed before they are executed;

h) the extent to which orders to trade are issued or transactions are realised at or around a specific time when reference prices, opening prices, settlement prices and valuations are calculated and lead to price changes which have an effect on such prices and valuations;

i) the extent to which the persistent placing of orders or execution of transactions that, on a stand-alone basis, would be uneconomic and counterintuitive, is triggering a manipulation by deliberately lowering or increasing the market price and enabling a market participant to subsequently profit through other trading activity related to the same or related wholesale energy product; and

j) the extent to which placed orders (including any cancellation or modification thereof) are disrupting or delaying (or are likely to do so) the functioning of the trading system; are making it more difficult (or are likely to do so) for other persons to identify genuine orders on the trading system, including by entering orders which result in the overloading or destabilisation of the order book; or are creating or likely to create a false or misleading signal as to the supply, demand or price of a wholesale energy product, in particular by entering orders to initiate or exacerbate a trend.

(312) Signals of (attempted) market manipulation through the employment of fictitious devices or any other form of deception or contrivance:

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; and

c) whether a large number of orders are issued to the market using high-frequency algorithmic techniques representing a significant proportion of the daily orders, in a specific trading session of the relevant wholesale energy product, but are not validated according to the market rules or are cancelled after the orders validation process of the market,.

6.3.2. Types of practices

(313) Recitals in REMIT identify, in a general and non-exhaustive way, some types of practices that constitute market manipulation and attempts to manipulate the market:

"(13) (…) 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. (…)"

(314) Article 16(1)(b) of REMIT stipulates that in order to ensure that NRAs carry out their tasks under this Regulation in a coordinated and consistent way, the Agency shall, as appropriate, publish non-binding guidance on non-exhaustive indicators and examples of market behaviour relating to market manipulation set out in Article 2(2). Based on the current experience, the Agency has developed a non-exhaustive list of types of practices that could constitute, under certain circumstances, market manipulation, or attempts thereof, and are currently considered relevant for wholesale energy markets. Again, these types of practices are not conclusive and should only be regarded as a starting point when considering whether or not a behaviour gives rise to indications of a possible REMIT breach in the form of market manipulation or attempted market manipulation. Some of the below practices relate to specific types of behaviours, while others describe more general situations. It is to be noted that these types of practices can be used individually or in combination. Furthermore, these types of practices can fall under one or more of the types of market manipulation identified in Subchapters 6.2.1 to 6.2.4. The classification below is indicative only.

(315) Types of practice of (attempted) market manipulation through (attempting to give) giving false or misleading signals and/or securing the price at an artificial level:

a) Wash trades: 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 beneficial interest or market risk is transferred between parties who are acting in concert or collusion;[133,134]

b) Pre-arranged trading: entering into arrangements for the sale or purchase of a wholesale energy product where the transfer of beneficial interest or market risk is only between parties who are acting in concert or collusion;[135]

c) Phishing: executing orders to trade, or a series of orders to trade, in order to uncover orders of other participants, and then entering an order to trade to take advantage of the obtained information;

d) Layering: issuing multiple non-genuine orders to trade at different price levels (layers) on one side of the order book, in order to enter into one or multiple transactions on the other side of the order book;[136]

e) Spoofing: issuing a single large or multiple non-genuine orders at the same price level on one side of the order book, in order to enter into one or multiple transactions on the other side of the order book;[137]

f) Creating a floor or a ceiling in the price pattern: transactions or orders to trade carried out in such a way that obstacles are created to the wholesale energy products, with prices falling below or rising above a certain level, mainly in order to avoid negative consequences deriving from changes in the price;

g) Painting the tape: other forms of entering orders to trade or engaging in a transaction or series of transactions which are shown on a public display facility to give the impression of activity or price movement in a wholesale energy product;

h) Momentum ignition: entering orders to trade or a series of orders to trade, or executing transactions or series of transactions, likely to start or exacerbate a trend and to encourage other participants to accelerate or extend the trend in order to create an opportunity to close out or open a position at a favourable price;

i) Quote stuffing: entering a large number of orders to trade and/or cancellations and/or updates to orders to trade so as to create uncertainty for other participants, slowing down their process, and/or to camouflage one's own strategy;

j) Advancing the bid: entering orders to trade which increase the bid (or decrease the offer) for wholesale energy products, in order to increase (or decrease) its price;

k) Smoking: posting orders to trade to attract other market participants employing traditional trading techniques ('slow traders') and then rapidly revising the orders onto less generous terms in the hopes of executing profitably against the incoming flow of 'slow trader' orders to trade;

l) Erroneous orders: unintentionally placing orders or entering into transactions that send false or misleading signals regarding supply, demand or price of a wholesale energy product;

[133] For more information on this behaviour, see the Agency's Guidance Note 1/2017 of 19 June 2017 on the application of Article 5 of REMIT on the prohibition of market manipulation to wash trades.

[134] The behaviour could cover sleeve transactions, which are not manipulative per se (as other wash trades) but needs to be assessed as any other transaction in the context of Article 5 of REMIT.

[135] Idem.

[136] For more information on this behaviour, see the Agency's Guidance Note 1/2019 of 22 March 2019 on the application of Article 5 of REMIT on the prohibition of market manipulation to layering and spoofing.

[137] Idem.

m) Placing orders with no intention of executing them: issuing order(s) to trade, without an interest in their individual execution (the orders may be withdrawn before the execution or even executed), which are likely to give misleading signals as to the supply of or demand or price for wholesale energy products or likely to secure the price at an artificial level;

n) Marking the reference period: entering into orders to trade or executing transactions on a wholesale energy product at a reference time of the trading session (e.g. marking the closing, the opening, the settlement) in an effort to increase, decrease or maintain the reference price (e.g. closing price, opening price, settlement price) at a specific level. This practice may take place on any individual trading day, but also on specific dates such as future/option expiry dates or quarterly/annual portfolio or index reference/valuation points;

o) Distort costs associated with a commodity contract: entering into arrangements in order to distort costs associated with a wholesale energy product, such as storage or transportation, with the effect of fixing the settlement price of a financial instrument or a related wholesale energy product at an artificial level of price;

p) Abusive squeeze (also known as 'market cornering'): this involves one or more natural/legal persons with a significant influence over the supply, demand, or delivery mechanism for a wholesale energy product and/or the underlying product of a derivative contract exploiting this influence in a way that distorts, or is likely to distort, the price at which others have to deliver, take delivery or defer delivery of the 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 this in itself is not market manipulation, nor does having a significant influence over the supply, demand, or delivery mechanisms for a wholesale energy product by itself constitute market manipulation;

q) Cross-product manipulation: undertaking trading or entering orders to trade on one wholesale energy product (including entering indications of interest) with a view to improperly influence the price of another (usually related) product. An example might be trading in the underlying wholesale energy product to distort the price of the derivative contract, or trading on the day-ahead/intraday market to influence the balancing market. Another example might be entering into arrangements in order to distort costs associated with a wholesale energy product, such as the transportation cost, with the effect of fixing the price of a wholesale energy product at an abnormal or artificial level;

r) Cross-venue manipulation: undertaking trading or entering orders to trade through one PPAT or bilaterally (including entering indications of interest) with a view to improperly influence the price of the same wholesale energy product in another PPAT or on another bilateral contract;

s) Transmission capacity hoarding: this practice involves (i) the acquisition of all or part of the available transmission capacity (ii) without using it or without using it effectively;[138] and

t) 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).

Manipulative capacity withholding occurs, for example, when a market participant with the relative ability to influence the price or the interplay of supply and demand of a wholesale energy product, decides, without justification, not to offer or to economically withhold the available production, storage or transportation capacity on the market. This includes the undue limiting of infrastructure or transmission capacities, resulting in prices that likely do not reflect the fair and competitive interplay of supply and demand.

[138] For more information on this behaviour, see the Agency's Guidance Note 1/2018 of 22 March 2018 on the application of Article 5 of REMIT on the prohibition of market manipulation to transmission capacity hoarding.

In particular, electricity generation capacity withholding refers to the practice of keeping available generation capacity from being competitively offered on the wholesale electricity market, even though offering it competitively would lead to profitable transactions at the prevailing market prices. Electricity generation capacity withholding can occur in two ways, namely via economic withholding[139] or physical withholding[140]. Electricity generation capacity withholding may be performed by one or more market participants,[141] acting independently or in collaboration.

REMIT applies to electricity generation capacity withholding irrespective of whether competition law (also) applies. Electricity generation capacity withholding does not automatically amount to a breach of Article 5 of REMIT. A case-by-case analysis that takes into account the circumstances and specificities of the market[142] is therefore needed. REMIT does not prohibit prices to be high, provided that they reflect a fair and competitive interplay between supply and demand.[143]

The following approach, based on two concurrent elements, can assess whether a behaviour involving electricity generation capacity withholding amounts to a breach of Article 5 of REMIT in view of the market manipulation criteria as defined in Article 2(2) of REMIT.[144] The first element to assess is whether the market participant concerned is able, in the case-specific circumstances, to influence the price or the interplay of supply and demand of a wholesale energy product by engaging in such behaviour.[145] The second element to assess is whether the market participant has any legitimate technical, regulatory[146] and/or economic[147] justification for not offering its available generation capacity or for offering it above the marginal cost.

In case of intent, any action involving capacity withholding, even beyond the issuing of orders to trade or the entering into transactions, can amount to an attempt to manipulate the market.

(316) Types of practice of (attempted) market manipulation through the employment of fictitious devices or any other form of deception or contrivance:

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[139] Actions undertaken to offer available generation capacity at prices which are above or at the market price and do not reflect the marginal cost (including opportunity cost) of the market participant's asset, which results in the related wholesale energy product not being traded or related asset not being dispatched.

[140] Actions undertaken in the form of not offering the available generation capacity at any price.

[141] For example, producer or storage asset owners.

[142] For example, there are different time frames and types of market places to be taken into account.

[143] Assuming a fair and competitive interplay between supply and demand, and absent of market failures, the market clearing price will depend on the adequacy/inadequacy of the available generation capacity. In case of adequacy, the market clearing price will be set by the marginal generating technology dispatched and/or by the marginal elastic load dispatched. In these hours, infra-marginal technologies will obtain legitimate rents, which can be used towards covering fixed costs. In case of inadequacy, the market clearing price will be set by the estimated value of lost load of the inelastic loads. In these hours, all generating technologies will obtain a legitimate rent, which can be used towards covering fixed costs.

[144] For example, and not limited to, setting prices at an artificial level.

[145] For example, but not limited to, being a 'pivotal supplier' i.e. a power supplier whose capacity must be used to meet peak demand and whose capacity exceeds the market's supply margin.

[146] For instance, in a situation of force majeure or localised transmission constraints. The validity of reasons for unavailability of a power plant could be assessed against the 'would be' behaviour of a competitive market participant.

[147] I.e. opportunity costs. Opportunity costs represent the expected value of the most valuable choice that was not taken. In wholesale electricity markets, this can, for example, represent offering at a different point in time for energy-limited available generation assets, e.g. reservoir hydropower units. It can also represent offering in a different sequential market (such as forward, day-ahead or intraday markets) for available generation assets, based on said expectations. Ultimately, the expectation on the value of electricity in real time, including expected outages and considering the volume to be traded, will impact the opportunity costs.

a) Trash and cash: taking a short position in a wholesale energy product and then undertaking further selling activity and/or disseminating misleading negative information, directly or indirectly affecting the wholesale energy product with a view to decrease its price by the attraction of other sellers. When the price has fallen, the position is totally or partially closed;[148]

b) Pump and dump: taking a long position in a wholesale energy product and then undertaking further buying activity and/or disseminating misleading positive information directly or indirectly affecting the wholesale energy product with a view to increase its price by the attraction of other buyers. When the price has risen, the position is totally or partially closed[149];

c) Opening a position and closing it immediately after its public disclosure: opening a position in a wholesale energy product and closing it (either partially or totally) shortly after having publicly disclosed the existence of such a position;

d) Creating a misperception through specific actions: engaging (or not engaging when there is an expectation on the market of engaging), for example, in a flow, movement, transportation, injection or storage of electricity or natural gas which might create a misleading impression as to the supply, demand, price or value of a wholesale energy product;

e) Misleading research or recommendations: entering orders to trade or transactions before or shortly after the market participant or persons linked to that market participant produce or disseminate contrary research or investment recommendations that are made publicly available; and

f) Other more general forms of dissemination of false or misleading information with an underlying trading interest: disseminating false or misleading information through the media, including the internet, or by any other means, which results or is likely to result in the moving of the price of a wholesale energy product in a direction favourable to the position held or to a transaction planned by the person or persons interested in the dissemination of the information.

[148] If the practice does not include the dissemination of misleading information directly or indirectly affecting the wholesale energy product, it could still be a type of practice of (attempted) market manipulation through (attempting to give) giving false or misleading signals and/or securing the price at an artificial level, if there is 'further selling activity' after taking a short position.

[149] If the practice does not include the dissemination of misleading information directly or indirectly affecting the wholesale energy product, it could still be a type of practice of (attempted) market manipulation through (attempting to give) giving false or misleading signals and/or securing the price at an artificial level, if there is 'further buying activity' after taking a long position.

(317) Types of practice of (attempted) market manipulation through the dissemination of information:

a) Dissemination of false or misleading information: this may include the posting of information or the issuance of a press release through the media, including the internet, or by any other means, which contains false or misleading statements about the supply, demand, or price of a wholesale energy product; and

b) Other more general forms of disseminating false or misleading information: this covers a course of conduct designed to give a false and misleading impression through any means about the supply, demand or price of a wholesale energy product.

6.4. Scope of the provision

6.4.1. Persons falling into the scope of Article 5 of REMIT

(318) Article 5 of REMIT prohibits any engagement in, or attempt to engage in, market manipulation on wholesale energy markets. Contrary to some other REMIT provisions,[150] Article 5 of REMIT is drafted in general terms and is not exclusively destined to market participants. This means that the prohibition of market manipulation applies to any legal or natural person.

(319) The last subparagraph of Article 2(2) specifies that "Market manipulation may designate the conduct of a legal person, or, in accordance with Union or national law, of a natural person who participates in the decision to carry out activities for the account of the legal person concerned."

(320) This is consistent with the definition of market manipulation examined under Subchapter 6.2, according to which market manipulation (or attempted market manipulation) can happen off-market (without any order being placed or any transaction being entered into) through the dissemination of false or misleading information. Any person can give or be likely to give false or misleading signals as to the supply, demand or price of wholesale energy products and can therefore manipulate the wholesale energy markets.

(321) NRAs should therefore carefully scrutinise the behaviour of market participants, but also that of natural and legal persons whose actions are more likely to give signals as to the supply, demand or price of wholesale energy products. Based on the experience so far, the following entities (non-exhaustive list) were identified as more likely to take actions that give signals as to the supply, demand or price of wholesale energy products:

- legal or natural persons that are market participants;
- legal or natural persons that are to become market participants;[151]
- legal or natural persons that manage physical assets or are under contractual obligations that can have a strong impact on the supply or demand of wholesale energy products; [152]
- public authorities;[153]
- persons professionally arranging transactions, publishing indexes, benchmarks or other information on prices, supply or demand;

[150] See Subchapter 2.4 of this Guidance.

[151] This may include, for example, the case of legal or natural entities that have assets under planning, construction or development that are directly or indirectly related to the supply (or demand) of wholesale energy products.

[152] This may include, for example, critical or relevant suppliers of services to markets participants.

[153] This could include, for example, public entities with decision-making powers on the amount of availability of the supply or demand of wholesale energy products.

- legal or natural persons using monitoring technologies to provide real-time (or quasi-real-time) information on the capacity or use of facilities for the supply or demand of wholesale energy products;
- legal or natural persons delivering and/or providing information about wholesale energy market developments and analysis, or forecasts on the supply, demand or prices of wholesale energy products;
- legal or natural persons providing information or input to the calculation of benchmarks;
- legal or natural persons publishing wholesale energy price benchmarks;
- news providers; or
- any other natural or legal person that is likely to give signals as to the supply, demand or price of wholesale energy products.

(322) Through their usual channels (media or internet-based platforms), these legal and natural persons could disseminate information that gives or is likely to give false or misleading signals to the market in breach of Article 5 of REMIT, provided they knew, or ought to have known that the information was false or misleading.

(323) Taking into consideration the fast proliferation of algorithmic trading in the wholesale energy markets, another aspect the NRAs should take into consideration is that natural or legal persons involved in algorithmic trading fall equally into the scope of Article 5 of REMIT. Persons using algorithms to trade are thus responsible for the behaviour of their algorithm on the market and can be held liable for market manipulation in case the algorithm is likely to give/gives false or misleading signals or secures the market price at an artificial level, even in situations where this results from a poor design of the algorithm. In a similar way, the legal or natural person(s) that participate(s) in the conception or design of the algorithm can also be held liable for attempted market manipulation if the mere conception and design of the algorithm reveals a manipulative intent. Article 5a of REMIT provides further details regarding the obligations of market participants engaging in algorithmic trading.

6.4.2. The scope of the market manipulation provision under REMIT vs. the scope of competition law

(324) As recalled in Chapter 2 of this Guidance, Article 1(2) of REMIT provides that the Regulation is without prejudice to the application of European competition law[154] to the practices covered by REMIT. In other words, the fact that REMIT is applicable to a certain situation or behaviour does not prevent the application of European competition law to the same situation or behaviour.[155]

(325) This derives from the fact that the two legislations – REMIT and EU competition law – cover different types of breaches. While REMIT prohibits market manipulation under Article 5, competition law prohibits agreements between companies which prevent, restrict or distort competition in the EU and which may affect trade between Member States (Article 101 of the Treaty on the Functioning of the European Union (TFEU)) and abuses of a dominant position (Article 102 of the TFEU).

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[154] The two central rules of competition law are set out in Articles 101 and 102 of the Treaty on the functioning of the European Union – TFEU.

[155] There are several examples of the cooperation between NRAs and national competition authorities in order to ensure a coordinated implementation of REMIT and competition law. For example, case IO 09-0015 from the Belgian Competition Authority where CREG (the Belgian NRA) had a major role in the analysis:
https://www.belgiancompetition.be/sites/default/files/content/download/files/2014IO15-ABC_Electrabel%20PUB.pdf
Another example is case PRC/2016/5 from the Portuguese competition authority that started from a notification from ERSE (the Portuguese NRA) including a detailed report on the behaviour:
https://extranet.concorrencia.pt/PesquisAdC/Page.aspx?IsEnglish=True&Ref=PRC_2016_5

(326) A company does not need to engage in agreements on the sale or purchase of wholesale energy prohibited by competition law to be in breach of Article 5 of REMIT. In a similar way, a company also does not need to have or abuse a dominant position to indulge in market manipulation prohibited under REMIT, whereas being in a dominant position and abusing it are necessary conditions for the qualification of a breach of the European competition law. Consequently, a breach of REMIT does not necessarily amount to a breach of competition law.

(327) Yet, in certain situations, the same behaviour might qualify as both market manipulation under REMIT and as a breach of European competition law. Such situations could, for instance, be seen in pre-arranged manipulative trading, A-B-A manipulative wash trades, and manipulative electricity generation capacity withholding (these types of practices are described in Subchapter 6.3.2.), among others, which are types of behaviour that either give false or misleading signals and/or secure the market price at an artificial level in the meaning of REMIT and may also constitute a prohibited agreement or an abuse of dominant position according to competition law. The cooperation of the Agency and NRAs with the competition authorities, as foreseen by REMIT, should be also understood in this respect.

6.4.3. The scope of the market manipulation provision under REMIT vs. the scope of other laws/regulations

(328) According to its Article 1(2), REMIT is without prejudice to the application of European competition law to the practices covered by REMIT. In the same way, REMIT does not preclude the application of other laws and regulations that are specifically tailored to sanction, for example, money laundering, corporate fraud and tax fraud.

(329) Some orders or transactions on the wholesale energy markets may not be motivated by a real need to procure/sell energy,[156] but rather to achieve other goals, such as money laundering, corporate or tax fraud, and therefore represent a breach of the legislations that forbid that type of behaviour. Whatever is the motive behind these trading activities, if they end up being manipulative according to REMIT, they can qualify as a breach of Article 5 of REMIT as well.

(330) In reality, even though these trading activities are fraudulent in nature, they do not necessarily intend to manipulate the wholesale energy markets. Nevertheless, depending on their recurrence, scale and the prices at which the transactions were concluded, they could harm the integrity of the wholesale energy markets. As a consequence, NRAs should examine, on a case-by-case basis, whether they (were likely to) sent false or misleading signals as to the supply, demand or price of wholesale energy products and/or secured market prices at artificial levels. If so, they will also qualify as a breach of Article 5 of REMIT.

6.5. Exemptions

(331) The REMIT Regulation does not provide for general exemptions to the prohibition of (attempted) market manipulation.

(332) Only Article 2(2)(a)(ii) defining the type of market manipulation as any behaviour relating WEP which secures or is likely to secure the price at an artificial level, and Article 2(3)(a)(ii) defining attempted market manipulation through price securing, provide exemptions to the qualification of market manipulation.

(333) According to these provisions, securing, or likely to secure, (or having the intention to secure) the price of one or more wholesale energy products at an artificial level is (attempted) market manipulation, *"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 such transaction or order to trade conforms to accepted market practices on the wholesale energy market concerned*".

[156] Wash trades, a type of practice described in Subchapter 6.3.2., is often used for this type of schemes.

(334) Recital 14 of REMIT further provides that accepted market practices ('AMPs'), such as those applying in the financial services sector, which are currently defined by Articles 3(1)(9) and 13 of MAR,[157] could be a legitimate way for market participants to secure a favourable price for a wholesale energy product.

(335) It is noted that according to the wording of REMIT, the 'accepted market practice' argument can only be used in respect of this specific category of (attempted) market manipulation linked to price securing (detailed in Subchapter 6.2.2), and not in respect of the other categories of market manipulation[158] (described in Subchapters 6.2.1, 6.2.3 and 6.2.4) that do not provide this exemption possibility.

(336) It is furthermore underlined that in order for a price securing behaviour not to be considered manipulative, a person has to establish cumulatively that his/her reasons were legitimate and that the order or transaction conformed to accepted market practices on the relevant market. Therefore, the burden of proof lies on the suspected market participant.

(337) The reasons invoked by a person to justify any order or transaction and demonstrate that the behaviour conformed to accepted market practices should be examined by NRAs on a case-by-case basis.

(338) In compliance with Recital 27 of REMIT, the Agency's Guidance is addressing the issue of AMPs to support NRAs performing this assessment.

(339) The Agency notes the following as regards AMPs under REMIT:

(340) Firstly, the AMPs accepted by financial market authorities according to MAR may also apply under REMIT, but AMPs under REMIT are not limited to these AMPs. Accordingly, new AMPs relating to wholesale energy markets may be established under REMIT.

(341) Secondly, in the same way as financial market authorities have consistently made a distinction between practices and activities, the Agency will also distinguish between practices and activities carried out on 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 on the market.

(342) 'Activities' are considered too broad to qualify for the status of AMPs. Only the concrete market practices implementing these 'activities' may qualify as AMPs. For instance, an 'activity' such as hedging could be undertaken in different ways. If the hedging 'activity' in itself cannot be considered an AMP, specific practices of market participants aimed at hedging could be accepted as AMPs.

(343) Lastly, the decision on whether a process constitutes an AMP is a matter of national or regional specificities. AMPs are therefore primarily the responsibility of individual NRAs, which means that a practice that a particular NRA considers an AMP may not be viewed as such by another. However, each NRA has a duty to consult 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 will be provided to the national legal text once they have been recognised and have undergone the requisite national (if required) and European consultation process.

(344) The following non-exhaustive list of factors shall be taken into account by NRAs when assessing particular practices on the wholesale energy markets:

- the level of transparency of the relevant market practice to the whole market: transparency of market practices is crucial for considering whether a particular market practice can be accepted by NRAs. The less transparent a practice is, the more likely it is not to be accepted;

[157] See also the Delegated Regulation (EU) 2016/908 of 26 February 2016 supplementing MAR and laying down regulatory technical standards on the criteria, the procedure and the requirements for establishing an accepted market practice and the requirements for maintaining it, terminating it or modifying the conditions for its acceptance

[158] Under MAR, the concept of AMP may apply in relation to market manipulation according to Article 12(1)(a) of that Regulation, covering manipulations through both giving false/misleading signals and price securing.

- 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 NRAs;

- 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 direct or indirect risk inherent in the relevant practice for the integrity of related markets in the relevant wholesale energy product within the whole Union;

- the outcome of any investigation of the relevant market practice by any NRA, 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 its time frame), the types of traded wholesale energy products, and the type of market participants.

(345) Overriding principles to be observed by NRAs to ensure that AMPs do not undermine market integrity, while fostering innovation and the continued dynamic development of wholesale energy markets, include:

- new or emerging AMPs should not be assumed to be unacceptable by an NRA 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;

- a market practice that has been established as an AMP by a particular NRA shall not be considered to be applicable to other markets unless the NRAs of those other markets have accepted that practice too;

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

7. Application of the obligation on the notification of algorithmic trading and direct electronic access

7.1. Introduction

(346) This chapter provides guidance to NRAs concerning the application of the obligations on notifying algorithmic trading and direct electronic access under the REMIT revision. The Subchapters 7.2 and 7.3 illustrate the Agency's current understanding of what falls in and what falls out of-scope of notification for both algorithmic trading and direct electronic access. Further, relevant parties' notification responsibilities are clarified, enhancing compliance and transparency.

(347) Market participants can fulfil their notification obligations via ACER's CEREMP tool. Market participants registered in Italy, Romania and Slovenia need to notify the NRA directly, and by doing so they will be considered to have also notified ACER.

7.2. Algorithmic Trading

(348) According to REMIT, algorithmic trading means trading, including high frequency trading, in wholesale energy products where a computer algorithm automatically determines individual parameters of orders to trade, such as whether to initiate the order, the timing, price or quantity of the order or how to manage the order after its submission, with limited human intervention or no such intervention at all, not including any system that is only used for the purpose of routing orders to one or more organized market places or for the processing of orders involving no determination of any trading parameters or for the confirmation of orders or the post-trade processing of executed transactions.

(349) A legal obligation was introduced in Article 5a (2) by the REMIT revision:

"A market participant that engages in algorithmic trading in a Member State shall notify that engagement to the national regulatory authority of the Member State where it is registered pursuant to Article 9(1) and to the Agency."

(350) The obligation for notification of algorithmic trading activity entered into force on 7 May 2024.

(351) Below is a non-exhaustive list of situations that fall within the scope of the new notification obligation as regards algorithmic trading. In making the categorisation as to what is in scope and what is not in scope, in line with the definition in the REMIT revision, the focus should be on the fact that an algorithm is not dependent (or if so only to the limited extent) on any human intervention and as such can automatically set the parameters of orders on historical and/or real-time data, initiate orders and execute transactions.

(352) In-scope of notification:

- Internal (market participant's) algorithms: in-house built, tested on an OMP and deployed tool where a computer algorithm automatically determines individual parameters of orders such as whether to initiate the order, the timing, price or quantity of the order or how to manage the order after its submission, with limited or no human intervention;

- External (OMPs') "execution algorithms" without human intervention (Trading functionalities with automated management of orders): orders that are executed through functionalities which additionally to routing orders to OMPs offer automated managing of the order (e.g. automatically redirecting unexecuted portions of such orders to other venues or slicing orders prior to execution). Such functionalities differ from automated order routing systems, as the latter merely determine the OMP (or OMPs) to which the order has to be sent without changing any parameter of the order (i.e. the order is unmodified in its components, including its size). On the contrary, algorithmic trading encompasses both the automatic generation of orders and the optimisation of order-execution processes (e.g. slicing of orders) by automated means; and

- Stand-alone vendor algorithms by third parties: all types of algorithms independent of their complexity (e.g. PowerBot).

(353) Out of-scope of notification:

- External order types offered as standard functionalities by OMPs: they are a standard way to interact with the market and are made available on a wide range of exchanges and execution platforms as natively offered strategies/functionalities where trading takes place that do not contain further own dynamics apart from predefined parameters (e.g. Iceberg orders like those where the portion of orders is pre-defined and the slice does not react or change when market conditions change, stop-limit orders, delayed orders). This differs from the OMPs' execution algorithms, offered for example by some exchanges as additional chargeable service to the market participants;

- Systems used for the confirmation of orders or post-trade processing executed transactions: they are not directly related to placing orders/executing transactions;

- Signal generators: Signal generators do not act in the market. It will still be a human trader who will have to check the information provided by the signal generator and, if the suggestion provided is agreeable, either place a manual trade or set up an algo to trade (except if it is combined with execution algorithm without human interference, which is then by default considered as in-scope of notification); and

- Systems for pure order routing, i.e. [or "which includes"] systems which do not process any external parameters or market variables when forwarding orders in an automated way.

7.3. Direct Electronic Access

(354) For the purpose of the REMIT revision, direct electronic access (DEA) means an arrangement whereby a member, participant or client of an organised marketplace allows another person to use its trading code so the person can electronically transmit orders to trade relating to a wholesale energy product directly to the organised marketplace, including arrangements which involve the use by a person of the information technology infrastructure of the member, participant or client, or any connecting system provided by the member, participant, or client, to transmit the orders to trade (direct market access) and arrangements whereby such an infrastructure is not used by a person (sponsored access).

(355) A legal obligation has been introduced in Article 5a(3) of the REMIT revision:

"A market participant that provides direct electronic access to an OMP shall notify the national regulatory authority of the Member State where the market participant is registered pursuant to Article 9(1) and the Agency accordingly."

(356) The notification obligation on market participants that provide direct electronic access to an OMP entered into force on 7 May 2024.

(357) In ACER's view, the notification shall be provided by the DEA provider (namely the "market participant that provides DEA" as the legal text sets out) and not by the DEA client. Since the client of a DEA provider does not provide DEA to an OMP, no notification is expected from the client. The definitions of 'provider' and 'client' are detailed in the Transaction Reporting User Manual (TRUM) and the FAQs on transaction reporting document (question 2.3.9).[159]

(358) ACER considers Article 20(1) and (2) of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 applicable in respect of notifications according to Article 5a(3) of the REMIT revision.

[159] https://www.acer.europa.eu/sites/default/files/REMIT/REMIT%20Reporting%20Guidance/FAQs%20on%20Transaction%20Reporting/FAQ-on-transaction-reporting.pdf

(359) Lastly, ACER considers that market participants automatically submitting orders to an OMP via a Software as a Service (SaaS) should not be considered as providing DEA to that OMP, given that in such scenario, there is no other person involved apart from the market participant that submits its orders via SaaS. As per the definition in the REMIT revision, DEA access to an OMP requires that *"[…] a member, participant or client of an organised marketplace allows* ***another*** *person to use its trading code so the person can electronically transmit orders to trade relating to a wholesale energy product directly to the organised marketplace, […]"*.

8. Registration of market participants

8.1. Introduction

(360) 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.

8.2. Which market participants are obliged to register?

(361) According to Article 9(1) of REMIT, *"Market participants entering into transactions which are required to be reported to the Agency pursuant to Article 8(1) shall register with the national regulatory authority […]."*

(362) According to Article 2(7) of REMIT, *"'Market participant' means any person, including transmission system operators, distribution system operators, storage system operators and LNG system operators who enters into transactions, including the placing of orders to trade, in one or more wholesale energy markets*."

(363) In Subchapter 2.4 of this Guidance, the Agency provides its understanding of the notion of market participant as defined in Article 2(7) of REMIT.

(364) 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).

(365) The requirement to register under REMIT applies to *any* person, legal or natural, that enters into transactions, including orders to trade, 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 in the process of registering as a market participant. Provided that they are not separate legal persons, branches of a market participant do not need to register as separate market participants.

(366) The registration requirement is also applicable to those market participants who are direct electronic access clients, if the transactions they enter into via the direct electronic access are reportable under Article 8(a) of REMIT.

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

8.3. What information are market participants required to provide?

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

(369) 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[160]. This Decision and format are still valid. The registration format consists of 5 sections:

- Section 1: Data related to the market participant

[160] Agency Decision no 01/2012 relating to the registration format pursuant to Article 9(3) of Regulation (EU) No 1227/2011.

- 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

(370) 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.

(371) In addition, if not already provided under any of the above-mentioned sections, market participants established or resident in a third country that enter into transactions that are required to be reported pursuant to Article 8(1) REMIT, also have to provide information on the name, email address, postal address and telephone number of their designated representative, as stipulated in Article 9(1)(d) of REMIT:

"By 8 November 2024, market participants established or resident in a third country that enter into transactions that are required to be reported to the Agency pursuant to Article 8(1): […]

(d) shall notify the name, email address, postal address and telephone number of their designated representative to the national regulatory authority of the Member State where that designated representative resides or is established and to the Agency."

8.4. Establishment of national registers

(372) 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 […]."

(373) 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.

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

(375) 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 has made available a Registration User Manual (RUM) to NRAs. The RUM provides 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 is updated periodically, on the basis of the feedback from NRAs.

8.5. Which NRA should market participants register with?

(376) According to Article 9(1):

"Market participants entering into transactions which are required to be reported to the Agency pursuant to Article 8(1) shall register with the national regulatory authority in the Member State in which they are established or resident.

By 8 November 2024, market participants established or resident in a third country that enter into transactions that are required to be reported to the Agency pursuant to Article 8(1):

(a) shall designate a representative in a Member State in which the market participants are active on the wholesale energy markets, and shall register with the national regulatory authority of that Member State. The representative shall be designated by a written mandate and shall be authorised to act on the market participants' behalf; […]."

(377) 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[161]. 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.

(378) 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 designate their representative, as long as the market participant is active in that Member State, and subsequently register themselves in the same Member State. This means the registration and designation must be in the same Member State, however, ACER considers it sufficient to be registered and have a designated representative in one Member State only for the whole of the European Union.

8.6. Market participants established or resident in a third country

(379) A new legal obligation has been introduced in Article 9(1) of the REMIT revision:

"By 8 November 2024, market participants established or resident in a third country that enter into transactions that are required to be reported to the Agency pursuant to Article 8(1):

(a) shall designate a representative in a Member State in which the market participants are active on the wholesale energy markets and shall register with the national regulatory authority of that Member State. The representative shall be designated by a written mandate and shall be authorised to act on the market participants' behalf;

(b) shall mandate their designated representative for the purpose of being addressed in addition to or on their behalf, by the national regulatory authorities or the Agency, on all issues necessary for the receipt of, compliance with and enforcement of decisions or requests for information issued in relation to this Regulation;

(c) shall provide their designated representative with the necessary powers and means to guarantee their efficient and timely cooperation with the national regulatory authorities or the Agency and to comply with the decisions and requests for information of the national regulatory authorities or the Agency issued in relation to this Regulation, including providing access to the requested information; and

(d) shall notify the name, email address, postal address and telephone number of their designated representative to the national regulatory authority of the Member State where that designated representative resides or is established and to the Agency".

(380) Market participants should register and designate their representative in the same Member State. Providing correct and up-to-date contact information for the designated representative is of outmost importance as NRAs and ACER should be able to contact the representative directly in matters relating to the market participant.

(381) Market participants have the obligation to assure that the designated representative has the correct mandates and is authorised to act on behalf of the market participant in accordance with any national rules or specifications applicable in the Member State where the market participant wants to delegate to a representative.

[161] See judgment in Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, C-55/94, EU:C:1995:411, paragraph 24 and 25.

Non-EU market participants will be able to fulfil the obligation in Article 9(1)(d) by updating their market participant registration details in the Centralised European Register of Energy Market Participants (CEREMP). The following scenarios may apply:

(382) The non-EU market participant does not have any presence in the EU

- The non-EU market participant is active in one Member State only

The market participant is already registered with the NRA in the MS where it is active. Since the market participant needs to be registered in the same MS as the one where it designates its representative, it should designate its representative in the MS where it is already registered and active. In case the market participant is not already registered with an NRA in a MS, that market participant needs to designate a representative in the MS where it is active and register with the NRA of that MS.

- The non-EU market participant is active in two or more Member States

The market participant is already registered with an NRA in one MS where it is active. In order to comply with the obligation in the REMIT revision to designate a representative in a MS where it is active, it can either do so in the same MS where it is already registered or designate a representative in another MS where the market participant is active. In case of the latter, the market participant will need to move its registration to the NRA of the MS where it intends to designate the representative. In case the market participant is not already registered with an NRA in a MS where it is active, that market participant needs to designate a representative in any of the MS where it is active and register with the NRA of that same MS.

If the market participant needs to change registration to another MS where it is active it can use the CEREMP functionality "Change Member State"[162].

Once the market participant changes registration to another MS, the market participant will get a new ACER code and will need to report lifecycle events (novation) to already reported and outstanding trades and contracts.[163] Novation will also have to be reported by the counterparty.

(383) The market participant has a headquarter in a non-EU country, and a branch (not a subsidiary) in an EU MS

Whether or not such non-EU market participant will have to designate a representative will depend on whether its presence in the EU can be considered an "establishment" [164] under EU law. For example, if a non-EU market participant has a branch in the EU from which it also carries out its REMIT-related activities (for example: trading in wholesale energy products) on a stable basis, it does not need to designate a representative. However, if it only has an office in the EU from where no substantial economic activity is carried out, that will not suffice to conclude that it is an establishment. Eventually the assessment will need to be carried out on a case-by-case basis.

(384) ACER encourages NRAs to collect and EU established MPs to provide the location details on where they are established via CEREMP.

(385) Further detailed information on the obligations in Article 9(1) for third country market participants can be found in ACER's 3rd Open Letter on the designation of representatives by non-EU market participants[165].

[162] The functionality is not available for Italy, Slovenia and Romania MSs because the registration is done via other tools than CEREMP.

[163] Please consult TRUM Annex VII on how to report novation. It is available from https://www.acer.europa.eu/remit-documents/remit-reporting-guidance.

[164] Chapter 8.5. of ACER Guidance

[165] Open letter on the designation of representatives by non-EU market participants and on the new obligations of persons professionally arranging or executing transactions (PPAETs), according to the revised REMIT, 25 September 2024.

8.7. What is the deadline for registration submissions?

(386) According to Article 9(4) of REMIT, *"market participants (...) shall submit 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)*."

(387) Thus, market participants must submit all the Sections of the registration form (Sections 1 to 5) before entering into any transaction which is required to be reported to the Agency. In line with Article 12(2) of Commission Implementing Regulation (EU) No 1348/2014, the reporting obligation will apply to market participants from 7 October 2015 and from 7 April 2016, according to the type of data to be reported to the Agency.

(388) Consequently, the Agency considers that any person who enters into a transaction, which is required to be reported to the Agency from 7 October 2015 or 7 April 2016, without having submitted the registration form to the relevant NRA, is in breach of Article 9 of REMIT. Furthermore, the Agency points out that in line with Article 9(5) of REMIT, market participants are obliged to communicate promptly to the relevant NRA any change as regards the information provided in their registration form.

(389) NRAs should encourage market participants to register well in advance of entering into a reportable transaction in order to facilitate the registration and reporting processes.

(390) Market participants established or resident in a third country, must designate a representative and subsequently register with the national regulatory authority of that Member State by 8 November 2024, in accordance with Article 9(1) of REMIT. Third country market participants already registered in a Member State before the entry into force of the revision of REMIT (Regulation 2024/1106) do not have to register again if they intend to designate their representative in the same Member State as they are already registered in. If they intend to designate their representative in another Member State they subsequently have to register themselves with the national regulatory authority in that Member State.

8.8. Issuance of the ACER code

(391) 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 enables market participants to report data under Article 8 of REMIT. Market participants also need the list of ACER codes in order to provide information relating to Section 4 of the registration form (data related to the corporate structure of the market participants).

(392) According to Article 9(4) of REMIT, market participants shall submit the registration form prior to entering into transactions, including orders to trade, 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 of the information in the national registers to the Agency for the first time, in accordance with the Agency Decision No 01/12. According to Article 2 of this Agency Decision, NRAs should promptly[166] 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 fulfil their reporting obligations under Article 8(1) of REMIT and an efficient and effective data collection by the Agency. The registration system provides for automatic checks that prevent incomplete registration forms from being submitted.

(393) For market participants that registered *before* the Agency published the European register for the first time, the ACER code was 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.

[166] According to Article 2 of the Agency 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.

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

8.9. Requirement to keep registration information up to date

(395) 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."

(396) 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.

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

8.10. The role of NRAs in the registration process

(398) Having in mind that the market participants are obliged to register at the *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.

(399) 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 the Agency's registration system, it is the NRAs that should provide users with support during the registration process. As referred to in Subchapter 8.4 of this Guidance, the Agency will make available a Registration User Manual (RUM) to NRAs, which may use it when supporting market participants. However, the Agency recognises that ultimate responsibility to register successfully lies with market participants.

(400) In accordance with Article 9(3) of REMIT, the second role of NRAs is to transmit the information in their national registers to the Agency, in the format determined by the Agency. In accordance with Article 2 of the Agency 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.

(401) 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 in order 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 in cooperation with the NRAs will provide for automatic checks that will prevent incomplete registration forms from being submitted by market participants.

(402) 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.

(403) It is important to note that through the registration process, NRAs do not issue an authorisation or license to trade to the market participants and the registration is without prejudice to obligations to comply with the applicable trading and balancing rules. The completion of the registration process does not constitute a ‘know-your-customer’ check or ‘fit-and-proper’ assessment of the market participant.

9. Application of the obligations of persons professionally arranging or executing transactions (PPAETs)

9.1. Introduction

(404) This chapter provides guidance to NRAs concerning the application of the obligations imposed on persons professionally arranging or executing transactions (PPAETs) by Article 15 of REMIT.

(405) The following subchapters illustrate the Agency's understanding of who is considered to be a PPAET (Subchapter 9.2); what is comprised in the duty to notify potential breaches of Article 3, 4 or 5 of REMIT (Subchapter 9.3); and what is expected from PPAETs regarding effective arrangements and procedures to identify such potential breaches (Subchapter 9.4). Finally, subchapter 9.5 covers the compliance advocacy, i.e. the actions the Agency recommends NRAs to take to promote the advocacy of Article 15 of REMIT.

9.2. Delimitation of the concept of PPAET

(406) REMIT defines the concept of PPAETs under Article 2(8a) as follows:

"(…) a person professionally engaged in the reception and transmission of orders for, or in the execution of transactions in, wholesale energy products."

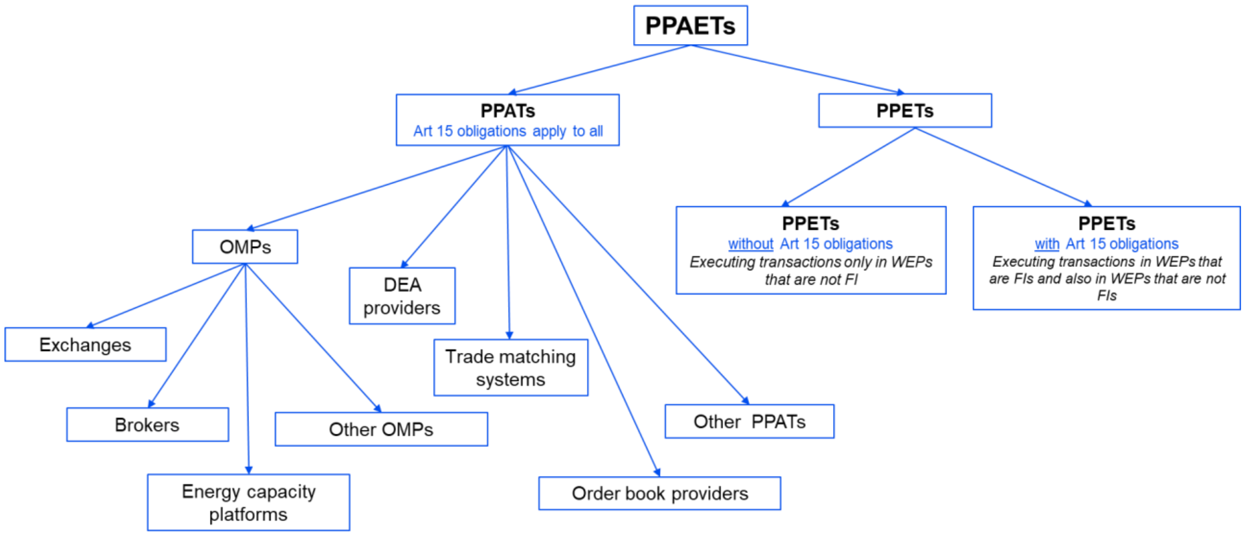
(407) Articles 15(1) and 15(2) of REMIT distinguish between persons professionally arranging transactions (PPATs) and persons professionally executing transactions (PPETs) under Article 16 of MAR who also execute transactions in WEPs that are not financial instruments. Thus, the concepts of PPATs and PPETs under Article 15(2), i.e. PPETs with obligations under Article 15, are addressed separately in subchapters 9.2.1 and 9.2.2 of this chapter.

(408) In addition to the definition of PPAET under Article 2(8a) of REMIT, Recitals (12)[167] and (18)[168] of Regulation 2024/1106; Article 8(4) of REMIT; and Article 2(4) of Commission Implementing Regulation (EU) No 1348/2014 include references related to the concept of PPAET. Figure 1 presents an overview of PPAETs.

[167] Recital 12: *"(…) order book providers should also be designated as persons professionally arranging transactions subject to the obligation to monitor and report suspected breaches of this Regulation".*

[168] Recital 18: *"Persons professionally arranging or executing transactions should have the obligation to report suspicious transactions in breach of Regulation (EU) No 1227/2011 with regard to insider trading and market manipulation and, in order to enhance the possibility of enforcement of such breaches, should also have the obligation to report suspicious orders and potential breaches of the obligation to publish inside information. Direct electronic access providers and order book providers are considered to be persons professionally arranging transactions.*

Figure 1: An illustrated overview of entities referenced as PPAETs under REMIT[169]



9.2.1. The concept of 'PPAT'

(409) Article 2(8a) of REMIT defines the concept of 'person professionally arranging transactions' (PPAT), which is embedded in the concept of 'PPAET', as "(…) a person professionally engaged in the reception and transmission of orders (…) in wholesale energy products".

(410) In addition to the definition in Article 2(8a), the concept of PPAT appears several times across different provisions in REMIT.

(411) According to Article 8(4)(d) of REMIT, PPATs are responsible for the reporting of information for the purposes of Article 8(1), (1a) and(1)(b) of REMIT:

"For the purposes of paragraph 1, 1a and 1b information shall be provided by: (…) (d) an OMP, a trade-matching system or other persons professionally arranging or executing transactions'.

(412) The concept of OMP is defined in Article 2(20) of REMIT as follows:

"(…) OMP means an energy exchange, an energy broker, an energy capacity platform or any other system or facility in which multiple third-party buying or selling interests in wholesale energy products interact in a manner that may result in a transaction."

(413) As per the definition above, REMIT classifies energy exchanges, energy brokers and energy capacity platforms as OMPs. Given that OMPs and trade-matching systems are engaged in the reception and transmission of orders, it can be concluded that all these entities fall under the definition of PPATs.

(414) Further, regulated markets (RMs), multilateral trading facilities (MTFs) and organised trading facilities (OTFs) under Directive 2014/65/EU, are to be considered as OMPs under REMIT when they provide a *'system or facility in which multiple third-party buying or selling interests in wholesale energy products interact in a way that may result in a transaction'*.

[169] According to Articles 15; 2(20); 2(8a); 8(3); and 8(4)(d) of REMIT, and Recitals (12) and (18) of Regulation (EU) 2024/1106.

(415) Also, the definition of an OMP could include systems or facilities where one seller interacts with many buyers or one buyer interacts with many sellers, if the buying/selling interests interact in a manner that may result in a transaction on WEPs..

(416) In addition, Recital (12) of Regulation 2024/1106 states that "*(…) order book providers should also be designated as persons professionally arranging transactions subject to the obligation to monitor and report suspected breaches*", and recital (18) further specifies that "*(…) direct electronic access providers and order book providers are considered to be persons professionally arranging transactions*".

(417) Finally, "*any other system or facility in which multiple third-party buying or selling interests in wholesale energy products interact in a manner that may result in a transaction*"[170], equally classify as OMPs and are hereby referred as "Other OMPs".

(418) In sum, PPATs that are expressly referred to in REMIT can be aggregated in the following categories:

- OMPs[171] (composed by: Exchanges, Brokers, Energy Capacity Platforms and 'Other OMPs',)[172];
- Trade Matching Systems[173];
- Order Book Providers[174];
- DEA Providers[175]; and
- Other PPATs[176].

(419) In order to clarify which additional entities may fall under the concept of PPATs (aside from those entities already explicitly cited in REMIT), and are thus subject to Articles 15(1) and 15(3) obligations, the existence of different elements should be assessed on a case-by-case basis. For an entity to be considered a PPAT, ACER considers that it must fulfil the following three cumulative criteria:

- **Be a '<u>person</u>'**: defined as either a natural or legal person[177] according to Article 2(8a) of REMIT.
- **Acting '<u>professionally</u>'**: the literal analysis of the wording and the case law leads to the following interpretation: "*engaged in a specified activity as part of one's normal and regular paid occupation*;" and
- **'<u>Arranging transactions</u>'**: are activities, including the reception and transmission of orders, that aim to enable or assist third parties (third-party buying or selling) in a way that directly or indirectly brings about a particular wholesale energy transaction (i.e. has the effect that the transaction is concluded). This may entail among others, providing a facility in which third-party buying or selling interests in wholesale energy products are able to interact in a way that results in a transaction. Simply providing the means by which parties to a transaction (or a possible transaction) are able to communicate with each other is excluded from the concept of PPAT[178]. If a person makes arrangements that go beyond providing the means of communication, and adds value to what is provided, it will no longer be excluded and shall be recognised as a PPAT.

[170] See the definition of "organised marketplace" or "OMP" under Article 2(20) of REMIT.

[171] See Article 8(4)(d) of REMIT.

[172] See Article 2(20) of REMIT.

[173] See Article 8(4)(d) of REMIT.

[174] See Recital 12 of Regulation 2024/1106.

[175] See Recital 18 of the Regulation 2024/1106.

[176] PPAT fulfilling criteria but that cannot be included in other categories.

[177] This includes also a natural or legal persons that are responsible for an entity or a system that arranges transactions.

[178] For instance, persons such as Internet service providers, e-mail service providers, messaging providers or telecommunication providers are excluded from the concept of PPAT.

(420) The main characteristic of a PPAT is its professional **intermediary role**, e.g. the reception and transmission of orders in wholesale energy products.

(421) The following aspects should also be taken into consideration when evaluating whether a person is professionally arranging transactions:

- The arranging activity can comprise the whole trade lifecycle or be restricted to one or more parts of it.
- The number of PPATs involved in a transaction is irrelevant to determine whether an entity is a PPAT. There can be one or several PPATs involved for a transaction to be concluded.
- The PPAT's legal form, ownership, the type of market it operates, the type of the wholesale energy product, the number of parties it represents and whether it directly enters or not into transactions are not relevant elements to determine whether an entity is a PPAT.

(422) In view of the above, the table below provides a framework to assess the application of the PPAT concept. It does not include a comprehensive assessment of all entities that may or may not be PPATs. The assessment of the existence of the cumulative criteria, as described above, has to be done on a case-by-case basis.

Analysis of selected entities vis-à-vis the PPATs' characteristics				
Type	**Characteristics**			
	Person	**Professionally**	**Arranging transactions**	**Brief description of transactions' arrangement**
Energy Exchanges (including RMs, MTFs and OTFs)	✓	✓	✓	• Bringing about transactions with the introduction of the buyer/seller by reception and transmission of their orders into a trading system; • Providing a facility that facilitates the entering into transactions, including the matching algorithm and post-trade processes.
Broker platforms/ Brokers (including RMs, MTFs and OTFs)	✓	✓	✓	• Bringing about transactions by introducing buyer/seller by reception and transmission of their orders (voice, screen or other means); or • Providing a facility that facilitates the entering into transactions.
Cross border capacity exchanges/ platforms	✓	✓	✓	• Bringing about transactions by introducing buyer/seller by reception and transmission of their orders into a trading system; or • Providing a facility that facilitates the entering into transactions (e.g. Market Participants and TSOs, acting as market participants).
TSOs (or persons acting on their behalf) organising gas trades, energy balancing, capacity trading	✓	✓	✓	• Bringing about transactions by introducing buyer/seller by reception and transmission of their orders; or • Providing a facility that facilitates the entering into transactions.
Trade Matching System	✓	✓	✓	• Providing a facility that facilitates the entering into transactions that allows matching of orders.
Order book provider or Order book aggregator	✓	✓	✓	• Bringing about transactions by introducing buyer/seller or by aggregating several order books,

				• Providing a facility that facilitates the entering into transactions and also allows placement or pre-defined modifications of orders or/and matches orders.
Direct electronic access provider	✓	✓	✓	• A market participant under REMIT, offering a service to act as an intermediary by providing access to the market to other market participants.
Communication facilities	✓	✓	×	• They only provide a generic facility not designed for the entering into transactions by third parties, a mere communication channel, albeit more tailored to the activity and sophisticated than by e-mail or phone.

9.2.2. The concept of 'PPET'

(423) Article 2(8a) of REMIT defines the concept of 'person professionally executing transactions (PPET)', which is embedded in the concept of PPAET, as "*(…) a person professionally engaged in (…) the execution of transactions in wholesale energy products*".

(424) ACER understands that 'execution' should include trading on own account as well as execution of orders on behalf of a third party, either directly or in accordance with a discretionary mandate given by the third party.

(425) It should be noted that not all PPETs have obligations under Article 15 of REMIT. Article 15(2) of REMIT only includes obligations on PPETs under Article 16 of MAR who also execute transactions in wholesale energy products that are not financial instruments. .

(426) To be subject to the obligations under Article 15(2) of REMIT, the PPET in question shall meet two cumulative criteria:

(i) It needs to be considered a PPAET under MAR (Regulation (EU) No 596/2014), and

(ii) It needs to execute transactions in WEPs that **are not** financial instruments.

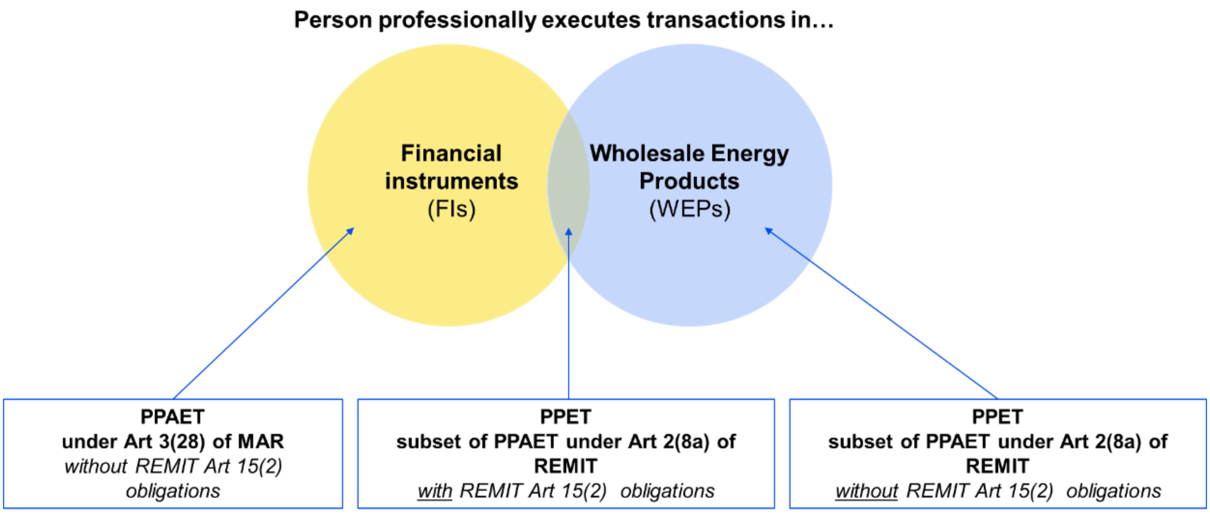
PPAET under MAR

(427) The first necessary condition to fall under the scope of Article 15(2) of REMIT is that the person is professionally executing transactions under Article 16 of Regulation (EU) No 596/2014, i.e. obligations already exist according to MAR. The extent of such obligations is to be interpreted according to MAR and associated legislation.

PPET executing transactions in WEPs that are not financial instruments

(428) If a PPET executes transactions only in WEP that are not financial instruments (and is therefore not executing any transactions under MAR), it will not be subject to the obligations stemming from Article 15(2) of REMIT. The below figure illustrates the relation between financial instruments and wholesale energy products, and the different PPAET provisions under MAR and REMIT.

Figure 2: PPETs with obligations under Article 15(2) of REMIT



9.3. The duty to notify potential breaches of Article 3, 4 or 5 of REMIT

(429) An important number of orders and transactions on the wholesale energy markets are intermediated by PPAETs. Through their role as persons professionally engaged in the reception and transmission of orders, or in the execution of transactions, PPAETs have knowledge of the market in which they operate and of their clients. Hence, they are in an important position to monitor trading activities and identify potential breaches of REMIT.

(430) In this context, REMIT imposes an explicit responsibility on PPAETs to monitor and contribute to the integrity, transparency and proper functioning of the European wholesale energy markets:

(431) According to Article 15(1) of REMIT, *"any person professionally arranging transactions in wholesale energy products who reasonably suspects that an order to trade or a transaction, including any cancellation or modification thereof, whether placed on or outside an OMP, could breach Article 3, 4 or 5, shall notify the Agency and the relevant national regulatory authority without further delay and in any event no later than four weeks from the day on which that person becomes aware of the suspicious event.*"

(432) According to Article 15(2) of REMIT, *"any person professionally executing transactions under Article 16 of Regulation (EU) No 596/2014 who also executes transactions in wholesale energy products that are not financial instruments, and who reasonably suspects that an order to trade or a transaction, including any cancellation or modification thereof, whether placed on or outside an OMP, could breach Article 3, 4 or 5 of this Regulation, shall notify the Agency and the relevant national regulatory authority without further delay and in any event no later than four weeks from the day on which that person becomes aware of the suspicious event*."

(433) This subchapter specifies further the obligation to notify potential breaches of Article 3, 4 or 5 of REMIT. It focuses on what, whom, when and how to notify. It is not intended to determine the criteria for the detection of a potential breach. The assumption of a reasonable suspicion lies within the responsibility of the PPAET.

(434) Although the obligation to notify a potential breach relates to Articles 3, 4 and 5 of REMIT, PPAETs, when performing their monitoring duties, might become aware of a potential breach of another REMIT provision[179]. In this case, as a good cooperation practice, PPAETs are invited to transmit all available information to ACER and the relevant NRA(s), through secure established communication channels.

[179] Notably of a breach of the data reporting obligations under Article 8 or the obligation to register under Article 9 of REMIT.

9.3.1. What to notify?

(435) The notification of a potential REMIT breach should be clear and accurate, to enable the Agency and the NRA(s) to understand the basic facts of the case and should contain as much information as possible for the NRA(s) to start an adequate assessment.

(436) When reporting a potential breach of Article 3, 4 or 5 of REMIT, PPAETs should provide the information on the identity of the market participant(s), the timing of the potential breach, the market(s) concerned and details on the related transaction(s)/order(s)/behaviour(s)/urgent market message(s).

(437) As a best practice, the Agency recommends that a Suspicious Transaction or Order Report (STOR) should contain, when available, information on the:

1. Type of market abuse or breach of the obligation to disclose inside information:
   - insider trading and/or ineffective or non-timely disclose inside information and/or market manipulation; and
   - identification of the subcategory of potential breach.

2. Details of the notifying party:
   - identification of the notifying party: name, organisation, position and contact details; and
   - notification date and time.

3. Description of the potential breach (transaction(s)/order(s)/behaviour(s)/disclosure of inside information as well as absence of disclosure)
   - description of the order(s)/transaction(s)/behaviour(s): product(s) involved, product delivery location, product delivery date (start and end, orders/transactions timestamps, time period when the potential breach occurred), load type, contract ID(s), transaction ID(s), transactions/orders, other details;
   - description of the inside information related to the potential breach of Article 3 and Article 4: date of disclosure of inside information, asset concerned, start date and time, end date and time, content disclosed remarks on the inside information disclosure, installed and unavailable capacity;
   - information on the potentially affected parties and products; and
   - identification of the PPAET(s) involved (other than the notifying party – if applicable): PPAET name, additional PPAET identification details.

4. Reasons for suspecting that the order(s)/transaction(s)/behaviour(s) might constitute insider trading/market manipulation, or that there was ineffective or non-timely disclosure of inside information.

5. Identification of persons involved in the potential breach:
   - identification of person(s) involved in the potential breach: name, organisation, position and contact details; and
   - identification of any other person(s) associated with the potential breach: name, organisation, position and contact details and possible relation to the aforementioned persons.

6. Identification of the notified parties:
   - identification of the relevant NRA(s) to be notified; and
   - identification of other entities that were notified.

7. Further information which may be of significance:
   - analysis of the behaviour;
   - spreadsheet analysing the relevant transaction(s)/order(s)/behaviour(s);
   - copy of the communications with the market participant or other entities on the event;
   - any kind of other action already undertaken by the PPAET or market participant(s);
   - estimation of the impact of the event on the market prices or damage caused to the market;
   - estimation of the benefit from the potential breach for the market participant;
   - Member State(s) affected and any related supporting evidence; and
   - any other information which the PPAET or a market participant considers relevant (e.g. information on events which may lead to a potential breach of another REMIT provision).

(438) Notifications about potential breaches of Article 4 of REMIT (obligation to publish inside information) have been explicitly added to the REMIT revision, complementing the existing notification obligations for potential breaches of Articles 3 and 5 of REMIT. As such, ACER considers that Article 4 monitoring requires an active approach to detect possible breaches and cannot be performed as a mere side product of the monitoring obligations of Articles 3 and 5 breaches.

(439) Regarding PPATs, ACER expects that they fulfil their obligations under Articles 15(1) and 15(3) of REMIT on the basis of information that is available to them and focus on those Inside Information Platforms used by markets participants whose orders or transactions they arrange, in particular if they are managed directly by the PPAT or by a legal person that is part of the PPAT's group.

(440) Regarding PPETs, ACER understands that the provisions of Articles 15(2) and 15(3) of REMIT do not aim at imposing burdensome obligations on PPETs. Instead, the monitoring activities of PPETs should focus on their own trading and disclosure activities and be based on the information that is available to them, as well as the information that is publicly available.

9.3.2. Whom to notify?

(441) It is important to provide PPAETs with some references to maximise the probability that the notifications are sent to the NRAs that will likely be involved in further reviewing the case.

(442) In addition to the Agency, that should be notified in any case, the PPAETs should notify at least the following NRA(s):

- The NRA(s) in the Member State(s) of the delivery of the wholesale energy product(s)[180]; and
- The NRA in the Member State in which the Market Participant involved in the potential breach has registered (in the Centralised European Register of Energy Market Participants, CEREMP).

(443) If a single NRA meets both criteria, only that NRA should be notified, in addition to the Agency. Otherwise, all those NRAs that meet at least one of the criteria should be notified.

(444) Where a PPAET notifies more than one NRA, it should inform each NRA of the other NRAs being notified. If the PPAET submits the notification via ACER Notification Platform, this step is not necessary, since all NRAs and the Agency are jointly notified.

(445) If the PPAET has already notified at least the NRA(s) that fulfil(s) the criteria referred above based on the evidence available to it at the moment of the notification, the PPAET should not be held responsible for not having notified other NRAs identified after the notification as affected by the potential breach. However, where, in accordance to the national law of the Member State, where the PPAET is incorporated and/or active, another NRA than the one(s) mentioned above shall be notified, the PPAET should notify this NRA in addition to the one(s) mentioned in this Guidance.

(446) If a potential breach involves wholesale energy products that are also financial instruments falling in the scope of Article 2 of MAR, the PPAET should notify ACER, the NRA(s) identified above, as well as the relevant competent financial authorities, in order to promote the cooperation between different investigatory authorities.

(447) ACER's Notification Platform is available to facilitate notifications of the suspected breaches for Articles 3, 4 and 5 of REMIT: https://www.acer-remit.eu/np/str. This platform should be used for the simultaneous notification of ACER and the relevant NRAs under Article 15 of REMIT. To ensure legal certainty, the notifying PPAET receives an immediate confirmation of its notification.

[180] For transportation contracts, the notion of delivery is to be understood as the location where the transmission service is provided. For example, if the suspicion involves orders or transactions on the capacity of an interconnector between two countries, the NRAs in both countries should be notified.

(448) Where the PPAET is notifying the competent NRA(s) through any other communication means than ACER's Notification Platform, it shall also inform ACER separately through the Notification Platform in order to be compliant with Article 15 of REMIT.

9.3.3. When to notify?

(449) PPATs under Article 15(1) and PPETs under Article 15(2) "who reasonably suspect that an order to trade or a transaction, including any cancellation or modification thereof, whether placed on or outside an OMP, could breach Article 3, 4 or 5 of this Regulation, shall notify the Agency and the relevant national regulatory authority without further delay and in any event no later than four weeks from the day on which that person becomes aware of the suspicious event."

(450) The obligation on PPAETs to notify potential breaches under Articles 15(1) and 15(2) of REMIT entails meeting two cumulative criteria:

- There must be a reasonable suspicion of a breach; and
- The notification shall be made without further delay and in any event no later than four weeks from the day on which that person becomes aware of the suspicious event.

(451) In other words, PPAETs shall notify ACER and the relevant NRA(s) of a potential breach of Article 3, 4 or 5 of REMIT as soon as possible, but only once they have reasonable grounds to suspect such breach, and must do so no later than four weeks from the day on which that person becomes aware of the suspicious event.

(452) The timeliness of the notification after the occurrence of a suspicious event is of crucial importance when it comes to collecting evidence. The sooner ACER and the NRA(s) are informed about the reasonable suspicion of the potential breach, the earlier they can collect evidence. ACER encourages PPAETs to also submit any relevant additional information which they may become aware of after they fulfil their notification obligations.

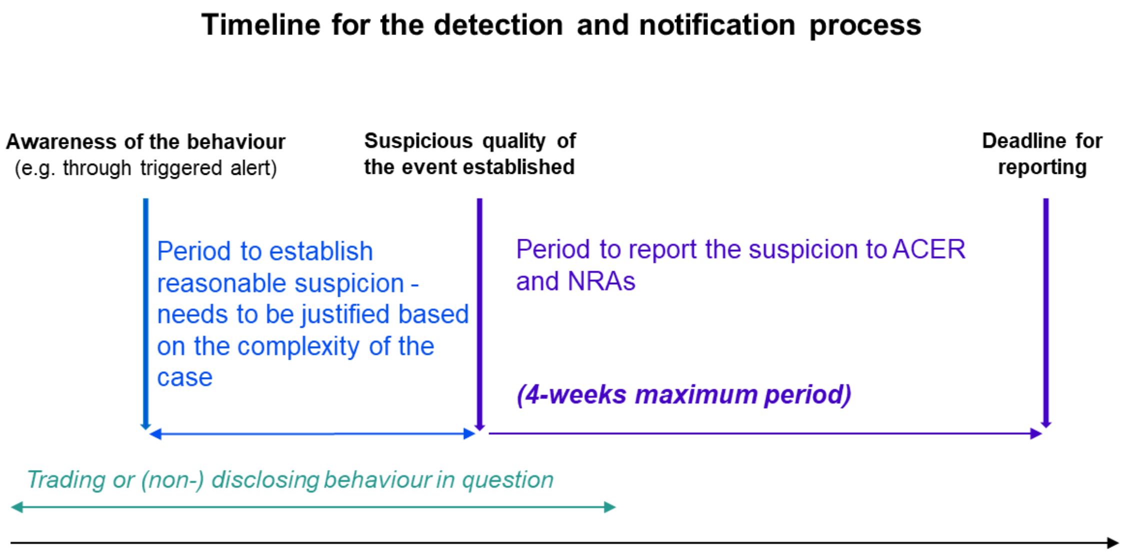
(453) Once PPAETs detect an event that requires further scrutiny, for example through alerts, they should collect evidence and conduct the necessary analysis to further assess that event. This will enable the PPAETs to assess whether there are reasonable grounds to suspect a potential breach of REMIT and to produce a timely and relevant Article 15 of REMIT notification.

(454) Once awareness is established that a certain event is suspicious, PPAETs should within at most four weeks gather all the necessary information to produce a comprehensive notification. ACER understands that certain events can be established as suspicious at the time or close to the time of their occurrence. This is especially the case for events that are restricted to a very short time frame (such as events involving one trading session, or events that can be sufficiently elucidated without having to request third party information). For more complex cases, PPAETs should be in a position to explain (and justify) the timeline between the day of occurrence of the event(s) and the notification, according to the specific circumstances of the behaviour under assessment, if requested so by the NRA or ACER[181].

(455) A summary of the approach is presented in Figure 3.

Figure 3: Detection of potential breaches and notification timeline

[181] As per the provisions included in Article 13(8) of REMIT.



(456) Arrangements and procedures in place shall establish the internal processes on how to determine whether an event is suspicious and, how to notify a potential breach to ACER and the relevant NRA(s).

(457) Arrangements and procedures in place shall also entail the possibility to notify a potential breach which occurred in the past, where reasonable grounds of suspicion have arisen in the light of subsequent events or information. In such cases, the PPAET should be able to explain and justify the delay between the day of occurrence of the suspicious event and the notification, according to the specific circumstances of the behaviour under assessment, if requested to by the NRA or ACER.

(458) ACER and NRAs expect the notifications they receive from PPAETs to be sufficiently substantiated and meaningful[182]. PPAETs should produce a timely and quality notification facilitating ACER's and NRAs' further review of the suspicious behaviour. PPAETs should also transmit any relevant additional information which they become aware of after the notification is originally submitted, as soon as they have that information analysed.

9.3.4. How to notify?

(459) PPAETs shall use secure communication channels to notify the Agency and NRA(s).

(460) As a service to NRAs, the Agency has established on its website a secure 'Notification Platform' for the notification of, inter alia, Article 15 of REMIT notifications by PPAETs (available at: https://www.acer-remit.eu/np/home). The Notification Platform enables PPAETs to fulfil their notification obligations, allowing them to directly notify, simultaneously and in a standardised manner, one or several of the 27 EU NRAs, together with the Agency. To ensure legal certainty, the notifying PPAET receives an immediate confirmation of its notification.

(461) The PPAETs may also choose to notify a potential breach using the secure communication channels that NRAs may have put at their disposal, additional to the 'Notification Platform' of the Agency. NRAs should publish on their website the communication channel that PPAETs should use to notify potential breaches.

(462) In order to be compliant with Article 15 of REMIT, any contact with the competent NRA(s) through any other means than the Notification Platform shall be complemented by the submission of a notification to the Agency via the Notification Platform.

[182] ACER expects alerts generated by systems to go through human screening, data quality control, and to be complemented with circumstantial information and confirmation before being submitted as notifications to ACER and the relevant NRA(s).

9.4. The duty to establish and maintain effective arrangements, systems and procedures

9.4.1. The aim

(463) According to Article 15(3) of REMIT:

(464) PPATs under Article 15(1) and PPETs under Article 15(2) "shall establish and maintain effective arrangements, systems and procedures to:

(a) identify potential breaches of Article 3, 4 or 5;

(b) guarantee that their employees carrying out surveillance activities for the purpose of this Article are preserved from any conflict of interest and act in an independent manner;

(c) detect and report suspicious orders and transactions."

(465) The provisions of Article 15(3) of REMIT set out the responsibility for PPAETs not only to notify whenever they have reasonable grounds to suspect a potential breach, but also to proactively monitor the wholesale energy markets in which they are involved. The provisions of Article 15(3) apply to a variety of entities and should be proportionate to the type, size, activities and information available to different PPAETs.

(466) The following subchapters provide guidance on what can be expected from PPAETs with regards to establishing and maintaining effective arrangements, systems and procedures for monitoring.

(467) Given the fact that PPAETs vary in size and organisational characteristics and engage in different activities and operate different markets (e.g. electricity, gas, hydrogen, spot, futures, capacity, etc.), there is no one-size-fits-all governance or organisational arrangement. For such recommendations, while some concern basic requirements applicable to all PPAETs, the way to implement the recommended measures shall take into consideration the specificities of each PPAET.

(468) ACER also acknowledges that monitoring obligations by PPAETs pursuant to Article 15(1) and 15(2) should be reasonable and proportionate and not go beyond publicly available information and the data available to the PPAET, or data that can be obtained via third parties.

(469) In general, the effectiveness of the market surveillance activity of a PPAT, and its level of internal and external independence and integrity, depend on the organisational arrangements and procedures as well as systems in place. A common element of effectiveness is the timeliness of reporting. In the subchapters below the Agency defines some minimum arrangements, systems and procedures for PPETs (Subchapter 9.4.2), PPAT arrangements (Subchapter 9.4.3) and PPAT procedures and systems (Subchapter 9.4.4) that NRAs should expect from PPAETs. .

9.4.2. Arrangements, systems and procedures for PPETs under Article 15(2) of REMIT

(470) Regulation 2024/1106 introduced for the first-time monitoring but also notification obligations for PPETs under Articles 15(2) and 15(3) of REMIT. It is important to stress, as explained in section 9.2.2., that the obligation lies only on PPETs under MAR who also execute transactions in wholesale energy products that are not financial instruments.

(471) ACER expects the monitoring activities of such PPETs to focus on reasonably suspicious breaches of Articles 3, 4, or 5 of REMIT, on behaviours observed (i) in the course of their trading activities and (ii) in relation to information that is available to the PPET. To this end, Article 15(3) of REMIT requires PPETs under Article 15(2) to establish and maintain internal effective arrangements, systems and procedures that should enable them to detect and notify such breaches. ACER acknowledges that such arrangements, systems and procedures should be reasonable and proportionate to the size and trading activities of the PPET.

(472) Given that PPETs under Article 15(2) already need to comply with obligations under Article 16(2) of MAR and the relevant associated technical standards to *"establish and maintain effective arrangements, systems and procedures to detect and report suspicious orders and transactions (…)"* and notify *"Reasonable suspicions"* of "*insider dealing, market manipulation or attempted insider dealing or market manipulation"*, ACER understands that the relevant PPETs are already engaging in similar obligations than those prescribed under Article 15(2) of REMIT. Consequently, the relevant PPETs should extend these already existing arrangements, procedures and systems under MAR to potential breaches of Articles 3, 4, and 5 of REMIT, taking also into consideration the specific features of energy physical markets.

(473) In addition to the already established processes and procedures under Article 16(2) of MAR, examples of arrangements, systems and procedures for PPETs under REMIT could include, but are not limited to:

- Adoption of internal procedures and educational courses for staff on REMIT compliance, including measures and systems to prevent and discover insider trading, market manipulation, and non-effective or non-timely disclosure of inside information[183];
- Procedures on how to conduct an effective assessment to determine a reasonable suspicion for potential breaches of Articles 3, 4, or 5 (the full decision-making process should be traceable and key decision points should be recorded; these provisions should cover also data storage);
- Internal handbooks and procedures on how to write adequate, complete and informative notifications; and
- Internal procedures on how to submit a notification via the Notification Platform to ACER and to the relevant NRA(s).

9.4.3. Arrangements for PPATs

(474) In this subchapter, the Agency provides high-level guidance on the appropriate minimum arrangements that NRAs should require from PPATs so that they can properly perform their market surveillance tasks.

a) Governance

(475) The essential function of market surveillance is to create trust in markets by ensuring orderly trading, according to the applicable rules, ultimately leading to trustworthy market outcomes in terms of fair prices and allocated volumes. To generate trust, the market surveillance functions need to be independent of potential conflicts of interest with market participants, but also from potential short term commercial interest from trading venues or platforms.

(476) The market surveillance function should be carried out by sufficiently trained staff, with adequate IT systems, resources and efficient and effective access to all relevant information available to perform their function. Market surveillance duties and processes should be separated from commercial interests and should be carried out solely with proper market functioning and public interest in mind. Information gained through market surveillance activities should not be used for other purposes, such as for commercial interest.

(477) It is recommended that staff engaged in market surveillance activities be relieved from their duties only upon the prior consent of the responsible NRA. Staff engaged in market surveillance activity should be able to freely decide on the subject and the methods of their assessment in coordination with the responsible NRAs and ACER. It constitutes good practice if the result of these assessments are shared with the management of the PPAT. The management should not influence nor change the results of the assessment nor block their notification according to Article 15 of REMIT. This is of utterly importance to create an independent surveillance function.

[183] Including non-disclosure, incomplete disclosure, erroneous disclosure and disclosure that is not according to REMIT or the ACER Guidance

(478) The absence of conflict of interest must be reflected in the governance model of the PPAT taking into account potential conflicts of interest at individual and corporate level. Individual conflicts of interest may arise when a market surveillance team member has close contacts with market participants who trade on its platform. The market surveillance team member might be inclined not to internally report an suspicious event or notify a potential breach to the NRA(s) and the Agency for a number of reasons, including to avoid damaging its relationships and future career prospects with the market participants.

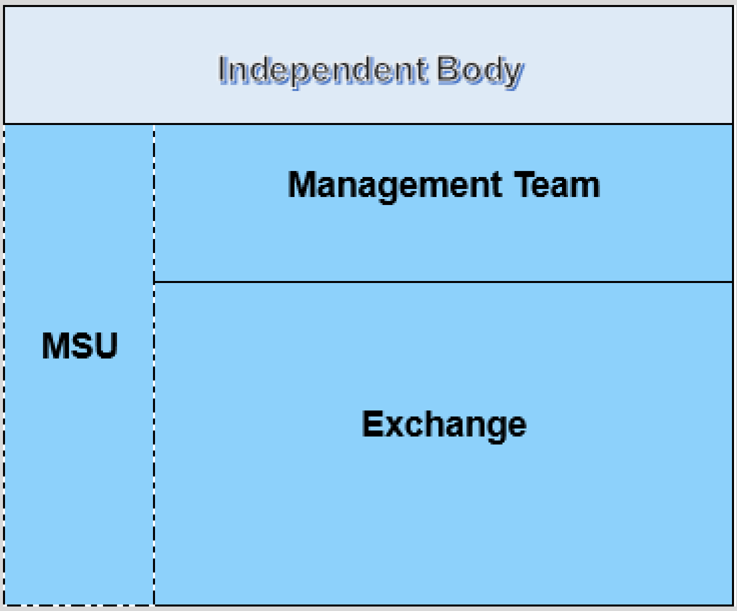
(479) Corporate conflicts may arise when a market surveillance team member wants to report a suspicious event/notify a potential breach regarding a market participant, while the management team does not want to, for commercial or other reasons. The market surveillance team member might be put under pressure not to report a suspicious event/notify a potential breach. The existence and the nature of corporate conflicts is affected, among other things, by the structure of control, the governance model, as well as the nature of the business activity performed by the PPAT. In order to identify and to prevent or manage conflicts of interest, it is important to consider all the steps to be undertaken by the PPAT, from detecting a suspicious event to finally notifying a potential breach to the NRA(s).

(480) Appropriate governance models, based on the assessment of the potential sources of risk within the PPAT, could mitigate the abovementioned risks by addressing how market surveillance teams are structured, how they report to the management team (internal reporting) and how they notify STORs to NRAs (external reporting). One example of governance models will be discussed below, respectively addressing different degrees of conflicts of interest that the PPAT might experience.

Non-exhaustive examples of a governance structure that can mitigate conflict of interests

Market Surveillance Unit (MSU)

In this governance model the market surveillance team operates independently from the other parts of the PPAT. The MSU is only accountable towards an Independent Body, not involved in the daily management of the PPAT (e.g. Exchange Council, Supervisory Board) that is responsible for the supervision of the effective execution of the unit activities. Differences may exist in the structure, duties and composition of the Independent Body .



In this situation, as the market surveillance team operates as a segregated unit from the other PPAT activities and does not report to the management team, the conflicts of interest at corporate level can in theory be more effectively mitigated. The composition and the duties of the Independent Body are of utmost importance in this model to ensure that the mitigation of these risks is effective and that the confidentiality of the market surveillance activities is secured. In this case the governance structure should include clear rules on the nomination of the members of the Independent Body, as well as on its duties, to adequately mitigate the individual potential conflicts of interest. Both the structure of the Independent Body and the level of segregation of the market surveillance team should also take into account potential conflicts arising from the PPAT's control structure and the types of activities carried out by the PPAT.

Outsourced Surveillance Activity

In this situation, the market surveillance activity is performed as an outside service.

PPATs shall ensure that the delegated entity complies with the organisational and procedural arrangements described in this Guidance. In addition, it should ensure that no conflicts of interest or confidentiality issues arise.

PPATs belonging to a group of companies should be able to delegate their monitoring functions to another entity within the same group.

In addition, PPATs should be able to outsource a part of their surveillance activity, including the analysis of orders and transactions, alerts generation for the detection of suspicious events, as well as the identification of potential breaches of Articles 3, 4 and 5 of REMIT.

PPATs will remain fully responsible for the obligations stated in Article 15(1) and 15(3).

The PPATs should:

- retain the expertise and resources necessary for evaluating the quality of the services provided and the organisational adequacy of the providers, and for supervising the outsourced services effectively and managing the risks associated on an ongoing basis;
- have direct access to the relevant information related to the outsourced service;
- should still be able to conduct any complementary analysis; and

define in a written agreement their rights and obligations and those of the providers. The outsourcing agreement should allow PPATs to terminate it.

b) Organisational setup

(481) Proper organisation of the market surveillance activity is essential for its ability to detect market abuse. This involves at least five dimensions: adequacy of resources; human resources policy; appropriate amount of human resources dedicated to market surveillance (referred to as market surveillance team); communication with other units and confidentiality.

(482) For each dimension the PPAT should be able to justify why its organisational setup is best suited for the tasks of the market surveillance team.

(1) Adequacy of resources

(483) The market surveillance activity requires availability of some fundamental resources, which include human resources, analytical tools and data/information. The appropriate amount of resources dedicated to the market surveillance activity is dependent on the size of the PPAT. Independently from the specific requirements on these issues, the adequacy of these resources, both in terms of quantity and quality, is fundamental in order to ensure effectiveness and true independence of market surveillance.

(484) The human resources, analytical tools and data/information should be adequate to perform real-time and *ex post* analyses on suspicious events which are deemed relevant for the markets the PPAT operates. For example, markets with low transactions volumes might be better suited for manual supervision, but markets with high transactions volumes could benefit from automated systems.

(485) There should always be an element of human analysis in the detection of potential REMIT breaches as the most effective form of surveillance will likely be a mix of both automated and human forms.

(2) Human resources policy

(486) Various internal and external factors, such as potential conflicts of interest at individual level, have the potential to influence the work of the market surveillance team. In order to ensure an adequate level of quality, consistency and effectiveness of the market surveillance teamwork, there should be a human resource policy with specific requirements for the market surveillance staff that can contribute to establish and safeguard the independence and integrity of the team. That policy can include the principles for the management of conflicts of interest (including the list of interests that need to be declared).

(487) As part of the specific requirements for the market surveillance staff, the human resource policy should develop specific incentives which are based on the accomplishment of the market surveillance function and not correlated to financial/commercial achievements. In that context, NRAs feedback on the performance of the surveillance functions should be considered.

(3) Dedicated market surveillance team

(488) The specificities of the market surveillance function require the identification of a dedicated team. The market surveillance team will be specifically assigned to the monitoring activities, endowed with the relevant skills and able to devote the required time and operate in a timely manner. Implementation of appropriate segregation measures (e.g., Chinese walls) is critical in the creation of a dedicated market surveillance team in order to ensure the integrity and confidentiality of the information assessed.

(4) Communication with other units

(489) Whichever the way the market surveillance team is organised, the team itself needs to keep regular contact with other functions within the PPAT, to get access to the information needed to perform its activities. Early involvement of surveillance during the creation phase of new products is necessary to ensure appropriate and timely surveillance after the go-live.

(5) Confidentiality

(490) In order to safeguard the integrity of the market surveillance team, the information collected by the market surveillance team for the purpose of investigating a suspicious event shall be considered confidential and systems that restrict the access to such information shall be implemented.

c) Clear definition of the function

(491) The lack of a clear definition of the market surveillance function may undermine the ability of the market surveillance team to perform its tasks, namely through the weakening of the trust in the function.

(492) Therefore, the market surveillance team should have a clear (written) function and be trusted by the PPAT management, other PPAT employees and members/customers. Without a clear definition of the function and trust from the PPAT management, other PPAT employees and a certain authority towards PPAT members/customers, the market surveillance team can neither investigate suspicious events nor notify potential breaches of REMIT adequately.

(493) The mission of the market surveillance function should be broader than the sum of the tasks of the market surveillance team, as it should affect PPAT employees working outside of that team. These employees may jeopardise the market surveillance team's compliance efforts if they are not aware of the mission of the market surveillance function (for example: PPAT employees working outside of the market surveillance team may have reasonable grounds to suspect a potential breach of REMIT, but may not report it to the relevant market surveillance team member due to lack of awareness of the legal obligations or of the mission of the market surveillance function).

(494) The PPAT should have arrangements to ensure that its employees working outside of the market surveillance team are aware of the mission of the market surveillance function.

9.4.4. Systems and procedures for PPATs

(495) Procedures and systems are key to ensuring that the PPAT fulfils its obligations under Article 15(1) of REMIT. PPATs should have systems in place that allow them to detect potential breaches and monitor relevant markets, as well as to ensure streamlined reporting. PPATs' procedural arrangements should be documented, including any changes or updates to them. Documentation on the compliance of the PPAT with these procedural arrangements should also be elaborated. Both kinds of documentation should be maintained for a period of at least five years.

(496) This subchapter outlines guidance on the market monitoring strategy, human resources policies, communications and traceability related procedures.

a) Market surveillance strategy

(497) In order to identify potential breaches of Articles 3, 4 or 5 of REMIT, the PPAT shall have a documented market surveillance strategy. That strategy shall be designed based on a risk assessment.

(498) The market surveillance strategy shall define thresholds for investigating alerts and include processes in place to identify potential breaches. It should also prescribe some actions to be performed by the monitoring team to further assess the suspicious events.

(499) The risk assessment shall include at least the identification of the different types of market abuse that may constitute Article 3, 4 or 5 breaches and a graduation of the different forms of market abuse based on the expected risk of occurrence on the PPAT platform/operations. The identification of the different types of market abuse that may constitute Article 3, 4 or 5 breaches shall take into consideration Chapters 3, 4, 5, 6, and 8 of this Guidance.

(500) The risk assessment and the market monitoring strategy shall be revised regularly. In particular, they shall be revised when there is evidence that the current strategy is not comprehensive enough and some (potential) breach was not detected. It shall also be revised whenever relevant changes in the markets or in the market participants' behaviour take place. Best practices should be taken into consideration when designing such strategy.

(501) The PPAT should be able to explain to the NRA and ACER, upon request, how it manages the alerts generated by the adopted system and why the adopted level of automation is appropriate for its business.

b) Human resources related procedures

(502) Conflicts of interest can have the potential to affect the integrity and focus of the market surveillance team. Therefore, the market surveillance team within each PPAT should be covered by the organisation's human resources policies and procedures, which should safeguard the independence and integrity of the market surveillance team members as well as other affected departments.

(503) The human resources policy implemented by the PPAT should have focus on conflicts of interest throughout the organisation. As part of the management of conflicts of interest, relevant employees should be required to declare potential interests that they may have in companies active in the wholesale energy markets, for example shareholdings or close family relationships. Basic background checks should routinely be carried out at the commencement of employment, covering fraud and criminal record checks. Due diligence should be applied when employing staff to work in the market surveillance team.

(504) Consideration should be given to potential psychological harassment of the market surveillance team by persons involved in trading-related activities, such as brokers or traders within the PPAT. A broker or trader within the PPAT could be investigated for a potential breach of REMIT and that broker or trader could then harass the market surveillance team member during the investigation. Appropriate training should be given to the market surveillance team on how to handle potential psychological harassment situations and safeguards should be in place to manage this.

(505) Members of the market surveillance team should be given appropriate training and guidance on REMIT and the practical considerations for the application of Article 15. Training should be delivered regularly according to the training map and should be updated in line with any guidance offered by the Agency and NRAs. Training on REMIT should not be restricted to the members of the market surveillance team and should be offered across the organisation where appropriate. A record of training attendance or completion should be kept and the effectiveness of training shall be assessed by the PPAT.

(506) It constitutes good practice that surveillance staff is not relieved from their duties without the prior consent of the responsible NRA or exchange supervisory authority.

c) Communication related procedures

(507) Internal policies should cover the use of data and information by the market surveillance team and should allow its members to access any information or data which may help to explain the suspicious event under investigation. The market surveillance team should also be able to request information from the market participant in relation to a suspicious event.

(508) Communication between the market surveillance team and anyone involved in a suspicious event/potential breach of REMIT should be carefully considered in order to avoid tipping off the company or person under suspicion. The market surveillance team should have and follow a policy setting the process for approaching members/customers and all communication in relation to a suspicious event/potential breach should be noted or recorded on file.

(509) As a general rule, once a STOR has been submitted to ACER and the relevant NRA(s), the market surveillance team should not make contact with the member/customer in relation to that incident unless agreed with the responsible NRA(s) and ACER. Furthermore, under no circumstance should the market surveillance team make the member/customer aware that a STOR has been submitted to ACER. In exceptional circumstances it may be necessary for the market surveillance team or senior management at the PPAT to contact the member/customer reported in a STOR and they may enforce a sanction such as suspension of trading. By its nature, this form of contact may tip the member/customer off that an investigation is being conducted, but it may be necessary in order to avoid further harm to the market. If this is to happen, engagement with the relevant NRA and ACER from the start is important.

(510) In circumstances where contacts between market surveillance teams of different PPATs are envisaged, for example in potential cases of cross-market manipulation, internal policies should detail procedures accordingly. Guidelines relating to what can be discussed between market surveillance teams should be clearly defined in the internal policies and all contact and decisions should be recorded so that if a STOR is raised, the relevant NRA is aware of the work that has already been carried out and if it is not this can be justified.

(511) The communication policy in place should detail how staff members outside of the market surveillance function identify and/or escalate suspicions of market abuse.

d) Traceability related procedures

(512) All work carried out by the market surveillance team should be recorded whether in a dedicated case management system, a shared folder or in traceable email records, for a period of at least five years.

(513) It is advisable to have a clear written policy on surveillance procedures which details the processes that the market surveillance team should follow when looking into a suspicious event. The full PPATs' decision-making process related to the qualification of a suspicious event as a potential breach (from the initial alert to the STOR being raised) should be traceable and key decision points should be recorded.

(514) All transaction(s)/order(s)/behaviour(s), including related updates to them, particularly relating to a suspicious event/potential breach should be stored by the PPAT for a defined amount of time. The relevant NRA may place further retention requirements on the PPAT where appropriate.

(515) NRAs should request PPATs to maintain for a period of at least five years the information documenting the analysis carried out with regard to a suspicious event/potential breach which have been examined and the reasons as to whether or not submitting a STR. This information shall be provided to the NRA upon request.

(516) All processes and decisions made by the market surveillance team should also be recorded. The PPAT should conduct internal audits or hire an external auditor to review their processes at least on a regular annual basis and in certain circumstances an NRA may wish to conduct a visit or audit.

9.5. Compliance advocacy

(517) Within the limits of their investigatory and/or sanctioning powers, ACER and the relevant NRAs shall enforce PPAETs compliance with Article 15. Based on their competencies, ACER and NRAs may choose to issue ‘Systems and Controls Questionnaires’ relating to the PPAET’s Article 15 processes, amongst other. They may also conduct visits to the PPAET’s market surveillance and monitoring teams to assess their surveillance and monitoring processes in practice. This will help ACER and NRAs understand the processes that STORs have gone through to consider their next steps. ACER and NRAs may also choose to run STOR Supervision Fora, focussing on best-practice sharing between the PPAETs.

(518) It is at the discretion of ACER and NRAs whether to conduct visits, issue questionnaires or hold fora relating to REMIT Article 15 processes. Adequate notice should be given to the PPAET ahead of any such activities.

10. REMIT compliance and penalty regimes

10.1. Introduction

(519) This chapter provides some considerations from the Agency on best practices that market participants could implement to ensure their compliance with REMIT (Subchapter 10.2) and the Agency's current understanding on the enforcement of the different REMIT obligations and prohibitions through national penalty regimes under Article 18 of REMIT (Subchapter 10.3).

10.2. Compliance regime

(520) 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 towards the other obligations and prohibitions of REMIT.

(521) NRAs should consider the following best practice examples of such compliance regime for market participants, 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:
  - internal communication and training concept (raising the awareness of employees);
  - external communication and reporting to the Agency/NRAs;
  - 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.

10.3. Penalty regimes

(522) Article 18(1) of REMIT stipulates that Member States shall lay down the rules on penalties applicable to infringements of REMIT and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, dissuasive, and proportional. Member States should notify, in detail, those provisions to the Commission and to the Agency and shall notify them without delay of any subsequent amendment affecting those provisions.

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 REMIT, 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); the obligation to disclose inside information according to Article 4(1); the obligation to notify the Agency and the competent NRA of delayed disclosure of inside information according to Article 4(2); the obligation to submit daily to the Agency the LNG market data according to Article 7c(1); the obligation to provide the Agency with a record of wholesale energy market transactions, including orders to trade, according to Article 8(1); the obligation to register with the competent NRA according to Article 9(1); and the obligations of PPAETs according to Article 15.

(523) According to Article 18 (3) of REMIT, Member States shall, in accordance with national law and subject to the *ne bis in idem* principle, ensure that the national regulatory authorities have the power to impose at least the following administrative fines and other administrative measures with regard to breaches of this Regulation:

(a) require the breach to be brought to an end;

(b) order the disgorgement of the profits gained or losses avoided due to the breaches insofar as they can be determined;

(c) issue public warnings or notices;

(d) impose periodic penalty payments; and

(e) impose administrative fines.

(524) To this end, Article 18 of REMIT differentiates between 'administrative fines' and 'other administrative measures'. 'Administrative fines' refer to Article 18(3)(e), while 'other administrative measures' refer to Article 18(3) (a), (b), (c) and (d).

(525) Moreover, Articles 18(4) and 18(5) of REMIT differentiate between penalties with regard to natural persons and legal persons, and aim to set a **minimum level of the maximum thresholds** for the administrative fines.

(526) With regard to natural persons, Article 18(4) of REMIT states that the minimum level for the **maximum administrative fines** referred to in paragraph 3, point (e), shall be as follows:

(a) for breaches of Articles 3 and 5, ***at least*** EUR 5,000,000;

(b) for breaches of Articles 4 and 15, ***at least*** EUR 1,000,000;

(c) for breaches of Articles 8 and 9, ***at least*** EUR 500,000.

Notwithstanding paragraph 3, point (e), the amount of the administrative fine shall not exceed 20 % of the yearly income in the preceding calendar year of the natural person concerned. Where the natural person has directly or indirectly benefited financially from the breach, the amount of the administrative fine shall be at least equal to that benefit.

Example:

Situation: Market Participant A (MP A), a natural person, has been found to have breached Articles 3, 4 and 15 of REMIT and directly benefitted financially from the breach of a total amount of EUR 10,000.

Assessment: The NRA could impose administrative fines for each of the separate infringements in accordance with Article 18(3)(e):

- With regards to natural persons, for the Article 3 breach, Article 18(4)(a) provides that the *maximum* administrative fine should be *at least* EUR 5,000,000. Therefore, the Member State can, in its national law, set a **maximum threshold** for the administrative fine of **minimum EUR 5,000,000, or higher** (E.g., EUR 8,000,000). In such case, the NRA can impose a fine on MP A up to the maximum amount provided under its national threshold (E.g., EUR 8,000,000), provided it does not exceed 20% of the yearly income in the preceding calendar year of MP A.

- With regards to natural persons, for the Article 4 breach, Article 18(4)(b) provides that the *maximum* administrative fine should be *at least* EUR 1,000,000. Therefore, the Member State can, in its national law, set a **maximum threshold** for the administrative fine of **minimum EUR 1,000,000, or higher** (E.g. EUR 2,000,000). In such case, the NRA can impose a fine on MP A up to the maximum amount provided under its national threshold (E.g., EUR 2,000,000), provided it does not exceed 20% of the yearly income in the preceding calendar year of MP A.
- With regards to natural persons, for the Article 15 breach, Article 18(4)(b) provides that the *maximum* administrative fine should be *at least* EUR 1,000,000. Therefore, as in the point above, the Member State can, in its national law, set a **maximum threshold** for the administrative fine of **minimum EUR 1,000,000, or higher** (E.g. EUR 2,000,000). In such case, the NRA can impose a fine on MP A up to the maximum amount provided under its national threshold (E.g., EUR 2,000,000), provided it does not exceed 20% of the yearly income in the preceding calendar year of MP A.

In addition, according to Article 18(3)(b), the NRA should have the power to order the disgorgement of the profits gained or losses avoided due to the breaches insofar as they can be determined. Consequently, since MP A was found to have benefitted financially from the breach by EUR 10,000, the NRA could impose an administrative measure of EUR 10,000 on MP A.

Accordingly, in addition to the disgorgement of the profits gained, and any other relevant administrative measure, the NRA could impose a total of three distinct administrative fines for each of the separate infringements committed by MP A.

The 20% maximum cap applies to each infringement committed by the market participant separately, since a finding that multiple infringements exist may entail the imposition of a number of distinct fines, each time within the limits laid down in Article 18(4) of REMIT[184].

Further, each of the administrative fines is higher than the EUR 10,000 that MP A financially benefited from. Hence, this example complies with Article 18(4), last subparagraph, which determines that “where the natural person has directly or indirectly benefited financially from the breach, the amount of the administrative fine shall be at least equal to that benefit”.

(527) Similarly, with regard to legal persons, Article 18(5) of REMIT states that the minimum level for the **maximum administrative fines** referred to in paragraph 3, point (e), shall be as follows:

(a) for breaches of Articles 3 and 5, ***at least*** 15 % of the total annual turnover in the preceding business year;

(b) for breaches of Articles 4 and 15, ***at least*** 2 % of the total annual turnover in the preceding business year;

[184] See the competition Judgement of the General Court (Fifth Chamber), In Case T-446/05, 28 April 2010.

(c) for breaches of Articles 8 and 9, ***at least*** 1 % of the total annual turnover in the preceding business year.

(528) Notwithstanding paragraph 3, point (e), the amount of the administrative fine shall not exceed 20 % of the total annual turnover in the preceding business year of the legal person concerned. Where the legal person has directly or indirectly benefited financially from the breach, the amount of the administrative fine shall be at least equal to that benefit.

Example:

Situation: Market Participant B (MP B), a legal person, has been found to have breached Article 8 of REMIT. It was not possible to determine whether MP B directly or indirectly financially benefitted from such breach.

Assessment: In addition to any relevant administrative measure set in Article 18(3)(a)-(d), the NRA could impose an administrative measure in accordance with Article 18(3)(e).

With regard to legal persons, for the Article 8 breach, Article 18(5)(c) provides that the *maximum* administrative fine should be *at least* 1% of the total annual turnover in the preceding business year. Therefore, the Member State can, in its national law, set a **maximum threshold** for the administrative fine of **minimum 1% of the total annual turnover in the preceding business year of the legal person, or higher, provided it does not exceed 20%** (E.g. 7%). In such case, the NRA could impose a fine on MP B up to the maximum amount provided under its national threshold (E.g. 7% of his total annual turnover in the preceding business year). In this way, the NRA ensures that the administrative fine does not exceed 20% of the total annual turnover in the preceding business year of MP B.

(529) In Article 18(6) of REMIT, NRAs are empowered with the discretion to disclose measures or penalties imposed for infringements.

(530) Article 18(7) of REMIT provides that Member States shall ensure that when determining the type and level of administrative fines and other administrative measures, national regulatory authorities take into account all relevant circumstances, including, where appropriate:

(a) the gravity and duration of the infringement;

(b) the degree of responsibility of the person responsible for the infringement;

(c) the financial strength of the person responsible for the infringement, as indicated, for example, by the total annual turnover of a legal person or the yearly income of a natural person;

(d) the importance of the profits gained or losses avoided by the person responsible for the infringement, insofar as they can be determined;

(e) the level of cooperation of the person responsible for the infringement with the competent authority, without prejudice to the need to ensure disgorgement of profits gained or losses avoided by that person;

(f) previous infringements by the person responsible for the infringement;

(g) measures taken by the person responsible for the infringement to prevent its repetition; and

(h) the duplication of criminal and administrative proceedings and fines for the same infringement against the person responsible for the infringement.

(531) Finally, Article 18(8) of REMIT indicates that the national regulatory authorities shall cooperate closely to ensure that the exercise of their supervisory and investigative powers, and the administrative fines that they impose, and the other administrative measures that they take, are effective and appropriate under this Regulation. They shall coordinate their actions in accordance with Article 16(2) in order to avoid duplication and overlaps when exercising their supervisory and investigative powers and when imposing administrative fines in respect of cross-border cases.

Annex 1: List of abbreviations

Abbreviation	Meaning
ACER/Agency	European Union Agency for the Cooperation of Energy Regulators
AMP	Accepted Market Practice
BZ	Bidding Zone
CEREMP	Centralised European Register of Energy Market Participants
DEA	Direct Electronic Access
DSO	Distribution System Operator
EC	European Commission
EEA	European Economic Area
EMIR	European Market Infrastructure Regulation
ENTSO-E	European Network of Transmission System Operators for Electricity
IIP	Inside Information Platform
LNG	Liquefied Natural Gas
LSO	LNG System Operator
MAD	Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 (market abuse directive)
MAR	Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation)
MiFID	Directive 2004/39/EC on Markets in Financial Instruments
MIFID II	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments
MIFIR	Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments
MMC	Market Monitoring Committee
MMD	Market Monitoring Department
MMU	Market Monitoring Unit
MP	Market Participant
MTF	Multilateral Trading Facility
NRA	National Regulatory Authority
OMP	Organised Market Place
OTC	Over The Counter
OTF	Organised Trading Facility
PPAT	Person Professionally Arranging Transactions
PPET	Person Professionally Executing Transactions

PPAET	Person Professionally Arranging or Executing Transactions
PTRS	Physical Transmission Rights
REMIT	Regulation (EU) No 1227/2011 on Wholesale Energy Market Integrity and Transparency
RRM	Registered Reporting Mechanism
SSO	Storage System Operator
STOR	Suspicious Transaction or Order Report
TSO	Transmission System Operator
TMS	Trade Matching Systems
WEP	Wholesale Energy Product