ACER

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

6th Edition

22 July 2021

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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.

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, as appropriate. 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 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 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

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://documents.acer-remit.eu/wp-content/uploads/1st_edition_ACER_guidance.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://documents.acer-remit.eu/wp-content/uploads/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://documents.acer-remit.eu/wp-content/uploads/4th-Edition-ACER-Guidance-updated.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://documents.acer-remit.eu/wp-content/uploads/5th-Edition-ACER-Guidance-updated.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://documents.acer-remit.eu/wp-content/uploads/202105_5th-Edition-ACER-Guidance-Update2.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://documents.acer-remit.eu/category/all-documents/

- 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://documents.acer-remit.eu/category/all-documents/

- 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://documents.acer-remit.eu/category/all-documents/

- 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

- 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

- 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 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 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation
  https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0124&from=EN

- DIRECTIVE 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)
  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:096:0016:0016:EN:PDF

- DIRECTIVE 2004/109/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

- DIRECTIVE 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (MiFID)
  https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0039&from=EN

- DIRECTIVE 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions
  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:162:0070:0075:EN:PDF

- 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

- 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

- 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

- Market Abuse Directive - Level 3 – second set of CESR guidance and information on the common operation of the Directive to the Market (Ref. CESR/06-562b)

  https://www.esma.europa.eu/sites/default/files/library/2015/11/06_562b.pdf

- Market Abuse Directive - Level 3 – third set of CESR guidance and information on the common operation of the Directive to the Market (Ref. CESR/09-219)

  https://www.esma.europa.eu/sites/default/files/library/2015/11/09_219.pdf

- 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) 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

- 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

- 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

- 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

- 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

Preface by the Director on the 6th edition

The European Green Deal mandates a decarbonisation of the EU's energy system by relying on an increased use of renewable sources and on a fully integrated, interconnected and digitalised EU energy market, while also aiming at ensuring a secure and affordable energy supply for EU citizens.

This objective can only be achieved on the basis of a transparent and efficient price formation at wholesale level. In this context, REMIT (Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency) plays a major role. 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 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 National Regulatory Authorities (NRAs) constitutes a key instrument used by the Agency to overcome it.

Over the last 10 years, five 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.

On the 10th anniversary of the first publication, and taking into account the expected market developments resulting from the implementation of the European Green Deal, as well as the experience gained so far, including the feedback received from NRAs, market participants and other stakeholders, the Agency considers it necessary to structurally revamp its ACER Guidance with the publication of a 6th edition. In this new edition, the Agency has 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.

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

Table of Contents

1. Introduction

This document contains the 6th edition of the non-binding Guidance on the application of REMIT, directed at National Regulatory Authorities (NRAs), pursuant to Article 16(1) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency[1] (REMIT).

It currently 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 registration of market participants (Chapter 7); the obligations of persons professionally arranging transactions (Chapter 8); and best practices on compliance and penalty regimes (Chapter 9).

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 legislation[2].

In particular, this 6th edition of the Guidance further elaborates and provides examples on the scope of REMIT and on the core prohibitions of insider trading and market manipulation, as respectively laid down in Articles 3 and 5 of REMIT. It looks at all the elements of their definitions, at signals and indicators of breaches of these prohibitions and at their exemptions. The document provides guidance as to how these market abuses should be understood under REMIT and what type of behaviour could be qualified as a REMIT breach. The Guidance does not touch upon the sanctioning of these breaches, the conditions of which are determined at national level by the EU Member States.

In this edition, the structure and the content of the Guidance were revisited as follows:

- Previous Chapters 2 and 3 of the 5th edition of this Guidance were amended and merged into a new Chapter 2 on the scope of REMIT;
- A new Chapter 5 on the prohibition of insider trading was added, building on the content of previous Chapter 8 of the 5th edition and replacing it;
- A new Chapter 6 on the prohibitions of market manipulation and attempted market manipulation was added, merging the content from the previous Chapters 6, 8 and 10 of the 5th edition and replacing it;
- Previous Chapter 4 of the 5th edition of this Guidance was not amended and became Chapter 7 of the 6th edition;
- Previous Chapter 5 of the 5th edition of this Guidance was not amended and became Chapter 3 of the 6th edition;

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

[2] 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.

- Previous Chapter 7 of the 5th edition of this Guidance was not amended and became Chapter 4 of the 6th edition;
- Previous Chapter 9 of the 5th edition of this Guidance was not amended and became Chapter 8 of the 6th edition; and
- Previous Chapter 10 of the 5th edition of this Guidance was partially integrated in the new Chapter 6 and the remaining content became Chapter 9 of the 6th edition.

2. REMIT scope

2.1. Introduction

Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency (REMIT) establishes 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).[3,4]

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.

This chapter intends to provide guidance to the NRAs on the scope of REMIT by presenting the Agency's understanding of the notions of wholesale energy products ('WEP') and markets ('WEM') as defined by Article 2 of REMIT.[5] 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')

Article 1(2) of REMIT establishes that REMIT applies to wholesale energy products.[6] 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:

(a) contracts for the supply of electricity or natural gas where delivery is in the Union;

(b) derivatives relating to electricity or natural gas produced, traded or delivered in the Union;

(c) contracts relating to the transportation of electricity or natural gas in the Union;

(d) *derivatives relating to the transportation of electricity or natural gas in the Union."*

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

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

[3] 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).

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

[5] 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/.

[6] For the exceptions to the general scope of application of REMIT on specific provisions, see Subchapter 2.5 infra.

In view of the definition of wholesale energy products in Article 2(4) of REMIT, the Agency considers contracts for the supply or transportation of electricity and natural gas traded intraday, within-day, day-ahead, two-day-ahead, week-end, week, monthly, quarterly, yearly, long-term or during any other time period generally accepted in the market as contracts for the supply or transportation of electricity 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.

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 intermediated by persons personally arranging transactions (the concept of PPATs is further detailed in Chapter 8 of the Guidance) but also that are traded bilaterally and/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[7] where applicable, shall be considered wholesale energy markets according to REMIT.

Concerning the contracts for the supply of natural gas, pursuant to Article 2(7) of Directive 2009/73/EC, 'supply' means the sale, including resale, of natural gas, including liquefied natural gas ('LNG'), to customers. Accordingly, it is without doubt that contracts for the supply of LNG with delivery in the European Union ('EU') are wholesale energy contracts pursuant to Article 2(4)(a) of REMIT.

Furthermore, pursuant to Article 1(2) of Directive 2009/73/EC, the rules established for natural gas, including LNG, 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 contracts.

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.[8]

As explicitly mentioned in REMIT, contracts for the supply and distribution of electricity 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[9] greater than 600 GWh, these contracts will fall within the scope of REMIT wholesale energy products.

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

[8] 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.

[9] 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/).

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

For the purposes of REMIT, the definition of 'final customer' draws on the relevant definition in Directive (EU) 2019/944[10] of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity, and 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. These Directives define a final customer as *"a customer purchasing electricity or natural gas for his own use"*.[11]

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 or natural gas at full use of that customer's production capacity. It comprises all consumption by that customer as a single economic entity, in so far as consumption takes place on markets with interrelated wholesale prices.

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

With regard to Article 2(5) of REMIT, the Agency understands 'consumption [...] *at full use* of that customer's production capacity' to mean the maximum amount of energy (electricity or natural gas) that a final customer could consume in a year, i.e. if the customer 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 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 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 their 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;

[10] 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 (OJ L 158, 14.6.2019, p. 125–199) repealed Directive 2009/72/EC.

[11] See also Directive (EU) 2019/944, ibid, Art. 2.3, where the definition of the final customer remains the same *('final customer' means a customer who purchases electricity for own use*).

- 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 as the development of a single European energy market continues to progress.[12] Having this in mind, the Agency considers it prudent for market participants to take into account the consumption capacity of all their plants across the Union when assessing whether the consumption capacity threshold of 600 GWh is exceeded.

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 or natural gas[13] 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 or natural gas	**X**	
Transportation contracts in the Union of electricity 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 or natural gas	**X**	
Gas transport capacity contracts in the Union related to upstream pipeline networks	**X**	
Contracts relating to the transportation of electricity 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 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**	

[12] 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://acer.europa.eu/en/Electricity/Market%20monitoring/Pages/Current-Edition.aspx.

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

	In scope of REMIT	
	Yes	No
Derivatives relating to electricity or natural gas produced, traded or delivered in the Union	X [14]	
Derivatives of the transportation contracts of electricity or natural gas in the Union	X [15]	
Intra-group transactions of electricity and natural gas for delivery in the Union[16]	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[17] and through capacity remuneration mechanisms in the Union	X	
Contracts for the supply of electricity or natural gas for the use of final customer with a consumption capacity greater than 600 GWh/year[18] in the Union	X	
Contracts for green certificates and emission allowances		X
Production of electricity or gas by a production unit which is consumed within the same production facility		X

2.2.2. Wholesale energy markets ('WEM')

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."

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.

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

[14] 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.

[15] Ibid.

[16] Intra-group transactions means over-the-counter ('OTC') contracts entered into with another counterparty which is part of the same group.

[17] 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.

[18] 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 for the trading of electricity or natural gas with delivery in the EU;
- redispatching and countertrading mechanisms[19], in so far as wholesale energy products are traded there;
- intraday or within-day markets for the trading of electricity or natural gas with delivery in the EU;
- day-ahead or two-day-ahead markets for the trading of electricity or natural gas with delivery in the EU, including week-end products;
- physical markets for the trading of electricity 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 or natural gas in the EU;
- derivatives markets relating to electricity or natural gas produced, traded or delivered in the Union, including financial OTC markets;
- derivatives markets relating to the transportation of electricity or natural gas in the EU;
- generation capacity markets and capacity remuneration mechanisms, in so far as wholesale energy products are traded there;
- local flexibility markets for electricity[20], in so far as wholesale energy products are traded there.

2.3. Geographical scope

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 place of trading.

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[21], non-EU persons are also covered by REMIT provided that they enter into transactions in wholesale energy products.

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 register in the EU Member State in which they are active. 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. The prohibitions of insider

[19] 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".

[20] 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.

[21] 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.

trading and market manipulation therefore apply irrespective of the location of the person involved in potential market abuse.

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 and therefore fall under the scope of REMIT.

Pursuant to Article 2(4) of REMIT, depending on the typology of contract, four 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);
- '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); 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

Concerning the contracts for the supply of electricity 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 or natural gas must be in the EU.

As a consequence, contracts for the supply of electricity 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 or natural gas produced/generated and delivered outside of the EU. On the contrary, contracts for the supply of electricity or natural gas produced/generated outside the EU but delivered within the EU borders will be under the scope of REMIT.

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

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

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 or natural gas produced or traded in the EU. Such contracts are wholesale energy products irrespective of whether the related electricity or natural gas is delivered in the EU.[22]

Under Article 2(4)(b) of REMIT, it is also clear that if the underlying electricity or 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 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 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 market place 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.[23]

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

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

[22] 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.

[23] 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.

contracts under 2(4)(d) of REMIT, as they must relate to the transportation of electricity or natural gas in the EU.

The concept of 'transportation of electricity 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 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 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 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.

The contracts or derivatives related to the transportation of electricity or natural gas (including LNG biogas and renewable gases) involving the transportation of electricity 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 Russia into the EU (the contract stipulates that the entry point is in a Russian location and the delivery point is at the border between Ukraine and Slovakia).

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 Russia to Slovakia.
- It is *related to that transportation in the EU* – the delivery point of the natural gas to be transported is the border between Slovakia and Ukraine that is partially located in the EU (as Slovakia is the EU Member State while Ukraine is not).

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

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.

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

As the electricity 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 be also 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

This subchapter identifies the type of natural or legal persons that can fall in the scope of REMIT, particularly in the scope of the provisions where NRAs are responsible for investigating and/or enforcing.

In general terms, it can be stated that any person (legal or natural) can fall in 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.

This subchapter sets out the personal scope of each of the six 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 report REMIT data under Article 8 of REMIT, (v) obligation to register under Article 9(1) of REMIT, and (vi) obligations to notify and to have arrangements in order to identify market abuse by persons professionally arranging transactions under Article 15 of REMIT.

The list below indicates the persons covered by the six REMIT prohibitions and obligations:

(i) Prohibition of insider trading

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

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.

Market participants[24] 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.

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

(iii) Market manipulation

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.

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

Therefore, the prohibition of market manipulation (and attempted market manipulation) under Article 5 of REMIT applies to any natural or legal person, and presents 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) Data reporting obligation

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

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')[25] and Transaction Reporting User Manual.[26]

(v) Registration of market participants

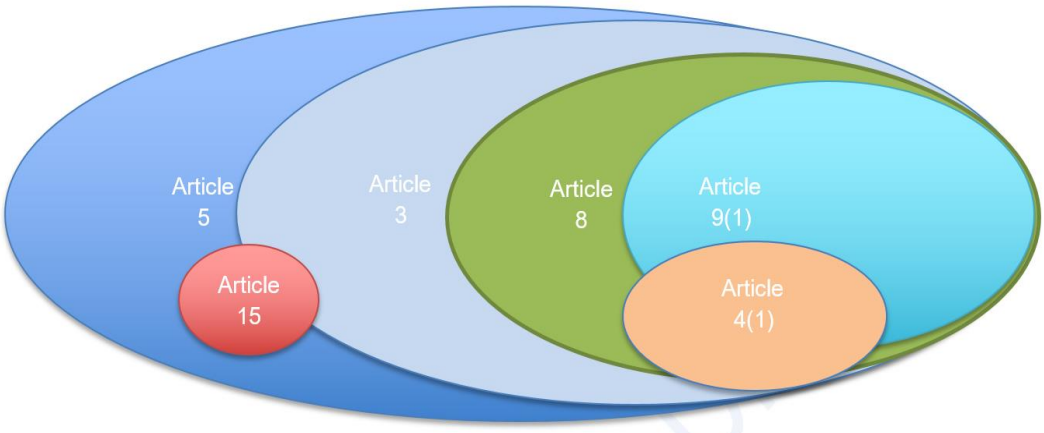
The registration obligation defined in Article 9(1) of REMIT applies to market participants entering into transactions which are required to be reported to the Agency in accordance with Article 8(1). More details on the registration obligation is provided in Chapter 7.

(vi) Obligations of persons professionally arranging transactions

The obligations to notify and to have arrangements in order to identify market abuse under Article 15 of REMIT apply to persons professionally arranging transactions. The delimitations of the concept of PPATs is provided in Subchapter 8.2.

The illustration below shows the different personal scopes of the six prohibitions and obligations of REMIT towards legal and natural persons. The widest personal scope is defined for the prohibition of market manipulation under Article 5 of REMIT, which is applicable to all legal and natural persons. On the other side of the scale, the obligation to publish inside information under Article 4(1) of REMIT is only applicable to the pre-defined group of market participants, and the obligation to notify and to have arrangements in order to identify market abuse under Article 15 is restricted to persons professionally arranging transactions.

Figure 1: Different personal scopes of the six prohibitions and obligations of REMIT



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

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

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, 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 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 which are required to be reported to the Agency in accordance with Article 8(1) of REMIT.

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

- **Energy trading companies** in the meaning of 'electricity undertaking' pursuant to Article 2(35) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity[27] carrying out at least one of the following functions: transportation, supply, or purchase of electricity, and in the meaning of 'natural gas undertaking' pursuant to Article 2(1) of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas carrying out at least one of the following functions: transportation, supply or purchase of natural gas, including liquefied natural gas ('LNG');

- **Producers of electricity or natural gas** in the meaning of Article 2(2) of Directive 2009/72/EC[28] and Article 2(1) of Directive 2009/73/EC**,** including producers supplying their production to their in-house trading unit or energy trading company;

- **Shippers of natural gas;**

- **Balance responsible entities;**

- **Wholesale customers** in the meaning of Article 2(8) of Directive 2009/72/EC[29] and Article 2(29) of Directive 2009/73/EC;

- **Final customers** in the meaning of Article 2(9) of Directive 2009/72/EC[30] and Article 2(27) of Directive 2009/73/EC, acting as a single economic entity having a consumption capacity of 600 GWh or more per year for gas or electricity. If the consumption of a final customer takes place in

[27] 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.

[28] Cf. Art. 2(38), ibid.

[29] Cf. Art. 2(2), ibid.

[30] Cf. Art. 2(3), ibid.

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(4) of Directive 2009/72/EC[31] and Directive 2009/73/EC;

- **Distribution system operators ('DSOs')** in the meaning of Article 2(6) of Directive 2009/72/EC[32] and Directive 2009/73/EC;

- **Storage system operators ('SSOs')** in the meaning of Article 2(10) of Directive 2009/73/EC;

- **LNG system operators ('LSOs')** in the meaning of Article 2(12) of Directive 2009/73/EC;

- **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 wholesale energy markets.

For instance, SSOs and LSOs are explicitly mentioned as market participants in Article 3(4)(b) of REMIT and are therefore considered market participants if entering into transactions in one or more wholesale energy markets. LSOs may sell contracts which eventually lead to the extraction or feeding of gas into/from the gas network. In several markets, some SSOs conclude contracts for the supply of gas in cases where storage facilities experience operational problems, but despite the malfunction, seek to provide customers with gas and therefore acquire volumes over the spot market. As a result, these LSOs and SSOs are market participants for the purposes of REMIT, and are required to publish inside information according to Article 4(1) of REMIT. Additionally, information related to the capacity and use of facilities for storage and the use of LNG facilities is required to be reported to the Agency according to Article 8(5) of REMIT.[33]

[31] Cf. Art. 2(35), ibid.

[32] Cf. Art. 2(29), ibid.

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

2.5. Interaction between REMIT and the financial legislation

According to Article 1(2) of REMIT, REMIT applies to trading in wholesale energy products. However, according to the same Article, Articles 3 and 5 of REMIT shall not apply to wholesale energy products which are financial instruments and to which Article 9 of Directive 2003/6/E (and as of the 3 July 2016, Article 2 of MAR)[34,35] applies.[36]

Article 1(2) of REMIT therefore defines the delimitation among the scope of application of the market abuse prohibitions of Articles 3 and 5 of REMIT, on the one hand, and the market abuse prohibitions of MAR, on the other hand.

In any case, it is to be noted that Article 1(2) of REMIT does not exclude the application of other Articles of REMIT to any type of wholesale energy product (including the ones that are also financial instruments). For example, the obligation to disclose inside information laid down in Article 4(1) of REMIT applies regardless of whether the wholesale energy product also qualifies as a financial instrument. The obligation for market participants to provide data to the Agency (according to Article 8 of REMIT)[37] and to register with the relevant NRA (according to Article 9 of REMIT) also continues to apply.

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[34] Article 1(2) of REMIT refers to the Article 9 of Directive 2003/6/EC (MAD). MAD was repealed by MAR (*op. cit* , n. 3). According to Article 37 of MAR, references to Directive 2003/6/EC shall be construed as references to MAR and shall be read in accordance with the correlation table set out in Annex II to MAR. According to the correlation table set out in Annex II of MAR, Article 9, first paragraph, of MAD correlates with Article 2(1)(a) and (2) of MAR, Article 9, second paragraph, of MAD correlates with Article 2(1)(d) of MAR and Article 9, third paragraph, of MAD correlates with Article 17(1) and Article 18(7) of MAR.

[35] According to Article 2(1) of MAR, the Regulation applies to financial instruments:

(a) admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made;

(b) traded on an 'multilateral trading facility' ('MTF'), admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made;

(c) traded on an 'organised trading facility' ('OTF'); and

(d) not covered by point (a), (b) or (c), the price or value of which depends on or has an effect on the price or value of a financial instrument referred to in those points, including, but not limited to, credit default swaps and contracts for difference.

In addition, Article 2(3) of MAR defines that MAR applies to any transaction, order or behaviour concerning any financial instrument […], irrespective of whether or not such a transaction, order or behaviour takes place on a trading venue.

[36] The financial instruments subject to the MAR provisions are, as specified in Article 3(1)(1) of MAR, the instruments defined in Article 4(1)(15) of MiFID II and further specified in Section C of its Annex I.

According to Annex I Section C of MiFID II, wholesale energy products that fall in the following categories would qualify as financial instruments:

(5) Options, futures, swaps, forwards and any other derivative contracts relating to the supply of electricity/gas with delivery in the EU or for the transportation of electricity/gas in the EU that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;

(6) Options, futures, swaps, and any other derivative contract relating to the supply of electricity/gas with delivery in the EU or for the transportation of electricity/gas in the EU 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;

(7) Options, futures, swaps, forwards and any other derivative contracts relating to the supply of electricity/gas with delivery in the EU or for the transportation of electricity/gas in the EU, that can be physically settled not otherwise mentioned above and not being for commercial purposes, which have the characteristics of other derivative financial instruments;

(10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF.

[37] According to Article 8(3) of REMIT, this obligation does not apply if market participants fulfilled their obligation to provide data in line with the applicable financial regulation. It is, however, important to note that the scope of the data reporting obligations

Moreover, Article 1(2) of REMIT provides that REMIT is without prejudice to MAR, MiFID II and MiFIR,[38] as well as to the application of competition law to the practices covered by REMIT. More detailed information on the interaction between REMIT and competition law in the field of market manipulation can be found in Subchapter 6.4.2.

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 market place, in the product 'Market Area A Power Base Q1 OTF Future' for the year 2022.

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 2022).
- *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 2022). 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 market place 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): the day-ahead electricity price of Market Area A.

As a derivative relating to electricity traded and delivered in the Union, 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, and the prohibitions of insider trading and market manipulation under Articles 3 and 5 of REMIT are fully applicable to transactions in this product.

under REMIT is essentially different from that included in the financial regulation (more information on the data reporting obligations under REMIT can be found here: https://documents.acer-remit.eu/category/remit-reporting-user-package/).

[38] Article 1(2) of REMIT refers to MiFID, which have been repealed by MiFID II and MiFIR.

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 report 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 '2022 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 '2022 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 2022 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 only 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 included in the definitions of financial instruments given in Section C of Annex I of Directive 2014/65/EU.

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 Union, 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 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 a financial instrument and to which Articles 3 and 5 of REMIT do not apply

Situation: Potential insider trading was identified on the regulated market segment of an organised market place. It notably relates to transactions in the product 'Market Area A Power Base Year Future' for the year 2022.

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 2022).
- *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 2022). But 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 market place 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): 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 Union, 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 MAR as described under its Article 2.

According to Article 1(2) of REMIT, Articles 3 and 5 of REMIT do not apply to this suspicious transaction, which instead falls in the scope of MAR and is to be scrutinised by the competent financial authorities.

Considerations:

In the situation above, the NRA assessing the case should refer it to the competent financial authority, and notify the Agency under Article 16(3)(a) of REMIT. Nevertheless, the NRA is still responsible for the assessment of whether the behaviour constitutes a potential breach of Article 4 of REMIT in case the potential insider trading is related to a non-effective or non-timely disclosure of inside information.

3. Application of the definition of 'inside information'

3.1. Introduction

This chapter covers what the Agency currently considers 'inside information' under REMIT.

Qualifying a specific fact[39] as 'inside information' under REMIT requires a two-step approach. Firstly, it must be determined whether there is an item 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).

The remainder of this chapter is structured along the two-step approach by providing guidance on what the Agency considers 'information' under REMIT (Chapter 3.2) and on the definition of 'inside information', including the application of the four cumulative conditions that qualify information as 'inside information' (Chapter 3.3)[40].

3.2. The concept of 'information' under REMIT

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 (EC) No 714/2009 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 or natural gas or related to the capacity and use of LNG facilities, including planned or unplanned unavailability of these facilities;*

(c) *information which is required to be disclosed in accordance with legal or regulatory provisions at Union or national level, market rules, and contracts or customs on the relevant wholesale energy market, insofar as this information is likely to have a significant effect on the prices of wholesale energy products; and*

(d) *other information that a reasonable market participant would be likely to use as part of the basis of its decision to enter into a transaction relating to, or to issue an order to trade in, a wholesale energy product."*

Article 2(1)(a) of REMIT states that all information which is required to be disclosed under Regulations (EC) No 2019/943[41] and (EC) No 715/2009[42] 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.

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

[40] 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

[41] Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (Text with EEA relevance). This Regulation repealed Regulation (EU) 714/2009.

[42] 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.

The concept of 'information' under REMIT also encompasses information related to all planned or unplanned changes[43] in the capacity or output of any size at a facility for production, storage, consumption or transmission of natural gas 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 or natural gas, including planned and unplanned unavailability of these facilities;
- the capacity and use of facilities for storage of electricity or natural gas, including planned and unplanned availability of these facilities;
- the capacity and use of facilities for consumption of electricity 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.

Article 2(1)(c) of REMIT explains that the concept of 'information' under REMIT also covers facts[44] 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.

In that respect, it is important to highlight the regulatory provisions at the European Union level included in Regulation (EC) 543/2013 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.

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 their decision to issue an order to trade in a wholesale energy product, should be considered 'information' under REMIT.

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

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

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) and (c) 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'.

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 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) and (d) of REMIT.

3.3. The definition of 'inside information'

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."*

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.

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.

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[45], 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 lists of insiders and/or mechanisms in place to identify insiders[46].

The internal compliance rules should be consistent with a market participant's organisational structure and trading strategy.

3.3.1. Information of a precise nature

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

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

The precise nature of the information is to be assessed by the 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 lengthy process may be precise information.

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

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[47].

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

[46] 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.

[47] 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

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[48]. 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).

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 lengthy process may be precise information

Intermediate steps in a lengthy 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

[48] 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).

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.

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 lengthy 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 lengthy 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

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.

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[49] or by any other party.

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 (see Chapter 4 for more details), is used. 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.

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)

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.

'Wholesale energy products' are defined under Article 2(4) of REMIT as[50]:

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

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.

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

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.

It is important, however, to note that the mere 'likelihood' of a significant price effect is enough to meet this condition and that no actual price effect is required.

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[49] 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.

[50] Further guidance on the Agency's current understanding of the notion of 'wholesale energy products' is also provided in Subchapter 3.2 of this Guidance.

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.).

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.

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.

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[51].

[51] This 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

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

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 this request to activate reserves 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

In their assessments, the NRAs should take into consideration Recital 12 of REMIT, which explicitly states that information regarding a market participant's own[52] plans and strategies for trading should not be considered as inside information.

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.

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.

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

[52] 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

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. This chapter, as lastly amended, should be fully complied with after a transition period which will be communicated by the Agency.

According to Article 4(1) of REMIT,

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

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

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

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. The Agency believes that, in order to achieve effective disclosure according to Article 4 of REMIT, the information shall be disclosed using a platform for the

disclosure of inside information (Inside Information Platform or IIP),[53] i.e. an electronic system for the delivery of information which allows multiple market participants to share information with the wide public and complies with the minimum quality requirements listed in Subchapter 4.2.2.

Using Inside Information Platforms as the default disclosure mechanism is supported by the fact that:

(a) This disclosure mechanism is indicated by a combined reading of Article 4(1) and Article 4(4) of REMIT. According to Article 4(4) of REMIT the publication of inside information, including in aggregated form, in accordance with Regulation (EU) 2019/943[54] or (EC) No 715/2009, or guidelines and network codes adopted pursuant to those Regulations, constitutes simultaneous, complete and effective public disclosure. The transparency rules under these regulations stipulate a publication of transparency information on central information transparency platforms. Therefore, the disclosure by Inside Information Platforms would then foster a consistent understanding of effective disclosure according to Article 4(1) of REMIT and Article 4(4) of REMIT.

(b) This disclosure mechanism promotes convergence with technical standards established under financial market legislation in this regard, in particular those established under Article 17 of MAR, as further specified in Commission Implementing Regulation (EU) 2016/1055 laying down implementing standards with regards to the technical means for appropriate public disclosure of inside information.

(c) The reduction in the number of publication channels leads to a significant reduction in complexity and effort for market participants to access and use information that is published according to Article 4 of REMIT.

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[55], 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.

Regarding the publication of inside information, including in aggregated form, in accordance with Regulation (EU) 2019/943[56] or (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations, and Commission Regulation (EU) No 543/2013, this is also considered, according to Article 4(4) REMIT, as a simultaneous, complete and effective public 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.

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. 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.

The publication of inside information on platforms 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

[53] The platform shall adhere to the rules of protection of Personal Data, in accordance with the General Data Protection Regulation 2016/679.

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

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

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

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).

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 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

The following minimum requirements shall be fulfilled by the Inside Information Platform in order to ensure an effective disclosure of inside information:

- 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, allowing easy and fast access by the public;
- the platform shall facilitate active distribution of inside information by means of web feeds in a way that enables the Agency to collect[57] - 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);
- 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;

[57] 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.

- 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.

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[58]. 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.

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 fields and allowed values listed in ANNEX VII of the REMIT MoP should be supported by the platform.

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.

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.

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

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.

[58] 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

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

- if the inside information has to be published in accordance with Regulation (EU) 2019/943[59] and (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations, and Commission Regulation (EU) No 543/2013, the publishing according to these rules and regulations, including in aggregated form, is considered simultaneous, complete and effective public disclosure (Article 4(4) of REMIT). However, it has to be stressed that even if Article 4(4) of REMIT states that the publication of inside information, including in aggregated form, in accordance with the above-mentioned Regulations, constitutes simultaneous, complete and effective public disclosure, it does not necessarily constitute disclosure in a timely manner and the inside information has to be published, in any case, before trading in wholesale energy products to which that information relates, or recommending another person to trade in wholesale energy markets to which that information relates.

- if the inside information does not have to be made public in accordance with Regulation (EU) 2019/943[60] and (EC) No 715/2009 and Commission Regulation (EU) No 543/2013, the Agency currently considers that there is no reason for applying a different reasonable timeframe for the disclosure of information than stated in the above-mentioned Regulations. Such information should therefore normally be published as soon as possible, but at the latest within one hour if not otherwise specified in applicable rules and regulations. But in any case the inside information has to be published before trading in wholesale energy products to which that information relates or recommending another person to trade in wholesale energy markets to which that information relates.

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

4.4. Delayed disclosure of inside information

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

"A market participant may under its own responsibility exceptionally delay the public disclosure of inside information so as not to prejudice its legitimate interests provided that such omission is not likely to mislead the public and provided that the market participant is able to ensure the confidentiality of that information and does not make decisions relating to trading in wholesale energy products based upon that information. In such a situation the market participant shall without delay provide that information, together with a justification for the delay of the public disclosure, to the Agency and the relevant national regulatory authority having regard to Article 8(5)."

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

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

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

4(2) can only be determined ex-post. As soon as the legitimate interests cease to exist, the market participant must disclose the inside information in accordance with Article 4(1).

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

4.5. Exemption in Article 4(7)

According to Article 4(7) of REMIT,

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

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

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

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

5. Prohibition of insider trading

5.1. Introduction

Article 3(1) of REMIT prohibits persons who possess inside information[61] 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.

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.

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.

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.

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.

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

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."

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*'.

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

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.[62] 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).

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

<table>
<tr><th></th><th colspan="2">Forms of insider trading</th></tr>
<tr><th></th><th>Attempted form</th><th>Effect form</th></tr>
<tr><td>On-market</td><td>Using inside information by trying to acquire or dispose of wholesale energy products</td><td rowspan="2">Using inside information by acquiring or disposing of wholesale energy products

Disclosing inside information[63]

Recommending or inducing to acquire/dispose of wholesale energy products</td></tr>
<tr><td>Off-market</td><td></td></tr>
</table>

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.

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.

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.

[62] '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.

[63] 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.

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.

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.

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.

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

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*".

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)

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.[64]

[64] 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.

In the light of the above and the scope and objectives of REMIT, in order to comply with the prohibition of insider trading, 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.[65]

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.

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.

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.

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.[66] 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.[67]

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

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.

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

[65] 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.

[66] 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"*.

[67] 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.

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.

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.

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

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

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).

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.[68] 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

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.

In order to meet this condition, it is necessary to define to which wholesale energy product[69] the inside information relates.

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

[68] 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.

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

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).

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).

Below, 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.

- *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.

Assessment: The PPAT used inside information to acquire, for their 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 their 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:

- A client's order to trade sent to the PPAT is part of the client's own trading strategy and does not constitute information under REMIT, as far as the client is concerned. Therefore, it is not considered inside information from the client's perspective. However, it can qualify as inside information for the PPAT, as it is not part of the PPAT '*own trading strategy*' but rather the strategy of their client. Notwithstanding, the PPAT is not the relevant Market Participant that has 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 WEP, 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

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"*.

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

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).

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.

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).

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.

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

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.[70] 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.

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.

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.

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

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.
- *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

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*".

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')[71] one or more direct or indirect signals relevant for trading on one or more wholesale energy markets that are related to that inside information.

[71] Person receiving a tip or recommendation.

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.

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.[72]

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

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

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

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:

[72] 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.

- 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.

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

The following examples of types of practices could constitute insider trading, and are currently considered relevant for the wholesale energy markets:

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.

A typical example of this prohibited behaviour is when an agent (e.g. 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.[73] 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.[74] 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 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.[75]

[73] 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.

[74] 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.

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

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

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'.[76]

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.

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

[76] 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.

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.

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 9.2).

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.

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.

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

Articles 3(3) and 3(4) of REMIT provide exemptions from the application of the prohibition of insider trading.[77]

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

Article 3(3) of REMIT provides that:

[77] 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.

"Points (a) and (c) of paragraph 1 of this Article shall not apply to transmission system operators when purchasing electricity or natural gas in order to ensure the safe and secure operation of the system in accordance with their obligations under points (d) and (e) of Article 12 of Directive 2009/72/EC[78] or points (a) and (c) of Article 13(1) of Directive 2009/73/EC."

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[79] 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[80] 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.

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)[81] 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.

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.

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

[78] 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.

[79] 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.

[80] 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.

[81] 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.

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

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

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

(b) transactions entered into by electricity and natural gas producers, operators of natural gas storage facilities or operators of LNG import facilities the sole purpose of which is to cover the immediate physical loss resulting from unplanned outages, where not to do so would result in the market participant not being able to meet existing contractual obligations or where such action is undertaken in agreement with the transmission system operator(s) concerned in order to ensure safe and secure operation of the system. In such a situation, the relevant information relating to the transactions shall be reported to the Agency and the national regulatory authority. This reporting obligation is without prejudice to the obligation set out in Article 4(1);

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

Concerning the exemption 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.

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.

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.

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[82] 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.

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.

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.

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*'.

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(ies).

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.

[82] 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

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.

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.

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.[83]

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.

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.

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

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'.

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

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

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

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

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

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

or

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

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

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

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

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."

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.

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 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.

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.

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.

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[84] – not necessary to show that the suspected person knew that he/she was infringing REMIT.

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.

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.[85] 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.

Articles 2(2) and 2(3) of REMIT distinguish four 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; and (4) disseminating false or misleading information.

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.[86]

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[87] on one or more wholesale energy markets. This includes, for example, the issuance of new orders, the amendment/modification of existing orders, the

[84] 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.

[85] 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.

[86] '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.

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

cancellation of orders, the establishment of links or dependencies between orders, or any other action relating to entering into transactions or issuing orders.[88]

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.

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.

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><td colspan="2" rowspan="2"></td><td rowspan="2">Intention</td><td colspan="2">Effect</td></tr>
<tr><td>Likely effect</td><td>Real effect</td></tr>
<tr><td rowspan="3">On-market</td><td>Giving false/misleading signals</td><td rowspan="4">Attempted market manipulation</td><td colspan="2" rowspan="4">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>
</table>

[88] 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).

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

As mentioned above, entering into any transaction or issuing any order to trade in 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).

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.[89]

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.

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.

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.

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:

- orders placed or transactions executed at price levels that are uneconomical[90] for the market participant;
- 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 …);

[89] 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/en/remit/Pages/Overview-of-the-sanction-decisions.aspx.

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

- 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.

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.

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.

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.

Assessing orders/transactions giving false or misleading signals

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.

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.

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.

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.

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

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.

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.

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[91] 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.

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.

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.

The views of other market participants and PPATs present in the relevant market at the time of the suspicious behaviour may constitute relevant evidence in determining the likelihood of 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').

[91] For example, carrying out multiple manipulative transactions on an illiquid market can increase the likelihood of these transactions giving 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.

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 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) there is a likelihood that the behaviour would 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.

Assessing an attempt to give false or misleading signals

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.

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 the price at an artificial level

Entering into any transaction or issuing any order to trade in wholesale energy products is considered a breach of the market manipulation prohibition under Article 5 of REMIT when this order/transaction secures, or attempts 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).

Market manipulation is thus established when an artificial price level is 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.

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.

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

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.

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.

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.

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.[92]

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.

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.[93] Thus, even a very short-term artificial movement of the price is sufficient to be qualified as a breach of Article 5 of REMIT.

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.[94] More guidance on how NRAs should assess these exemptions is provided under Subchapter 6.5.

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

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

[93] 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.

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

quantity. The ask and bid orders matched. This was the last transaction of the day for the day-ahead product.

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

Entering into any transaction or issuing any order to trade in 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).

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.

The 'off-market' part of the strategy can be the dissemination of false or misleading information as covered under Subchapter 6.2.4 below,[95] but also the undertaking of actions sending misleading signals.[96] 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).

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.

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.

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

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.

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.

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.

[95] 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/en/remit/Pages/Overview-of-the-sanction-decisions.aspx

[96] 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

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).

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 4.2 (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.

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.

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.).

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,[97] 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.[98]

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.

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.

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.

[97] 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).

[98] 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.

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.

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.[99]

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.

[99] 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 this link.

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.
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.

6.3. Indicators of market manipulation

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, which shall not necessarily be deemed, by themselves, to constitute (attempted) market manipulation.

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.

6.3.1. Possible signals

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.

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) Whether realised transactions lead to no change in beneficial ownership of a wholesale energy product;

d) 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;

e) 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;

f) 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;

g) 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;

h) 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

i) 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.

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;

and

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.

6.3.2. Types of practices

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. (…)"

In order to provide further guidance to the NRAs, based on the current experience, the Agency 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.

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;[100,101]

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;[102]

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;[103]

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;[104]

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;

[100] 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.

[101] 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.

[102] Idem.

[103] 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.

[104] Idem.

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;

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;[105] 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.

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[106] or physical withholding[107]. Electricity generation capacity withholding may be performed by one or more market participants,[108] 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[109] is therefore needed. REMIT does not prohibit prices to be high, provided that they reflect a fair and competitive interplay between supply and demand.[110]

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.[111] 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.[112] The second element to assess is whether the market participant has any

[105] 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.

[106] 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.

[107] Actions undertaken in the form of not offering the available generation capacity at any price.

[108] For example, producer or storage asset owners.

[109] For example, there are different time frames and types of market places to be taken into account.

[110] 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.

[111] For example, and not limited to, setting prices at an artificial level.

[112] 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.

legitimate technical, regulatory[113] and/or economic[114] 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.

Types of practice of (attempted) market manipulation through the employment of fictitious devices or any other form of deception or contrivance:

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;[115]

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[116];

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.

[113] 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.

[114] 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.

[115] 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.

[116] 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.

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

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,[117] 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.

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.

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;[118]
- 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; [119]
- public authorities;[120]
- persons professionally arranging transactions, publishing indexes, benchmarks or other information on prices, supply or demand;
- 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;

[117] See Subchapter 2.4 of this Guidance.

[118] 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.

[119] This may include, for example, critical or relevant suppliers of services to markets participants.

[120] 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 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 publishing wholesale energy price benchmarks or indexes;
- 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.

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.

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.

6.4.2. The scope of the market manipulation provision under REMIT vs. the scope of competition law

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 law121 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.[122]

This derives from the fact that the two legislations – REMIT and European 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).

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

[121] 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.

[122] 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:
http://www.concorrencia.pt/vPT/Praticas_Proibidas/Decisoes_e_Contencioso/Documents/PRC%202016%2005%20-%20Decis%C3%A3o%20Final%20VNC.pdf

qualification of a breach of the European competition law. Consequently, a breach of REMIT does not necessarily amount to a breach of competition law.

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

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.

Some orders or transactions on the wholesale energy markets may not be motivated by a real need to procure/sell energy,[123] 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.

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

The REMIT Regulation does not provide for general exemptions to the prohibition of (attempted) market manipulation.

Only Article 2(2)(a)(ii) defining the type of market manipulation through the securing of 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.

According to these provisions, securing (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 that transaction or order to trade conforms to accepted market practices on the wholesale energy market concerned*".

[123] Wash trades, a type of practice described in Subchapter 6.3.2., is often used for this type of schemes.

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,[124] could be a legitimate way for market participants to secure a favourable price for a wholesale energy product.

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[125] (described in Subchapters 6.2.1, 6.2.3 and 6.2.4) that do not provide this exemption possibility.

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.

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.

In compliance with Recital 27 of REMIT, the Agency's Guidance is addressing the issue of AMPs to support NRAs performing this assessment.

The Agency notes the following as regards AMPs under REMIT:

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.

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.

'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.

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.

The following non-exhaustive list of factors shall be taken into account by NRAs when assessing particular practices on the wholesale energy markets:

[124] 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

[125] 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 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;
- 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.

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. Registration of market participants

7.1. Introduction

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

7.2. Which market participants are obliged to register?

According to Article 9(1) of REMIT,

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

According to Article 2(7) of REMIT,

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

In 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.

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

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

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

7.3. What information is market participants required to provide?

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

On 26 June 2012, the Agency adopted a Decision determining the registration format to be used for the establishment of the European register of market participants[126]. The registration format consists of 5 sections:

- Section 1: Data related to the market participant
- Section 2: Data related to the natural persons linked to the market participant

[126] Agency Decision no 01/2012 relating to the registration format pursuant to Article 9(3) of Regulation (EU) No 1227/2011.

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

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

7.4. Establishment of national registers

According to Article 9(2) of REMIT:

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

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

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

NRAs should ensure that market participants are provided with information on how to register. For this purpose, and for the purpose of ensuring accuracy in the European register of market participants established by the Agency in accordance with Article 9(3) of REMIT, the Agency will make available a Registration User Manual (RUM) to NRAs. The RUM will provide guidance on how the fields in the registration format should be populated. On the basis of the RUM, NRAs may provide guidance to market participants on how to register. The manual will be updated periodically, on the basis of the feedback from NRAs.

7.5. With which NRA should market participants register?

According to Article 9(1):

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

According to settled case law of the Court of Justice of the European Union, a legal or natural person can be established in more than one Member State. The legal or natural person is established in the Member State(s) in which it pursues a professional activity on a stable and continuous basis[127]. If a market participant is established in more than one Member State, the Agency would normally expect market participants to register in the Member State in which they have their primary establishment.

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

[127] 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.

7.6. What is the deadline for registration submissions?

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)."

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.

For market participants entering into transactions on an organised market place (OMP), the registration obligation takes effect, at the latest, prior to **7 October 2015**. For all other market participants, the registration obligation takes effect, at the latest, prior to **7 April 2016,** or prior to the **first day they enter into transactions** which are required to be reported to the Agency.

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.

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.

Market participants who have registered before 17 March 2015 (before the Agency published for the first time the list of market participants in the European register) **have not been able to complete Section 4** (data related to the corporate structure of the market participant) **of the registration form by the time of its submission to the NRA**. In accordance with the Agency Decision No 01/2012, they shall provide information on Section 4 of the registration form within 3 months from the first publication of the European register. **They shall, therefore, update their registration form in Section 4 at the latest by 17 June 2015.**

Examples:

Example 1: Market participant (MP) A registered before 17 March 2015

MP A registered before 17 March 2015 and it was required to complete Sections 1, 2, 3 and 5 of the registration form before submission.

Section 4 of the registration form (*Data related to corporate structure of the MP*) was not filled by the MP A at the time of the first submission as the publication of the European register of MPs occurred for the first time on 17 March 2015.

After 17 March 2015, MP A has three months (until 17 June 2015) to fill Section 4 of the registration form with the data available at the European register (so that Section 4 contains all data on MP A related undertaking(s) which are registered MPs) at the time of section's 4 submission for the first time.

In case MP B (a related undertaking to the MP A) only registers after 17 June 2015, MP A will also be obliged to update data in Section 4 accordingly, once MP B registration is published at the European register of MPs.

In addition to the updates of Section 4 of the registration form, MP A has an obligation to promptly update any other information provided in its registration form (this obligation is defined in Article 9(5) of REMIT) at any time once that change takes effect (e.g.: if MP A chooses a new Registered Reporting Mechanism (RRM), Section 5 of the registration form needs to be updated accordingly).

Example 2: MP C registered <u>after 17 March 2015</u>

If MP C has registered after 17 March 2015, it is obliged to complete all Sections (1 to 5) of the registration form with updated data at the time of submission of the registration form. In Section 4 of the registration form (*Data related to corporate structure of the MP*), MP C is required to include all its related undertaking(s) which are registered MPs i.e. all those that are published in the European register of MPs at the time of the form submission.

If MP D (a related undertaking to the MP C) registers with the relevant NRA at a later stage, MP C is also required to promptly update its registration form accordingly once MP D registration is published at the European register of MPs.

In addition to the update of Section 4 of the registration form, MP A has an obligation to promptly update any other information provided in its registration form (this obligation is defined in Article 9(5) of REMIT) at any time once that change takes effect (e.g.: if MP A chooses a new RRM, Section 5 of the registration form needs to be updated accordingly).

7.7. Issuance of the ACER code

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

According to Article 9(4) of REMIT, market participants shall submit the registration form prior to entering into transactions which are required to be reported to the Agency in accordance with Article 8(1) of REMIT. The ACER code will be issued upon the transmission 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[128] transmit the registration information to the Agency once it is submitted by the market participant, after which the Agency immediately issues the ACER code. Thus, NRAs should ensure that market participants receive the ACER code in a timely manner, and in any case before the transactions entered by the market participants are required to be reported to the Agency in accordance with Article 8(1) of REMIT. This will enable market participants to fulfill their reporting obligations under Article 8(1) of REMIT and an efficient and effective data collection by the Agency. The registration system will provide for automatic checks that will prevent incomplete registration forms from being submitted.

For market participants registering before the Agency for the first time publishes the European register, the ACER code will be issued upon the submission of those market participants' first phase information (relating to Sections 1, 2, 3 and 5) to the relevant NRA. However, such market participants should not consider the receipt of an ACER code as a confirmation that they have completed the registration process. In order to complete the process, such market participants still need to provide the information relating to Section 4 of the registration format, as described in Subchapter 0.

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

[128] 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.

7.8. Requirement to keep registration information up to date

According to Article 9(5) of REMIT,

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

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

Although the responsibility to update the information provided to the national registers rests with the market participants, the Agency considers it best practice that NRAs set up regular reminders (e.g. once a year) to market participants asking them to check that the information submitted is still correct and up to date.

7.9. The role of NRAs in the registration process

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.

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 7.4 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.

The second role of NRAs is to transmit the information in their national registers to 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.

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 will provide for automatic checks that will prevent incomplete registration forms from being submitted by market participants.

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

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

7.10. Conclusions

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

1. Before entering into a transaction required to be reported to the Agency in accordance with Article 8(1) of REMIT, the market participant submits a registration form to the relevant NRA, providing information relevant to Sections 1, 2, 3 and 5 of the Agency Decision No 01/2012. NRAs should encourage market participants to register in advance in order to facilitate a smooth registration process. It is the market participant's responsibility to provide correct and complete information for the registration;

2. The NRA promptly transmits the information in its national register to the Agency;

3. Immediately following the transmission of the information from the NRA to the Agency, the Agency issues a unique identifier (the 'ACER code') for the market participant and informs the market participant and the relevant NRA;

4. The Agency establishes a European register of market participants, based on the information provided by NRAs. A list of market participants based on the European register is published;

5. The market participant completes the second phase of the registration process by submitting information relevant to Section 4 of the registration format. The deadline for the submission of this information is 3 months after the Agency publishes for the first time the European register of market participants.

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

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

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

8. Application of the obligations of persons professionally arranging transactions (PPATs)

8.1. Introduction

This chapter provides guidance to NRAs concerning the supervision of the obligations imposed on persons professionally arranging transactions (PPATs) by Article 15 of REMIT.

According to Article 15 of REMIT:

"Any person professionally arranging transactions in wholesale energy products who reasonably suspects that a transaction might breach Article 3 or 5 shall notify the national regulatory authority without further delay.

Persons professionally arranging transactions in wholesale energy products shall establish and maintain effective arrangements and procedures to identify breaches of Article 3 or 5."

An important number of trades in the wholesale energy markets are intermediated by PPATs. Through their role as intermediates, PPATs have exclusive knowledge of the market in which they operate and of their clients; hence, they are in a good position to monitor trading activities and identify potential breaches of REMIT. Therefore, REMIT imposes an explicit responsibility on PPATs to monitor and contribute to the integrity, transparency and proper functioning of the European wholesale energy markets.

The following subchapters illustrate the Agency's current understanding on who is considered to be a PPAT (Subchapter 8.2), what is comprised in the duty to notify potential breaches of Article 3 or 5 of REMIT (Subchapter 8.3) and what is expected from PPATs regarding effective arrangements and procedures to identify those potential breaches (Subchapter 8.4). Subchapter 8.5 covers the compliance advocacy, i.e. the actions the Agency recommends NRAs to take in order to promote the advocacy of Article 15 of REMIT.

8.2. Delimitation of the concept of PPAT

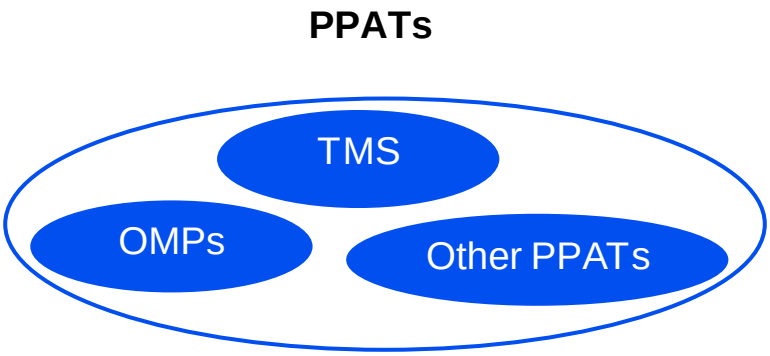
Apart from Article 15 of REMIT, Article 8(4)(d) of REMIT and Article 2(4) of Commission Implementing Regulation (EU) No 1348/2014 include references linked to the concept of PPAT.

Article 8(4)(d) of REMIT provides an overview of the entities that could be considered as PPATs:

"For the purposes of paragraph 1, information shall be provided by: (…) (d) an organised market, a trade-matching system or other person professionally arranging transactions."

Therefore, it can be concluded that organised market places and trade-matching systems fall under the definition of PPATs. Furthermore, any other entities engaged in similar activities must be included in the concept (Figure 2).

Figure 2: Relationship between the concepts of PPAT, organised market places (OMPs) and trade-matching systems (TMS)



The concepts of '*organised market place*' or '*organised market*' are defined in Article 2(4) of Commission Implementing Regulation (EU) No 1348/2014 as follows*:*

(a) "A multilateral system, which brings together or facilitates the bringing together of multiple third party buying and selling interests in wholesale energy products in a way that results in a contract,

(b) any other system or facility in which multiple third-party buying and selling interests in wholesale energy products are able to interact in a way that results in a contract.

These include electricity and gas exchanges, brokers and other persons professionally arranging transactions, and trading venues as defined in Article 4 of Directive 2014/65/EU[129]."

As the concept of other PPATs is not explicitly defined, in order to clarify which entities fall under the definition of PPAT and are subject to Article 15 obligations, the existence of different elements should be assessed on a case-by-case basis. For an entity to be considered a PPAT, it has to fulfil the following three cumulative criteria:

- **person**: means either natural or legal person;
- **professionally**: the literal analysis of the wording and the case law[130] leads to the following interpretation: *engaged in a specified activity as part of one's normal and regular paid occupation*;
- **arranging transactions** is an activity that aims to:

[129] A 'trading venue' means a regulated market, a 'multilateral trading facility' (MTF) or an 'organised trading facility' (OTF). Article 4(15) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFID II), describes an MTF as a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments, in the system and in accordance with non-discretionary rules, in a way that results in a contract. OTF means a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract. Trading venues on which only financial instruments are traded are not subject to the obligations under Article 15 of REMIT, but are subject to the obligations under Article 16 of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) (MAR). According to Article 16 of MAR, investment firms that operate a trading venue shall (also) establish and maintain effective arrangements, systems and procedures aimed at preventing and detecting insider dealing, market manipulation and attempted insider dealing and market manipulation.

[130] See judgments in *Motosykletistiki Omospondia Ellados NPID (MOTOE)*, C-49/07, EU:C:2008:376; *Polysar*, C-60/90, EU:C:1991:268; *Commission* v *Italy*, C-270/03, EU:C:2005:371.

- enable or assist third parties (buyer or seller) in a way that directly brings about a particular wholesale energy transaction (i.e. has the direct effect that the transaction is concluded); **or**,

- provide a facility that facilitates the entering into transactions by third parties in wholesale energy products (buyer or seller). Simply providing the means by which parties to a transaction (or possible transaction) are able to communicate with each other is excluded from the concept of PPAT[131]. If a person makes arrangements that go beyond providing the means of communication, and adds value to what is provided, it will lose the benefit of this exclusion and shall be recognised as a PPAT.

Further considerations for the definition of the PPAT concept are mentioned below:

- The main characteristic of a PPAT is its **intermediary role** (whether acting as a principal or as an agent), i.e. arranging transactions in wholesale energy products. Its legal form, ownership, the type of market it operates, the type of the wholesale energy product and the number of parties it represents are not relevant elements in order to determine whether an entity is a PPAT.

- REMIT places different obligations on PPATs and market participants. Therefore, it is necessary to establish, in each particular case, whether the person concerned is acting as a PPAT or as a market participant. Whereas a market participant enters into transactions involving a wholesale energy product, a PPAT arranges the transaction of the wholesale energy product. Nevertheless, the same entity may well qualify as a PPAT in one transaction and as a market participant in another transaction. Also, there are situations where a person is both a market participant and a PPAT in the same transaction.

- The arranging activity can comprise the whole trade lifecycle or be restricted to one or more parts of it.

- Some transactions may involve the participation of several PPATs and others may not involve the participation of any PPAT.

[131] For instance, persons such as Internet service providers, e-mail service providers, messaging providers or telecommunication providers are excluded from the concept of PPAT.

Some examples of the application of the concept of PPAT

Some entities were assessed against the above characteristics in order to identify whether they fulfil the criteria to be classified as PPATs.

The table below should be considered as an example for the application of the PPAT concept. Therefore it does not include a comprehensive assessment of all entities that may or may not be PPATs. The assessment of the existence of the three cumulative criteria, as described above, has always to be done on a case-by-case basis.

Figure 3: Analysis of selected entities vis-à-vis the PPATs' characteristics

Type	Characteristics			
	Person	Professionally	Arranging transactions	Brief description of transactions' arrangement
Energy Exchanges	✓	✓	✓	• Bringing about transactions by introducing buyer/seller; or • Providing a facility that facilitates the entering into transactions by third parties – Allows placement of orders, matches orders and executes transactions.
Broker platforms/ Brokers	✓	✓	✓	• Bringing about transactions by introducing buyer/seller; or • Providing a facility that facilitates the entering into transactions by third parties – Allows placement of orders, matches orders and executes transactions.
Cross border capacity exchanges/ platforms	✓	✓	✓	• Bringing about transactions by introducing buyer/seller; or • Providing a facility that facilitates the entering into transactions by third parties – Allows placement of orders, matches orders and executes transactions.
Secondary capacity allocation platforms	✓	✓	✓	• Bringing about transactions by introducing buyer/seller; or • Providing a facility that facilitates the entering into transactions by third parties – Allows placement of orders, matches orders and executes transactions.
TSOs (or persons acting on their behalf) organising gas trades, energy balancing, capacity trading	✓	✓	✓	• Bringing about transactions by introducing buyer/seller; or • Providing a facility that facilitates the entering into transactions by third parties – Allows placement of orders, matches orders and executes transactions.
Sleeves (arranging)	✓	✓	✓	• Bringing about transactions by offering a service to act as an intermediary to sell or to purchase commodities, on behalf of other market participants, that do not have an agreement to trade with each other.
Sleeves (not arranging)	✓	✓	×	• Entering into transactions to allow the sale or purchase of commodities between other market participants that do not have an agreement to trade, without trading on behalf of those market participants.
Communication facilities	✓	✓	×	• It only provides a generic facility not specifically designed for the entering into transactions by third parties.

8.3. The duty to notify potential breaches of Article 3 or 5 of REMIT

According to Article 15(1) of REMIT:

"Any person professionally arranging transactions in wholesale energy products who reasonably suspects that a transaction might breach Article 3 or 5 shall notify the national regulatory authority without further delay."

This subchapter intends to specify further the obligation to notify potential breaches of Article 3 or 5 of REMIT. It focuses on what, whom, when and how to notify. It is not intended to determine criteria for the detection of a potential breach. The assumption of a reasonable suspicion lies within the responsibility of the PPAT.

Although the obligation to notify a potential breach relates to Articles 3 and 5 of REMIT, PPATs, when performing their monitoring duties, might become aware of a potential breach of another REMIT provision[132]. In this case, as a good cooperation practice, PPATs are invited to transmit all available information to the relevant NRA(s), through the communication channels they will find adequate.

8.3.1. What to notify?

The notification of a potential REMIT breach should be clear and accurate, to enable 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 assessment of the case.

When reporting a potential breach of Article 3 or 5 of REMIT, PPATs 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).

As a best practice, the Agency recommends that a Suspicious Transaction Report (STR) should contain, when available, information on the:

1. Type of market abuse:
   - insider trading and/or market manipulation;
   - identification of the subcategory of market abuse.

2. Details of the notifying party:
   - identification of the notifying party: name, organisation, position and contact details;
   - notification date and time.

3. Description of the potential breach (transaction(s)/order(s)/behaviour(s)):
   - 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 or potential inside information (for Article 3 breaches): date of disclosure of inside information, asset concerned, start date and time, end date and time, content disclosed remarks on the inside information disclosure;
   - information on the potentially affected parties and products;
   - identification of the PPAT(s) involved (other than the notifying party – if applicable): PPAT name, PPAT other identification details.

4. Reasons for suspecting that the order(s)/transaction(s)/behaviour(s) might constitute insider trading/market manipulation.

[132] Notably of a breach of the obligation to publish inside information under Article 4, of the data reporting obligations under Artide 8 or the obligation to register under Article 9 of REMIT.

5. Identification of persons involved in the potential breach:
   - identification of person(s) involved in the potential breach: name, organisation, position and contact details;
   - identification of any other person(s) associated with the potential breach: name, organisation, position and contact details.

6. Identification of the notified parties:
   - identification of the relevant NRA(s) to be notified;
   - 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 PPAT;
   - estimation of the impact of the event on the market prices;
   - estimation of the benefit from the potential breach for the market participant;
   - Member State(s) affected and any related supporting evidence;
   - any other information which the PPAT considers relevant (e.g. information on events which may lead to a potential breach of another REMIT provision).

8.3.2. Whom to notify?

According to Article 15(1) of REMIT:

"Any person professionally arranging transactions in wholesale energy products who reasonably suspects that a transaction might breach Article 3 or 5 shall notify the national regulatory authority without further delay."

It is important to provide PPATs 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.

The PPAT 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)[133];
- 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).

If a single NRA meets both criteria, only that NRA should be notified. Otherwise all those NRAs that meet at least one of the criteria should be notified.

Where a PPAT notifies more than one NRA, it should inform each NRA of the other NRAs being notified.

If the PPAT 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 PPAT 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 PPAT is incorporated and/or active, another NRA than the one(s) mentioned above shall be notified, the PPAT should notify this NRA in addition to the one(s) that should be notified as per the criteria mentioned in this Guidance.

[133] 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.

Article 1(2) of REMIT refers that Articles 3 and 5 shall not apply to wholesale energy products which are financial instruments and to which Article 2 of MAR applies. However, if a potential breach involves wholesale energy products that are also financial instruments falling in the scope of Article 2 of MAR), the PPAT should also notify the NRA(s) identified above in parallel with the relevant financial authorities, in order to promote the cooperation between different investigatory authorities.

8.3.3. When to notify?

Article 15 of REMIT provides that:

"Who reasonably suspects that a transaction might breach Article 3 or 5 shall notify the national regulatory authority without further delay."

The notion of 'without further delay' is linked to the existence of a reasonable suspicion of a potential breach of REMIT. In other words, the PPAT shall notify the NRA(s) after preliminary analysis of an anomalous event and as soon as it has reasonable grounds to suspect a potential REMIT breach.

The timeliness of the notification after the occurrence of an anomalous event is of crucial importance when it comes to collecting evidence. The sooner the NRA is informed about the potential breach, the earlier it can collect evidence (notably communication records) avoiding its destruction or deterioration.

In order to promote best practice, PPATs shall notify the NRA(s) as soon as possible once they have reasonable grounds to suspect a REMIT breach, and should usually do so no later than four weeks from the occurrence of the anomalous event.

This recommendation means that PPATs should perform market surveillance routinely. Once they detect an anomalous event, they should collect evidence and conduct the necessary analysis to further assess that event. This will enable the PPATs to assess whether there are reasonable grounds to suspect a potential breach within four weeks of the occurrence of the anomalous event, and to produce a good quality STR.

This four-week period is deemed sufficient for the PPATs to perform market surveillance, to gather the necessary information to conclude on the existence of reasonable grounds and to produce a comprehensive notification including the elements listed in Subchapter 8.3.1 above.

However, should the anomalous event be of particular complexity, or should the PPAT be unable, for other objective reasons, to conclude on the existence of reasonable grounds of suspicion within the timeframe indicated above, the PPAT should proceed with its analysis and notify the NRA(s) as soon as it has reasonable grounds to suspect a REMIT breach.

The practice of delaying the submission of an STR in order to be able to incorporate further STRs[134] cannot be reconciled with the obligation to act without further delay when the PPAT has gathered sufficient evidence to have reasonable grounds to suspect a potential breach.

Arrangements and procedures in place shall 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 PPAT should be able to explain the delay between the day of occurrence of the anomalous event and the notification, according to the specific circumstances of the case, if requested to by the NRA.

PPATs should also transmit any relevant additional information which they become aware of after the notification is originally submitted.

[134] For instance waiting for the repetition of the same behaviour or for another potential breach by the same market participant.

8.3.4. How to notify?

PPATs shall use secure communication channels to notify the NRA(s).

As a service to NRAs, the Agency has established on its website a secure 'Notification Platform' for the notification of, inter alia, STRs by PPATs (available at: https://www.acer-remit.eu/np/home). The Notification Platform enables PPATs to fulfil their notification obligations, allowing them to directly notify, simultaneously and in a standardised manner, one or several of the 28 NRAs together with the Agency. In order to ensure legal certainty, the notifying PPAT receives an immediate confirmation of its notification.

The PPATs may also choose to notify a potential breach using the secure communication channels that NRAs may have put at their disposal.

In any case, NRAs should publish on their website the communication channel that PPATs should use in order to notify potential breaches.

Any contact to the competent NRA(s) through any other means than the secure communication channels referred to above does not replace the submission of an STR.

8.4. The duty to establish and maintain effective arrangements and procedures

8.4.1. The aim

According to Article 15(2) of REMIT:

"Persons professionally arranging transactions in wholesale energy products shall establish and maintain effective arrangements and procedures to identify breaches of Article 3 or 5."

The provisions of Article 15 of REMIT set out the responsibility of a PPAT not only to notify whenever it has reasonable grounds to suspect a potential breach, but also to proactively monitor the wholesale energy markets in which it is involved.

This subchapter provides guidance on what can be expected from PPATs with regards to establishing and maintaining effective arrangements and procedures for monitoring.

Given the fact that PPATs vary in size and organisational characteristics, and operate different markets (e.g. electricity, gas, spot, futures, capacity, etc.), there is no one-size-fits-all governance or organisational arrangement. As a result, while some recommendations concern basic requirements applicable to all PPATs, the way to implement the recommended measures shall take into consideration the specificities of each PPAT.

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 in place. In the subchapters below the Agency defines some minimum organisational (Subchapter 8.4.2) and procedural (Subchapter 8.4.3) arrangements that NRAs should expect PPATs to put in place.

8.4.2. Organisational arrangements

In this subchapter, the Agency provides high-level guidance on the appropriate minimum organisational arrangements that NRAs should require from PPATs so that they can properly perform their market surveillance tasks.

a) Governance

In establishing a governance model, the PPAT has to take into account the 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 anomalous event or notify a potential breach to the NRA(s) for a number of reasons, including to avoid damaging its relationships and future career prospects with the market participants.

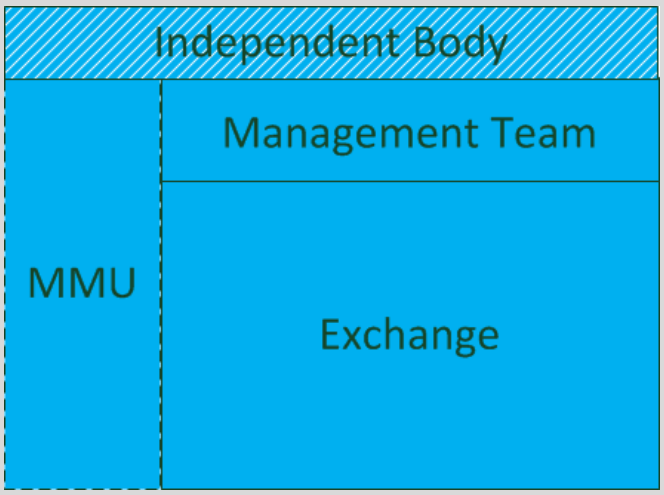
Corporate conflicts may arise when a market surveillance team member wants to report an anomalous event/notify a potential breach regarding a market participant, while the management team does not want to, for commercial or other reasons. The market surveillance team member might be put under pressure not to report an anomalous 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 an anomalous event to finally notifying a potential breach to the NRA(s).

Appropriate governance models, based on the assessment of the potential sources of risk within the PPAT, could mitigate the above mentioned risks by addressing how market surveillance teams are structured, how they report to the management team (internal reporting) and how they notify STRs to NRAs (external reporting). Three examples of governance models will be discussed below, respectively addressing different degrees of conflicts of interest that the PPAT might experience.

Some examples of alternative governance structures that can mitigate conflict of interests

(1) Market Monitoring Unit (MMU)

In this governance model the market surveillance team operates independently from the other parts of the PPAT. The MMU 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 (for example, members may be external to the PPAT or at least some of them, including NRA representatives).

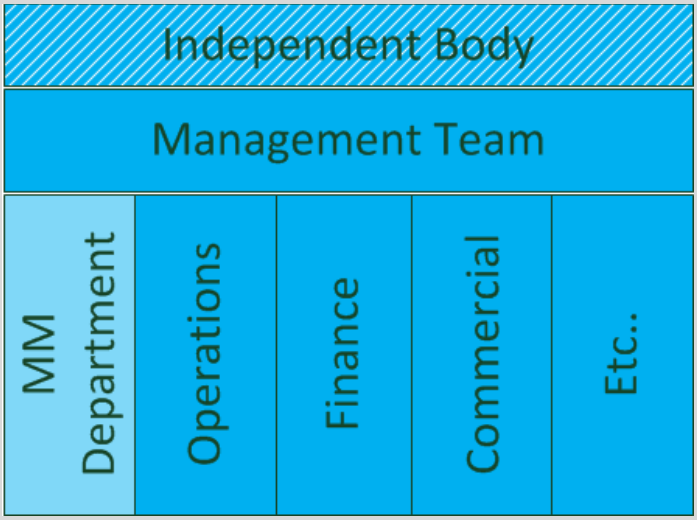


In this situation, as the market surveillance team operates as a segregated unit from the other PPAT activities and does not report to the management team, the conflicts of interest at corporate level can in theory be more effectively mitigated. The composition and the duties of the Independent Body 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.

(2) Market Monitoring Department (MMD)

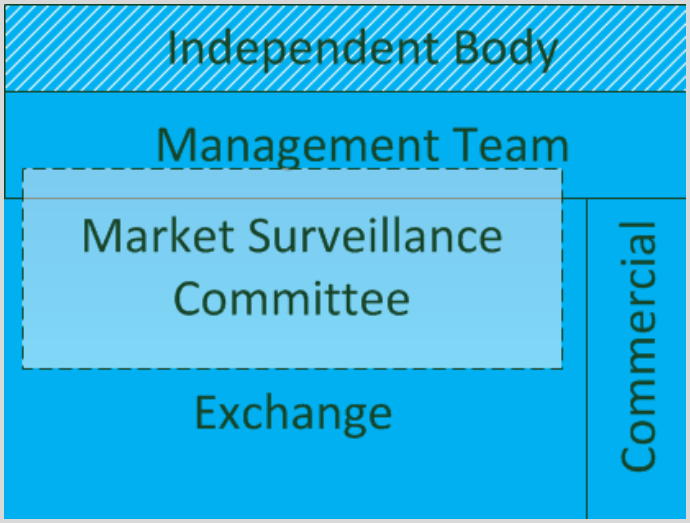
In this governance model, the market surveillance team operates as any other department within the organisation, reporting to a Director who may be member of the Management Team.



In this situation some consideration should be given to the reporting lines to prevent conflicts of interests. The market surveillance team should not report to a Director whose objectives or performance are evaluated based on commercial achievements rather than on the fulfilment of the mission of the market surveillance function. Appropriate arrangements, based on the nature and assessment of the PPAT's conflicts of interests, should be in place to manage the flow of confidential information (also at the Management Team level). Appropriate processes that enable the auditing of the reporting from the Market Monitoring Department to the Management Team should be in place to mitigate potential conflicts of interest. The independent body or an auditing body can take responsibilities for the supervision of these communications. The appointment of a compliance officer could also be envisaged.

(3) Market Monitoring Committee (MMC)

In this governance model, the market surveillance team consists of a number of experts, working in different parts of the PPAT. The MMC is accountable towards the Management Team as a whole or to a designated Director.



In the situation where the market surveillance team is organised by way of a committee, appropriate arrangements should be in place to mitigate potential conflicts of interest and to ensure the confidentiality of the data as it might flow through different parts of the organisation. The members of the MMC should not have their objectives or performance evaluated based on commercial achievements but rather on the fulfilment of the mission of the market surveillance function. Also, the members of the MMC should not simultaneously work for the teams in the PPAT with commercial responsibilities.

As in the situation where a MMD is in place, due consideration should be given to the reporting lines of the market surveillance team. Appropriate processes that enable the auditing of the reporting from the MMC to the Management Team should be in place to mitigate potential conflicts of interest. The independent body or an auditing body can take responsibilities for the supervision of these flows of information. The appointment of a compliance officer could also be envisaged.

b) Organisational setup

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.

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

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.

The human resources, analytical tools and data/information should be adequate to perform real-time and *ex post* analyses on anomalous 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.

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

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 team work, 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).

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.

(3) Dedicated market surveillance team

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.

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 monitoring activity, including the analysis of orders and transactions, alerts generation for the detection of anomalous events, as well as the identification of potential breaches of Articles 3 and 5 of REMIT. However, 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;
- define in a written agreement their rights and obligations and those of the providers. The outsourcing agreement should allow PPATs to terminate it.

In any case, PPATs shall ensure that the delegated entity complies with the organisational and procedural arrangements described in this Guidance. PPATs will remain fully responsible for the obligations stated in Article 15 and should submit themselves any STR to the competent NRA(s). Furthermore, PPATs should still be able to conduct any complementary analysis.

(4) Communication with other units

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.

(5) Confidentiality

In order to safeguard the integrity of the market surveillance team, the information collected by the market surveillance team for the purpose of investigating an anomalous event shall be considered confidential and systems that restrict the access to such information shall be implemented.

c) Clear definition of the function

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.

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 anomalous events nor notify potential breaches of REMIT adequately.

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).

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.

8.4.3. Procedural arrangements

Procedural arrangements are key to ensuring that the PPAT fulfils its obligations under Article 15 of REMIT. This subchapter outlines guidance on the market monitoring strategy, human resources policies, communications and traceability related procedures.

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.

a) Market monitoring strategy

In order to identify potential breaches of Articles 3 or 5 of REMIT, the PPAT shall have a documented market monitoring strategy. That strategy shall be designed based on a risk assessment.

The market monitoring 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 anomalous events.

The risk assessment shall include at least the identification of the different types of market abuse that may constitute Article 3 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 or 5 breaches shall take into consideration Chapters 3, 4, 5, 6, and 8 of this Guidance.

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 practice should be taken into consideration when designing such strategy.

The PPAT should be able to explain to the NRA, 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

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.

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.

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.

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.

c) Communication related procedures

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 anomalous event under investigation. The market surveillance team should also be able to request information from the market participant in relation to an anomalous event.

Communication between the market surveillance team and anyone involved in an anomalous 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 an anomalous event/potential breach should be noted or recorded on file.

As a general rule, once an STR has been submitted to an NRA, the market surveillance team should not make contact with the member/customer in relation to that incident unless agreed with the NRA. Furthermore, under no circumstance should the market surveillance team make the member/customer aware that an STR has been submitted to the NRA. 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 STR 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 from the start is important.

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 an STR 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.

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

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.

It is advisable to have a clear written policy on monitoring procedures which details the processes that the market surveillance team should follow when looking into an anomalous event. The full PPATs' decision-making process related to the qualification of an anomalous event as a potential breach (from the initial alert to the STR being raised) should be traceable and key decision points should be recorded.

All transaction(s)/order(s)/behaviour(s), including related updates to them, particularly relating to an anomalous 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.

NRAs should request PPATs to maintain for a period of at least five years the information documenting the analysis carried out with regard to an anomalous 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.

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 an annual basis and in certain circumstances an NRA may wish to conduct a visit or audit.

8.5. Compliance advocacy

Within the limits of their investigatory and sanctioning powers, the relevant NRAs shall enforce PPATs compliance with Article 15. Based on their competencies, and among other things, NRAs may choose to issue 'Systems and Controls Questionnaires' relating to the PPAT's Article 15 processes. They may also conduct visits to the PPAT's market surveillance teams in order to assess their surveillance and monitoring processes in practice. This will help NRAs understand the processes that STRs have gone through to consider their next steps. The NRA may also choose to run STR Supervision Forums, focussing on best-practice sharing between the PPATs.

It is at the discretion of each NRA whether to conduct visits, issue questionnaires or hold forums relating to REMIT Article 15 processes and adequate notice should be given to the PPAT ahead of any such activities.

NRAs can implement peer reviews on the quality of the STRs and benchmark PPATs performance against references to improve compliance with the Article 15 requirements.

9. REMIT compliance and penalty regimes

9.1. Introduction

This chapter provides some considerations from the Agency on best practices that market participants could implement to ensure their compliance with REMIT (Subchapter 9.2) and on the enforcement of the different REMIT obligations and prohibitions through national penalty regimes (Subchapter 9.3).

9.2. Compliance regime

The Agency is of the opinion that market participants should develop a clear compliance regime towards real time or close to real time disclosure of inside information and towards the other obligations and prohibitions of REMIT.

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.

9.3. Penalty regimes

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

Annex 1: List of abbreviations

Abbreviation	Meaning
ACER/Agency	European Union Agency for the Cooperation of Energy Regulators
AMP	Accepted Market Practice
CEREMP	Centralised European Register of Energy Market Participants
EC	European Commission
EEA	European Economic Area
ENTSO-E	European Network of Transmission System Operators for Electricity
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
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
REMIT	Regulation (EU) No 1227/2011 on Wholesale Energy Market Integrity and Transparency
RRM	Registered Reporting Mechanism
SSO	Storage System Operator
STR	Suspicious Transaction Report
TSO	Transmission System Operator
TMS	Trade Matching Systems