ACER
Agency for the Cooperation of Energy Regulators

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

4th Edition

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The **Agency for the Cooperation of Energy Regulators** (the Agency) is the European Union body created by the Third Energy Package to achieve the Internal Energy Market (IEM).

The Agency was officially launched in March 2011 and has its seat in Ljubljana, Slovenia. As an independent European body which fosters cooperation among European energy regulators, the Agency ensures that market integration and the harmonisation of regulatory frameworks are achieved in accordance with the EU's energy policy objectives.

The overall mission of the Agency, as stated in its founding Regulation, is to complement and coordinate the work of national energy regulators at EU level, and to work towards the completion of a single EU energy market for electricity and natural gas.

The Agency's missions and tasks are defined by Regulation (EU) 2019/942 establishing a European Union Agency for the Cooperation of Energy Regulators. In 2011, the Agency received specific tasks under Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency (REMIT).

According to REMIT, the Agency is responsible for monitoring wholesale energy markets to detect market abuse. The monitoring of wholesale energy markets by the Agency shall be based on the timely collection of data relating to the transactions executed and the orders placed on wholesale energy markets in the European Union (trading data), as well as on fundamental data, that is, data relating to the operational conditions of the energy systems in both the electricity and gas sectors.

More information on the Agency: www.acer.europa.eu.

Further information on the Agency's activities under REMIT:
http://www.acer.europa.eu/remit.

The Agency's REMIT Portal: https://www.acer-remit.eu/portal/home.

This document contains the updated 4th edition of the Guidance on the application of REMIT, which the Agency may adopt pursuant to Article 16(1) of REMIT.

Compared to the previous version, chapters 7 and 8 have been updated to provide further guidance on the disclosure of inside information and on the exemption from the prohibition on insider trading under Article 3(4)(b) of REMIT.

Related Documents

- ACER Programming Document 2018-2020
  http://acer.europa.eu/en/the_agency/Mission_and_Objectives/Documents/ACER%20Programming%20Document%202018-September2017-Final.pdf

- 1st edition of ACER Guidance on the application of the definitions set out in Article 2 of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency
  https://www.acer.europa.eu/en/remit/Documents/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://www.acer.europa.eu/en/remit/Documents/2nd%20edition%20of%20ACER%20Guidance%20on%20the%20application%20of%20REMIT.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-REMIT.pdf

- REGULATION (EC) No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency
  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:326:0001:0016:en:PDF

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

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

- COMMISSION 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

- 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

- 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 2003/6/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

- REGULATION (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC
  https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0596&from=EN

- DIRECTIVE 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments
  http://eur-lex.europa.eu/LexUriServ/site/en/consleg/2004/L/02004L0039-20060428-en.pdf

- DIRECTIVE 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments 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

- DIRECTIVE 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC
  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:390:0038:0038:EN:PDF

- DIRECTIVE 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 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation
http://www.esma.europa.eu/system/files/MADImplDir_2003_124.pdf

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

- Market Abuse Directive - Level 3 – first set of CESR guidance and information on the common operation of the Directive to the Market
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
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

- 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/

Preface by the Director on the 4th edition of 17 June 2016

Pursuant to Article 16(1) of Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency (REMIT), the Agency issues non-binding guidance in order to ensure that National Regulatory Authorities (NRAs) carry out their tasks under this regulation in a coordinated and consistent way.

The 1st edition of ACER Guidance on the application of REMIT was published on 21 December 2011 and focused on those 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 was published on 22 September 2012 and 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 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.

Taking into account the experience gained so far, including the feedback received from NRAs, market participants and other stakeholders, the Agency now considers necessary to update the Guidance and publish a 4th edition.

In this 4th edition, strong emphasis is put on Article 15 of REMIT. The Agency intends to provide more detailed guidance to NRAs concerning the supervision of the obligations imposed on persons professionally arranging transactions by Article 15 of REMIT, taking into account the important number of trades in the wholesale energy markets that they intermediate. This edition, therefore, defines the Agency's understanding of the notion of persons professionally arranging transactions and provides guidance to NRAs on how to monitor the compliance of these persons with the obligations to (i) notify potential REMIT breaches and (ii) establish and maintain effective arrangements and procedures to identify such potential breaches.

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

Alberto Pototschnig
Director
Agency for the Cooperation of Energy Regulators

Important Notice

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

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

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

This Guidance is without prejudice to Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 (market abuse) and Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments 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.

Table of Contents

1 Introduction 10

2 Scope of the Regulation 11

3 Application of the definitions of "wholesale energy products", "wholesale energy market" and "market participant" 13

3.1 Introduction 13

3.2 Wholesale energy products 13

3.3 Wholesale energy market 15

3.4 Market participant 16

3.5 Application of REMIT for market participants from non-EU and non-EEA countries 18

4 Registration of market participants 19

4.1 Introduction 19

4.2 Which market participants are obliged to register? 19

4.3 What information is market participants required to provide? 20

4.4 Establishment of national registers 20

4.5 With which NRA should market participants register? 21

4.6 What is the deadline for registration submissions? 21

4.7 Issuance of the ACER code 23

4.8 Requirement to keep registration information up to date 24

4.9 The role of NRAs in the registration process 24

4.10 Conclusions 25

5 Application of the definition of "inside information" 27

5.1 Introduction 27

5.2 Information and information of a precise nature 27

5.3 Made public 30

5.4 Likelihood of having a significant price effect 31

5.5 REMIT examples of inside information 32

5.6 Conclusions 32

6 Application of the definition of "market manipulation" 34

6.1 Introduction 34

6.2 REMIT definition of market manipulation 34

6.3 REMIT examples of market manipulation 36

6.4 Examples of the various types of practice which could constitute market manipulation 36
6.5 Conclusions 39

7 Application of the obligation to disclose inside information 41
7.1 Introduction 41
7.2 Disclosure of inside information in an effective manner 42
7.3 Disclosure of inside information in a timely manner 45
7.4 Delayed disclosure of inside information 46
7.5 Exemption in Article 4(7) 47

8 Application of the market abuse prohibitions and possible signals of potential insider dealing or market manipulation 48
8.1 Introduction 48
8.2 Application of market abuse prohibitions 48
8.3 Indications of a potential breach 52

9 Application of the obligations of persons professionally arranging transactions (PPATs) 55
9.1 Introduction 55
9.2 Delimitation of the concept of PPAT 55
9.3 The duty to notify potential breaches of Article 3 or 5 of REMIT 59
9.4 The duty to establish and maintain effective arrangements and procedures 63
9.5 Compliance advocacy 72

10 Application of the implementation of prohibitions of market abuse 73
10.1 Introduction 73
10.2 Accepted Market Practices (AMPs) regime 73
10.3 Compliance regime 76
10.4 Penalty regimes 76

List of Abbreviations 78

1 Introduction

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

This 4th edition of the Guidance places strong emphasis on Article 15 of REMIT. Indeed, the Agency intends to provide more detailed guidance to NRAs concerning the supervision of the obligations imposed on persons professionally arranging transactions (PPATs) by Article 15 of REMIT. This edition defines the Agency's understanding of the notion of PPAT, and provides guidance to NRAs on how to monitor the PPATs' compliance with their obligations to notify potential REMIT breaches, and on how to establish and maintain effective arrangements and procedures to identify such potential breaches.

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 Package Regulations and Directives[2].

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

2 Scope of the Regulation

According to Article 1(2) of REMIT, the Regulation applies to trading in wholesale energy products, whilst Articles 3 and 5 of this Regulation shall not apply to wholesale energy products which are financial instruments and to which Article 9 of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 (market abuse) (MAD) applies. In addition, Article 1(2) of REMIT provides that the Regulation is without prejudice to the MAD and Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (MiFID), as well as to the application of European competition law to the practices covered by REMIT.

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

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

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

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

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

of MiFID is not covered by the market abuse prohibitions of MAD, but by the market abuse prohibitions of REMIT.

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

3 Application of the definitions of "wholesale energy products", "wholesale energy market" and "market participant"

3.1 Introduction

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

3.2 Wholesale energy products

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

> *"Wholesale energy products" means the following contracts and derivatives, irrespective of where and how they are traded:*
>
> *(a) contracts for the supply of electricity or natural gas where delivery is in the Union;*
>
> *(b) derivatives relating to electricity or natural gas produced, traded or delivered in the Union;*
>
> *(c) contracts relating to the transportation of electricity or natural gas in the Union;*
>
> *(d) derivatives relating to the transportation of electricity or natural gas in the Union.*

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

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

For the purposes of REMIT, the definition of final customer draws on the relevant definition in 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 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 meaning *a customer purchasing electricity or natural gas for his own use*.

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

> *"Consumption capacity" means the consumption of a final customer of either electricity or natural gas at full use of that customer's production capacity. It comprises all consumption by that customer as a single economic entity, in so far as consumption takes place on markets with interrelated wholesale prices.*
>
> *For the purposes of this definition, consumption at individual plants under the control of a single economic entity that have a consumption capacity of less than 600 GWh per year shall not be taken into account in so far as those plants do not exert a joint influence on wholesale energy market prices due to their being located in different relevant geographical markets.*

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

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

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

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

As regards the understanding of "markets with interrelated wholesale prices", the Agency considers that wholesale energy markets are increasingly interlinked across the Union. There is

already a high degree of interrelation of wholesale electricity and natural gas prices across the Union and there is an expectation of increased interrelation as the development of a single European energy market continues to progress[3]. Having this in mind, the Agency considers it prudent for market participants to take into account the consumption capacity of all their plants across the Union when assessing whether the consumption capacity threshold of 600 GWh is exceeded.

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

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

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

3.3 Wholesale energy market

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

> *"Wholesale energy market "means any market within the Union on which wholesale energy products are traded.*

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

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

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

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

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

3.4 Market participant

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

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

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

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

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

- **Energy trading companies** in the meaning of "electricity undertaking" pursuant to Article 2(35) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity 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 and Article 2(1) of Directive 2009/73/EC**,** including producers supplying their production to their in-house trading unit or energy trading company;

- **Shippers of natural gas;**

- **Balance responsible entities;**

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

- **Final customers** in the meaning of Article 2(9) of Directive 2009/72/EC and Article 2(27) of Directive 2009/73/EC, acting as a single economic entity, that have a consumption capacity of 600 GWh or more per year for gas or electricity. If the consumption of a final customer takes place in markets with interrelated prices, his total consumption capacity is the sum of his consumption capacity in all those markets (see Chapter 3.2 for further explanation of these concepts);

- **Transmission system operators (TSOs)** in the meaning of Article 2(4) of Directive 2009/72/EC and Directive 2009/73/EC;

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

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

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

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

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

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

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

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

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

4 Registration of market participants

4.1 Introduction

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

4.2 Which market participants are obliged to register?

According to Article 9(1) of REMIT,

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

According to Article 2(7) of REMIT,

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

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

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

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

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

4.3 What information is market participants required to provide?

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

On 26 June 2012, the Agency adopted a Decision determining the registration format to be used for the establishment of the European register of market participants[4]. The registration format consists of 5 sections:

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

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

4.4 Establishment of national registers

According to Article 9(2) of REMIT:

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

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

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

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

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

provide guidance to market participants on how to register. The manual will be updated periodically, on the basis of the feedback from NRAs.

4.5 With which NRA should market participants register?

According to Article 9(1):

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

According to settled case law of the Court of Justice of the European Union, a legal or natural person can be established in more than one Member State. The legal or natural person is established in the Member State(s) in which it pursues a professional activity on a stable and continuous basis[5]. If a market participant is established in more than one Member State, the Agency would normally expect market participants to register in the Member State in which they have their primary establishment.

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

4.6 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.

[5] 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.

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 after 17 March 2015

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).

4.7 Issuance of the ACER code

As required by Article 9(2) of REMIT, each market participant registered under REMIT will be issued with a unique identifier (the "ACER code"). The ACER code will enable market participants to report data under Article 8 of REMIT. Market participants will also need the list of ACER codes in order to provide information relating to Section 4 of 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[6] 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 Chapter 4.6.

[6] 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.

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

4.8 Requirement to keep registration information up to date

According to Article 9(5) of REMIT,

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

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

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

4.9 The role of NRAs in the registration process

Having in mind that 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 Chapter 4.4 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.

4.10 Conclusions

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

1. Before entering into a transaction required to be reported to the Agency in accordance with Article 8(1) of REMIT, 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.

5 Application of the definition of "inside information"

5.1 Introduction

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

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

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

The following paragraphs provide guidance on what the Agency currently considers as covered by the four above criteria[7].

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

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

5.2 Information and information of a precise nature

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

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

(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;*

[7] Concerning wholesale energy products which are financial instruments and to which Article 9 of MAD applies, please refer to the relevant CESR guidance and information on the MAD, see the three sets of CESR guidance and information on the common operation of the Directive to the Market listed in the "Related Documents" section of this Guidance.

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

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

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

"Transparency information" versus "inside information"

The concept of "transparency information" refers to all data that shall be published under the transparency obligation of Regulation (EC) No 714/2009[8] and (EC) No 715/2009[9], including applicable guidelines and network codes adopted pursuant to those Regulations. This includes information referred to in the Commission Regulation (EU) No 543/2013[10], which amends the guidelines annexed to Regulation (EC) No 714/2009. Transparency information is cited in Article 2(1)(a) of REMIT as a type of information that may constitute inside information.

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

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

[8] 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.
[9] 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.
[10] Commission Regulation (EU) No 543/2013 of 14 June 2013 on submission and publication of data in electricity markets.

Inside information should normally be considered as an *ad hoc*, structured data that is likely to have a significant effect on price that has not been disclosed to the market. Such a requirement goes beyond the periodic and regular publication of data under the above regulations and may be fulfilled by certain transparency information.

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

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

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

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

Regardless of whether indicative thresholds are applied by market participants, NRAs should ensure that market participants are aware that a planned or unplanned change in the capacity or output of any size at a facility for production, storage, consumption or transmission of natural gas or electricity may constitute inside information if it meets the criteria outlined in Article 2(1) of

REMIT. It is up to market participants to judge whether information that they hold constitutes inside information and therefore needs to be made public.

The notion of "inside information" is likely to be subject to interpretation by national and European courts. Rulings on the definition of inside information under MAD, insofar as the same concepts are applied under this Directive, should also be relevant in this respect[11].

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

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

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

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

5.3 Made public

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

It is sufficient, but also required, that information is made available simultaneously to the broad trading public, ensuring equal access to the information since any interested market participant may apprise itself of the information (a concept referred to as "sectoral publicity"). This can be the case, for example, if a generally accessible electronic system for the dissemination of information is used, but does not require publication in the media. Hence, publishing information only to

[11] See for instance the judgment in *Gelti*, C-19/11, EU:C:2012:397, as regards the criterion of "precise information".

selected market participants, for example via an energy exchange information service or news board, which is available exclusively to exchange members, does not satisfy the requirement of informing the broad trading public.

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

5.4 Likelihood of having a significant price effect

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

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

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

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

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

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

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

5.5 REMIT examples of inside information

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

(12) The use or attempted use of inside information to trade either on one's own account or on the account of a third party should be clearly prohibited. Use of inside information can also consist in trading in wholesale energy products by persons who know, or ought to know, that the information they possess is inside information. Information regarding the market participant's own plans and strategies for trading should not be considered as inside information. Information which is required to be made public in accordance with Regulation (EC) No 714/2009 or Regulation (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations, may serve, if it is price-sensitive information, as the basis of market participants' decisions to enter into transactions in wholesale energy products and therefore could constitute inside information until it has been made public.

(15) The disclosure of inside information in relation to a wholesale energy product by journalists acting in their professional capacity should be assessed taking into account the rules governing their profession and the rules governing the freedom of the press, unless those persons derive, directly or indirectly, an advantage or profits from the dissemination of the information in question or when disclosure is made with the intention of misleading the market as to the supply of, demand for, or price of wholesale energy products.

5.6 Conclusions

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

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

- information relating to the capacity and use of facilities for production, storage, consumption or transmission of electricity or natural gas or related to the capacity and use of LNG facilities, including planned or unplanned unavailability of these facilities, and;

- information which is required to be disclosed in accordance with other legal or regulatory provisions at Union or national level, insofar as this information is likely to have a significant effect on the prices of wholesale energy products.

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

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

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

6 Application of the definition of "market manipulation"

6.1 Introduction

This Chapter is aimed at providing NRAs with examples of the types of market activities which, in the view of the Agency, would fulfil the definition of market manipulation provided in Article 2(2) and (3) of REMIT. The guidance and accompanying examples are intended to help NRAs to develop a common understanding of what constitutes market manipulation[12].

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

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

6.2 REMIT definition of market manipulation

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

> *(a) entering into any transaction or issuing any order to trade in wholesale energy products which:*
>
> > *(i) gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of wholesale energy products;*
> >
> > *(ii) secures or attempts to secure, by a person, or persons acting in collaboration, the price of one or several wholesale energy products at an artificial level, unless the person who entered into the transaction or issued the order to trade establishes that his reasons for doing so are legitimate and that that transaction or order to trade conforms to accepted market practices on the wholesale energy market concerned; or*

[12] Concerning wholesale energy products which are financial instruments and to which Article 9 of MAD applies, please refer to the relevant CESR guidance and information on MAD (see the three sets of CESR guidance and information on the common operation of the Directive to the Market listed in the "Related Documents" section of this Guidance).

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

or

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

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

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

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

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

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

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

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

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

or

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

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

6.3 REMIT examples of market manipulation

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

(13) Manipulation on wholesale energy markets involves actions undertaken by persons that artificially cause prices to be at a level not justified by market forces of supply and demand, including actual availability of production, storage or transportation capacity, and demand. Forms of market manipulation include placing and withdrawal of false orders; spreading of false or misleading information or rumours through the media, including the internet, or by any other means; deliberately providing false information to undertakings which provide price assessments or market reports with the effect of misleading market participants acting on the basis of those price assessments or market reports; and deliberately making it appear that the availability of electricity generation capacity or natural gas availability, or the availability of transmission capacity is other than the capacity which is actually technically available where such information affects or is likely to affect the price of wholesale energy products. Manipulation and its effects may occur across borders, between electricity and gas markets and across financial and commodity markets, including the emission allowances markets.

(14) Examples of market manipulation and attempts to manipulate the market include conduct by a person, or persons acting in collaboration, to secure a decisive position over the supply of, or demand for, a wholesale energy product which has, or could have, the effect of fixing, directly or indirectly, prices or creating other unfair trading conditions; and the offering, buying or selling of wholesale energy products with the purpose, intention or effect of misleading market participants acting on the basis of reference prices. However, accepted market practices such as those applying in the financial services area, which are currently defined by Article 1(5) of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) and which may be adapted if that Directive is amended, could be a legitimate way for market participants to secure a favourable price for a wholesale energy product.

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

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

6.4.1 False/misleading orders/transactions and price positioning

a) Wash trades: This is a practice consisting of entering into arrangements for the sale or purchase of a wholesale energy product, where there is no change in beneficial interests or market risk, or where beneficial interest or market risk is transferred between parties who are acting in concert or collusion[13].

b) Improper matched orders: These are transactions where both buy and sell orders are entered at or nearly at the same time, with the same price and quantity by different but colluding parties. These transactions constitute market manipulation unless they are legitimate trades carried out in conformity with the rules of the relevant trading platform (e.g. crossing trades).

c) Layering: This behaviour consists of 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[14].

d) Spoofing: This behaviour consists of 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[15].

e) Other order-based behaviours: These behaviours involve issuing order(s) to trade, with or without an interest in their individual execution, 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. For example, due to the frequency and/or overall volume of the order(s) to trade, the behaviour results in entering into transactions at overall terms and conditions that are generally, but not necessarily, more favourable, directly or indirectly, to the market participant involved than those that would have otherwise prevailed in the absence of those orders.

f) Marking the close: This practice involves deliberately buying or selling wholesale energy products at the close of the market in an effort to alter the closing price of the wholesale energy product. This practice may take place on any individual trading day, but is particularly associated with dates such as future/option expiry dates or quarterly/annual portfolio or index reference/valuation points.

g) Abusive squeeze (also known as “market cornering”): This involves a party or parties with a significant influence over the supply of, or demand for, or delivery mechanisms for a wholesale energy product and/or the underlying product of a derivative contract exploiting a decisive position in order to materially distort the price at which others have to deliver, take delivery or defer delivery of the instrument/product in order to satisfy their obligations. (It should be noted

[13] 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.
[14] 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.
[15] 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.

that the proper interaction of supply and demand can and often does lead to market tightness, but that this is not of itself market manipulation. Nor does having a significant influence over the supply of, demand for, or delivery mechanisms for a wholesale energy product by itself constitute market manipulation.)

h) Cross-market-manipulation: Trading on one market to improperly position the price of a wholesale energy product on a related market. This practice involves undertaking trading in one market with a view to improperly influencing the price of the same or a related wholesale energy product in another market. An example might be the trading in the underlying product of a wholesale energy derivative to distort the price of the derivative contract. (Transactions to take legitimate advantage of differences in the prices of wholesale energy derivatives or underlying products as traded in different locations - "arbitrage" - would not constitute manipulation.)

i) Actions undertaken by persons that artificially cause prices to be at a level not justified by market forces of supply and demand, including actual availability of production, storage or transportation capacity, and demand ("physical withholding"): This is for example the practice where a market participant decides not to offer on the market all the available production, storage or transportation capacity, without justification and with the intention to shift the market price to higher levels, e.g. not offering on the market, without justification, a power plant whose marginal cost is lower than the spot prices, misusing infrastructure, transmission capacities, etc., that would result in abnormal high prices.

j) 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.[16]

6.4.2 Transactions involving fictitious devices/deception

a) Dissemination of false or misleading market information through media, including the internet, or by any other means (in some jurisdictions this is known as "scalping"): This is done with the intention of moving the price of a wholesale energy product in a direction that is favourable to the position held or a transaction planned by the person disseminating the information.

b) Pump and dump: This practice involves taking a long position in a wholesale energy product and then undertaking further buying activity and/or disseminating misleading positive information about the wholesale energy product with a view to increasing the price of the wholesale energy product. Other market participants are misled by the resulting effect on price and are attracted into purchasing the wholesale energy product. The manipulator then sells out at the inflated price.

[16] 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.

c) Circular trading: The process of executing a sell order with the knowledge that an offsetting buy order is being placed at the exact same time. The action is considered illegal because it excludes competition.

d) Pre-arranged trading: The practice of two commodity dealers trading with each other at prices upon which they have agreed in advance. Pre-arranged trading is designed to exclude other dealers from the market, to gain a tax advantage, or both. As a result, pre-arranged trading is illegal. The Agency considers that certain more specific practices, such as crossing/pre-arranged trades, could be considered accepted market practices, and thus do not constitute market manipulation, provided that they are undertaken according to the rules of the relevant trading venue applicable to their conduct. But in most of such cases, conduct of the practice in conformity with the rules of the trading venue would be sufficient in itself to promote market integrity and therefore the question of giving the practice accepted market practice status does not arise.

6.4.3 Dissemination of false and misleading information

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

a) Spreading false/misleading information through the media: This involves behaviour such as posting information via internet or issuing a press release which contains false or misleading statements about a wholesale energy product which is admitted to trading on an organised market. The person spreading the information knows or ought to have known that it is false or misleading and is disseminating the information in order to create a false or misleading impression. Spreading false/misleading information through an officially recognised channel for disseminating information to users of an organised market is particularly serious as it is important that market participants are able to rely on information dissemination via such official channels.

b) Other behaviour designed to spread false/misleading information: This type of market manipulation would cover a course of conduct designed to give a false and misleading impression through means other than the media. An example might be the movement of physical commodity stocks to create a misleading impression as to the supply or demand for a commodity or the deliverable into a commodity futures contract.

6.5 Conclusions

The aforementioned examples of the various types of practices which could constitute market manipulation are inspired by the NRAs' own experiences and the experiences in financial markets

made by financial market authorities, with whom the Agency and NRAs will closely cooperate in the implementation of REMIT. The examples can therefore currently be taken as an indication for possible signals of market manipulation in wholesale energy markets according to REMIT.

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

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

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

7 Application of the obligation to disclose inside information

7.1 Introduction

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

7.2 Disclosure of inside information in an effective manner

7.2.1 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),[17] 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 Chapter 7.2.2.

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 (EC) No 714/2009 or (EC) No 715/2009, or guidelines and network codes adopted pursuant to those Regulations, constitutes simultaneous, complete and effective public disclosure. 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[18], following an assessment of IIPs' compliance with quality requirements listed in Chapter 7.2.2, 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

[17] The platform shall adhere to the rules of protection of Personal Data, in accordance with the General Data Protection Regulation 2016/679.
[18] https://www.acer-remit.eu/portal/list-inside-platforms

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 (EC) No 714/2009 or (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations, and Commission Regulation (EU) No 543/2013, which amends the guidelines annexed to Regulation (EC) No 714/2009, 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 Section 7.2.2) 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 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 Regulation (EU) No 596/2014 (Market Abuse Regulation), 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 Market Abuse Regulation as well as the Commission Implementing Regulation (EU) 2016/1055.

7.2.2 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 - 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;
- 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 minimum quality requirements listed above. 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 (see also Chapter 10.2 of this Guidance concerning the Accepted Market Practices (AMPs) regime).

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

7.3 Disclosure of inside information in a timely manner

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

- if the inside information has to be published in accordance with Regulations (EC) No 714/2009 and (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations, and Commission Regulation (EU) No 543/2013, which amends the guidelines annexed to Regulation (EC) No 714/2009, the publishing according to these rules and regulations, including in aggregated form, is considered simultaneous, complete and effective public disclosure (Article 4(4) of REMIT). However, it has to be stressed that even if Article 4(4) of REMIT states that the publication of inside information, including in aggregated form, in accordance with the above-mentioned Regulations, constitutes simultaneous, complete and effective public disclosure, it does not necessarily constitute disclosure in a timely manner and the inside information has to be published, in any case, before trading in wholesale energy products to which that information relates, or recommending another person to trade in wholesale energy markets to which that information relates.

- if the inside information does not have to be made public in accordance with Regulations (EC) No 714/2009 and (EC) No 715/2009 and Commission Regulation (EU) No 543/2013, the Agency currently considers that there is no reason for applying a different reasonable

timeframe for the disclosure of information than stated in the above-mentioned Regulations. Such information should therefore normally be published as soon as possible, but at the latest within one hour if not otherwise specified in applicable rules and regulations. But in any case the inside information has to be published before trading in wholesale energy products to which that information relates or recommending another person to trade in wholesale energy markets to which that information relates.

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

7.4 Delayed disclosure of inside information

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

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

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

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

7.5 Exemption in Article 4(7)

According to Article 4(7) of REMIT,

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

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

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

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

8 Application of the market abuse prohibitions and possible signals of potential insider dealing or market manipulation

8.1 Introduction

This Chapter is intended to provide guidance to NRAs as to the application of the market abuse prohibitions and as to indications of transactions which may involve inside information or market manipulation as defined in Article 2(1) to (3) of REMIT.

8.2 Application of market abuse prohibitions

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

8.2.1 Types of market abuse

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

1. Insider trading – when an insider trades, or tries to trade, in wholesale energy products on the basis of inside information relating to that wholesale energy product (Article 3(1)(a) of REMIT). The Agency considers that the market participant holding inside information is also obliged to refrain from any amendment or selective withdrawal of the order placed ("hands-off approach") in order to comply with the prohibition of insider trading.

2. Improper disclosure of inside information – where an insider improperly discloses inside information to another person, unless such disclosure is made in the normal course of the exercise of their employment, profession or duties (Article 3(1)(b) of REMIT).

3. Recommending on the basis of inside information – where an insider is recommending or inducing, on the basis of inside information, another person to acquire or dispose of wholesale energy products to which that information relates (Article 3(1)(c) of REMIT).

4. False/misleading transactions - trading, or placing orders to trade, which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of wholesale energy products (Article 2(2)(a)(i) and (3)(a)(i) of REMIT).

5. Price positioning - trading, or placing orders to trade, which secures or attempts to secure, by a person, or persons acting in collaboration, the price of one or several wholesale energy products at an artificial level, unless the person who entered into the transaction or issued the order to trade establishes that his reasons for doing so are legitimate and that that transaction or order to trade conforms to accepted market practices on the wholesale energy market concerned (Article 2(2)(a)(ii) and (3)(a)(ii) of REMIT).

6. Transactions involving fictitious devices/deception - trading, or placing orders to trade, which employs fictitious devices or any other form of deception or contrivance (Article 2(2)(a)(iii) and (3)(a)(iii) of REMIT).

7. Dissemination of false and misleading information - giving out information that conveys a false or misleading impression about a wholesale energy product where the person doing this knows or ought to have known the information to be false or misleading (Article 2(2)(b) and (3)(b) of REMI).

8.2.2 Application of the prohibition of insider trading

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

1. members of the administrative, management or supervisory bodies of an undertaking;

2. persons with holdings in the capital of an undertaking;

3. persons with access to the information through the exercise of their employment, profession or duties;

4. persons who have acquired such information through criminal activity;

5. persons who know, or ought to know, that it is inside information.

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

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

8.2.3 Exemptions from the prohibition of insider trading

Paragraphs 3 and 4 of Article 3 of REMIT stipulate exemptions from the prohibition of insider trading. However, it should be stressed that the exemptions may only apply for the prohibition of insider trading and are without prejudice of the obligation to publish inside information according to Article 4(1) of REMIT, as specified in chapter 7 of this Guidance. This chapter is intended to provide guidance to NRAs concerning the use of these exemptions in order to ensure a consistent understanding on the circumstances in which these exemptions may be applied.

Article 3(3) of REMIT provides:

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

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

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

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

> *(a) transactions conducted in the discharge of an obligation that has become due to acquire or dispose of wholesale energy products where that obligation results from an agreement concluded, or an order to trade placed, before the person concerned came into possession of inside information;*
>
> *(b) transactions entered into by electricity and natural gas producers, operators of natural gas storage facilities or operators of LNG import facilities the sole purpose of which is to cover the immediate physical loss resulting from unplanned outages, where not to do so would result in the market participant not being able to meet existing contractual obligations or where such action is undertaken in agreement with the transmission system operator(s) concerned in order to ensure safe and secure operation of the system. In such a situation,*

the relevant information relating to the transactions shall be reported to the Agency and the national regulatory authority. This reporting obligation is without prejudice to the obligation set out in Article 4(1);

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

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

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

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

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

Regarding the first instance, the Agency considers that the contractual obligations referred to must exist *ex ante* of the immediate physical loss resulting from unplanned outages. The existing contractual obligations must relate to the relevant period of the unplanned outage. The Agency considers a market participant "not being able" to meet such existing contractual obligations only if the market participant has no other own assets available and if the physical loss cannot be covered through any existing framework such as intraday / within day or balancing markets. The application of exemption in Article 3(4)(b) of REMIT cannot coincide with the application of Article

4(2) concerning delayed disclosure of inside information, as Article 4(2) requires that the market participant does not make decisions based upon the relevant inside information.

As regards the second instance, the Agency considers that the criterion *to ensure the safe and secure operation of the system* may apply in cases of Article 3(4)(c) of REMIT. If a market participant applies the exemption in Article 3(4)(b), the relevant information relating to the transactions shall be reported to the Agency and to the NRA. This reporting of the notification should take place as soon as possible, according to the market participant's best capacity.

Concerning the timeframe 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*.

In order to assist those market participants who are subject to the obligation to report information to the Agency and NRAs according to Article 3(4)(b), the Agency has developed a standard notification format, based on the experience in financial markets, and recommends its adoption by all NRAs. The relevant electronic format is published on the Agency's website. With regard to the exemption of Article 3(4)(c) of REMIT, the Agency considers that it will normally coincide with the exemption of Article 4(2) of REMIT, and that in such case the authority competent for emergency planning shall ensure publication in accordance with Article 4(1) of REMIT. If a market participant is required by national emergency rules to enter into transactions, any such transactions entered into, whilst in possession of inside information, will not be in breach of Article 3 of REMIT.

8.2.4 Application of the prohibition of market manipulation

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

8.3 Indications of a potential breach

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 transaction gives rise to indications of a possible REMIT breach. Moreover, they are to be applied using judgement rather than necessarily being interpreted literally. It is recognised that transactions corresponding to the signals listed below may be legitimate and hence do not necessarily give reasonable grounds for suspicion.

8.3.1 Possible signals of insider dealing

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

a) significant trading by major market participants before the announcement of the information, having a significant price effect;

b) transactions resulting in sudden and unusual changes in the volume of orders and prices, before the announcement of the information, having a significant price effect.

8.3.2 Possible signals of market manipulation

The following non-exhaustive list of signals, which should not necessarily be deemed in themselves sufficient to determine market manipulation, may be taken into account when transactions or orders to trade are examined by persons professionally arranging transactions related to false or misleading signals and to price securing[19]:

a) the extent to which orders to trade given or transactions undertaken represent a significant proportion of the daily volume of transactions in the relevant wholesale energy product on the trading venue concerned, in particular when these activities lead to a significant change in the price of the wholesale energy product;

b) the extent to which orders to trade given or transactions undertaken by persons with a significant buying or selling position in a wholesale energy product lead to significant changes in the price of the wholesale energy product or a related wholesale energy product admitted to trading on a trading venue;

c) whether transactions undertaken lead to no change in beneficial ownership of a wholesale energy product admitted to trading on a trading venue;

d) the extent to which orders to trade given or transactions undertaken include position reversals in a short period and represent a significant proportion of the daily volume of transactions in the relevant wholesale energy product on the trading venue concerned, and might be associated with significant changes in the price of a wholesale energy product admitted to trading on a trading venue;

e) the extent to which orders to trade given or transactions undertaken are concentrated within a short time span in the trading session and lead to a price change which is subsequently reversed;

[19] Concerning wholesale energy products which are financial instruments, see Article 4 of Commission 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 (MAD) as regards the definition and public disclosure of inside information and the definition of market manipulation.

f) the extent to which orders to trade given change the representation of the best bid or offer prices in a wholesale energy product admitted to trading on a trading venue, or more generally the representation of the order book available to market participants, and are removed before they are executed;

g) the extent to which orders to trade are given or transactions are undertaken at or around a specific time when reference prices, settlement prices and valuations are calculated and lead to price changes which have an effect on such prices and valuations;

h) the extent to which persistent execution of trades that on a stand-alone basis would be uneconomic and counterintuitive triggering a manipulation by deliberately lowering or increasing the market price and enabling a market participant to subsequently profit to a much greater degree through separate trading activity via a larger connected accrued position.

The following non-exhaustive list of signals, which should not necessarily be deemed in themselves to constitute market manipulation, may be taken into account when transactions or orders to trade are examined by persons professionally arranging transactions related to the employment of fictitious devices or any other form of deception or contrivance[20]:

a) whether orders to trade given or transactions undertaken by persons are preceded or followed by dissemination of false or misleading information by the same persons or persons linked to them;

b) whether orders to trade are given or transactions are undertaken by persons before or after the same persons or persons linked to them produce or disseminate research or recommendations which are erroneous or biased or demonstrably influenced by material interest.

[20] Concerning wholesale energy products which are financial instruments, see Article 5 of Commission Directive 2003/124/EC implementing MAD as regards the definition and public disclosure of inside information and the definition of market manipulation.

9 Application of the obligations of persons professionally arranging transactions (PPATs)

9.1 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 9.2), what is comprised in the duty to notify potential breaches of Article 3 or 5 of REMIT (subchapter 9.3) and what is expected from PPATs regarding effective arrangements and procedures to identify those potential breaches (subchapter 9.4). Subchapter 9.5 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.

9.2 Delimitation of the concept of PPAT

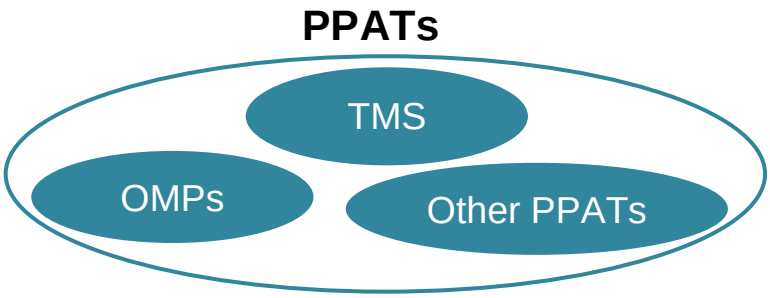
Apart from Article 15 of REMIT, Article 8(4)(d) of REMIT and Article 2(4) of Commission Implementing Regulation (EU) No 1348/2014 include references linked to the concept of PPAT.

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 1).

Figure 1 – 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*[21]*.*

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:

[21] 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.

- **person**: means either natural or legal person;
- **professionally**: the literal analysis of the wording and the case law[22] 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:
    - 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[23]. 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.

[22] 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.

[23] 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 2 – 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.

9.3 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[24]. 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.

9.3.1 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

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

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.

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).

9.3.2 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)[25];
- 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.

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 9 of MAD applies. However, if a potential breach involves wholesale energy products that are also financial instruments (according to Article 9 of MAD), 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.

9.3.3 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

[25] 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.

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 9.3.1 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[26] 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.

9.3.4 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).

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

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.

9.4 The duty to establish and maintain effective arrangements and procedures

9.4.1 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 9.4.2) and procedural (subchapter 9.4.3) arrangements that NRAs should expect PPATs to put in place.

9.4.2 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.

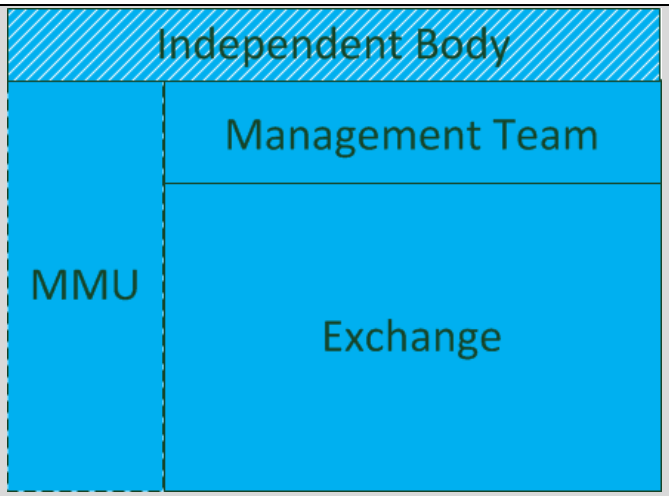
Corporate conflicts may arise when a market surveillance team member wants to report an anomalous event/notify a potential breach regarding a market participant, while the management team does not want to, for commercial or other reasons. The market surveillance team member might be put under pressure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

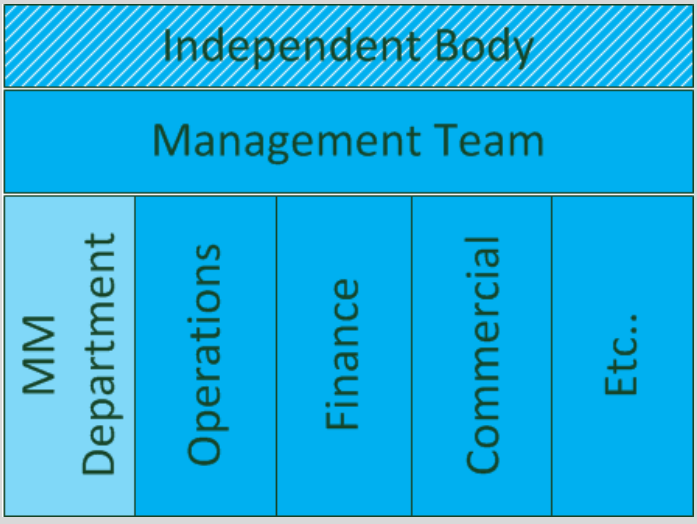
In this governance model the market surveillance team operates independently from the other parts of the PPAT. The MMU is only accountable towards an Independent Body, not involved in the daily management of the PPAT (e.g. Exchange Council, Supervisory Board) that is responsible for the supervision of 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)

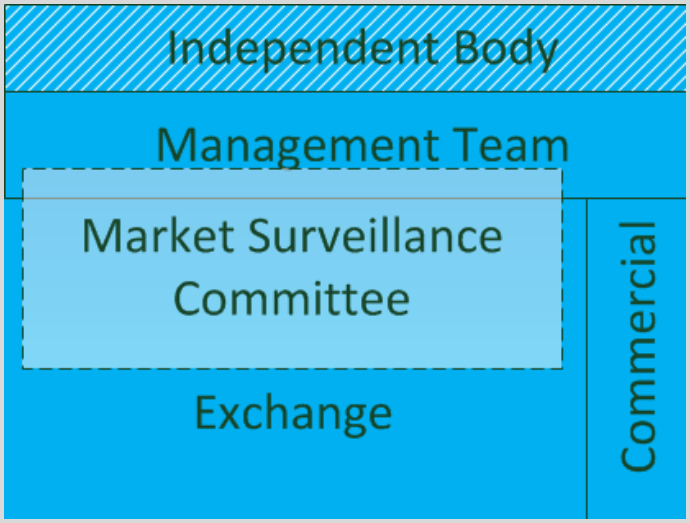
In this governance model, the market surveillance team operates as any other department within the organisation, reporting to a Director who may be member of the Management Team.



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.

9.4.3 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 5, 6, 7, 8, and 10 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.

9.5 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.

10 Application of the implementation of prohibitions of market abuse

10.1 Introduction

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

10.2 Accepted Market Practices (AMPs) regime

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

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

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

The Agency concludes the following as regards AMPs under REMIT:

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

Secondly, in the same way as financial market authorities have consistently made a distinction between practices and activities, also the Agency will distinguish between practices and activities carried out in wholesale energy markets. "Activities" would cover different types of operations or strategies that may be undertaken such as arbitrage, hedging and short selling. "Market practices" would cover the way these activities are handled and executed in the market.

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

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

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

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

- The level of transparency of the relevant market practice to the whole market: Transparency of market practices by market participants is crucial for considering whether a particular market practice can be accepted by competent authorities. The less transparent a practice is, the more likely it is not to be accepted. However, practices on non-regulated markets might for structural reasons be less transparent than similar practices on regulated markets. Such practices should not be in themselves considered as unacceptable by competent authorities;

- the need to safeguard the operation of market forces and the proper interplay of the forces of supply and demand: Market practices inhibiting the interaction of supply and demand by limiting the opportunities for other market participants to respond to transactions can create higher risks for market integrity and are, therefore, less likely to be accepted by competent authorities;

- the degree to which the relevant market practice has an impact on market liquidity and efficiency: Market practices which enhance liquidity and efficiency are more likely to be accepted than those reducing them;

- the degree to which the relevant practice takes into account the trading mechanism of the relevant market and enables market participants to react properly and in a timely manner to the new market situation created by that practice;

- the risk inherent in the relevant practice for the integrity of, directly or indirectly, related markets, whether regulated or not, in the relevant wholesale energy product within the whole Union;

- the outcome of any investigation of the relevant market practice by any competent authority, in particular whether the relevant market practice breached rules or regulations designed to prevent market abuse, or codes of conduct, be it on the market in question or on directly or indirectly related markets within the Union;

- the structural characteristics of the relevant market including whether it is regulated or not, the types of wholesale energy products traded and the type of market participants.

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

- new or emerging AMPs should not be assumed to be unacceptable by the competent authority simply because they have not been previously accepted by it;

- practising fairness and efficiency by market participants is required in order not to create prejudice to normal market activity and market integrity.

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

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

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

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

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

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

10.3 Compliance regime

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

- Compliance culture: the creation of a corporate culture to comply with REMIT requirements,

- Compliance objectives: the compliance with REMIT requirements, namely the registration, disclosure and reporting obligations and the market abuse prohibitions,

- Compliance organisation: the definition of roles and responsibilities in the internal organisation (e.g. responsibilities for the REMIT requirements (centralised vs. decentralised), internal vs. external reporting lines, internal vs. external interfaces, provision of resources: human / technical (IT Systems) resources),

- Compliance risks: the identification / assessment of concrete compliance risks,

- Compliance programme: the identification of concrete actions to define compliant/non-compliant behaviour,

- Communication: the communication of the rules and regulations to be observed:

    - internal communication and training concept (raising the awareness of employees);
    - external communication and reporting to the Agency/NRAs;
    - reporting processes: internal reports on compliance, reporting of infringements, status of current processes, etc.

- Monitoring improvements: internal controls, audits, etc.; reporting lines for monitoring results; documentation of processes and actions.

10.4 Penalty regimes

According to Article 18 of REMIT, Member States should have laid down the rules on penalties applicable to infringements of REMIT by 29 June 2013. In order to ensure an effective implementation of REMIT, the Agency considers it important that penalties are put in place for all

potential infringements of REMIT, which may consist of breaches of the market abuse prohibitions of Articles 3 and 5 of the Regulation, but also of breaches of the obligation to notify the relevant information to the Agency and the competent NRA in situations according to Article 3(4)(b) of the Regulation, the obligation to disclose inside information according to Article 4(1) of the Regulation, the obligation to notify the Agency and the competent NRA of delayed disclosure of inside information according to Article 4(2) of the Regulation, the obligation to provide the Agency with a record of wholesale energy market transactions, including orders to trade, according to Article 8(1) of the Regulation, the obligation to register with the competent NRA according to Article 9(1) of the Regulation, and the obligations of persons professionally arranging transactions according to Article 15 of the Regulation.

List of Abbreviations

ACER/Agency	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) (MAD)
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
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