Comparison of the 1st and 2nd Edition of 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

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This document compares the first and second edition of the Agency's Guidance on the application of Regulation (EU) No 1227/2011 on Wholesale Energy Market Integrity and Transparency (REMIT). It is not the Agency's Guidance, nor can it be referred to as such.
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This Document contains a comparison of the content of the 1st and the 2nd Edition of Guidance on the application of Regulation (EU) No 1227/2011 on Wholesale Energy Market Integrity and Transparency (REMIT), which the Agency may adopt pursuant to Article 16(1) of REMIT. Deletions are marked with ~~strikethrough in blue colour~~ and new text is marked with underline in red colour. Moves are marked in green colour, ~~double strikethrough for copy~~ and double underline for paste.

Related Documents

- ACER Work Programme 2012, http://www.acer.europa.eu/portal/page/portal/ACER_HOME/The_Agency/Work_programme/ACERWP%202012FINAL.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 http://www.acer.europa.eu/remit/Documents/1st_edition_ACER_guidance.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 (EC) No 713/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0001:0014:EN:PDF

- 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 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0015:0035:EN:PDF

- 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

- Directive 2003/6/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 28 January 2003 on insider dealing and market manipulation (market abuse), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:096:0016:0016:EN:PDF

- Directive 2004/39/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 April 2004 on markets in financial instruments,

http://eur-lex.europa.eu/LexUriServ/site/en/consleg/2004/L/02004L0039-20060428-en.pdf

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

- European Commission proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), 20 October 2011, COM(2011) 651 final,
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0651:FIN:EN:PDF

- European Commission proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, 20 October 2011, COM(2011) 654 final,
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0654:FIN:EN:PDF

- European Commission proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories, COM(2011) 652 final,
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0652:FIN:EN:PDF

- European Commission proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council, COM(2011) 656 final,
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0656:FIN:EN:PDF

- European Commission proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC, COM(2011) 683 final,
http://ec.europa.eu/internal_market/securities/docs/transparency/modifying-proposal/20111025-provisional-proposal_en.pdf

- Directive 2003/124EC 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://www.esma.europa.eu/system/files/MAD___implementing_measure_2nd_set_OJ_version.pdf

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

common operation of the Directive (Ref. CESR/04-505b)
http://www.esma.europa.eu/system/files/04_505b.pdf

- Market Abuse Directive - Level 3 – second set of CESR guidance and information on the common operation of the Directive
http://www.esma.europa.eu/system/files/06_562b.pdf

- Market Abuse Directive - Level 3 – third set of CESR guidance and information on the common operation of the Directive
http://www.esma.europa.eu/system/files/09_219.pdf

Preface by the Director on the 1st edition

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

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

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

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

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

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

Alberto Pototschnig
Director
Agency for the Cooperation of Energy Regulators

Preface by the Director on the 2nd edition

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

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

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

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

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

Alberto Pototschnig
Director
Agency for the Cooperation of Energy Regulators

Important Notice

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

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

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

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

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1 Introduction

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

This second edition of the Guidance concentrates on the following issues:

- The scope of REMIT (Chapter 2),
- the application of the definitions of
  - o wholesale energy products, wholesale energy market and market participant (Chapter 3),
  - o inside information (Chapter 4) and
  - o market manipulation (Chapter 5), as well as
- the application of
  - o the obligation to publish inside information according to Article 4 of REMIT (Chapter 6),
  - o the prohibitions of market abuse according to Articles 3 and 5 of REMIT and on possible signals of suspected insider dealing and market manipulation which persons professionally arranging transaction are obliged to notify to NRAs pursuant to Article 15 of REMIT (Chapter 7) and
  - o the implementation of prohibitions of market abuse according to Article 13 of REMIT and the application of Accepted Market Practices (Chapter 8).

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

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

2 Scope of the Regulation

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

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

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

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

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

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

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

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

3.1 Introduction

This chapter covers the Agency's current understanding of the notions of wholesale energy markets, wholesale energy products 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.*
>
> *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.*

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;*

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

Conversely, the Agency considers contracts for green certificates and emission allowances not to be wholesale energy products as they do not fulfil the requirements set out in Article 2(4) of REMIT. The Agency is aware that these contracts can have a significant price effect on wholesale energy markets. According to Article 10 of REMIT, emission allowances or derivatives relating to emission allowances collected by trade repositories or competent authorities overseeing trading in emission allowances or derivatives thereof shall be provided to the Agency together 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, and price formation in both sectors is interlinked. They include, inter alia, regulated markets, multilateral trading facilities and over-the-counter (OTC) transactions and bilateral contracts, direct or through brokers.

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

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

- Derivatives markets relating to electricity or natural gas produced, traded or delivered in the Union, including financial OTC markets;

- Derivatives markets relating to the transportation of electricity or natural gas in the Union.

In future, also generation capacity markets (CRM) may have to be considered.

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. Lastly, pursuant to Article 9(1) of REMIT, market participants have to register with the competent NRA if entering into transactions which are required to be reported to the Agency in accordance with Article 8(1) of REMIT.

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

- **Energy trading companies** in the meaning of 'electricity undertaking' pursuant to Article 2(35) of Directive 2009/72/EC carrying out at least one of the following functions: transportation, supply, or purchase of electricity, and in the meaning of 'natural gas undertaking' pursuant to Article 2(1) of Directive 2009/73/EC carrying out at least one of the following functions: transportation, supply or purchase of natural gas, including LNG;

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

- **Shippers of natural gas;**

- **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, unless only entering into contracts for the supply and distribution of electricity or natural gas for their own full use of consumption capacity of less than 600 GWh ;

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

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

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

- **Investment firms** in the meaning of Article 4(1) No 1 of Directive 2004/39/EC.

The crucial criterion for the assessment of whether a company is a market participant is the entering into transactions, including the placing of orders to trade, in wholesale energy markets. For instance, SSOs and LSOs are explicitly mentioned as market participants in Article 3(4)(b) of REMIT and are therefore considered as market participants if entering into transactions in one or more wholesale energy market. LSOs may sell contracts which eventually lead to the feed in or extraction of gas from the gas network. In several markets, some SSOs conclude contracts for the supply of gas in cases where storage facilities experience operational problems, but despite the malfunction, seek to provide customers with gas and therefore acquire volumes over the spot market. As a result of this and for the purposes of REMIT, these LSOs and SSOs are market participants and are required to publish inside information according to Article 4(1) of REMIT. Information related to the capacity and use of facilities for storage and the use of LNG facilities is considered inside information according to Article 4(1) of REMIT and considered to be reported to the Agency according to Article 8(5) of REMIT. SSOs and LSOs seem to be best placed to fulfill this disclosure obligation and data reporting requirement under REMIT. Accordingly, the Agency considers it as best practice if SSOs and LSOs, even if not entering into transactions in wholesale energy products, facilitate publication of information in relation to Article 4(1) of REMIT on behalf of the potentially multiple market participants involved. The system operator is typically best placed to publish relevant REMIT related information and by doing so can avoid duplicate, and potentially misleading publications by individual market participants involved. Market participants should however ensure they have back-up arrangements for publication to cover situations where 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 have met 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 further guidance on the application of the notion of market participant on market participants from non-EU and non-EEA countries.

According to Article 2(6) of REMIT, a market participant is any person who enters into transactions in one or more wholesale energy markets. This applies irrespective of the location of the person. Accordingly, also persons from non-EU and non-EEA countries are covered by REMIT provided that they enter into transactions in wholesale energy markets. Article 9(1) of REMIT confirms this understanding that REMIT also applies to market participants from non-EU and non-EEA countries as it requires market participants not established or resident in the Union entering into transactions which are required to be reported to the Agency in accordance with Article 8(1) of REMIT, to register in a Member State in which they are active.

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

4 Application of the definition of "inside information"

~~1.1~~4.1 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" ~~by means of the following four criteria~~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[2].

It should be noted that the criteria on information of a precise nature (see ~~point 2~~chapter 4.2) and on significant price effect (see ~~point 2~~chapter 4.4) are very much linked to each other and ~~hence it is important not to consider each criterion in isolation~~are therefore 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.

~~1.2~~4.2 "Information" and ~~"Information~~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;*

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

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

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

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

However, Article 2(1), second subparagraph, of REMIT solely gives indications as to the notion of "information". In order to consider an information an inside information, it still has to fulfil all four criteria of Article 2(1), first subparagraph, of REMIT mentioned above (see ~~point 2~~chapter 4.1), i.e. that the information must be of a precise nature, ~~should~~that it has not ~~have~~ been made public, ~~should relate~~that it relates, directly or indirectly, to one or more wholesale energy products and that, if ~~it were~~ 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" contains all data that shall be published under the transparency obligation of Regulations (EC) No 714/2009 and (EC) No 715/2009, including applicable guidelines and network codes. The concept of "inside information" comprises on the one hand only those transparency information that is likely to have a significant effect on the prices of wholesale energy products, but on the other hand goes even beyond 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 periodic, structured data subject to Regulations (EC) No 714/2009 and (EC) No 715/2009 including applicable guidelines and network codes.

Inside information should 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 highlight or pre-empt certain transparency data.

Specifically, inside information may relate to any item of information that is within the scope of the above regulations 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.

The interpretation of “inside information” is likely to be the subject to interpretation of national and European Courts and has to take into account rulings on the definition of inside information under MAD insofar as the same concepts are applied under this Directive and under REMIT (see for instance the ECJ ruling in case C-19/11 as regards the criterion of “precise information”).

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. A trading strategy, if based on quantifiable specifications, can be analysed on historical data to project the future performance of the strategy.

~~1.3~~4.3 Made public

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

~~As regards disclosing inside information *effectively*, the Agency, currently and at least for an interim phase, considers the following disclosure mechanisms:~~

- ~~if market participants are required to make information publicly available through a Transmission System Operator[3] (TSO) platform (e.g. RTE-UFE transparency initiative) or a transparency platform of an energy exchange (e.g. Nord Pool Spot, EEX Transparency platform etc.), in accordance with Regulations (EC) No 714/2009 and (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations, market participants with inside information to disclose should use such disclosure mechanisms currently specified by competent national regulatory authorities on the basis of the relevant Regulations, if not otherwise specified in relevant rules and regulations, or by the competent NRA. According to Article 4(4) of REMIT, such publication of inside information, including in aggregated form, in accordance with Regulation (EC) No 714/2009 or (EC) No 715/2009, or guidelines and network coded adopted pursuant to those Regulations, constitutes simultaneous, complete and effective public disclosure. Such platforms should also be used for the disclosure of further inside information.~~

- ~~if such platforms do not yet exist, market participants may be allowed, at least for an interim period and unless otherwise specified, to publish inside information which they possess on their own website. However, where such disclosure mechanism is chosen, it is important that disclosure of inside information enhances the level of transparency across the EU and does not distort the dissemination of information. Information shall therefore be disclosed in a manner ensuring that it is capable of being disseminated to as wide a public as possible, including the media. Therefore, inside information shall be disclosed by a market participant free of charge, in a non-discriminatory, user-friendly and quantifiable manner and, where appropriate, in a downloadable format that allows for quantitative analysis. The information should be published in the official language(s) of the relevant Member State and in English.~~

[3] ~~It should be noted that according to Article 2(7) of REMIT, TSOs are market participants themselves.~~

~~As regards the *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, the delay in publishing under 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 considers 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, to constitute 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 the prohibition of insider trading ceases to apply.~~ ~~This is why, in case no real time or close to real time disclosure through a transparency platform applies, at least for an interim period and unless otherwise specified, market participants holding inside information may publish the relevant information on their own website if they intend to trade on the basis of this information.~~

- ~~if the inside information has not 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, the Agency currently considers that there is no reason for changing the definition of a reasonable timeframe to publish information. Such information must therefore normally be published, at least on the market participant's website, within one hour if not otherwise specified in applicable rules and regulations.~~ ~~But in any case the inside information has to be published before the prohibition of insider trading ceases to apply.~~

~~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.~~

~~Article 3(4)(b) and Article 4(2) of REMIT provide for exemptions from the obligation to timely publish inside information and from the prohibition to trade on this information before it is published in a number of specified cases. In all these cases, however, the relevant information should be reported to the Agency and the competent NRA without delay. In order to assist those market participants who are subject to the obligations to report information according to Article 3(4)(b) and Article 4(2) of REMIT, the Agency has developed a standard notification format, based on the experiences in financial markets, and recommends its adoption by all NRAs.~~ ~~The Agency foresees to collect the notifications required by Article 3(4)(b) and Article 4(2) of REMIT mainly through an electronic format, especially when there are data standards relating to this information (like for information to be published in accordance with Regulations (EC) No 714/2009 and (EC) 715/2009). The relevant electronic format is published on the Agency's website.~~

~~**Significant**~~In general, inside 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 inside information public. No distinction is made as to whether the inside information were made public by the market participant or by any other party.

It is sufficient, but also required, that inside information is made available simultaneously to the broad trading public, ensuring equal access to the information since any interested market

participant may apprise themselves of the inside 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 inside information within an energy exchange information service or news board available only to selected participants 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 to be considered as inside information (if that information is or subsequently becomes known to the market participant). Therefore market participants should not only rely on such service providers to publish inside information on their behalf.

~~1.4~~4.4 Likelihood of having a significant price effect

Information is deemed to constitute inside information only if the circumstances on which the information is based would, if it became publicly known, likely have significant effect on the prices of a wholesale energy product. The Agency understands the criterion of significant price effect to narrow the wide notion of information down to that information which is crucial enough in order to have a potential to significantly affect prices~~, thus excluding that any knowledge of non-public information which potentially has only marginal price effect shall prevent market participants from trading in wholesale energy products~~.

According to Article 2(1) of REMIT, the likelihood to significantly affect the prices of wholesale energy products is ~~already~~ sufficient in order for the information to be qualified as inside information. Hence, no actual price effect is required. ~~It is sufficient if the ex-ante available information is likely to have a significant price effect.~~

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 ~~totality 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 related wholesale energy product in the given circumstances.

Ex-post information may be used to check the presumption that the ~~ex-ante~~ information has a significant price effect, but should not be used to take action against someone who drew reasonable conclusions from ~~ex-ante information~~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 ~~is price sensitive~~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.

~~1.5~~4.5 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.

~~1.6~~4.6 Examples of information which could constitute inside information

The definitions of Regulations (EC) No 714/2009 and (EC) No 715/2009 and Directives 2009/72/EC and 2009/73/EC, including guidelines and network codes adopted pursuant to those Regulations, apply.

4.6.1 Examples illustrating the rules for defining inside information in wholesale electricity markets

As regards wholesale electricity products, Regulation (EC) No 714/2009, including guidelines and network codes adopted pursuant to this Regulation, particularly the current 2006 Congestion Management Guidelines, annexed to the Regulation, ~~apply. The Guidelines~~ put obligations on TSOs to provide information on transmission infrastructure and its use, generation, load, balancing and also certain wholesale market aspects. As part of the information has its source outside the TSOs (i.e. generators and users of electricity), concerned market participants are obliged to provide the TSOs with the relevant data for publication. Information on network infrastructure shall include information on capacity allocation and congestion management procedures and operational and planning security standards. The classes of information to be published on a regular basis (annual, monthly, week-ahead forecasts, daily day-ahead and intra-day information) include data related to available transmission capacity, capacity used, aggregated realised commercial and physical flows and information on planned outages and unplanned outages of generation units larger than 100 MW. Additionally, information on forecast demand and generation, as well as (ex-post) realised values for the forecast information is to be published. At the current stage, at least until the "Comitology Guidelines on Fundamental Electricity Data Transparency" are adopted and ~~enter~~entered into force[4], the Agency believes that the following examples may constitute inside information for wholesale electricity products regarding the market participant's own business or facilities of which the market participant concerned owns or controls or has the balance responsibility for in whole or in part, in particular information relevant to facilities for production, consumption or transmission of electricity, regarding:

- any planned outage, limitation, expansion or dismantling of capacity of one generation unit, consumption or transmission facility that equals or exceeds 100 MW, including changes of such plans;

- any unplanned outage or failure of capacity that equals or exceeds 100 MW for one generation unit, consumption or transmission facility, including updates on such outages or failures.

~~any other information that is likely to have a significant effect on the prices of one or more~~ in wholesale electricity product if made public.

[4] Commission Public Consultation Document on Guidelines on Fundamental Electricity Data Transparency (2011), http://ec.europa.eu/energy/gas_electricity/consultations/20110916_electricity_en.htm.

~~1.6.1~~4.6.2 Examples illustrating the rules for defining inside information in wholesale gas markets

As regards wholesale natural gas products, Regulation (EC) No 715/2009, including guidelines and network codes adopted pursuant to this Regulation, ~~apply. Several new transparency requirements for natural gas were introduced. For instance, Article 19 of Regulation (EC) No 715/2009~~ stipulates transparency requirements for market participants, for instance for LNG and storage facilities~~.~~ according to Article 19 of Regulation (EC) No 715/2009. Furthermore, ~~the Gas Comitology Committee agreed on a revision of~~ Chapter 3 of Annex 1 of Regulation (EC) No 715/2009 was revised[5]. At the current stage, legally-binding transparency requirements are most detailed for transmission systems, but also some basic transparency requirements for LNG and storage facilities and on entry points according to points 3.2 et seq. of the aforementioned revised Chapter 3 of Annex 1 of Regulation (EC) No 715/2009 and in ERGEG Guidelines for Good Practice (GGP)[6] apply, which are also considered relevant for the definition of inside information. Additionally, the Third Package offers the possibility to develop comitology guidelines for storage and LNG transparency as well. ~~Even if at EU level, no thresholds like for the aforementioned examples for electricity are indicated, at least for an interim period and unless otherwise specified, existing thresholds defined e.g. for the publication of real time flow information or *de minimis* exemptions granted at national level by competent authorities may be taken into consideration.~~

At the current stage, the Agency believes that ~~respect of~~ the ~~aforementioned transparency requirements is essential to avoid breaches of~~ following examples may constitute inside information for wholesale gas products regarding the market participant's own business or facilities which the market participant concerned owns, controls or has the balance responsibility for in whole or in part, in particular information relevant to facilities for production, consumption, storage or transport of gas, including LNG, regarding:

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

[5] See Commission Decision of 10 November 2010 amending Chapter 3 of Annex I to Regulation (EC) No 715/2009 of the European Parliament and of the Council on conditions for access to the natural gas transmission networks (OJ L 293, 11.11.2010, p. 67).

[6] See in particular the ERGEG Guidelines of Good Practice for LNG System Operators (GGP LNG), Ref: E08-LNG-06-03, and the EREGEG Guidelines for Good TPA Practice for Storage System Operators (GGPSSO), Ref: E04-PC-01-14, both available under http://www.energy-regulators.eu.

- any information related to the capacity and use of LNG facilities, including planned or unplanned unavailability of these facilities.

Concerning a threshold for gas similar to the above mentioned threshold for electricity, the Agency considers the following: Since gas markets differ in size, structure and liquidity it is currently not possible to define one single European threshold which would be of practical value. It should be noted that there are no thresholds in the transparency 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.~~ either. **For this reason NRAs, after proper market consultation, may define an indicative threshold for the relevant gas market in accordance with the Accepted Market Practices regime described in Chapter 8 below.** The threshold should be made available through the ACER website. By collating threshold data, the Agency will ~~update its guidance as necessary.~~ provide market participants which are active in more than one Member State with a one-stop-shop overview of the situation Europe-wide regarding thresholds. The nationally set threshold can be revised by the relevant NRA in order to take into account possible developments, taking into consideration feedback from market participants. Such approach should apply until the transparency guidelines according Regulation (EC) No 715/2009 stipulate a threshold at European level.

~~1.7~~4.7 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~~,~~ 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 ~~and~~.

~~any~~Experience will show which kind of other information ~~that~~ is likely to have a significant effect on the prices of one or more wholesale electricity product 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.

5 Application of the definition of "market manipulation"

~~1.8~~5.1 Introduction

This Chapter is aimed at providing NRAs with examples of the types of market activities which, in the view of the Agency, would fulfil the definition of market manipulation stipulated in Article 2(2) and (3) of REMIT. The guidance and accompanying examples are intended to help NRAs to develop a common understanding of what constitutes market manipulation[7].

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 paper 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.

~~1.9~~5.2 REMIT definition of market manipulation

Article 2(2) of REMIT distinguishes four elements of market manipulation. These are (1) market manipulation through 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*

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

order to trade conforms to accepted market practices on the wholesale energy market concerned; or

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

or

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

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

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

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

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

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

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

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

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

or

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

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

~~1.10~~5.3 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.

~~1.11~~5.4 Examples of the various types of practice which could constitute market manipulation

The following examples of types of practices ~~which~~ 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:

~~1.11.1~~5.4.1 False/misleading transactions

a) Wash trades: This is the practice of entering into arrangements for the sale or purchase of a wholesale energy product where there is no change in beneficial interests or market risk, or where the transfer of beneficial interest or market risk is only between parties who are acting in concert or collusion. The Agency recognises that certain more specific practices, such as crossing/pre-arranged trades, could be considered accepted market practices, and thus do not constitute market manipulation, provided that they are undertaken according to the rules of the relevant trading venue. But in most of such cases, conduct of the practice in conformity with the rules of the trading venue would be sufficient in itself to promote market integrity and therefore the question of giving the practice accepted market practice status does not arise.

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

c) Placing orders with no intention of executing them: This involves the entering of orders, especially into electronic trading systems, which are higher/lower than the previous bid/offer of the market participant concerned. The intention is not to execute the order but to give a misleading impression that there is demand for or supply of the wholesale energy product at that price. The orders are then withdrawn from the market before they are executed. (A variant of this type of market manipulation is to place a small order to move the bid/offer price of the wholesale energy product, being prepared for that order to be executed if it cannot be withdrawn in time.)

~~1.11.2~~5.4.2 Price positioning

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

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

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

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

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

~~1.11.3~~5.4.3 Transactions involving fictitious devices/deception

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

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

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

d) Pre-arranged trading: The practice of two commodity dealers trading with each other at prices upon which they have agreed in advance. Pre-arranged trading is designed to exclude other dealers from the market, to gain a tax advantage, or both. As a result, pre-arranged

trading is illegal. The Agency considers that certain more specific practices, such as crossing/pre-arranged trades, could be considered accepted market practices, and thus do not constitute market manipulation, provided that they are undertaken according to the rules of the relevant trading venue applicable to their conduct. But in most of such cases, conduct of the practice in conformity with the rules of the trading venue would be sufficient in itself to promote market integrity and therefore the question of giving the practice accepted market practice status does not arise.

~~1.11.4~~5.4.4 Dissemination of false and misleading information

This type of market manipulation involves dissemination of false and misleading information without necessarily undertaking any accompanying transaction. This could include creating a misleading impression by ~~failure~~failing to properly ~~to~~ 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 ~~to~~ 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 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.

~~1.12~~5.5 Conclusions

The aforementioned examples of the various types of practices which could constitute market manipulation are inspired by ~~European energy regulators'~~the NRAs' own experiences and the experiences in financial markets made by financial market authorities, with whom ~~ACER~~the Agency and NRAs will closely cooperate in the ~~application~~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.

~~2~~6 Application of the obligation to disclose inside information

Article 4(1) of REMIT obliges market participants to 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.

6.1 Introduction

The obligation to disclose inside information lies with the market participant according to Article 2(7) of REMIT. However, 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 owns, but also in respect of inside information they control of for whose operational matters that market participant or undertaking is responsible, either in whole or in part.

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 receiving the inside information in the normal course of the exercise of their employment, profession or duties as referred to in Article 3(1)(b) of REMIT. If so, that market participant *or person* shall ensure simultaneous, complete and effective disclosure of that information. However, this paragraph 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. The limitation of this exception to Article 4(3) of REMIT is considered to mean, in contrary, that no such exception applies to market participants in relation to parent undertakings or related undertakings according to Article 4(1) of REMIT.

6.2 Effective public disclosure

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

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

- if platforms for the disclosure of inside information exist, for instance operated by Transmission System Operators[8] (TSOs) (e.g. RTE-UFE transparency initiative) or energy exchanges (e.g. Nord Pool Spot, EEX Transparency platform etc.), in accordance with Regulations (EC) No 714/2009 and (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations, market participants with inside information to disclose should use such disclosure mechanisms, if not otherwise specified in relevant rules and regulations, or by the competent NRA. According to Article 4(4) of REMIT, such publication of inside information, including in aggregated form, in accordance with Regulation (EC) No 714/2009 or (EC) No 715/2009, or guidelines and network codes adopted pursuant to those Regulations, constitutes simultaneous, complete and effective public disclosure. Such platforms should also be used for the disclosure of further inside information. This means that a simultaneous publication on the market participant's website is not necessary if a transparency platform is used which discloses inside information in a timely manner. The possibility of using only the transparency platform will decrease the organisational burden on the market participant. In addition, the Agency believes that the use of transparency platforms leads to easier accessible information for all market participants.

- if adequate transparency platforms do not yet exist or simultaneously to a publication through a platform for the disclosure of inside information, market participants may be allowed, at least for an interim period and unless otherwise specified, to publish inside information which they possess on their own website. However, where such disclosure mechanism is chosen, it is important that disclosure of inside information enhances the level of transparency across the EU and does not distort the dissemination of information. Information shall therefore be disclosed in a manner ensuring that it is capable of being disseminated to as wide a public as possible, including the media. Therefore, inside information shall be disclosed by a market participant free of charge, in a non-discriminatory, user-friendly and quantifiable manner. The information should be published in the official language(s) of the relevant Member State and in English or in English only.

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

- the caption "Publication according to Article 4(1) of REMIT / UMM – Urgent Market Message"
- a subject heading that summarises the main content of the publication
- the name and contact information of the market participant
- if applicable, the name and location of the respective asset
- if applicable, the balancing area or market area concerned
- the time and date of the relevant occurrence, including e.g. the (estimated) duration of outages

[8] It should be noted that according to Article 2(7) of REMIT, TSOs are market participants themselves.

- the time and date of publication

- if applicable, the reasons for the unavailability of generation units, consumption units or parts of the electricity or gas grid

- if applicable, a history of prior publications regarding the same event, e.g. if a prognosis is updated or an unplanned outage becomes a planned outage.

Each publication should be as short as reasonably possible and usually not exceed 10 to 20 lines. Therefore, publications should not include statements by company executives, any form of advertisement or any other irrelevant information. For the same reason, the Agency discourages the use of disclaimers. If disclaimers are used, they should be clearly separated from the main body.

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

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

The following IT standards are considered effective and should be applied for the disclosure of inside information through company websites or transparency platforms:

- Platforms shall fulfil the following requirements ("Regulated Information Service (RIS) requirements"):

    - have adequate policies and arrangements in place to make public inside information on behalf of market participants as close to real time as is technically possible on a reasonable commercial basis,

    - be able to efficiently and consistently disseminate inside information on behalf of market participants in a way that ensures fast access to the information on a non-discriminatory basis and in a format that facilitates the consolidation of the information with similar data from other sources,

    - ensure high availability consistent with market expectations,

    - operate and maintain effective administrative arrangements designed to prevent conflicts of interests with market participants,

- have sound security mechanisms in place designed to guarantee the security of the means of transfer of information, minimise the risk of data corruption and unauthorised access and to prevent information leakage before publication, maintain adequate resources and foresee back up facilities for their platforms to avoid temporary technical problems as much as possible and define emergency procedures describing what market participants shall do in the unlikely event that the platform application is out of order,

- be able to report the inside information received from market participants for disclosure to the Agency and NRAs as non-aggregated and individual data once the REMIT implementing acts apply;

- keep the historic inside information available for a period of at least 2 years.

- Market participants disclosing inside information on their own website as a fall-back option or simultaneously to a disclosure of inside information through an inside information platform shall make the inside information available through web feeds in a format that facilitates the consolidation of the information with similar data from other sources. Social media shall only be used as additional sources not replacing website publications. Historic inside information should remain available on the market participants' website if not remained available by the inside information platform for a period of at least 2 years in order to allow other market participants to learn best practice disclosure and to assess previous incidents of the same facilities.

While market participants are responsible for the disclosure of inside information, the Agency understands that they do not have influence on the operation of transparency platforms. Therefore, the Agency believes that market participants are not responsible for temporary technical problems of such platforms fulfilling the above-mentioned RIS requirements. If the information was transmitted to the transparency platform in time, the market participant should therefore not be charged for having breached the obligation to disclose inside information. If technical problems persist, however, market participants have to use other platforms or their own website instead. Although delayed disclosure of inside information due to technical problems of transparency platforms does not imply a breach of the disclosure obligation, the market participant is not allowed to trade based on that information as long as it is not available to the market.

The Agency regards the enclosed Urgent Market Message role models for the disclosure of inside information as best practice examples for the effective disclosure of inside information according to Article 4(1) of REMIT through platforms.

6.3 Timely public disclosure

As regards the *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, the delay in publishing under 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 considers 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, to constitute 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 the prohibition of insider trading ceases to apply.

- if the inside information does not have 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, the Agency currently considers that there is no reason for applying a different reasonable timeframe for the disclosure of information. Such information must therefore normally be published within one hour if not otherwise specified in applicable rules and regulations. But in any case the inside information has to be published before the prohibition of insider trading ceases to apply.

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.

Article 3(4)(b) and Article 4(2) of REMIT provide for exemptions from the obligation to timely publish inside information and from the prohibition to trade on this information before it is published in a number of specified cases. In all these cases, however, the relevant information should be reported to the Agency and the relevant NRA without delay. In order to assist those market participants who are subject to the obligation to report information according to Article 3(4)(b) and 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 Agency foresees to collect the notifications required by Article 3(4)(b) and Article 4(2) of REMIT mainly through an electronic format, especially when there are data standards relating to this information (like for information to be published in accordance with Regulations (EC) No 714/2009 and (EC) 715/2009). The relevant electronic format is published on the Agency's website.

7 Application of the market abuse prohibitions and possible signals of suspected insider dealing or market manipulation

~~2.1~~7.1 Introduction

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

~~2.1.1~~7.1.1 ~~The duty to establish and maintain effective arrangements and procedures~~

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

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

~~The Agency currently considers independent market surveillance departments in the case of energy exchanges and compliance officers in the case of brokers as best practices of effective arrangements to identify breaches of the prohibitions of market abuse. Applicable rules for market surveillance and compliance in the EU financial market legislation may serve as a guidance to establish and maintain such mechanisms.~~

~~**The duty to notify suspicious transactions**~~

~~It should be emphasised that the notification regime laid down by REMIT requires that persons subject to it decide on a case-by-case basis where there are reasonable grounds for suspicion concerning the relevant transaction.~~

7.2 Application of market abuse prohibitions

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

7.2.1 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.

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

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

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

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

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

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

7.2.2 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 from using inside information by acquiring or disposing of wholesale energy products to which that information relates but also prohibits from using inside information by trying to acquire or dispose of wholesale energy products to which that information relates.

7.2.3 Exemptions from the prohibition of insider trading and from the obligation to disclose inside information

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 ~~therefore neither exhaustive (a~~without prejudice of the obligation to publish inside information according to Article 4(1) of REMIT.

Article 3(3) and (4) of REMIT stipulates:

> *3. 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.*
>
> *4. This Article 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.

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

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

The Agency considers that, since the exemption is limited in scope to the aforementioned market participants, any unplanned outage under this exemption may only relate to production, storage or LNG import facilities. It furthermore considers that the exemption may only be applied for unplanned events, i.e. an event which is not ex-ante known by the primary owner of the data, that any physical loss needs to be caused immediately and solely through the unplanned event and that any transaction going beyond the immediate physical loss may not benefit from the exemption.

The exemption may only be applied by the aforementioned market participants in the aforementioned circumstances in the following two instances:

- Where the sole purpose of the transactions entered into 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 TSO(s) concerned in order to ensure safe and secure operation of the system.

Regarding the first alternative, 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 event. The Agency considers a market participant "not being able" to meet such existing contractual obligations in particular ~~transaction may be suspicious even~~ if ~~it matches none of the indications) nor determinative (a~~the market participant has no other own assets available to cover the loss.

As regards the second alternative, the Agency considers that the criterion "to ensure the safe and secure operation of the system" will mainly apply in cases of Article 3(4)(c) of REMIT.

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.

In case a market participant not only aims at applying the exemptions from the prohibition of insider trading according to Article 3(3) and (4) of REMIT, but also the exemption of Article 4(2) of REMIT concerning the delayed disclosure of inside information, the Agency and the relevant NRA(s) must be notified accordingly. According to Article 4(2) of REMIT, the market participant concerned shall without delay provide that information, together with a justification for the delay of the public disclosure, to the Agency and the relevant NRA having regard to Article 8(5) of REMIT, if the conditions of Article 4(2) of REMIT are met.

Notification forms for delayed disclosure of inside information are available at the Agency's website.

7.2.4 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 ~~may not necessarily be suspicious simply because it matches one or more of the indications).~~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.

~~2.2~~7.3 Indications of possible suspicious transactions

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

~~2.2.1~~7.3.1 Possible signals of insider dealing

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

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

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

~~2.2.2~~7.3.2 Possible signals of market manipulation

The following non-exhaustive list of signals, which should not necessarily be deemed in themselves sufficient to ~~constitute~~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[9]:

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;

[9] Concerning wholesale energy products which are financial instruments, see Article 4 of implementing Directive 2003/124/EC on the Market Abuse Directive.

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

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

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

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[10]:

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.

[10] Concerning wholesale energy products which are financial instruments, see Article 5 of implementing Directive 2003/124/EC on the Market Abuse Directive.

~~2.3~~7.4 Method of reporting suspicious transactions

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

Notification to the competent authority can be effected by mail, electronic mail, telecopy or telephone, provided that in the latter case, written confirmation is provided upon request by the competent authority.

The Agency considers that it would assist those subject to the obligation to report suspicious transactions if there were a standard reporting format for doing so. The Agency, based on the experiences in financial markets, therefore recommends using the format published on the Agency's website and urges NRAs to adopt it for suspicious transaction reporting to NRAs, the notification of which has to be forwarded to the Agency without delay pursuant to Article 16(2) of REMIT.

7.5 The obligations of persons professionally arranging transactions

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

~~2.3.1~~7.5.1 The duty to establish and maintain effective arrangements and procedures

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

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

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

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

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

The Agency currently considers independent market surveillance departments in the case of energy exchanges and compliance officers in the case of brokers as best practices of effective arrangements to identify breaches of the prohibitions of market abuse. Applicable rules for market surveillance and compliance in the EU financial market legislation may serve as a guidance to establish and maintain such mechanisms.

7.5.2 The duty to notify suspicious transactions

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

~~The Agency considers that it would assist those subject to the obligation to report suspicious transactions if there were a standard reporting format for doing so. The Agency, based on the experiences in financial markets, therefore recommends using the format presented in the Annex and urges NRAs to adopt it for suspicious transaction reporting to NRAs, the notification of which has to be forwarded to the Agency without delay pursuant to Article 16(2) of REMIT.~~

7.6 Application of the implementation of prohibitions of market abuse

7.6.1 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. In the interim phase until data collection according to Article 8 of the Regulation applies and the investigatory and enforcement powers are implemented at national level according to Articles 13(2) of the Regulation and penalties according to Article 18 of the Regulation apply, 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.

7.6.2 Accepted Market Practices (AMPs) regime

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

Article 2(2)(a)(ii) and (3)(a)(ii) of REMIT stipulate that accepted market practices such as those applying in the financial services area, which are currently defined by Article 1(5) of 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.

According to Article 1(5) of Directive 2003/6/EC, 'Accepted market practices' means practices that are reasonably expected in one or more financial markets and are accepted by the competent authority in accordance with guidelines adopted by the Commission in accordance with the procedure laid down in Article 17(2) of Directive 2003/6/EC. Under Directive 2003/6/EC, the concept of accepted market practices may either apply in relation to market manipulation according to Article 1(2) of Directive 2003/6/EC, 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 Directive 2003/6/EC.

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

Firstly, the AMPs accepted by competent authorities according to Directive 2003/6/EC may also apply under REMIT, but AMPs under REMIT are not limited to these accepted market practices. Accordingly, new AMPs may be established under REMIT, in particular concerning wholesale energy commodity markets.

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

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

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

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

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

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

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

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

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

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

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

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

Competent authorities should analyse the impact of the relevant market practice before carrying out the relevant market practice.

The Agency currently considers the application of the AMPs regime only 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 RIS requirements mentioned above 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;

- Definition of national/regional thresholds for the disclosure of inside information in relevant wholesale gas markets following consultation of market participants and accepted by the competent NRA(s) and notified to the Agency.

7.6.3 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.

7.6.4 Penalty regimes

When Member States lay down the rules on penalties applicable to infringements of REMIT and take all measures necessary to ensure that they are implemented according to Article 18 of the Regulation, NRAs should work towards penalties 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 8(1) of the Regulation, and the obligations of persons professionally arranging transactions according to Article 15 of the Regulation.

Annex 1

Best practice example of Urgent Market Message (UMM) for the disclosure of inside information in the wholesale electricity market

Template for reporting inside information at Nord Pool Spot

Indication of Event Type (e.g. Changes in Production or Consumption/Planned Outage (Maintenance)/Unplanned Outage)	
Indication of Event Lifecycle (e.g. follow-up)	
Message Date and Time:	
Decision Date and Time:	
Publication Date and Time:	
Market Participant:	
Market Participant ID:	
Affected regional area(s):	
Station:	
Production/Consumption/Transmission:	
Affected unit(s):	
Type of fuel(s):	
Installed effect (MW):	
Available Capacity during event (MW):	
Event start:	
Event stop:	
Duration uncertainty:	
Event status:	
Remarks/Additional information:	
Related Information:	

Annex 2

Best practice example of Urgent Market Message (UMM) for the disclosure of inside information in the wholesale gas market

Template for Regulatory Reporting for Danish offshore gas assets and storages facilities

Reference number	
Market:	
Message type:	
Company:	
Asset type affected:	
Asset unit affected:	
Starting time of capacity change (gas day):	
Ending time of capacity change (gas day):	
Duration uncertainty:	
Cause:	
Flow capacity influenced (MWh per gas day):	
Available capacity during outage or maintenance:	
Additional information:	

~~Annex: Suspicious transaction reporting format~~

~~Suspicious transaction reporting format~~

~~Description of the transaction(s)~~ _____
~~Reasons for suspecting that the transaction(s) might constitute insider dealing/market manipulation~~ _____
~~Identities of the market participant carrying out the transaction(s)~~ _____
~~Identities of any other market participant known to be involved in the transaction(s)~~ _____
~~Further information which may be of significance (please list any accompanying material you are supplying)~~ _____
~~Details of the person submitting the notification~~ _____