

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

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This Document contains the First Edition of Guidance on the application of the definitions set out in Article 2 of Regulation (EU) No 1227/2011 on Wholesale Energy Market Integrity and Transparency (REMIT), which the Agency has adopted pursuant to Article 16(1) of REMIT.

Related Documents

ACER/CEER/ERGEG documents

- ACER Work Programme 2012,
http://www.acer.europa.eu/portal/page/portal/ACER_HOME/The_Agency/Work_programme/ACERWP%202012FINAL.pdf

External Documents

- 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 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>

Preface by the Director

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.

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

Important Notice

According to Article 16(1) of Regulation (EU) No 1227/2011 on Wholesale Market Integrity and Transparency (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 shall publish non-binding guidance on the application of the definitions set out in Article 2 [of REMIT], as appropriate”.

Therefore the non-binding Guidance on the application of the definitions set out in Article 2 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 in no way provides an interpretation of the definitions set out in Article 2 of REMIT. It is made public for transparency purposes only.

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

This 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 transparency¹ (REMIT), on the application of the definition set out in Article 2 of REMIT.

This first edition of the Guidance concentrates on the three issues which the Agency considers to be priorities following the entry into force of REMIT. Therefore, this document provides guidance to NRAs on what the Agency considers:

- to represent inside information,
- to constitute market manipulation and
- as 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.

Therefore, Chapter 2 provides guidance to NRAs on the definition of inside information, which is also crucial in the context of market participants' disclosure obligations according to Article 4 of REMIT. Chapter 3 provides guidance to NRAs on types of practices that the Agency considers as constituting market manipulation or attempted market manipulation. Chapter 4 describes possible signals of suspected insider dealing or market manipulation which persons professionally arranging transactions are expected to notify to NRAs according to Article 15 of REMIT.

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.

¹ OJ L 326, 8.12.2011, p. 1.

2 Inside Information

2.1 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:

- 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 considers as covered by the four above criteria².

It should be noted that the criteria on information of a precise nature (see point 2.2) and on significant price effect (see point 2.4) are very much linked to each other and hence it is important not to consider each criterion in isolation. 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.

2.2 “Information” and “Information of a precise nature”

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

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>).

- (a) *information which is required to be made public in accordance with Regulations (EC) No 714/2009 and (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations;*
- (b) *information relating to the capacity and use of facilities for production, storage, consumption or transmission of electricity or natural gas or related to the capacity and use of LNG facilities, including planned or unplanned unavailability of these facilities;*
- (c) *information which is required to be disclosed in accordance with legal or regulatory provisions at Union or national level, market rules, and contracts or customs on the relevant wholesale energy market, insofar as this information is likely to have a significant effect on the prices of wholesale energy products; and*
- (d) *other information that a reasonable market participant would be likely to use as part of the basis of its decision to enter into a transaction relating to, or to issue an order to trade in, a wholesale energy product.*

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 2.1), i.e. the information must be of a precise nature, should not have been made public, should relate, directly or indirectly, to one or more wholesale energy products and, if it were made public, would be likely to significantly affect the prices of those wholesale energy products.

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.

2.3 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 Operator³ (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 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.
- 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.

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

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

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.

2.4 Significant price effect

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. 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, 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.

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;
- the market participant itself 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.

2.5 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.*

2.6 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.

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 into force, 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 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 wholesale electricity product if made public.

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 LNG and storage facilities. Furthermore, the Gas Comitology Committee agreed on a revision of Chapter 3 of Annex 1 of Regulation (EC) No 715/2009. 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) 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 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 update its guidance as necessary.

2.7 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,
- 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 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 will constantly review its guidance on inside information and publish a revised version of this non-binding guidance as soon as considered appropriate.

3 Types of practice that the Agency would consider constituting Market Manipulation or attempted Market Manipulation

3.1 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 manipulation⁴.

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.

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

⁴ Concerning wholesale energy products which are financial instruments and to which Article 9 of Directive 2003/6/EC applies, please refer to the relevant CESR guidance and information on the Market Abuse Directive (See CESR/04-505b, CESR/06-562b and CESR /09-219 published under <http://www.esma.europa.eu/index.php>).

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

or

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

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

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

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

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

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

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

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

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

or

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

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

3.3 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.*

3.4 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, are currently considered notably relevant for wholesale energy markets, in particular in the context of continuous trading of wholesale energy products:

3.4.1 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).

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.)

3.4.2 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.

3.4.3 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.

3.4.4 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 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 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 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.

3.5 Conclusions

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

4 Possible Signals of Suspected Insider Dealing or Market Manipulation

4.1 Introduction

This Chapter is intended to provide guidance to NRAs 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.

4.2 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.

4.3 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 below 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).

4.4 Indications of possible suspicious transactions

It is emphasised that these examples of indications are only a starting point for consideration of whether a transaction is suspicious and are neither conclusive nor comprehensive. Moreover, they are to be applied using judgement rather than necessarily being interpreted literally. It is recognised that transactions meeting signals may be legitimate and hence not give reasonable grounds for suspicion.

4.4.1 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.

4.4.2 Possible signals of market manipulation

The following non-exhaustive 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 false or misleading signals and to price securing⁵:

- a) the extent to which orders to trade given or transactions undertaken represent a significant proportion of the daily volume of transactions in the relevant wholesale energy product on the trading venue concerned, in particular when these activities lead to a significant change in the price of the wholesale energy product;
- b) the extent to which orders to trade given or transactions undertaken by persons with a significant buying or selling position in a wholesale energy product lead to significant changes in the price of the wholesale energy product or a related wholesale energy product admitted to trading on a trading venue;
- c) whether transactions undertaken lead to no change in beneficial ownership of a wholesale energy product admitted to trading on a trading venue;
- d) the extent to which orders to trade given or transactions undertaken include position reversals in a short period and represent a significant proportion of the daily volume of transactions in the relevant wholesale energy product on the trading venue concerned, and might be associated with significant changes in the price of a wholesale energy product admitted to trading on a trading venue;

⁵ Concerning wholesale energy products which are financial instruments, see Article 4 of implementing Directive 2003/124/EC on the Market Abuse Directive.

- 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.

The following non-exhaustive 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 contrivance⁶:

- 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.

4.5 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.

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

⁶ Concerning wholesale energy products which are financial instruments, see Article 5 of implementing Directive 2003/124/EC on the Market Abuse Directive.

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.

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.

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