

To all wholesale market participants and  
other interested parties

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Date: 08 September 2015

Dear Colleagues,

**Prohibition of market abuse under the Regulation on wholesale energy market integrity and transparency (EU) No 1227/2011 (REMIT)**

The aim of REMIT is to promote confidence and integrity in wholesale energy markets in Europe. This is to foster open and fair competition for the benefit of final consumers of energy. To help ensure consistent interpretation of REMIT, the Agency for the Cooperation of Energy Regulators (ACER) published non-binding guidance<sup>1</sup> to EU National Regulatory Authorities (NRAs)<sup>2</sup>, who are responsible for enforcing REMIT. We support this guidance.

Our Wholesale Market Conduct team has been monitoring the GB market and investigating certain actions. This has led us to engage with some participants about particular behaviour. We want to make our views in relation to that behaviour known to GB market participants more broadly, and are therefore writing this open letter. We recommend that market participants take into account ACER's guidance, the guidance contained in this letter and our additional information on REMIT on our website<sup>3</sup> when considering their approach to compliance with REMIT.

The focus of this letter is on behaviour that may constitute market manipulation, which would be a breach of Article 5 of REMIT. We also remind market participants of their duty to publish inside information in an effective and timely manner and of the upcoming deadlines for REMIT registration and transaction reporting. In addition, we highlight the importance of complying with reporting obligations under the Transparency Regulation.<sup>4</sup>

**Market manipulation**

This letter is intended to clarify certain aspects related to Article 2(2)(a) of REMIT. This defines market manipulation as:

- (a) entering into any transaction or issuing any order to trade in wholesale energy products which:*
  - (i) gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of wholesale energy products;*

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<sup>1</sup> <http://www.acer.europa.eu/Media/Pages/3rd%20Edition%20ACER%20Guidance%20REMIT%20%282%29.pdf>

<sup>2</sup> Ofgem is the NRA for Great Britain.

<sup>3</sup> This further guidance is available at <https://www.ofgem.gov.uk/electricity/wholesale-market/european-market/remit>. Particular regard should be had to Ofgem's open letter on REMIT inside information, published on 11 July 2014.

<sup>4</sup> European Commission Regulation (EU) No 543/2013 of 14 June 2013 on submission and publication of data in electricity markets.

- (ii) *secures or attempts to secure, by a person, or persons acting in collaboration, the price of one or several wholesale energy products at an artificial level, unless the person who entered into the transaction or issued the order to trade establishes that his reasons for doing so are legitimate and that that transaction or order to trade conforms to accepted market practices on the wholesale energy market concerned; or*
- (iii) *employs or attempts to employ a fictitious device or any other form of deception or contrivance which gives, or is likely to give, false or misleading signals regarding the supply of, demand for, or price of wholesale energy products.*

Please note the following:

- a. Article 5 of REMIT will be breached in any **one** of the situations described in Article 2(2)(a).
- b. Article 2(2)(a)(i) defines market manipulation as entering into any transaction or issuing any order to trade in wholesale energy products which gives or is likely to give, false or misleading signals as to the supply of, demand for or price of a wholesale energy product. **All three criteria do not need to be met in order for a breach to occur; supply of, demand for, or price of are all separate considerations under REMIT.**
- c. Market manipulation may occur **without an impact on supply, demand or price.**<sup>5</sup>
- d. There is **no need for there to have been intent** for market manipulation, as defined in Article 2(2)(a), to be found.<sup>6</sup> If the result of entering into any transaction or issuing any order to trade in wholesale energy products results in one of the outcomes described in Article 2(2)(a) of REMIT then this constitutes market manipulation under REMIT.

Market participants should take due care to ensure that erroneous trading does not accidentally result in outcomes that could constitute a breach of REMIT.

We would also like to offer some observations on a number of specific practices that we consider constitute market manipulation:

#### *Layering*

The act of entering a series of bids (or offers), which you do not intend to execute, at increasing (or, for offers, decreasing) prices is known as layering. This is likely to amount to market manipulation and a breach of REMIT.<sup>7</sup> This is because:

- a. the placement of bids (or offers) which are not intended to be traded provides a false signal as to the level of demand (supply) to the market (Article 2(2)(a)(i)); and/or
- b. the false signal may secure, or attempt to secure, the price at an artificial level (see Article 2(2)(a)(ii)). The price at which a wholesale energy product is secured is considered an artificial level if it reflects a false signal as to the demand for (or supply of) that product rather than prevailing market conditions.

Article 2(2)(a)(ii) allows a person suspected of market manipulation to establish that they have a legitimate reason for entering into the transaction in question or issuing the order to trade if it conforms to accepted market practices on the wholesale energy market

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<sup>5</sup> In Article 2(2)(a)(i) market manipulation is defined as entering into any transaction or issuing any order to trade in wholesale energy products which gives **or is likely to give**, false or misleading signals as to the supply of, demand for or price of a wholesale energy product.

<sup>6</sup> Intent is required in order to establish the following infringements: (i) a breach of Article 5 of REMIT by a market participant attempting to manipulate the market (see Article 2(3)); and (ii) the criminal offence of market manipulation (see the Electricity and Gas (Market Integrity and Transparency) (Criminal Sanctions) Regulations 2015).

<sup>7</sup> See, by analogy with the regulation of financial services, *Canada Inc (formerly trading as Swift Trade Inc) v Financial Services Authority* [2013] All ER (D) 266 (Feb).

concerned. REMIT<sup>8</sup> allows for ACER to publish non-binding guidance to address the issue of accepted market practices. ACER's guidance has said that the definition of accepted market practices is primarily the responsibility of individual NRAs. To date, Ofgem has not recognised any specific practices as accepted market practices.

#### *Small bids ahead of placing large offers and vice versa*

Through our monitoring we have noticed incidents whereby a number of small orders and trades at prices which do not reflect market fundamentals occur around the opening of markets, particularly in intraday power markets. We understand market participants may undertake this practice as a means of price discovery. However, we urge market participants to carefully consider how they do this. We consider that the submission of relatively small orders at prices which do not reflect market fundamentals ahead of relatively large orders in the opposite direction (sell or buy) could create a false or misleading signal as to supply, demand or price of wholesale energy products, which may constitute market manipulation, as defined in Article 2(2)(a)(i) of REMIT.

#### *Marking the close*

ACER's guidance refers to the practice of marking the close as an example of the type of manipulation set out in Article 2(2)(a)(ii). The practice of marking the close involves deliberately buying or selling wholesale energy products at the close of the market in a manner that seeks to secure the closing price of the wholesale energy product at an artificial price. It is our view that similar behaviour undertaken to secure price assessments or index prices at an artificial price would also be an example of the type of manipulation set out in Article 2(2)(a)(ii).

Therefore, when trading around the close of markets or around price assessment periods, market participants should be particularly mindful of how their trading may affect the closing or assessed price. Market participants should also be aware that entering into erroneous trades around these times could also constitute market manipulation even where such trades are later cancelled. Once the trade is executed the price signal is shared with market participants, and is not necessarily removed by its cancellation.

We would also emphasise that even if a closing or assessed price is not impacted by a market participant's trading, attempts to alter or influence these prices could still constitute attempted market manipulation and therefore breach Article 5 of REMIT.

#### *Pre-arranged trading*

We would like to emphasise to market participants that trading which takes place on an anonymous exchange but which has been the subject of a prior arrangement as to price and / or volume is likely to amount to market manipulation and a breach of REMIT as a form of pre-arranged trading.

Under Article 2(2)(a)(i) of REMIT, entering into a transaction, or issuing any order to trade in wholesale energy products which gives or is likely to give false or misleading signals as to the supply of, demand for, or price of wholesale energy products is a form of market manipulation. Pre-arranged trading is likely to give a false or misleading signal and as such could represent a breach of REMIT because it indicates to the market availability of supply and/or a price which is not actually available to the whole market on equal terms.

We feel it is important to point out that an existing order can become a pre-arranged trade if the price and/or volume are amended after prior agreement between two or more parties. It is not necessary for this activity to move prices for market manipulation to occur.

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<sup>8</sup> Recital 27 of REMIT.

## **Inside information disclosure practices**

We actively monitor market participants' notifications regarding the availability of their assets. Last year, this monitoring identified concerns regarding the timeliness and effectiveness of notifications and we published an open letter reminding market participants of their obligations.<sup>9</sup> Since then, we have noted improvements in many areas. However there remains room for even more improvement.

The updated 3<sup>rd</sup> edition of ACER's REMIT Guidance<sup>10</sup> states that market participants should ensure inside information is published as soon as possible, but at the latest within one hour if not otherwise specified in applicable rules and regulations. We echo this position. In terms of effectiveness, market participants should publish their notifications in such a way as to ensure they are easy to understand. To this end, we would encourage market participants to consider publishing an inside information "factsheet" to explain any part of their notification procedures/assumptions. Some market participants have already taken this approach. This aids transparency, which we consider to be an integral part of REMIT.

Additionally, we consider that disclosing inside information to other market participants, including affected stakeholders, prior to public disclosure may constitute a breach of REMIT Article 3(1)(b). Market participants should take account of REMIT Articles 3(1)(b) and (c) whenever considering sharing potential inside information or discussing products potentially affected by inside information.

We have noticed that some market participants use thresholds to determine whether to make a REMIT notification, for operational efficiency reasons. We would like to reiterate that under REMIT there are no thresholds for the disclosure of inside information, but that market participants' conduct will be assessed against the definition of inside information under REMIT Article 2(1). Whether or not a piece of information is covered by this definition is likely to depend on market conditions at the relevant time.

ACER has been consulting on inside information disclosure. We may provide further comment on GB market participant's disclosure practices after ACER has published their response to that, if necessary.

## **The Transparency Regulation**

The Commission Regulation No 543/2013 on submission and publication of data in electricity markets (the Transparency Regulation) entered into force in July 2013.

The 3<sup>rd</sup> edition of ACER's REMIT Guidance points to Article 2(1)(a) of REMIT, which states that information under the Transparency Regulation may also constitute a subset of inside information if it meets the criteria outlined in Article 2(1) of REMIT. We concur with this view.

As part of our ongoing monitoring activities we have identified a number of concerns regarding the timely and effective publication of data under the Transparency Regulation. We remind market participants that primary data owners have been obliged to comply with their obligations under Article 4 of the Transparency Regulation since 5 January of this year. We will continue to monitor compliance with the Transparency Regulation and ensure appropriate action is taken where required.

## **Upcoming deadlines for registering as a market participant**

Under Article 9(4) of REMIT, market participants who enter into transactions that are required to be reported to ACER under Article 8(1) of REMIT must register with a specified

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<sup>9</sup>[https://www.ofgem.gov.uk/sites/default/files/docs/2014/07/ofgem\\_open\\_letter\\_on\\_remit\\_inside\\_information\\_0.pdf](https://www.ofgem.gov.uk/sites/default/files/docs/2014/07/ofgem_open_letter_on_remit_inside_information_0.pdf)

<sup>10</sup> <http://www.acer.europa.eu/Media/Pages/3rd%20Edition%20ACER%20Guidance%20REMIT%20%282%29.pdf>

NRA. They must do this before they enter into a transaction which is required to be reported to ACER pursuant to Article 8(1) of REMIT. In line with the REMIT Implementing Acts<sup>11</sup>, the requirement to report transactions applies from the following dates:

- 7 October 2015 for contracts executed on organised market places
- 7 April 2016 for contracts concluded off organised market places.<sup>12</sup>

Once transaction reporting begins, any market participant that has not submitted their registration form and enters into a transaction which should be reported may be in breach of Article 9 of REMIT.

REMIT registration is open in Great Britain. We are pleased to see that a large number of market participants who trade on organised market places have already registered. We encourage those market participants who haven't registered yet, to ensure they do so well in advance of the start of transaction reporting. Details of how to register in Great Britain can be found on Ofgem's website.<sup>13</sup> Please email us via [REMIT.Registration@ofgem.gov.uk](mailto:REMIT.Registration@ofgem.gov.uk) if you have questions about this process.

### Next steps

We will continue to monitor GB wholesale electricity and gas markets. Where appropriate, we will take action to follow up on potential breaches of REMIT, including failures to register, report transactions or publically disclose inside information in a timely and effective manner.<sup>14</sup> We have published the procedural guidelines (including how we prioritise cases) and penalty policies we follow in relation to REMIT on our website.<sup>15</sup>

We recommend that market participants carefully consider the processes their traders follow when entering transactions in order to minimise the risk of breaching the prohibitions contained in REMIT. When considering those processes, market participants should take into account guidance from ACER, the contents of this letter and other publically available information from ACER<sup>16</sup> and Ofgem about REMIT.

If you would like to notify us of a potential breach of REMIT or the Transparency Regulations, please email [Market.Conduct@ofgem.gov.uk](mailto:Market.Conduct@ofgem.gov.uk). If you have any comments or questions on the content of this letter, please contact Louise van Rensburg, Head of Wholesale Market Conduct, at [REMIT@ofgem.gov.uk](mailto:REMIT@ofgem.gov.uk).

Yours sincerely,

Philippa Pickford  
Associate Partner, Markets

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<sup>11</sup> Commission Implementing Regulation (EU) 1348/2014 of 17 December 2014 on data reporting implementing Article 8(2) and Article 8(6) of Regulation (EU) 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency.

<sup>12</sup> In addition, reporting of the following will also begin on 7 April 2016: transportation contracts, TSO nominations (Article 8(3) and 9(2) of the IAs), market participant's data on LNG (Article 9(5) of the IAs) and storage (Article 9(9) of the IAs).

<sup>13</sup> <https://www.ofgem.gov.uk/electricity/wholesale-market/european-market/remit/registering-market-participant-under-remit>

<sup>14</sup> On 1 July 2015, the Electricity and Gas (Market Integrity and Transparency)(Enforcement etc.)(Amendment) Regulations 2015 entered into force (see

[http://www.legislation.gov.uk/uksi/2015/862/pdfs/ukxi\\_20150862\\_en.pdf](http://www.legislation.gov.uk/uksi/2015/862/pdfs/ukxi_20150862_en.pdf)). We have also recently received powers to prosecute breaches of Articles 3 and 5 of REMIT as criminal offences (see the Electricity and Gas (Market Integrity and Transparency) (Criminal Sanctions) Regulations 2015, available at <http://www.legislation.gov.uk/uksi/2015/979/introduction/made>)

<sup>15</sup> <https://www.ofgem.gov.uk/publications-and-updates/consultation-decision-remit-procedural-guidelines-and-penalties-statement-consultation>. We are currently consulting on our prosecution policy for criminal offences.

<sup>16</sup> <https://www.acer-remit.eu/portal/public-documentation>