

## Transparency of the electricity and natural gas markets: One decade of REMIT application (I)



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### 1. Prolegomena

[1] The end of year 2021 marked the 10th anniversary of the enactment of *EU Regulation No. 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency* (hereafter “**REMIT**” or “**the Regulation**”)<sup>1</sup>. On this occasion, the 5th REMIT Forum was organized as a series of virtual events on 25, 26 and 28 October 2021 (“**2021 REMIT Forum**”)<sup>2</sup>. The introductory webinar to REMIT and the main plenary session were followed by special interest groups sessions on data, reporting and technology as well as on the 6th Edition of *ACER Guidance on the application of REMIT* (“**ACER Guidance**”)<sup>3</sup>. Conclusions of the 2021 REMIT Forum will be revealed in different contexts throughout our own series of articles aimed at marking the occasion.

[2] As REMIT is of direct application in Romania, it’s time to look back and reflect on the main features of this instrument, considered to be the most advanced energy market monitoring effort. **On the occasion of the 10th REMIT anniversary, we prepared two articles that have a threefold purpose. Firstly**, they provide an overview of the REMIT core concepts, including the novelties brought in the latest edition of the ACER Guidance published on 22 July 2021 (this topic is treated in the current part of our REMIT series). **Secondly**, they show how REMIT was implemented in Romania considering that although it is of direct application, there are some aspects that need to be addressed at national level. Put it another way, structurally, REMIT is to be enforced by national regulatory authorities who have been given related national powers (this topic is treated mainly in the second part of our REMIT series). **Thirdly**, they provide an overview of the investigatory and enforcement results of the Romanian and other European NRAs for REMIT violations, as well as an overview of the rights and guarantees of those investigated (this topic is treated in the second part of our REMIT series). However, given the complexity of REMIT, these articles do not claim to be exhaustive, being rather an overview aimed at accompanying the readers on their way to the REMIT’s 10-year milestone.

[3] Before focusing on the core elements of the Regulation, some preliminary background remarks on REMIT purpose and application are necessary. Briefly, REMIT aimed to fill in a gap that was not previously approached under other financial regulations such as MAD/MAR<sup>4</sup> and MiFID II<sup>5</sup>, by prohibiting market manipulation and insider trading in the wholesale energy market. The area addressed by REMIT is knotty since there are potential overlaps between: **(i)** regulation of trading in wholesale energy markets, **(ii)** financial services regulation, and **(iii)** competition law. REMIT expressly provides<sup>6</sup> that it is without prejudice to MAR, MiFID II, as well as to the application of the European competition law to the practices covered by REMIT. In addition, the Agency for the

Cooperation of Energy Regulators (“ACER”)<sup>7</sup>, the national regulatory authorities (“NRAs”), the European Securities and Markets Authority (“ESMA”), the competent financial authorities of the European Union (“EU” or the “Union”) Member States and, where appropriate, the national competition authorities shall cooperate to ensure that a coordinated approach is taken to the enforcement of the relevant rules.<sup>8</sup> One of the conclusions of the 2021 REMIT Forum was that ACER should further enhance the collaboration with other institutions, such as ESMA, with regard to the monitoring of emission markets, as well as with neighbouring non-EU countries organisations for example, through the Energy Community Secretariat. Although the demarcation of these areas is of a paramount importance, it deserves to be addressed in a separate study rather than being dealt with in this overview<sup>9</sup>.

[4] In order to ensure an efficient market monitoring, the Regulation establishes and delimits the powers of ACER and those of NRAs (e.g., the National Energy Regulatory Authority (“ANRE”) in Romania)<sup>10</sup>. On the one hand, ACER ensures that REMIT is applied in a coordinated way across the EU, and it is best placed to carry out market monitoring at the EU level, as it has both a Union-wide view of the electricity and gas markets, and the necessary expertise in the operation of electricity and gas markets and systems in the Union<sup>11</sup>. On the other hand, NRAs, which have a comprehensive understanding of developments on energy markets in their respective Member State, have an important role in ensuring efficient market monitoring at national level<sup>12</sup>. ACER and NRAs collect and monitor relevant trading and fundamental data at market participant level to detect and sanction abusive behaviours, investigation and sanctioning being the responsibility of the latter.

[5] In addition, in order to ensure the coordination and consistency of the NRAs’ activities, ACER may issue non-binding guidance<sup>13</sup> on the application of the definitions set out in the Regulation, and on other issues related to its application. Based on these powers, in 2011 ACER developed the first edition of the ACER Guidance, which focused on the issues considered to be of priority at a time so close to the entry into force of the Regulation. Over the years, ACER Guidance has successively been updated with information on the definitions set out in the Regulation and the obligations imposed on market participants and NRAs.<sup>14</sup> Although non-binding, the ACER Guidance is extremely helpful in the investigations and surveillance processes, as well as in responding to the queries of the market participants.

[6] In 2021, marking the 10th anniversary of both the Regulation and the first edition of the ACER Guidance, ACER issued the 6th edition of the ACER Guidance which had been significantly modified from previous editions by restructuring the information in order to make it more intuitive. Furthermore, there are sections which have changed in substance. More specifically, there are three new chapters (i.e., ‘REMIT Scope’, ‘Prohibition of insider trading’ and ‘Prohibition of market manipulation’) which build on and add to or replace content from the previous editions. Within the discussions held during the 2021 REMIT Forum, the new edition of the REMIT Guidance was found to be more accessible to the reader and more comprehensive, while the practical examples were highlighted as important additions to the text. The insider trading chapter and the relevant indicators therein were deemed to be of particular importance. Regarding the possible evolution of the ACER Guidance, it was mentioned that since REMIT is not only about integrity but also about transparency, an important aspect to consider is that, apart from the prohibitions, the transparency obligations of actors, such as transmission system operators, also deserve further attention. It was also pointed out that the cases finalised by the NRAs could form interesting case studies to enrich the ACER Guidance<sup>15</sup>. The main novelties brought under the 6th edition of the ACER Guidance will be revealed in the ‘REMIT core concepts’ section of this article. In addition, ACER periodically updates its Q&A documents which contain a summary of REMIT stakeholders’ frequently asked questions and ACER’s answers on (i) REMIT policy matters<sup>16</sup>, (ii) REMIT transaction reporting<sup>17</sup>, and (iii) REMIT fundamental data and inside information<sup>18</sup>. The Q&A documents serve as guidance to REMIT stakeholders and do not constitute a binding legal interpretation of REMIT.

[7] The above regulations and documents have been considered for the preparation of this article. Obviously, the Romanian legislation has also been considered, in particular Law 123/2012 on electricity and natural gas (“**Romanian Energy Law**”), as recently amended under Government Emergency Ordinance no. 143/2021 for the amendment of Law no. 123/2012 on electricity and natural gas, as well as for the amendment of other regulatory acts (“**GEO 143/2021**”). **Our article on the novelties brought under the GEO 143/2021 is available [here](#).**

## 2. REMIT core concepts

### 2.1. Scope of REMIT

[8] As a preliminary remark, chapter ‘*Scope of REMIT*’ of the 6th edition of ACER Guidance provides a more detailed scope of wholesale energy products while also addressing the geographical scope of REMIT and expands the analysis on the interaction between REMIT and the financial services legislation. Amongst the novelties, the chapter notes that if biogas can technically and safely be injected into, and transported through, the natural gas system, then it will be treated as natural gas and will be subject to the provisions of REMIT. Furthermore, ACER outlines that the definition of wholesale markets includes re-dispatching and countertrading mechanisms, as well as local flexibility markets for electricity<sup>19</sup>, as long as wholesale energy products are traded there.

#### 2.1.1. Products and markets in scope

[9] **Products in scope.** REMIT applies to **(i)** wholesale energy products (“**WEPs**”) and **(ii)** certain contracts for the supply and distribution of electricity or natural gas for the use of final customers.

[10] WEPs are defined<sup>20</sup> as the following contracts and derivatives **irrespective of where and how they are traded**: **(i)** contracts for the supply of electricity or natural gas where delivery is in the Union; **(ii)** derivatives relating to electricity or natural gas produced, traded or delivered in the Union; **(iii)** contracts relating to the transportation of electricity or natural gas in the Union; **(iv)** derivatives relating to the transportation of electricity or natural gas in the Union.

[11] While typically the contracts for the supply and distribution of electricity or natural gas for the use of final customers are not WEPs, contracts for the supply and distribution to final customers with a consumption capacity **greater than 600 GWh/year** shall be treated as WEPs<sup>21</sup>.

[12] ACER considers contracts for the supply or transportation of electricity and natural gas traded intraday, within-day, day-ahead, two-day-ahead, weekend, week, monthly, quarterly, yearly, long-term or during any other time period, generally accepted in the market as contracts for the supply or transportation of electricity or natural gas<sup>22</sup>.

[13] As the definition of WEP applies to contracts and derivatives ‘*irrespective of how and where they are traded*’, ACER considers that this definition covers contracts and derivatives that are intermediated by persons personally arranging transactions (“**PPATs**”) **but which are also traded bilaterally and/or over the counter (“OTC”)**<sup>23</sup>. However, contracts for green certificates and emission allowances are not considered energy products<sup>24</sup>. Production of electricity or gas by a production unit which is consumed within the same production facility is also considered to be outside the scope of REMIT<sup>25</sup>.

[14] It should also be noted that pursuant to the *Proposal for a Regulation of the European Parliament and of the*

*Council on the internal markets for renewable and natural gases and for hydrogen (COM/2021/804 final)*<sup>26</sup>, REMIT should be amended as follows: **(i)** in Article 2, Article 3(3) and (4), Article 4(1), Article 8(5) the term ‘*electricity or natural gas*’ should be replaced with the term “*electricity, hydrogen or natural gas*”, and **(ii)** in Article 6(2) the term ‘*electricity and gas markets*’ should be replaced with the term ‘*electricity, hydrogen and natural gas markets*’, thus extending the scope of REMIT. **Our recently published article “Green hydrogen in Romania - embracing the future” is available here.**

[15] **Markets in scope.** The WEPs within the scope of REMIT are traded in so-called wholesale energy markets (“WEMs”), defined as any market within the Union on which WEPs are traded<sup>27</sup>. WEMs encompass **both commodity markets and derivative markets**, and they include, *inter alia*, regulated markets, multilateral trading facilities and OTC transactions and bilateral contracts, directly or through brokers<sup>28</sup>.

[16] In ACER’s understanding<sup>29</sup>, the definition of WEMs includes, but is not limited to: **(i)** balancing markets for the trading of electricity or natural gas with delivery in the EU; **(ii)** re-dispatching and countertrading mechanisms, in so far as WEPs are traded there; **(iii)** intraday or within-day markets for the trading of electricity or natural gas with delivery in the EU; **(iv)** day-ahead or two-day-ahead markets for the trading of electricity or natural gas with delivery in the EU, including week-end products; **(v)** physical markets for the trading of electricity or natural gas with delivery in the EU, including markets for physical forward contracts and non-standardised long-term contracts; **(vi)** markets for the transportation capacities of electricity or natural gas in the EU; **(vii)** derivatives markets relating to electricity or natural gas produced, traded or delivered in the Union, including financial OTC markets; **(viii)** derivatives markets relating to the transportation of electricity or natural gas in the EU; **(ix)** generation capacity markets and capacity remuneration mechanisms, in so far as WEPs are traded there; **(x)** local flexibility markets for electricity, in so far as WEPs are traded there.

[17] Under the Romanian Energy Law, as recently amended under GEO 143/2021, ‘*electricity markets*’ are defined as markets for electricity, including OTC markets and electricity exchanges, markets for the trading of energy, capacity, balancing and ancillary services in all timeframes, including forward, day-ahead and intraday markets<sup>30</sup>. It also provides that the following types of transactions can be concluded on the wholesale electricity market, in all timeframes: **(i)** directly negotiated bilateral transactions; **(ii)** transactions concluded following auctions on organized markets, including the electricity balancing market; **(iii)** electricity import and export transactions. In addition, long-term hedging products are tradable on exchanges in a transparent manner, and long-term supply contracts may be negotiated on over-the-counter markets, subject to compliance with the European competition law<sup>31</sup>.

### 2.1.2. Geographical scope

[18] The geographical scope is solely determined by the geographical delimitation of the concept of WEP and not by the geographical location of the legal or natural person trading these products or by the place of trading. Therefore, although the geographical scope of WEPs is anchored in the concepts of ‘*delivered*’, ‘*produced*’, ‘*traded*’, ‘*transported*’ and/or ‘*facilities located*’ in the EU, non-EU persons are also covered by REMIT, provided that they enter into transactions in WEPs.<sup>32</sup>

[19] REMIT expressly provides that market participants entering into transactions which are required to be reported to ACER shall register with the NRA in the Member State in which **(i)** they are established or **(ii)** resident or, **(iii) if they are not established or resident in the Union, in a Member State in which they are active**<sup>33</sup>. Accordingly, the obligations to register with the competent NRA and to report data to ACER, as well as the prohibitions of insider trading and market manipulation, also apply to non-EU persons, irrespective of the location

of the person involved in a potential market abuse<sup>34</sup>.

[20] Therefore, depending on the typology of contract, four criteria for the geographical delimitation of the scope of REMIT are relevant: **(i)** *'delivered in the EU'* for electricity of natural gas supply contracts; **(ii)** *'produced, traded or delivered in the EU'* for derivatives relating to electricity or natural gas; **(iii)** *'transportation in the EU'* for electricity or natural gas transportation contracts and derivatives relating to the transportation of electricity or natural gas; **(iv)** *'consumption in the EU'* for contracts for the supply and distribution to final customers with a consumption greater than 600 GWh/year<sup>35</sup>.

### 2.1.3. Persons in scope

[21] REMIT defines *'market participant'* as any person, including transmission system operators, who enters into transactions, including the placing of orders to trade, in one or more WEMs<sup>36</sup>, and *'person'* as any natural or legal person.<sup>37</sup>

[22] According to ACER's understanding of the notions of WEM and WEP, ACER currently considers at least the following persons to be *'market participants'* under REMIT if they enter into transactions, including orders to trade, in one or more WEMs<sup>38</sup>: **(i)** energy trading companies; **(ii)** producers of electricity or natural gas; **(iii)** shippers of natural gas; **(iv)** balance responsible entities; **(v)** wholesale customers; **(vi)** final customers; **(vii)** transmission system operators; **(viii)** distribution system operators; **(ix)** storage system operators; **(x)** liquefied natural gas ("**LNG**") system operators; **(xi)** investment firms.

[23] In general terms, it can be stated that any person (natural or legal) can fall in the overall scope of REMIT and not only market participants. However, not all REMIT prohibitions and obligations apply to the same array of persons, considering that some provisions have a broader scope while others a more restricted one. The table below indicates the persons covered by REMIT prohibitions and obligations.

## 2.2. Prohibitions and obligations under REMIT

[24] REMIT defines six prohibitions and obligations towards legal and natural persons for which NRAs are responsible for investigating and/or enforcing: **(i)** prohibition of insider trading under Article 3 (1); **(ii)** obligation to publish inside information under Article 4 (1); **(iii)** prohibition of market manipulation under Article 5; **(iv)** obligation to report REMIT data under Article 8<sup>44</sup>; **(v)** obligation to register under Article 9 (1), and **(vi)** obligations to notify and to have arrangements in order to identify market abuse by PPATs under Article 15.

### 2.2.1. Prohibition of insider trading

[25] As a preliminary remark, the chapter *'Prohibition of insider trading'* of the latest edition of ACER Guidance brings more clarity to each of the **three types of insider trading** set out in Article 3 of REMIT by including new examples and explanations of some of the underlying concepts and introducing the notions of *'on-market'* and *'off-market'* activities. The chapter also provides a non-exhaustive list of examples of natural and legal persons that can be treated as *'insiders'* (falling into the five categories regulated in REMIT).

[26] REMIT prohibits<sup>45</sup> persons who possess inside information<sup>46</sup> to: **(i)** use it for trading (or trying to trade), **(ii)** disclose it to any other person or **(iii)** recommend trading (or induce trading) based on it. Inside information is defined<sup>47</sup> as information of a precise nature which has not been made public, which relates, directly or indirectly,

to one or more WEPs and which, if it were made public, would be likely to significantly affect the prices of those WEPs. For more details, *See Section 2.2.3. 'Obligation to publish inside information'* of this Article.

[27] The possession of inside information results in an unfair informational advantage vis-à-vis other parties who are unaware of such information and creates information asymmetries between market participants. However, the unfair advantage obtained from the asymmetric knowledge of information that may bring a benefit to the person involved in this practice, does not need to materialize into a financial benefit for the person involved in the insider trading in order to breach REMIT.<sup>48</sup>

[28] **The first form of insider trading**<sup>49</sup> includes two nuances: **(i)** the use of inside information by acquiring or disposing of WEPs, and **(ii)** the use of that information by trying to acquire or dispose of WEPs (attempted use of inside information to trade)<sup>50</sup>. This form encompasses four relevant concepts: **(i)** *'the acquisition or disposal of WEPs (or attempt thereof)'*; **(ii)** *'for one's own account or for the account of a third party'*; **(iii)** *'directly or indirectly'*; and **(iv)** *'the information being related to WEPs'*.<sup>51</sup> Only this form of prohibition involves the use of inside information for trading or for trying to trade, and therefore constitutes an **'on-market'** practice.<sup>52</sup>

[29] **The second form of insider trading**<sup>53</sup> consists of disclosing inside information to any other person unless such disclosure is made in the normal course of the exercise of their employment, profession, or duties. This form encompasses two relevant concepts: **(i)** *'the disclosure of (inside) information to any other person'*; and **(ii)** *'the disclosure is not made in the normal course of the exercise of employment, profession, or duties'*.<sup>54</sup> This form involves the transmission of that inside information or recommendations based on that inside information and it is by nature **'off-market'** practice (as opposed to order/transaction-based behaviour).

[30] **The third form of insider trading**<sup>55</sup> consists in recommending or inducing another person, based on inside information, to acquire or dispose of WEPs to which that information relates. In this context, the term *'recommending or inducing'* should be interpreted as encompassing any action undertaken by the holder of inside information in order to provide to another person (also called the *'tippee'*) one or more direct or indirect signals relevant for trading on one or more WEMs that are related to that inside information<sup>56</sup>. This prohibition does not require the transmission of inside information to another person, but solely the transmission of a signal on the trading of WEPs. In the same way, this prohibition does not require any action from the beneficiary of the recommendation, i.e., it is irrelevant whether the person that received the recommendation used that information for trading or did not trade at all.<sup>57</sup>

[31] Pursuant to the ACER Guidance, amongst the **possible signals of insider trading** are **(i)** relevant and/or sudden changes in the traded volumes, **(ii)** relevant and/or sudden changes in the prices, **(iii)** changes in the trading behaviour, **(iv)** (potential) profit increase or change, **(v)** the lack of compliance with other REMIT obligations on inside information<sup>58</sup>.

[32] Pursuant to the ACER Guidance, amongst **examples of types of practices** that could constitute insider trading is *'front running'* with the following signals: **(i)** the time proximity between the agent and client's order, **(ii)** the better agent order, **(iii)** potential profit by the client and **(iv)** repetitions. Another type of practice is the *'double printing'*.<sup>59</sup>

[33] REMIT provides **several exemptions** from the application of the prohibition of insider trading.<sup>60</sup> However, it is important to note that these exceptions only apply to the prohibition of insider trading and not to the obligation

to publish inside information.

### 2.2.2. Prohibition of market manipulation

[34] As a preliminary remark, chapter '*Prohibition of market manipulation*' of the latest edition of the ACER Guidance focuses on the prohibition set out in Article 5 of REMIT and mostly follows the steps taken by the aforementioned chapter '*Prohibition of insider trading*', and introduces new examples on the key underlying concepts (i.e. giving false or misleading signals, securing an artificial price, employing a fictitious device, using deception or contrivance, and disseminating false or misleading information) and the notions of '*on-market*' and '*off-market*' activities. This chapter also makes an analysis of the personal scope of the prohibition laid down in Article 5.

[35] REMIT prohibits market manipulation on the WEMs in a broad sense<sup>61</sup> and defines two different forms: **(i)** '*market manipulation*'<sup>62</sup> and **(ii)** '*attempted market manipulation*'<sup>63</sup>. While the core element in the definition of '*market manipulation*' is the effect or the likely effect that certain types of behaviour have on the demand, supply or prices of WEPs, the core element in the definition of '*attempted market manipulation*' is the intention behind the behaviour, even if the attempt is unsuccessful.

[36] REMIT distinguishes four main categories of behaviour as manipulative: **(i)** giving false or misleading signals; **(ii)** securing the price at an artificial level; **(iii)** using fictitious devices, deception or contrivance; and **(iv)** disseminating false or misleading information.

[37] Market manipulation (and attempted market manipulation) can occur through '*on-market*' or '*off-market*' behaviours. For both manipulation and attempted market manipulation, the first three categories of behaviours mentioned above involve the issuance of an order or entering a transaction and, in that sense, they represent '*on-market*' behaviours. The fourth category of behaviour, which consists of disseminating false or misleading information, can manifest '*off-market*', using any communication channel or any other means to spread rumours or false news and, as such, no trading activity on the market is necessary for this type of manipulation to occur.<sup>64</sup>

[38] According to the definition of '*market manipulation*', what matters is whether the behaviour gave or was likely to give false or misleading signals as to the supply of, demand for, or price of WEPs and/or secured the price of those products at an artificial level. Pursuant to ACER, that definition does not include any element of intent. In other words, whether the behaviour is intentional or not is irrelevant to qualify it as a breach of Article 5 of REMIT in the form of '*market manipulation*'. As a result, ACER believes that a mere erroneous trading activity can end up being manipulative<sup>65</sup>. Instead, the definition of '*attempted market manipulation*' is focused on the concept of intent. Situations where there is evidence of an intention to manipulate the market, but eventually no effects on the market, qualify as a breach of Article 5 of REMIT in the form of attempted market manipulation.<sup>66</sup>

[39] Recitals in REMIT identify, in a general and non-exhaustive way, some types of practices that constitute market manipulation and attempts to manipulate the market.<sup>67</sup>

[40] **The REMIT Guidance gives the following examples of types of practice of (attempted) market manipulation through (attempting to give) giving false or misleading signals and/or securing the price at an artificial level** (some of them being a novelty of the latest edition): **(i)** wash trades, **(ii)** pre-arranged trading, **(iii)** phishing, **(iv)** layering, **(v)** spoofing, **(vi)** creating a floor or a ceiling in the price pattern, **(vii)** painting the tape, **(viii)** momentum ignition, **(ix)** quote stuffing, **(x)** advancing the bid, **(xi)** erroneous orders, **(xii)** placing orders with no intention of executing them, **(xiii)** marking the reference period, **(xiv)** distorted costs associated with a commodity contract, **(xv)** abusive squeeze (also known as 'market cornering'), **(xvi)** cross-product manipulation,

(**xvii**) cross-venue manipulation, (**xviii**) transmission capacity hoarding, (**ixx**) 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).<sup>68</sup>

[41] **The REMIT Guidance gives the following examples of types of practices of (attempted) market manipulation through the employment of fictitious devices or any other form of deception or contrivance** (some of them being a novelty of the latest edition): (**i**) trash and cash, (**ii**) pump and dump, (**iii**) opening a position and closing it immediately after its public disclosure, (**iv**) creating a misperception through specific actions, (**v**) misleading research or recommendations, (**vi**) other more general forms of dissemination of false or misleading information with an underlying trading interest.<sup>69</sup>

[42] **The REMIT Guidance gives the following examples of (attempted) market manipulation through the dissemination of information:** (**i**) dissemination of false or misleading information (this may include the posting of information or the issuance of a press release through the media, including the internet, or by any other means, which contains false or misleading statements about the supply, demand, or price of a WEP, and (**ii**) other more general forms of disseminating false or misleading information (this covers a course of conduct designed to give a false and misleading impression through any means about the supply, demand or price of a WEP).<sup>70</sup>

[43] The REMIT does not lay down **general exemptions** to the prohibition of (attempted) market manipulation. However, the REMIT provisions defining the type of (attempted) market manipulation by **securing the price at an artificial level** provide exemptions to the qualification of market manipulation.<sup>71</sup> REMIT also specifies that accepted market practices could be a legitimate way for market participants to secure a favourable price of a WEP.<sup>72</sup>

### 2.2.3. Obligation to publish inside information

[44] Article 4 of REMIT sets forth the **market participants'** obligation to publicly disclose in an effective and timely manner inside information which they possess in respect of (**a**) business or facilities which (**i**) *the market participant concerned*, or (**ii**) *its parent undertaking or related undertaking*, owns or controls or (**b**) business or facilities whose operational matters for which (**i**) *the market participant* or (**ii**) *undertaking is responsible*, either in whole or in part (including information relevant to the capacity and use of facilities for production, storage, consumption or transmission of electricity or natural gas or related to the capacity and use of liquefied natural gas LNG facilities, including planned or unplanned unavailability of these facilities).

[45] Inside information is defined as information (**i**) of a precise nature (**ii**) which has not been made public, (**iii**) which relates, directly or indirectly, to one or more WEPs and (**iv**) which, if it were made public, would be likely to **significantly affect** the prices of those WEPs.

[46] Qualifying a fact as inside information under REMIT requires a two-step approach: (**i**) it must be determined whether there is an item of information, and (**ii**) it must be ascertained whether it fulfils the above-mentioned four cumulative conditions.<sup>73</sup>

[47] Information shall be deemed to be of a **precise nature** if it indicates a set of circumstances which exist 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 WEPs<sup>74</sup>. The **precise nature** of the information is to be assessed by the information holder on a case-by-case basis and depends on what the information is, as well as on the surrounding context. In that assessment, the holder of the information may, among other things, take into consideration: (**i**) that there is a realistic prospect that a fact will occur; (**ii**) that the estimation of the potential price effect of information



disclosure is irrelevant for the assessment of the precise nature; and **(iii)** that intermediate steps in a lengthy process may be precise information.<sup>75</sup>

[48] Inside information is information that **has not been shared with the public** and, as a consequence, creates information asymmetries between market participants. Effective disclosure to the public of market participants is the criterion that transforms non-public information into public information. Once the information becomes public, it enhances the integrity and transparency of the market. Information is deemed to be public knowledge if such information has been made, by any party (it is irrelevant who), available to the public.<sup>76</sup>

[49] Inside information **must relate, directly or indirectly, to one or more WEPs** (see Section 2.1.1. ‘*Products and markets in scope*’ for the definition of WEPs). Information that has a possible effect on the demand, supply and/or prices of a WEP, or on the expectations of the demand, supply and/or prices of a WEP, shall be considered as directly or indirectly related to the WEP.<sup>77</sup>

[50] Information is deemed to constitute inside information only if, were it made public, it would be likely to have a **significant effect on the prices of related WEP**. Based on the condition of a significant price effect, ACER narrowed the wide notion of information down to the information that is **crucial enough to have the potential to significantly affect** the prices of WEPs, and therefore to information that is relevant for trading. However, the mere ‘*likelihood*’ of a significant price effect seems to be enough to meet this condition and no actual price effect is required.<sup>78</sup>

[51] The transparency of the WEMs requires the disclosure of inside information in a manner that enables the dissemination of information to as wide a public as possible, granting easy and equal access to all users of this information. ACER believes that, in order to achieve **effective disclosure**, information shall be disclosed using a platform for the disclosure of inside information (i.e., an electronic system for the delivery of information which allows multiple market participants to share information with the wide public and complies with the minimum quality requirements).<sup>79</sup>

[52] As regards the notion of **timely disclosure**, the inside information has to be published, in any case, before trading in WEPs to which that information relates, or recommending another person to trade in WEM to which that information relates.<sup>80</sup> However, REMIT indicates that a market participant **may exceptionally delay the public disclosure of inside information**<sup>81</sup>. In addition, the disclosure obligation is without prejudice to the right of market participants to delay the disclosure of sensitive information relating to the protection of critical infrastructure.<sup>82</sup>

#### **2.2.4. Obligation to report data**

[53] The disclosure obligation under Article 4 should not be mistaken for the reporting obligation established at Article 8 of the Regulation, which provides the obligation of the market participants to provide ACER with a record containing any relevant information on WEM transactions (including orders to trade), such as the products bought and sold, the price and quantity agreed, the dates and times of execution, the parties to the transaction and the beneficiaries of the transaction and other relevant information.<sup>83</sup>

[54] In addition, market participants shall provide the ACER and NRAs with information related 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, for the purpose of monitoring trading in WEMs. The reporting obligations of market participants shall be minimized by collecting the required information or parts thereof from existing sources where possible.

[55] The conclusion of the 2021 REMIT Forum was that although data reporting and collection is delivering, there is room for simplification, less fragmentation and further improvement of data quality. It was pointed out that since markets evolve quickly, REMIT, and in turn ACER, could benefit from more flexibility in data collection. For example, more flexibility in the scope, underlying definitions and how data are reported, would enable REMIT to better keep up with market developments, which are partly driven by more market integration, such as market coupling and the emergence of balancing market platforms.<sup>84</sup>

### 2.2.5. Obligation to register

[56] Market participants entering into transactions which are required to be reported to the ACER shall register with the NRA in the Member State in which they (i) are established or (ii) resident or (iii) if they are not established or resident in the Union, in a Member State in which they are active.<sup>85</sup>

[57] A market participant shall register **only with one NRA** and Member States shall not require a market participant already registered in another Member State to register again.<sup>86</sup>

[58] Market participants shall submit the registration form to the NRA **prior to entering into a transaction which is required to be reported to the ACER** and shall communicate promptly to the NRA any change which has taken place as regards the information provided in the registration form.<sup>87</sup>

[59] NRAs have implemented **national registers** of market participants which they shall keep up to date. The register gives each market participant a unique identifier and contains information to identify the market participant, including relevant details relating to its value added tax number, its place of establishment, the persons responsible for its operational and trading decisions, and the ultimate controller or beneficiary of the market participant's trading activities.<sup>88</sup>

[60] NRAs transmit the information from their national registers to the ACER which in turn, based on the information provided by NRAs, keeps the European register of market participants.<sup>89</sup>

### 2.2.6. PPATs' obligations

[61] An important number of trades in the WEMs are intermediated by persons professionally arranging transactions. In ACER's opinion, through their role as intermediaries, PPATs have exclusive knowledge of the market in which they operate and of their clients. Hence, they are considered to be in a good position to monitor trading activities and identify potential breaches of REMIT.<sup>90</sup>

[62] Any PPATs in WEPs who reasonably suspect that a transaction might breach Article 3 or 5 of REMIT shall notify the NRA without further delay.<sup>91</sup> For more details about the concept of PPAT, see Section 2.1.3. 'Persons in scope of this article'.

[63] In addition, PPATs in WEPs shall establish and maintain effective arrangements and procedures to identify breaches of Article 3 or 5.<sup>92</sup>

[64] **After this overview of the REMIT framework at European level with brief insights into the Romanian legislation, our REMIT series will continue with (i) a more detailed analysis of REMIT in Romania, (ii) a practical perspective on the sanctioning regime applied by various NRAs, including the Romanian NRA, and (iii) overall conclusions of our analysis.**

[1] The Regulation entered into force on 28 December 2011.

[2] Conclusions of the 2021 REMIT Forum are available [here](#).

[3] ACER Guidance on the application of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency, 6th Edition, 22 July 2021, available [here](#).

[4] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (“**Market Abuse Directive**” or “**MAD**”) repealed by Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (“**Market Abuse Regulation**” or “**MAR**”).

[5] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (“**MiFID II**”).

[6] Art. 1(2) of REMIT.

[7] Initially established under 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 which was repealed under Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators.

[8] Recitals (22), (27), (29) and Articles 1 (3), 16 (1) of REMIT.

[9] See, for example, Sections 2.5 ‘Interaction between REMIT and the financial legislation’, 6.4.2 ‘The scope of the market manipulation provision under REMIT vs. the scope of competition law’, 6.4.3 ‘The scope of the market manipulation provision under REMIT vs. the scope of other laws/regulations’ of the ACER Guidance.

[10] Organized and functioning under Government Emergency Ordinance no. 33/2007 on organization and functioning of the National Energy Regulatory Authority.

[11] Recitals (17) and (27) of REMIT.

[12] Recital (17) of REMIT.

[13] Pursuant to Recital (27) and Article 16 (1), subparagraph (1) of REMIT. See, for example, (i) 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, published on 20 December 2011, available [here](#); (ii) Guidance Note 1/2017 on the application of Article 5 of REMIT on the prohibition of market Manipulation (wash trades), published on 19 June 2017, available [here](#); (iii) Guidance note 1/2018 on the application of Article 5 of REMIT on the prohibition of market manipulation (transmission capacity hoarding), published on 22 March 2018, available [here](#); (iv) Guidance note 1/2019 on the application of Article 5 of REMIT on the prohibition of market manipulation (layering and spoofing in continuous wholesale energy markets), published on 22 March 2019, available [here](#).

[14] See (i) 1st Edition, published on 20.12.2011, (ii) 2nd Edition, published on 28.09.2012 and updated on 22.04.2013, (iii) 3rd Edition, published on 29.10.2013 and updated on 03.06.2015), (iv) 4th Edition, published on 17.06.2016 and updated on 15.10.2019, (iv) 5th Edition, published on 08.04.2020 and updated on 11.05.2021. All editions are available [here](#).

[15] Conclusions of the 2021 REMIT Forum are available [here](#).

[16] The 26th Edition of Q&As on REMIT published on 14 December 2021, available [here](#).

[17] The 12th Edition of FAQs on REMIT transaction reporting published on 30 April 2021, available [here](#).

[18] The 7th Edition of FAQs on REMIT fundamental data and inside information collection published on 30 April 2021, available [here](#).

[19] Flexibility service has recently been regulated in the Romanian Energy Law as amended under GEO 143/2021. The recent amendments regulate the concept of flexibility service (in addition to the system service, including the system service for the maintenance of frequency, which has been redefined and defined respectively), representing a service provided by a market participant and purchased by distribution system operators to support the efficient and secure operation of the distribution system and to maximize the quality of the services provided. Moreover, several provisions on incentives for the use of flexibility in distribution networks, how flexibility services are procured, specifications of these services, etc. have been included among the amendments.

[20] Article 2 (4) of REMIT. The Romanian Energy Law contains a similar definition on electricity in Article 3 pt. 94.

[21] Article 2 (4), subparagraph (2) of REMIT and Article 3 pt. 94 let. (e) of the Romanian Energy Law (as regards electricity).

[22] ACER Guidance, p.15.

[23] ACER Guidance, p.15.

[24] ACER Guidance, p.18.

[25] ACER Guidance, p.18.

[26] Proposal is available [here](#).

[27] Article 2 (6) of REMIT.

[28] Recital (5) of REMIT.

[29] See ACER Guidance, p.19.

[30] Article 3 pt. 81 of the Romanian Energy Law.

[31] Article 23 (2) of the Romanian Energy Law.

[32] ACER Guidance, p.19.

[33] Art. 9 (1) of REMIT.

[34] ACER Guidance, p. 19-20.

[35] ACER Guidance, p. 20.

[36] Art. 2 (7) of REMIT.

[37] Art. 2 (8) of REMIT.

[38] See ACER Guidance, p.25-26.

[39] Art. 3 (2) of REMIT.

[40] ACER Guidance, p.24.

[41] Art. 4 (1) of REMIT.

[42] Art. 8(4) of REMIT.

[43] Art. 8(4), let. (d) of REMIT provides an overview of the entities that could be considered as PPATs: “For the purposes of paragraph 1, information shall be provided by: (...) (d) **an organised market, a trade-matching system or other person professionally arranging transactions**”. Pursuant to ACER Guidance (p.104-105), for an entity to be considered a PPAT, it has to fulfil the following three cumulative criteria: (i) ‘person’- means either natural or legal person; (ii) ‘professionally’- the literal analysis of the wording and the case law leads to the following interpretation: engaged in a specified activity as part of one’s normal and regular paid occupation; (iii) ‘arranging transactions’ is an activity that aims to enable or assist third parties (buyer or seller) in a way that directly brings about a particular wholesale energy transaction (i.e. has the direct effect that the transaction is concluded); **or** provide a facility that facilitates the entering into transactions by third parties in wholesale energy products (buyer or seller). Simply providing the means by which parties to a transaction (or possible transaction) are able to communicate with each other is excluded from the concept of PPAT. If a person makes arrangements that go beyond providing the means of communication, and adds value to what is provided, it will lose the benefit of this exclusion and shall be recognised as a PPAT.

[44] See, in this regard, Commission Implementing Regulation (EU) No 1348/2014 of 17 December 2014 on data reporting implementing Article 8(2) and Article 8(6) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency.

[45] Article 3(1) of REMIT.

[46] See Section 2.1.3. ‘Persons in scope of REMIT’ of this Article.

[47] Article 2(1) of REMIT.

[48] ACER Guidance, p. 51.

[49] Article 3(1)(a) of REMIT.

[50] Pursuant to Recital (12) of REMIT, 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.

[51] These concepts are explained in ACER Guidance, p.52-57.

[52] 'On-market' refers to the placing of orders or the entering of transactions on the WEMs (including OTC markets). See ACER Guidance, p.51.

[53] Article 3(1)(b) of REMIT.

[54] These concepts are explained in ACER Guidance, p.57-59.

[55] Article 3(1)(c) of REMIT.

[56] ACER Guidance, p.59.

[57] ACER Guidance, p.60.

[58] See ACER Guidance, p.60-61.

[59] See ACER Guidance, p.62-63.

[60] See Article 3(3) and 3(4) of REMIT.

[61] Article 5 of REMIT provides that any engagement in, or attempt to engage in, market manipulation on WEMs shall be prohibited.

[62] Article 2 (2) of REMIT provides that **'market manipulation'** means: (a) entering into any transaction or issuing any order to trade in WEPs which: (i) gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of WEPs; (ii) secures or attempts to secure, by a person, or persons acting in collaboration, the price of one or several WEPs 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 WEM 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 WEPs; 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 WEPs, 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.

[63] Article 2(3) of REMIT provides that **'attempted market manipulation'** means: (a) entering into any transaction, issuing any order to trade or taking any other action relating to a WEP with the intention of: (i) giving false or misleading signals as to the supply of, demand for, or price of WEPs; (ii) securing the price of one or several WEPs 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 WEM 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 WEPs; 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 WEPs.

[64] ACER Guidance, p. 71-72.

[65] ACER Guidance, p.70.

[66] ACER Guidance, p.71.

[67] Recital (13) of REMIT: "(...) 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".

Recital (14) of REMIT: "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".

[68] For explanations of these practices, see ACER Guidance, p.88-91.

[69] For explanations of these practices, see ACER Guidance, p.91.

[70] For explanations of these practices, see ACER Guidance, p.92.

[71] Articles 2(2)(a)(ii) and 2(3)(a)(ii) of REMIT: "(...) 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”.

[72] Recital (14) of REMIT: “(...) However, accepted market practices such as those applying in the financial services area (...) could be a legitimate way for market participants to secure a favourable price for a wholesale energy product”.

[73] ACER Guidance, p. 31.

[74] Article 1(1) of REMIT.

[75] See ACER Guidance, p.35-37.

[76] See ACER Guidance, p.37-38.

[77] ACER Guidance, p.38.

[78] See ACER Guidance, p.38-41.

[79] See ACER Guidance, p. 44-47.

[80] ACER Guidance, p.48.

[81] Article 4(2) of REMIT: “(...) a market participant may under its own responsibility exceptionally delay the public disclosure of inside information so as not to prejudice its legitimate interests provided that such omission is not likely to mislead the public and provided that the market participant is able to ensure the confidentiality of that information and does not make decisions relating to trading in wholesale energy products based upon that information”.

[82] Article 4 (7) of REMIT.

[83] Article 8 (1) of REMIT.

[84] Conclusions of the 2021 REMIT Forum are available [here](#).

[85] Article 9 (1) of REMIT.

[86] Article 9 (1) of REMIT.

[87] Articles 9 (1) and 9(4) of REMIT.

[88] Article 9 (2) of REMIT.

[89] Article 9(3) of REMIT. The European Register of Market Participants is available &