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

The first article of our own REMIT series *is available here*. It provides an overview of the REMIT core concepts, including the novelties brought under the latest edition of the ACER Guidance published on 22 July 2021 and the main conclusions of the 2021 REMIT Forum. This second article of our REMIT series presents **(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)** the overall conclusions of our analysis.

3. REMIT in Romania

3.1. Preliminary aspects

[65] As a European regulation, REMIT is directly applicable at national level. However, there are certain aspects that have to be addressed by national legislation, especially with regard to the investigatory and enforcement powers or penalties for infringements. Structurally, REMIT is to be enforced by NRAs who have been given related national powers.

[66] Therefore, in Romania, in order to ensure a regulatory framework for the application of REMIT, several regulatory acts have been successively adopted or amended. In this respect, the Romanian Energy Law has successively been amended in order to **(i)** regulate the administrative offences and corresponding penalties for REMIT violations and **(ii)** regulate certain aspects regarding the cooperation between ANRE and ACER. In addition, secondary legislation was adopted by ANRE in order to regulate **(i)** the registration of market participants pursuant to REMIT, and **(ii)** the investigatory and enforcement powers of ANRE related to REMIT breaches.

3.2. Regulations on market participants' registration

[67] As already discussed in Section 2.2.5. '*Obligation to register*' dealt with in the first article of our REMIT series, market participants entering into transactions which are required to be reported to ACER shall register with the NRA in the Member State in which they are **(i)** 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. In this regard, in **2015** ANRE *adopted Order no. 1/2015 on the establishment of the National Register of participants in the wholesale energy market and the approval of the Procedure for registration of participants in the wholesale energy market* ("**2015 Registration Procedure**").

[68] The 2015 Registration Procedure has recently been amended under ANRE Order 129/2021 which entered into force on 28 December 2021. Order 129/2021 was aimed at eliminating the market participants' obligation to submit paper documents to ANRE and, as a result of experience gained over time, to extend the deadlines for submitting documents related to the modification/updating of registration data.

3.3. Regulations on administrative offences and penalties for REMIT breaches

[69] As the Regulation leaves it to the Member States to implement prohibitions against market abuse and to determine the penalties applicable in case of breaches, legal provisions have been adopted in this regard in Romania.

[70] **In 2012**, the initial version of the Romanian Energy Law regulated, insofar as transparency requirements were concerned, a general administrative offence consisting in non-compliance with the transparency requirements set out in European regulations, but **only for the natural gas market.**

[71] **In 2014**, the Romanian Energy Law was amended under the *Law 127/2014 on the amendment of Law no.123/2012 on electricity and natural gas, and Petroleum Law no. 238/2004* (**"Law 127/2014**"). Amongst other amendments, Law 127/2014 regulated the administrative offences and penalties for breaching the expressly mentioned REMIT provisions **regarding the electricity market**. As regards the **natural gas market**, Law 127/2014 amended the above-mentioned administrative offence, by adding to the transparency requirements of the European regulations, the transparency requirements of ANRE regulations.

[72] **In 2020**, the Romanian Energy Law was amended under the *Law no. 155/2020 on the amendment of Law no.123/2012 on electricity and natural gas and other regulatory acts* ("**Law 155/2020**"). Amongst other amendments, Law 155/2020 regulated the administrative offences and penalties for breaching the expressly mentioned REMIT provisions **regarding the natural gas market**. In addition, as **regards both the electricity and natural gas markets**, Law 155/2020 introduced an administrative offence consisting in the breach of the transparency requirements regulated by ANRE and the European regulations, **other than REMIT**.

[73] The relevant REMIT breaches listed in the Romanian Energy Law and the corresponding sanctions are analysed in Section 5 *'Romanian sanctioning regime and overview of the penalties imposed by ANRE'* of this article.

3.4. Regulations on ANRE's investigation and monitoring activity

[74] **In 2013**, ANRE adopted *Order no. 62/2013 for the approval of the Regulation for the identification, notification of and sanctioning for breaches of the regulations issued in the energy field* ("**Order 62/2013**", "**2013 Control Regulation**" respectively). This regulation established the procedural framework for ANRE's **control activity**, establishing the regime of identification, notification and sanctioning of administrative offences related to the regulatory acts issued in **both electricity and natural gas field**. However, the 2013 Regulation **was not applicable** to the breaches in the scope of the **investigation activity** provided for in the Romanian Energy Law. In addition, no reference to REMIT breaches was made in the 2013 Regulation, since they are in the scope of the investigation activity.

[75] **In 2017**, ANRE adopted *Order no. 25/2017 on the approval of the Regulation for the organization and conduct of the investigation activity in the energy field, regarding the operation of the wholesale energy market* (" **Order 25/2017**" and "**2017 Investigation Regulation**"). The 2017 Investigation Regulation established the organization and conduct of ANRE's **investigation activity for both electricity and natural gas markets**. Pursuant to this regulation, ANRE investigates the following REMIT violations: insider trading, market manipulation, non-disclosure of inside information, failure to comply with the obligation to provide information to

ACER and ANRE, failure to register as a market participant, and non-compliance with the obligations of PPATs.

[76] **In 2018**, ANRE adopted *Order no. 67/2018 for the approval of the Methodology for monitoring the wholesale electricity market* [93] ("**Order 67/2018**" and "**2018 Monitoring Methodology**"), which regulates the premises for carrying out a preliminary analysis of the market abuse suspicions in accordance with REMIT, notified by ACER, the participants in the wholesale electricity market and PPATs, or which may result from ANRE's monitoring activity.

[77] **In 2019**, ANRE adopted *Order no. 5/2019 for the amendment of Order 62/2013* ("**Order 5/2019**"). The purpose of Order 5/2019 was to split Order 62/2013 so as to regulate both the **(i) control activity** and **(ii) investigation activity**. As regards the 2013 Control Regulation, only its name has been changed in order to make it clearer that only the control activity falls under its scope. The main novelty of Order 5/2019 was the approval of the *Regulation on the identification, notification of and sanctioning for breaches of the regulations issued in the energy field, applicable to the investigation activity carried out by the ANRE* ("**2019 Investigation Regulation**"). The 2019 Investigation Regulation is applicable to both **electricity and natural gas markets**, and establishes the regime of identification, notification and sanctioning of the REMIT administrative offences [94]. The 2019 Investigation Regulation indicates that its provisions shall be supplemented with the provisions of *Government Ordinance no. 2/2001 on the legal regime of administrative offences*.

4. Overview of the penalties imposed by the European NRAs

4.1. Preliminary aspects

[78] The Regulation leaves it to the Member States to implement prohibitions against market abuse and to determine the penalties applicable in case of breaches [95] . However, if ACER suspects that there has been a breach of REMIT, it has certain powers including, for example, to request one or more NRAs to commence an investigation of the suspected breach, and to take appropriate action to remedy any breach found [96]. Even so, any decision about the appropriate action to be taken to remedy any breach found shall be the responsibility of the NRA concerned. Moreover, an NRA may refuse to act on ACER's request in certain situations [97].

[79] REMIT provides that the penalties should be in line with the penalties adopted by the Member States in implementing the MAD (repealed by MAR) [98]. It also sets forth that the European Commission should consider presenting proposals to harmonise minimum standards for the penalties systems of Member States in an appropriate time frame [99]. As far as we know, no such minimum standards have been adopted so far. In this regard, a lively discussion within the 2021 REMIT Forum ensued around the question of whether an increased centralisation of enforcement powers and a harmonisation of penalties are needed, an avenue that financial legislation and regulations appear to pioneer [100].

[80] The Regulation also provides that NRAs **may disclose** to the public the measures or penalties imposed, **except where such disclosure is likely to create disproportionate harm to the parties involved.** [101] Therefore, although the number of investigations carried out at European level is considerable [102] and the number of cases leading to sanctions is not to be underestimated, only a limited number [103] of sanctioning decisions have been made available to the public.

[81] Pursuant to ACER's information, since 2015, less than 30 penalty decisions have been published at European level, sanctioning violations of Articles 4, 5, 8 and 9 of REMIT. Of the published decisions, the largest share is represented by those covering market manipulation, followed by non-disclosure of inside information, non-compliance with the obligation to register as market participant, and non-compliance with reporting obligations. Besides the information published by ACER, certain data may be found in NRAs' annual reports. [104]

[82] The penalties imposed by the Member States for market abuse infringements are pecuniary and, pursuant to ACER information, have so far ranged from EUR 1,500 to EUR 42.5 million, the highest ever imposed fine to date. [105]

[83] Below is a brief presentation of several cases in which the European NRAs have applied sanctions for REMIT violations.

4.2. Violation of REMIT prohibitions

Market Manipulation (Article 5)

[84] According to the ACER, the first ever economic sanction for a REMIT breach was applied by the Spanish NRA ("**CNMC**") at the end of 2015, for market manipulation under Article 5 of the REMIT. The CNMC imposed a fine of EUR 25 million on a Spanish energy group after it was found to have manipulated prices over three weeks from its three hydroelectric power plants, which together accounted for half of the country's total hydroelectric capacity. The CNMC found that the energy group reduced the quantity of electricity from its hydroelectric plants dispatched in the day-ahead market, even though it was not justified by an exhaustion of its hydroelectric capacity, nor by expectations of future prices. The NRA concluded that this strategy was intended to cause entry by higher-priced combined cycle gas turbine (CCGT) power plants which would lead to a rise in market prices. When deciding on the amount of the fine, the CNMC took into consideration the already increased market prices at the relevant time, the long duration of the manipulation, the significant impact of the manipulation and the estimated benefit of approx. EUR 21.5 million (9% of revenue in the day-ahead market). [106]

[85] It seems that the above-mentioned case was a kind of Pandora's box, since the CNMC's decision was followed by 18 other market manipulation sanctioning decisions issued by NRAs from countries such as the UK, France, Spain, Germany, Denmark, Hungary and Lithuania. The sanctioned behaviours in these decisions covered mostly the following types of practices: marking the close, spoofing, layering, capacity hoarding, capacity withholding, dissemination of false or misleading information and deception.

[86] For example, in 2021, the Spanish NRA sanctioned an energy trading company for market manipulation behaviour. First, the CNMC found that, in order to lower prices and conclude large volume purchase transactions, the company issued several non-genuine orders at prices lower than the average market prices, involving very limited volumes, which amounts to **layering** behaviour. Second, the company was found guilty of **marking the close** behaviour after it concluded the last transaction of the gas within-day session setting the closing price just one second before the closure of the session. The CNMC found the price to be artificial and assessed such behaviour as contrary to economic logic because the transaction price was more than 1 EUR/MWh lower than the daily reference price, the weighted average price of the transactions of all other market participants and the weighted average price of all company's buy transactions in that trading session. Furthermore, the company acted as an aggressor to a buy order, as it had been visible for several hours and no interest was shown by the other market participants. Hence, the company was imposed a fine of EUR 60,000. [107]

[87] In Denmark, the State Prosecutor for Serious Economic and International Crime sanctioned two energy companies for engaging in **capacity hoarding** behaviour. According to the authority, each company hoarded capacity on the interconnectors for electricity by trading with itself, succeeding to exclude trades and thus preventing competition. The companies were fined approx. EUR 147,000 and EUR 20,400, respectively, both

fines including disgorgement of profits. [108]

[88] The highest ever fine for REMIT violation (i.e., EUR 42.5 million) was applied to a group of companies in the UK for breaching Article 5 of REMIT in the form of **deception and dissemination of information which gave, or was likely to give, false or misleading signals** to the UK electricity balancing markets [109]. According to the UK NRA ("**Ofgem**"), in order to increase profits, the group submitted physical notifications [110] to the system operator ("**ESO**") which distorted their best estimate of expected generation during the critical "darkness peak" evening period, when demand is highest. The action was aimed at inducing the ESO to pay the power stations to generate by purchasing the minimum level of power across the day so that the power stations would be able to generate at the darkness peak. Furthermore, the group submitted false or misleading signals on the power stations' operational characteristics by submitting false or misleading stable export limits [111] in order to require the ESO to purchase a higher volume of power. The EUR 42.5 million penalty imposed by Ofgem is composed of EUR 14.6 million, which represents the compensation for the losses incurred by the parties affected by the breach, and EUR 27.9 million (initial penalty of EUR 39.9 million discounted by 30% [112]) for violating Article 5 of REMIT.

4.3. Violation of REMIT obligations

[89] With regards to violations of the REMIT obligations, the publicly available sources seem to indicate that only a few enforcement decisions have been made public so far.

4.3.1. Obligation to register (Article 9)

[90] In one of its quarterly reports, the ACER notes that in 2018, the Spanish NRA issued fines against five companies that violated Article 9 of the REMIT, which establishes the obligation for market participants that enter into transactions in one or more WEMs in the EU to register with the relevant NRA. The aggregated amount of the fines was EUR 10,200.[113]

4.3.2 Reporting obligation (Article 8)

[91] Article 8 of REMIT led to several sanctioning decisions, one of which was issued by the Czech NRA. The NRA imposed a fine of approx. EUR 11,250 on a trading company for reporting 34 transactions with a delay of 590 to 603 days, accounting for a failure to report transactions in a timely manner. This decision represents the first sanction imposed by the Czech NRA under REMIT.[114]

4.3.3. Disclosure obligation (Article 4)

[92] In 2021, The Latvian Public Utilities Commission concluded that a company had breached Article 4 of REMIT by not disclosing inside information it possessed about its production facility in an effective and timely manner. The NRA concluded that the information on when the gas turbine actually returned to the operating mode and was synchronised with the electricity network qualified as inside information. The NRA pointed out that although the company had realised that turbine repairs would be completed earlier than previously communicated to the market, the corresponding urgent market message was not updated. Accordingly, the inside information on the date of return to operation was not effectively disclosed.

[93] The NRA concluded that the company had breached Article 4(1) of REMIT, as it had not disclosed, in an effective and timely manner, the inside information it possessed about when the gas turbine actually returned to the operating mode and was synchronised with the electricity network. The NRA did not, however, establish that the company would have gained revenues or any competitive advantage because of the violation. Considering the circumstances, the NRA decided to issue a warning to the company. [115]

[94] In 2020, Ofgem issued its first fine relating to the publication of inside information in energy markets in GB and the EU. The fine amounting £2.06 million was imposed against a company for violating Article 4(1) of REMIT, by failing to publicly disclose inside information to the WEM in an effective and timely manner[116]. The company announced that it was consulting on a proposal to end commercial operations at three of its four generating units and that its expectation was that "the three units would likely close by 1 April 2016". However, at a later date, the company **(i)** signed a non-binding Heads of Terms for a one-year contract to provide ancillary services to National Grid from 1 April 2016 covering any one of the three available units scheduled to close by 1 April 2016, and **(ii)** took a decision to retain Transmission Entry Capacity of 1,455MW, equivalent to the capacity of three units.

[95] Ofgem's investigation revealed the company's non-binding agreement and its decision to retain Transmission Entry Capacity for the three units on that date, reversed the likelihood that the three units would close. Consequently, the agreement was likely to have a significant effect on wholesale prices and was therefore inside information. The company did not publish this information in a timely manner. Instead, it waited until a later date to make an announcement once it had finalised the contract. Therefore, the company's delay in making a public announcement resulted in four days trading without the market knowing that more generation was likely to be available than previously thought. It is likely that this led to some market participants paying more for wholesale electricity than they should have.

[96] In reaching its decision, Ofgem took into account that REMIT was relatively new at the time of the breach, that guidance on the publication of inside information of this type was limited, and that the finding was the first of its kind under REMIT.

[97] ACER documentation provides for a sanctioning decision issued in 2015 by the Estonian Competition Authority. The authority imposed a EUR 10,000 fine on the Estonian transmission system operator for failure to inform the market in a timely manner of maintenance works that would disrupt the supply for a longer period than initially expected, on the 650 MW subsea electricity cable that links Estonia with Finland. However, the decision was appealed, and the Court held that the TSO's board decision was not based on precise enough information requiring the publication of an urgent market message. The authority further appealed the Court's decision to the Supreme Court, which rejected the appeal .[117]

5. Romanian sanctioning regime and overview of the penalties imposed by ANRE

5.1. Romanian sanctioning regime

[98] As already mentioned, the Romanian Energy Law is the regulatory act that ensures conformity with REMIT by establishing the sanctions for non-compliance with the obligations imposed by the Regulation. The penalties are pecuniary and represent a variable amount of the turnover of the company concerned. Thus, for both the natural gas and electricity sectors, market participants may be sanctioned with a fine ranging from 5% to 10% of the annual turnover [118] generated in the financial year preceding the sanctioning for violation of the prohibitions on market manipulation and insider trading. Conversely, a fine ranging from 1% to 5% of the annual turnover may be imposed for failure to comply with the obligation to register as market participant, non-disclosure of inside information, reporting obligations and PPATs' obligations to notify and to have arrangements in order to identify market abuse.

[99] The Table below provides an overview of all relevant REMIT breaches listed in the Romanian Energy Law

and the corresponding penalties. It should be mentioned that currently, only penalties for breaches committed by legal entities are regulated by the Romanian Energy Law.

[100] *ANRE Order no. 13/2022 for the approval of the Procedure for the establishment and individualization by the ANRE Regulatory Committee of administrative penalties by reference to the turnover, as a result of investigations* ("**Order 13/2022**") was published in the Official Gazette of 28 February 2022. The procedure approved under Order 13/2022 establishes the necessary rules for the application and individualization of the penalties applied by reference to the annual turnover for administrative breaches regulated by the Romanian Energy Law, depending on the gravity and duration of the violation, the impact produced on the electricity/natural gas market and the final customer, depending on the case, observing the principles of efficiency, proportionality, and dissuasive effect of the penalty.

[101] For example, in a case related to market manipulation under REMIT, a Romanian court held that the pre-arranged trade took place between two of the largest entities operating in natural gas field, with effects on both market competition and consumers, so that ANRE's orientation towards the maximum penalty appeared to be justified. The court added that the claimant was one of the largest entities operating in the natural gas supply field, with billions of RON in turnover, and its illegal actions produced huge effects on both competition and people who benefited from gas supply services, so that it could not be claimed that its actions lacked importance. In addition, it was mentioned that the claimant acted knowingly and unlawfully to increase its profits, even assuming the risk of being discovered. Thus, the court considered that the principle of proportionality was observed, making reference to the CtEDO decisions *Handyside v. the United Kingdom* [123] and *Müller and Others v. Switzerland* [124] without further analysis.

[102] In addition, it should be mentioned that while as a general rule the statute of limitations for the administrative offences regulated by the Romanian Energy Law is 2 years [125], the statute of limitations for REMIT breaches is 3 years for both electricity and natural gas sectors.[126]

5.2. Penalties imposed by ANRE and relevant case law

[103] Although ANRE has carried out its investigative activity and has sanctioned non-compliance with REMIT provisions by energy producers and suppliers, it has not made public, so far, any sanctioning decision. As already mentioned, pursuant to REMIT, Member States shall decide that the NRA **may disclose to the public measures or penalties imposed for infringement** of the Regulation, unless such disclosure would cause disproportionate damage to the parties involved.

[104] However, according to the most recent press release [127] on REMIT identified by us so far, published by ANRE in October 2020, at least 11 out of 17 companies under review at that time were sanctioned with fines amounting to a total of RON 6,600,000 (approx. EUR 1,335,000) for breaches of article 5 and 15 of REMIT.

[105] The jurisprudence identified at national level reveals several cases of REMIT breaches through market manipulation and non-disclosure of inside information. However, given the summary analysis of the courts which rather took over ANRE's arguments, it appears that there is no rich courts' practice, or a deep understanding of the REMIT core concepts.

[106] From the cases for which public information is available, we note the case referring to ANRE finding that two energy companies committed market manipulation by engaging in pre-arranged trading on a centralized market with the aim to artificially set the price of natural gas on the wholesale market and to mislead the market as

to the product supply, demand, or price, thus violating Article 5 corroborated with Article 2(2)(a)(i) of REMIT. More specifically, ANRE stated that the companies had agreed to participate together in the auction and agreed in advance on the purchase price of the product. ANRE concluded that involvement of two economic operators in any kind of transaction on the WEM or engagement in any kind of action involving WEPs, through the use of concerted practices whereby market participants agree in advance on the trading terms and product's price constitute market manipulation. Each company was imposed a RON 500,000 (approx. EUR 100,000) fine which at the time of the breach represented the legally maximum amount that could be imposed for market manipulation.

[107] Both companies appealed ANRE's decisions, the appeals being separately settled by the same court. The court rejected the companies' complaints for reasons that can be summarized as follows **(a)** given that both the seller and the buyer knew from the outset the selling price of the product , the auction could not have been conducted lawfully, irrespective of the fact that the pre-agreed price would have been within the average trading price; **(b)** the fact that there was a participant other than the two companies does not indicate that there was transparency and that the transaction was conducted in compliance with the supply and demand rules provided that, according to a previous agreement between the two companies, **(i)** they participated together in auction; **(ii)** following the offer of one of the companies, the third participant was excluded from the auction; **(iii)** the companies artificially negotiated the prices through successive proposals to create the appearance of legality; **(iv)** the successive artificial proposals finally reached the previously agreed price.

[108] Both companies appealed the court of first instance's decisions. In respect of one of the companies, the appeal was rejected by the court of appeal mostly for the same reasons described above. As regards the second company, the appeal is pending.

[109] Another case concerns an energy producer found guilty for violation of Article 5 of REMIT *(prohibition of market manipulation*) and Article 4(1) of REMIT (*obligation to publish inside information*), ANRE found that the company delayed the publication of 45 applications regarding the planned shutdown of the dispatchable energy groups due to the operational requests for withdrawal from operation of energy equipment, after the closure of the day-ahead market gates. The delay violated the legal deadline for publishing this kind of information. As regards the effects of such behaviour, pursuant to ANRE, the delay in the publication and transmission of information on the withdrawal and operation of energy-dispersing units, after the closure of the day-ahead market gates: (i) created disruptions, imbalance in the National Energy System, and also affected the stocks necessary for the safe operation of the National Energy System.(ii) affected the possibility of the transmission system operator to provide the necessary quantity of energy to electricity suppliers and final customers, and (iii) gave the energy producer the opportunity to sell the same amount of electricity at a higher price on another market, which meant a higher price for the final customer.

[110] ANRE applied a fine amounting RON 400,000 (approx. EUR 80,000), which at the time of the breach represented the legally maximum amount that could be imposed. The company successfully appealed the ANRE sanctioning decision before the court of first instance. However, the court of appeal reversed the court of first instance's decision.

6. Rights and guarantees of the investigated persons

[111] Considering the level of fines that can be applied and that have already been applied, it is necessary to provide an overview the rights and guarantees enjoyed by the persons suspected of violating the REMIT provisions.

[112] **Firstly**, and most important, REMIT expressly provides that it **respects (i) fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union ("CFREU")** as referred to in the Treaty on European Union ("**TEU**") [128] and **(ii)** the constitutional

traditions in the Member States. [129]

[113] When the rights recognized by the CFREU correspond to the rights guaranteed by the European Convention of Human Rights ("**ECHR**"), the meaning and scope of those rights shall be the same as those laid down by ECHR [130]. In addition, pursuant to the Explanations relating to the Charter of Fundamental Rights, "[t]he reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union. The last sentence of the paragraph is designed to allow the Union to guarantee more extensive protection. In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR." [131] Therefore, the scope and the meaning of CFREU rights shall be the same as the corresponding ECHR rights as interpreted by the case law of both the Court of Justice of the European Union ("**CJEU**") and the European Court of Human Rights ("**ECtHR**").

[114] Amongst the relevant rights and principles provided in the CFREU and ECHR that must be guaranteed by NRAs and courts in relation to REMIT investigations are **(i) the presumption of innocence** and the right of defence [132], **(ii)** the right to an effective remedy and to a fair trial [133], **(iii)** principles of legality and proportionality of offences and penalties [134]. In addition, the principle ***'in dubio pro reo***' constitutes a specific expression of the presumption of innocence, according to the ECtHR case law.[135]

[115] Even though certain ECHR and CFREU rights refer to criminal offences, **REMIT administrative sanctions easily meet the requirements of the traditional ECtHR doctrine that considers administrative sanctions with punitive or deterrent purposes and a significant degree of severity to be equivalent to a 'criminal charge'.**

[116] By analogy, the decisions of the ECtHR and the CJEU in which the issue of financial market manipulation was raised can be considered. For example, of particular relevance is the ECtHR case *Grande Stevens and Others v. Italy* [136], where the court assessed the lawfulness (by reference to Article 6 of the ECHR) of the administrative proceedings carried by Italian National Companies and Stock Exchange Commission having as object a potential market manipulation. First, the ECtHR stated that taking account of the severity of the fines (defined as administrative in nature under the Italian law) imposed and of those to which the applicants were liable, the penalties in question, through their severity, were criminal in nature, with the result that Article 6 of ECHR is applicable [137]. Also, the ECtHR stated that the criminal connotation of proceedings depends on the degree of severity of the penalty to which the person concerned is a *priori liable*, and not the severity of the penalty ultimately imposed.[138] Second, the ECtHR stated that quite apart from their financial severity, the penalties which some of the applicants were liable to incur carried a significant degree of stigma and were likely to adversely affect the professional honor and reputation of the persons concerned. [139]

[117] As regards the CJEU case law, when assessing the administrative fines under the former *Directive 2003/6/EC on insider dealing and market manipulation* (repealed by MAR), CJEU stated in the *case Spector Photo Group* [140] that in the light of the nature of the infringements at issue and the degree of severity of the sanctions which may be imposed, such sanctions may, for the purposes of the application of the ECHR, be qualified as criminal sanctions.

[118] **Secondly**, the investigatory powers of the NRAs **shall be exercised in a proportionate manner** [141] **in conformity with national law and may be subject to appropriate oversight.**[142]

[119] **Thirdly**, the penalties applicable in case of REMIT violations must be effective, dissuasive, and proportionate, and must reflect the nature, duration and seriousness of the breaches, the damage caused to consumers and the potential benefits obtained from insider trading and market manipulation.[143]

[120] **Fourthly**, REMIT affects neither national rules on the **standard of proof nor obligations** of NRAs and courts of the Member States **to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Union law**. The required evidentiary standard of proof for the purposes of the ECHR is that of '*beyond reasonable doubt*', and such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.

[121] **Last but not least**, Member States shall ensure that suitable mechanisms exist at national level under which a **party affected by a decision of the regulatory authority has a right of appeal to a body independent of the parties involved and of any government.** [144]

7. Final Thoughts

[122] The aim of our REMIT series is to reveal that REMIT has a special complexity and interpretability. This results at least from the fact that so far there have been 6 editions of REMIT Guidance, 26 editions of Q&As on REMIT, 12 editions of FAQs on REMIT transaction reporting, 7 editions of FAQs on REMIT fundamental data and inside information collection. This is supplemented by other ACER guidance currently at their first edition, but which will probably be updated in the future (e.g., guidance on layering and spoofing, transmission capacity hoarding and wash trades).

[123] Although the usefulness of ACER guidelines is indisputable, it must be borne in mind that they are not binding and should not be considered of absolute authority. At the very least, they should be interpreted by the NRAs not only to the detriment of those who fall under the REMIT scope, but also in their favour, where appropriate. It is also important for those falling under REMIT scope to analyse these guidelines and the existent practice in order to implement appropriate compliance systems.

[124] In addition, 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. Although the experience gained by the national authorities in the latter two areas is useful, the peculiarities of the electricity and natural gas markets should not be overlooked.

[125] One of the conclusions of the 2021 REMIT Forum was that ACER will in the future be asked to explain more and to educate stakeholders and political decision-makers. **It was pointed that the whole regime needs to carefully balance the proportionality between the administrative burdens put upon market participants and the security it produces for market participants, taxpayers and consumers**[145]**.**

[126] At least one thing is certain - the REMIT is not a black-and-white subject. Thus, in Spinoza's words, *"he who would distinguish the true from the false must have an adequate idea of what is true and false"*. This is applicable for both the NRAs and persons within REMIT's scope. We are pretty sure that further developments are to come and be embraced, but not before the previous lessons have been learned.

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[93] The 2018 Monitoring Methodology repealed *ANRE Order 35/2006 on the approval of the Methodology for monitoring the wholesale electricity market in order to assess the level of market competition and to prevent the*

abuse of a dominant position.
[94] Articles 1 and 6 of the 2019 Investigation Regulation.
[95] Recital (31) and art. 18 (1) of REMIT.
[96] Article 16 of REMIT.
[97] REMIT regulates the following situations: **(i)** compliance might adversely affect the sovereignty or security of the Member State addressed; **(ii)** judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities of the Member State addressed; or **(iii)** a final judgment has already been delivered in relation to such persons for the same actions in the Member State addressed.
[98] Recital (31) of REMIT.
[99] Recital (31) of REMIT. Reference is made to the consultation on the *Commission Communication of 12 December 2010 entitled 'Reinforcing sanctioning regimes in the financial services sector'. Following this and other Commission's communications, the Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse* was adopted.
[100] Conclusions of the 2021 REMIT Forum are available here.
[101] Article 18, para. (3) of REMIT.
[102] According to REMIT Quarterly Issue No. 27/Q4 2021, at the end of the last quarter of 2021 there were 298 REMIT breach cases under review. Link available here.
[103] The ACER Consolidated Annual Activity Report from 2020 outlines that out of 12 decisions in cases of market abuse issued by the NRAs, only three decisions were announced publicly. Link available here.
[104] For example, in the 2020 Report *'The functioning of the wholesale electricity and natural gas markets'* issued by French Commission de Régulation de l'Energie ("**CRE**"), it is provided (p. 20) that between 2014 and 2019, CRE opened 9 investigations under the REMIT Regulation, broken down as follows: **(i)** 2 investigations in 2014, **(ii)** 3 in 2016, **(iii)** 2 in 2017, **(iv)** 1 in 2018, **(v)** 1 in 2019 and **(vi)** no investigations were opened in 2020. All these investigations focus on the prohibition of insider trading and market manipulation (Articles 3 and 5 of REMIT), as well as the requirement to disclose inside information (Article 4 of REMIT). Of these investigations: **(i)** one was closed because the behaviour examined during the investigation occurred before the entry into effect of Act 2013-312 of 15 April 2013, which gave CRE's Dispute Settlement and Sanctions Committee ("**CoRDiS**") the power to sanction this type of breach; **(ii)** one was closed in 2020 for reasons related to the statute of limitations; **(iii)** one was closed in 2020 by a finding of non-breach; **(iv)** two were closed by a CoRDiS sanction decision; **(v)** two are currently being investigated by CoRDiS; **(vi)** for the two investigations remaining at the end of 2020, the investigating officer's analyses were still in progress. Report is available here.
[105] ACER's overview of sanction decisions, available here.
[106] More information on this case is available here.
[107] More information on this case is available here.
[108] More information on this cases is available here and here.
[109] More information on this case is available here.
[110] Physical notifications inform the system operator whether a power plant will generate electricity over an interval of time.
[111] Stable exports limits represent the minimum level at which a power station can, under stable conditions, generate.
[112] The company agreed to settle this matter during the early settlement window, therefore Ofgem discounted the penalty by 30% in accordance with its REMIT Penalties Statement, available here.
[113] REMIT Quarterly, Issue No. 14/Q3 2018, available here.
[114] REMIT Quarterly, Issue No. 20/Q1 2020, available here.
[115] REMIT Quarterly, Issue No. 27/Q4 2021, available here.
[116] More information on this decision is available here.
[117] REMIT Quarterly, Issue No. 4/Q4 2015, available here.
[118] '*Annual turnover'* is defined as the turnover of the offending legal entity generated from the licensed activity, in the financial year prior to the sanctioning of the breach. If, in the financial year preceding the sanctioning, the undertaking has not registered any turnover or this cannot be determined, the turnover

corresponding to the financial year in which the offender recorded a turnover (the year immediately preceding the reference year for the calculation of the turnover for the purpose of applying the sanction) shall be considered. If even in the year preceding the reference year for calculating the turnover in order to apply the sanction, the offender had not realized any turnover, the last registered turnover shall be considered. If the offender is a newly established legal entity, which did not register any turnover in the year prior to sanctioning, it shall be sanctioned with a fine ranging between RON 100,000 and RON 1,000,000. (Articles 93 (5) and 195 (4) of the Romanian Energy Law).
[119] '*Repeated offence*' is defined as committing the same offense at least twice over 12 consecutive months. (Articles 93 (42) and 195 (3) of the Romanian Energy Law).
[120] The rationale of this provision is not clear given that the sanction applicable to the repeated breach has the same severity as the sanction applicable to the first breach.
[121] The rationale for not applying the same sanctioning regime for repeated violations, as in the case of the electricity sector, is not clear.
[122] The rationale for not applying the same sanctioning regime, as in the case of the electricity sector, is not clear. It seems that it is rather a legislative mismatch given that the RON 100,000 - RON 500,000 fine was the penalty for violating the transparency requirements in natural gas sector in the previous versions of the Romanian Energy Law. Amendment of this provision was probably omitted by Law 155/2020.
[123] *Handyside v. the United Kingdom,* 7 December 1976, Series A no. 24.
[124] *Müller and Others v. Switzerland*, 24 May 1988, Series A no. 133.
[125] Articles 93 (7) and 195 (6) of the Romanian Energy Law.
[126] Articles 93 (8) and 195 (9) of the Romanian Energy Law.
[127] The press release is available here.
[128]Article 6 of TEU provides that: "**(1)** The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions; **(2)** The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties; **(3)** Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".
[129] Recital (24) of REMIT.
[130] Art.52 (3) of the CFREU: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention".
[131] Explanations relating to the Charter of Fundamental Rights (2007/C 303702), explanation on art. 52.
[132] Art.48 of CFREU. Presumption of innocence is regulated at Article 6(2) of ECHR.
[133] Art.47 of CFREU. Right to a fair trial is regulated at Article 6 of ECHR.
[134] Art.49 of CFREU.
[135] See, for example, *Cleve v. Germany*, ECtHR, No. 48144/09, January 15, 2015, § 52, citing *Vassilios Stavropoulos v. Greece*, ECtHR, No. 35522/04, September 27, 2007, §39, and *Tendam v. Spain*, ECtHR, No. 25720/05, July 13, 2010, § 37.
[136]*Grande Stevens and Others v. Italy*, ECtHR, No. 18640/10, March 4, 2014. ("**Grande Stevens**").
[137]Grande Stevens, § 99 and §101, citing also: **(i)** *Öztürk v. Germany*, ECtHR, No. no. 8544/79, February 21, 1984, §54: "As the contravention committed by Mr. Öztürk was criminal for the purposes of Article 6 (…) of the Convention, there is no need to examine it also in the light of the final criterion stated above (…). The relative lack of seriousness of the penalty at stake (…) cannot divest an offence of its inherently criminal character" and **(ii)** *Menarini Diagnostics S.r.l. v. Italy*, ECtHR, No. 43509/08, September 27, 2011, §44: "Having regard to the

various aspects of the case, and having examined their respective weight, the Court considers that the fine imposed on the applicant company is of a criminal nature, so that Article 6 § 1 is applicable, in the occurrence, under its penal aspect. Accordingly, the objection raised by the Government regarding the inapplicability *ratione materiae* of Article 6 of the Convention must be rejected".

[138] Grande Stevens, § 98, citing *Engel and Others v. the Netherlands*, ECtHR, Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, June 8, 1976, § 82: "However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring".

[139] Grande Stevens, §98 and § 122.

[140] CJEU, Case C-45/08, Spector Photo Group, ECLI:EU:C:2009:806, § 42, citing also CJEU, Case C-199/92 P *Hüls v Commission*, ECLI:EU:C:1999:358, §150: "given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments".

[141] Art. 13 (1) of REMIT.

[142] Recital (26) of REMIT.

[143] Recital 31 and Art. 18 of REMIT.

[144] Art. 14 of REMIT.

[145] Conclusions of the 2021 REMIT Forum are available here.