

Remit reshape: EU's updated rules to safeguard wholesale energy markets



1. Background and reform of the electricity market

Open and fair competition in electricity and gas markets requires transparency and integrity. *Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency* (“**REMIT Regulation**”) aimed to achieve this purpose, but it nevertheless needs amending to address current deficiencies, enhance transparency, and improve monitoring. The new amendments are intended to stabilize energy prices, protect consumers, and improve cross-border market abuse investigations and enforcement.

The updates to the REMIT Regulation are part of a reform of the electricity market that was first presented by the European Commission in March 2023. In November 2023, the Council and the European Parliament reached a provisional political agreement and afterwards, the *Regulation 2024/1106 of the European Parliament and of the Council of 11 April 2024 amending Regulations (EU) No 1227/2011 and (EU) 2019/942 to improve the Union's protection against market manipulation in the wholesale energy market* (“**Updated REMIT**”) was published in the Official Journal of the European Union and entered into force on 7 May 2024.

Below are several important changes that we have addressed and which we expect to further impact the actual way the REMIT Regulation is to be enforced in practice.

2. Third-country market participants required to designate a representative in the EU.

In line with other legislation of the same generation, the Updated REMIT requires third-country market participants which are not a resident of or established in the EU to designate a representative in the EU and register in a Member State in which they are active; registration and designation must be in the same Member State.

Designation should occur by November 8, 2024, and should be in the form of a written mandate to act on behalf of the market participant.

As a designated representative, the entity in question shall be a point of contact for the Agency for the Cooperation of Energy Regulators (“ACER”) or the national regulatory authority (“NRA”) on all matters pertaining to the receipt of, compliance with and enforcement of decisions or requests for information issued in relation to the REMIT Regulation, as updated.

3. Enlarged scope of the market manipulation concept.

One of the changes has been driven by the need to align the REMIT Regulation with the European Union legislation on financial markets, such as *Regulation (EU) No 596/2014 on market abuse*¹, particularly regarding the concepts of market manipulation and inside information, due to the growing interconnection between financial and energy markets.

The market manipulation concept has thus been amended to include conducting any transaction or issuing, modifying, or withdrawing any trading order, as well as any other behaviour related to wholesale energy products that (i) gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of wholesale energy products; (ii) secures or attempts to secure, by a person, or persons acting in collaboration, the price of one or several wholesale energy products at an artificial level; or (iii) employs or attempts to employ a fictitious device or any other form of deception or contrivance which gives, or is likely to give, false or misleading signals regarding the supply of, demand for, or price of wholesale energy products.

The Recitals of the Updated REMIT further clarify that the notion of "any other behaviour related to wholesale energy products" should include, but not be limited to, actions such as order multiplication, "*painting the tape*" or "*momentum ignition*". According to ACER Guidance on the application of REMIT Regulation², these latter types of behaviour are defined as follows:

• *Painting the tape* - entering orders to trade or engaging in a transaction or series of transactions which are shown on a public display facility to give the impression of activity or price movement in a wholesale energy product;

• *Momentum ignition* - entering orders to trade or a series of orders to trade, or executing transactions or series of transactions, likely to start or exacerbate a trend and to encourage other participants to accelerate or extend the trend in order to create an opportunity to close out or open a position at a favourable price.

In addition, the market manipulation concept has been updated with new aspects related to the manipulation of the benchmark index, as follows: transmitting false or misleading information or providing false or misleading input data regarding a benchmark index, where the person transmitting the information or providing the data knew or should have known that it was false or misleading, or engaging in any behaviour that manipulates the calculation of a benchmark index.

Not lastly, the Updated REMIT has clarified that market manipulation may refer to actions of a legal entity or of an individual participating in the decision to conduct activities on behalf of the legal entity in question.

4. Enlarged scope of the inside information concept.

The inside information concept is further enlarged to include the information transmitted by a market participant or by other persons acting on behalf of the market participant to a service provider trading on behalf of the market participant, concerning the pending orders of the market participant regarding wholesale energy products, which are specific in nature and directly or indirectly relate to one or more wholesale energy products.

Moreover, when the inside information refers to a process that takes place in stages, each stage of the process, as well as the entire process may constitute inside information. An intermediate stage of a protracted process may itself constitute a set of circumstances or an event or be related to one with a realistic forecast of occurrence. However, the significance of its impact on energy prices should not be presumed. It qualifies as inside information if it meets the criteria outlined in the Updated REMIT.

The Updated REMIT also clarifies that cancelling or modifying a trading order for a wholesale energy product based on insider information, if the order was placed before the person had access to the information, shall also be deemed as an abusive use of insider information.

5. Enlarged scope of the wholesale energy product concept.

It is also important to note that the concept of “wholesale energy product” has been amended. Therefore, the following additional categories of contracts now fall under the scope of the Updated REMIT:

• contracts for the supply of electricity or natural gas, including liquefied natural gas (“LNG”), with delivery in the Union or contracts for the supply of electricity that may result in delivery in the Union as a result of the single coupling of the day-ahead and intraday markets;

• electricity or natural gas derivatives produced, traded or supplied in the Union or electricity derivatives that may result in delivery in the Union as a result of the single coupling of the day-ahead and intraday markets;

• contracts relating to the storage of electricity or the storage of natural gas in the Union;

• derivative financial instruments related to electricity storage or natural gas storage in the Union.

6. Enhancing easy access and transparency

Pursuant to the Updated REMIT, market participants are obliged to disclose inside information on inside information platforms ("IIP"), which are subject to authorisation in accordance with the conditions set out in the Updated REMIT.

IIPs are therefore entities authorized to provide ACER with the operation service of a platform for publishing inside information and reporting the published inside information on behalf of market participants.

Requiring inside information to be published on specialized IIPs is aimed at ensuring easy access and transparency. While other channels can still be used by market participants, IIPs must comply with authorization requirements and data protection laws. Moreover, they must establish and maintain effective administrative measures to avoid conflicts of interest with their clients. Strong security mechanisms are necessary to safeguard the transmission of inside information and prevent unauthorized access or leaks. Sufficient resources and backup systems should be in place to ensure uninterrupted services. Additionally, the IIPs should have mechanisms for quickly verifying the integrity of inside information reports and promptly correcting any errors or omissions. Detailed information about the IIPs will be included in a delegated act to be issued by the European Commission by May 8, 2025.

Moreover, the Updated REMIT establishes the creation and functioning of registered reporting mechanisms ("RRM"), namely legal entities authorized to report or provide to ACER the service of reporting transaction details, including trading orders and fundamental data, either on their own behalf or on behalf of market participants.

RRMs use strong security measures to safeguard information transmission, minimize data corruption and unauthorized access, and prevent leaks while ensuring data confidentiality. They have adequate resources and backup systems to sustain their services. RRM's verify transaction report integrity, identify market participant errors, and promptly request corrected reports. They also detect and rectify errors or omissions to ensure accurate and complete transaction reporting to ACER. Detailed information about RRM's will be included in a delegated act to be issued by the European Commission by May 8, 2025.

7. ACER's enhanced role in cross-border investigations

Until now, Member States have only been responsible for supervising and performing activities under REMIT Regulation. However, market abuse is considered to increasingly cross borders, posing challenges in determining which regulatory authority has jurisdiction to investigate them. To address this concern, an efficient cross-border supervisory and investigation regime has been considered to be required, with ACER playing a more active role. Therefore, ACER has been equipped with adequate resources and expanded investigative powers, which it will be able to carry out in cooperation with the NRAs, including the authority to conduct on-site inspections, take statements, and issue requests for information.

Insofar as on-site inspections are concerned, ACER may carry out all necessary on-site inspections on the premises of the investigated persons where commercial evidence might be stored. If deemed necessary for a proper and efficient inspection, the inspections can be conducted without prior notice to the persons involved.

ACER's officials will be authorized, subject to a decision issued by ACER to: (i) enter the relevant premises; (ii) examine records and other evidence of commercial activities, regardless of format; (iii) take or obtain copies or extracts of such records or evidence; (iv) seal commercial premises and records as necessary for inspection for no more than 72 hours, except in duly justified cases; (v) request explanations from representatives or staff and record

their responses.

If there is a reasonable suspicion that commercial records relevant to proving a violation are kept in private spaces of directors, management staff, or other personnel, ACER may, by decision, conduct an on-site inspection of such private spaces, also substantiating the reasonable suspicion.

Insofar as requests for information are concerned, ACER is empowered to issue such requests from any person. Requests must cite the relevant legal basis, state the purpose, specify the required information and format, set a reasonable deadline, and emphasize the need for accuracy. Individuals must comply with information requests, ensuring completeness and accuracy. Failure to do so may result in penalties, enforced by national regulatory authorities at ACER's request.

In what regards taking statements, ACER has the prerogative to conduct interviews and gather statements from any individual who consents to be interviewed about matters under investigation and to record the responses provided. Should the interview occur at the premises of the individual in question, ACER will notify the national regulatory authority of the Member State where the interview is being conducted, and which can offer assistance during the interview process.

ACER may impose coercive penalties (periodic penalty payments) through a decision, in respect of persons subject to an investigation in order to (i) compel compliance with an on-site inspection and (ii) provide the requested information. Coercive penalties may be applied daily for a maximum period of six months until the person complies with the relevant decisions. For legal entities, the penalty amounts to 3% of the average daily turnover of the preceding financial year and for individuals, to 2% of the average daily income of the previous calendar year.

Any decisions adopted by ACER under the Updated REMIT should be subject to review by the Court of Justice of the European Union, including decisions whereby ACER has imposed a periodic penalty payment.

8. New sanctions

To ensure the consistent enforcement of administrative fines across all Member States for violations of the REMIT Regulation, the Updated REMIT establishes a list of administrative fines and other measures available to national regulatory authorities, as follows (we will follow up with the sanctioning regime under the Romanian law in a further article):

(a) for violations of Art. 3 (*Prohibition of insider trading*) and Art. 5 (*Prohibition of market manipulation*) - at least EUR 5,000,000 for individuals and at least 15% of the total annual turnover of the previous financial year for legal entities;

(b) for violations of Art. 4 (*Obligation to publish inside information*) and Art. 15 (*Obligations of persons professionally arranging transactions*) - at least EUR 1,000,000 for individuals and at least 2% of the total annual turnover of the previous financial year for legal entities;

(c) for violations of Articles 8 (*Data collection*) and 9 (*Registration of market participants*) - at least EUR 500,000 for individuals and at least 1% of the total annual turnover of the previous financial year for legal entities.

However, the amount of the administrative fine should not exceed 20% of the individual's annual income of the previous calendar year (for individuals) or 20% of the annual turnover of the legal person concerned of the previous financial year (for legal entities). If the individual or the legal entity has directly or indirectly financially benefited from the violation, the amount of the administrative fine must be at least equal to the benefit obtained.

9. Conclusion

The adoption of the Updated REMIT is a significant step forward in bolstering the EU's defences against market manipulation within the wholesale energy market. However, its effective enforcement will be influenced by various factors, such as loopholes or ambiguities in the regulatory framework, the evolving nature of market manipulation tactics, or challenges in consistently implementing and enforcing the new regulations across all Member States, given the differences in legal systems, regulatory capacities, and market structures.

1. Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC

2. 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