AALBORG UNIVERSITY

STUDENT REPORT

Master's Thesis

REMIT: A Study on the Effectiveness of Wholesale Energy Market Regulation

Business Administration and Commercial Law

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Resumé

I dette projekt benyttes juridisk metode til at redegøre for og analysere REMIT, i lyset af de lovændringer der for nyligt er blevet introduceret på området. Formålet med projektets udfærdigelse, er at konkludere hvorvidt lovgivningen har været effektiv i at opnå dets primære formål, hvilket er at sikre integritet og transparens på de europæiske energimarkeder. Projektet omfatter både den oprindelige lovgivning og retspraksis som er udsprunget heraf, samt tager direkte stilling til den for nyligt introducerede lovændring og hvorledes denne lovændring direkte tager hånd om de specifikke områder hvori der er umiddelbare mangler i den oprindelige forordning.

Projektet introducerer indledningsvist de relevante metoder som benyttes til at analysere lovgivningen, samt giver et overblik over det relevante anvendelsesområde. Herefter analyseres de centrale artikler i lovgivningen, som har de største juridiske implikationer overfor de markedsdeltagere som er omfattet af REMIT samt et dybdegående overblik over de parter som er både omfattet af lovgivningen, men også de som er involveret i håndhævelsen af lovgivningen overfor markedsdeltagerne. Dernæst analyseres nogle af de centrale elementer i den for nyligt introducerede lovændring til REMIT, med henblik på at give et overblik over de primære forskelle fra den originale og den fornyede lovtekst.

På baggrund af analysen i de forhenværende afsnit, gennemgås en række centrale afgørelser indenfor lovgivningens anvendelsesområde, med fokus på at analysere i hvilket omfang lovgivningen har opnået sine primære formål. Benyttelsen af relevant retspraksis er centralt i henhold til projektets primære problemstilling og giver et direkte indblik i den praktiske implementering af REMIT. Herefter gennemgås nogle af de centrale problemstillinger som analysen har tilkendegivet i et diskussionsafsnit, som både har fokus på problemstillinger som er opstået i led af REMITs anvendelse i praksis, samt i hvilke sammenhænge den opdaterede regulering kommer til at håndtere disse problemstillinger fremadrettet.

Afsluttende drages der en konklusion baseret på indholdet af både analysen og diskussion, som direkte besvarer projektets problemstilling, om hvorvidt REMIT har været effektiv i sin anvendelse. Konklusionen forholder sig både til den oprindelige regulering og hvorvidt denne har været effektiv i sine formål, samt hvorvidt dette ændres ved den for nyligt introducerede lovændring til REMIT.

1 – Introduction

1.1 – Background

With the recent energy crisis leading to higher and more volatile energy prices, there has been an increased focus on wholesale energy traders and their practices. Furthermore, the rapid expansion of renewable energy has shown the importance of energy traders in the supply chain to balance supply and demand throughout Europe, meaning that energy trading is more than speculation into the future energy prices. Wholesale energy trading is fundamental to ensure and protect the European power grid and therefore push the green transition.

With the recent volatility in the market there has been an increase of energy traders, who all want a part of the profit pool[1] [2]. With the current rules of the biggest energy exchange, European Power Exchange (EPEX), the capital needed to start trading in the market is rather limited[3], which has made an outflow from the old legacy firms to newly founded trading firms with limited capital. This has pushed Industry leaders in the legacy firms to call for more regulation, making it harder for these new firms to enter the market.[4]

Wholesale energy trading is already covered by multiple EU regulations. From the general EU rules in the EU competition law and the 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 (MAR)[5], to more sector related legislation like the Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II)[6] and the Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR)[7]. But the most relevant regulation for wholesale energy traders is the Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October

[1] (EPEX SPOT, 2024) – Currently 389 members
[2] (EPEX SPOT, 2019) – 300 members in 2019 – an 30% increase
[3] (ECC, 2024)
[4] (Vilnes, 2023)
[5] (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, 200, 2014 b)
[6] (DIRECTIVE 2014/65/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, 2014 a)
[7] (REGULATION (EU) No 648/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on OTC derivatives, central counterparties and trade repositories, 2012)

2011 on wholesale energy market integrity and transparency (REMIT)[8] which entered into force on the 28th of December 2011. Since its inception, 220.7 million EUR has been given in fines for breaches of the regulation.[9]

In recent years there has been a record high number of investigations into market manipulation. In the first quarter of 2019 there were 186 open investigations into potential REMIT breaches[10]. This number is up to 379 in the fourth quarter of 2023.[11] For the first time in REMIT history, natural persons have been arrested as a result of potential market manipulation.[12] This highlights that it is more important than ever to strengthen the understanding and implementation of these regulations by market participants (MPs).

This thesis will conduct a deep dive into the current regulatory framework of REMIT to observe how this legal act has been applied in practice. Furthermore, since REMIT has recently been amended, a contextual legal comparative analysis will be made between the former regulatory framework of REMIT and the amended regulation in Regulation (EU) 2024/1106 of the European Parliament and of the Council of 11 April 2024 amending Regulations (EU) No 1227/2011 and (EU) 2019/942 as regards improving the Union's protection against market manipulation on the wholesale energy market (REMIT II)[13], to analyze which changes has occurred and how this potentially will impact the wholesale energy markets going forward. The goal of the comparison is to identify any regressions or progressions in the effectiveness of the law.

1.2 – Research Questions

The research question for this thesis is as follows:

"Has REMIT been effective in its objectives to ensure market transparency and integrity and how does REMIT II seek to improve the effectiveness of the regulation?"

[8] (REGULATION (EU) No 1227/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011 on wholesale energy market integrity and transparency, 2011)

[9] (ACER, n.d. a)

[10] (ACER, 2019)

[11] (ACER, 2023)

[12] (Falkengaard, 2023)

[13] (Regulation (EU) 2024/1106 of the European Parliament and of the Council of 11 April 2024 amending Regulations (EU) No 1227/2011 and (EU) 2019/942 as regards improving the Union's protection against market manipulation on the wholesale energy market , 2024)

By “effective” means to what degree REMIT has been able to accomplish its goals in ensuring market transparency and integrity. Conversely, the word “effective” in this context does not refer to whether the regulation and its provisions are applicable by law.

To answer the research question above, the following sub questions will be covered.

- What are the key elements in REMIT?
- How has REMIT been applied in practice?
- How will REMIT II change the way the objectives are ensured?
- What challenges does REMIT face and does REMIT II address these?

1.3 – Objectives

The primary objective of this thesis is to provide an in-depth legal analysis of REMIT and its amendments under REMIT II, focusing on their impact on the European wholesale energy market. This goal will be achieved through the following specific objectives:

- **Comprehensive Analysis of the REMIT Framework:** This involves an exploration of the current regulation, including its history, the definition of wholesale energy products, the concepts of inside information and market manipulation, and the requirements and mechanisms for reporting certain data and publishing inside information. This analysis will lay down the foundation for understanding why the regulation has been applied in practice, the way it has and what the amendments emerging from REMIT II will change.
- **Case Law Analysis:** This objective aims to understand how REMIT has been enforced and applied in practice until now. Numerous examples of case law and the reasoning (or lack thereof) behind their results will be covered. This part will be crucial to answering the research question as defined earlier and aims to provide an understanding of where REMIT fails and the reasons behind it.
- **In-depth Examination of REMIT II Amendments:** This part involves analyzing the amendments introduced by REMIT II and their impact, with focus on issues with the former regulation. Some of the changes that will be addressed are the changes to the definition of wholesale energy products, and changes to how the regulation will be enforced on a broader European scale. This part also aims to understand the legislative intent behind these changes and lay the foundation for giving a prediction on what their practical implications might be going forward.

- **Discussion of Challenges and Implications:** A discussion on the challenges faced under REMIT and whether the amendments put forth in REMIT II can be expected to address said challenges effectively.
- **Conclusion:** This thesis will conclude by summarizing the findings uncovered from the analysis and discussion. Furthermore, it will reflect on the effectiveness of REMIT in achieving its objectives of ensuring market integrity and transparency and how REMIT II potentially addresses the effectiveness of the regulation as a whole.

1.4 – Methodology and Material

This thesis focuses on two methodological approaches, namely legal dogmatic and legal contextual comparison of different phases of law, namely REMIT to REMIT II. The dogmatic approach allows for a comprehensive analysis of a given legal subject[14]. The dogmatic approach will be used to gain insight into REMITs objectives and how it ensures market transparency and integrity. This will be done by analyzing the regulation itself, enforcement decisions and guidelines from the Agency for the Cooperation of Energy Regulators (ACER). The traditional method of legal dogmatic analysis will therefore be combined and integrated with doctrinal and jurisprudential research method, based on the comparison and analysis of case law. The dogmatic approach is specifically used in order to clarify any gaps or uncertainties within the regulation or the use thereof.

The legal contextual comparative approach will be used to outline the changes between the former REMIT framework and the amendments set out in REMIT II. The dogmatic approach on the former REMIT framework will give the proper foundation for the legal contextual comparative analysis. The former regulation and the REMIT II amendments have 12 years between them, meaning that the regulation stems from different political, environmental and technological standards and that the law will be analyzed in "context" which is to say that it will take into consideration the context where the REMIT I and REMIT II are embedded and the influence in the development of the law of different cross-areas components, such as market, policy and the advancement of technological standards. The EU law in the realm of REMIT requires a more holistic perspective that requires an examination of the law as part of the governance and regulation of the European Energy Union. Therefore, methodologically,

[14] (Smits, 2015, s. 5)

this thesis will integrate a black letter law analysis to a holistic contextual analysis of the law in which the law is embedded and applied.[15]

The answer to the research question of this thesis will be based on multiple sources of hard law, soft law and materials. The primary materials **used** in the research consists of the following:

- **EU Legislation:** The core of this thesis will revolve around the former REMIT framework and the amendments to REMIT from May 2024. The regulation is pivotal in understanding the legal framework governing wholesale energy markets in the European Union (EU) and aims to promote market integrity and transparency. Additionally, the thesis will briefly touch upon other financial legislative acts such as MiFID II and MAR. These will be covered to provide an understanding of the broader regulatory landscape affecting financial markets, such as the wholesale energy market.
- **Case Law:** A central component of this thesis will be the examination of case law related to REMIT. The case law demonstrates real world application of the regulation and provides an understanding of how regulatory bodies interpret REMIT in edge cases. Furthermore, this will give insight into the consequences that follow as a result of not complying with the regulation. The jurisprudential and practical consequence of the doctrinal legal analysis usage and application of the law will serve to understand the effectiveness of REMIT by observing and analyzing how the law is (d*e lege lata*) and how the law should be, (*de lege ferenda*).
- **Non-binding Guidelines:** In the realm of REMIT, ACER have been providing various non-binding guidelines to help assist in the interpretation of REMIT, especially in edge cases. These non-binding guidelines will be heavily incorporated in the research to assist in understanding both the legislative acts on the area, as well as the case law.

1.5 – Scope and Delimitation

This paper will mainly revolve around REMIT and REMIT II, which regulate the European wholesale energy markets. In order to understand the effectiveness of the former regulation, multiple examples of case law will be analyzed and put into perspective, in relation to the regulation and the guidelines in place.

In order to understand the practical application of REMIT, the non-binding REMIT guidelines, which are directly issued by the regulatory body of the regulation, ACER, will also be included

[15] (Harlow, 2022)

as key material. By including both the former regulation and the amendments, as well as the guidelines directly related to the regulation, this paper will give a cohesive, in-depth analysis of the effectiveness of the regulation.

This thesis will mainly revolve around the provisions in REMIT which MPs can be sanctioned by as a result of a breach. This will namely be REMIT art. 3, 4, 5, 8 & 9 (Sanctionable articles). Other articles, such as REMIT art. 2, will be included to contribute to the interpretation of the sanctionable articles.

Of the amendments and additions introduced by REMIT II, the pivotal provision will be the amendments to REMIT art. 2, 4 & 5 as well as the addition of REMIT art. 4a, 5a, 13a & 18. These provisions have been carefully selected, as they have been deemed to have the most relevance for the research question of this thesis.

Other regulations and directives are critical in the European landscape of regulating financial markets, and therefore the wholesale energy markets. Two other pivotal regulations will be included in this thesis as well. These are MIFiD II as well as MAR, which both play pivotal roles in regulating financial markets in the EU. Both MIFiD II and MAR regulate some of the same legislative aspects as REMIT and are directly linked to the regulation of wholesale energy markets as well. This thesis will mainly revolve around the application of REMIT, but MIFiD II and MAR will be included, in order to give perspective to the financial regulations in the EU in general and in order to give a more detailed and comprehensive picture of the efficiency of REMIT.

There are other relevant financial regulations, national laws, and guidelines in place, that are either relevant or even directly applicable to wholesale energy markets, both in the EU, as well as internationally: These will not be included, since such inclusion would withdraw focus from the effectiveness of REMIT and the European regulations on wholesale energy markets too much and is not directly within the scope of the thesis' research question.

The case law covered in this thesis has been chosen with a goal of demonstrating a breach of as many of the sanctionable articles as possible as well as one case of acquittal. Of the chosen case law, the focus area has been the elements of the decisions which directly relate to REMIT and breaches thereto. Conversely, any elements relating to e.g. national law have been excluded.

2 – The Original REMIT Framework

Since the inception of REMIT in 2011, the landscape of the wholesale energy markets in Europe has changed significantly. The regulation does not only allow access to and maintain a liberal and truly competitive market for participants but is also crucial for balancing the energy in both the coupled European electricity grids, as well as the European gas pipelines, that are essential for the functioning of the EU as an interconnected and collective economic area.

With changes in both the general economic and political landscape, as well as the wholesale energy industry itself, understanding the original REMIT framework is both relevant for the context of this thesis, but also in regard to assessing the effectiveness of REMIT 2.

In this chapter, the original REMIT framework will be accounted for, giving an understanding of both the historical context of the regulation, as well as an in-depth overview of how the framework was implemented in practice. The application of REMIT has never been more relevant, with growing attention on the wholesale energy market in the EU, since the energy crisis of 2022, and a significantly increased volume of activity in the wholesale energy markets over the past few years.

It is important to understand that as part of a complex and intertwined network of EU regulations and directives, the use of the original REMIT framework, is also relative to other regulations and directives that are closely related to the area and context of the regulation itself, such as MIFiD II and MAR. The contextual relation between these regulations and directives, makes it more difficult to give a true insight into how the framework is used and interpreted in practice, since the regulation and its effectiveness is not completely isolated from the usage of other directly related regulations and directives. Therefore, this chapter will also include a chapter regarding the interplay between these regulations in practice and how they are both similar and differ from one another.

This chapter will also give an overview of the relevant parties that are directly regulated by REMIT and those who are directly involved in the enforcement as well. These parties are central in understanding how the regulation currently is being implemented and works in practice. There is multiple EU level and national level parties involved in the enforcement of the regulation in practice, which creates legislative complexities in the upkeep of REMIT itself.

Hereinafter the chapter will give a comprehensive understanding of how multiple key elements of the regulation are defined and enforced in practice. The technical complexity of the European wholesale energy markets is high, which results in a regulation with very precise and technical

terms, that directly relates to how the market participants operate on these markets in practice. Both the definition of market manipulation and inside information, which are the primary areas of regulation in REMIT, are extremely important, both in the context of understanding the original REMIT framework, but also in relation to understanding the differences between the original regulation and REMIT 2, which will be central in the following chapters of this thesis.

Lastly, this chapter will give insight into the practical reality of how REMIT data is reported by market participants and how such data is handled by both ACER on an EU level, as well as by the National Regulatory Authorities (NRAs) on a national level. The reporting duties within the REMIT regulation is carried out by the MPs within the European wholesale energy markets and are central in understanding the responsibilities of both these MPs, as well as the regulatory bodies directly involved in REMIT in practice.

Understanding the original REMIT framework and how it was used in practice is central both to the research question at hand directly, as well as in relation to understanding the case law that has been accumulated over the time of REMIT's enforcement. Thirdly, the original REMIT framework and its practical usage are directly related to creating an understanding of the REMIT 2 amendments to the framework.

2.1 – History of European Energy Regulations

Throughout the history of the EU, multiple regulations regarding the energy markets have been implemented, all seeking to create a cohesive and functioning market within the EU, but with different focus areas within the market. Usually, these regulations are introduced as "Energy Packages", but there are multiple exceptions to this.[16] Both the first iteration, as well as the recent amendment to REMIT, is an example of a stand-alone regulation on the European energy markets.

The First Energy Package directly implemented core principles and values of the EU and its establishment into the coupled wholesale energy market. The First Energy Package mainly is relevant in the context of starting the liberalisation of the wholesale energy markets. The implementation of the First Energy Package happened between 1996 and 1998.

Before the implementation of The Second Energy Package on the functioning of the wholesale energy markets in the EU, both industrial and domestic consumers were not allowed to choose their own suppliers and thus no true competition existed between the suppliers of power and

[16] (Ciucci, 2023)

gas for the European consumers.[17] This was the main change implemented with the directives implemented in the Second Energy Package, which was adopted in 2003.[18]

A true liberalisation of the supply of energy within the EU, is directly in line with its core principals and the reasoning behind the establishment of the EU.[19] With a high focus on freedom of supplier choice, as well as protection of consumers, especially on the domestic level, the basis on which the European energy markets has since developed, are still apparent in the current state of the markets.

The Third Energy Package implemented in 2009, included two major changes:[20]

1. Establishing independent regulators within the wholesale energy market, including ACER, as well as ENTSO-E and ENTSO-G.
2. Stricter unbundling of the energy supply from the operation of the transmission networks.

While independent energy production and supply already was widely spread within the Union before 2009, The Third Energy Package directly restricted transmission operators from being in charge of the wholesale supply of energy.

Shortly after the implementation of The Third Energy Package, in 2011, ACER was granted a more direct role in the wholesale energy market, with the implementation of REMIT, which is directly overseen by ACER, in close cooperation with the NRAs.[21] While the former energy packages did regulate on the wholesale level of the market, REMIT directly regards the behaviour of MPs within the wholesale energy markets and is the main regulation towards the MPs that directly trade on the wholesale energy markets.

The two most recent energy packages implemented in the EU, the Fourth and Fifth Energy Packages, implemented in 2019 and 2021 both mainly revolve around incentivizing the green transition within the EU. The most recent energy Package, also known as “Fit For 55”, aims to ensure direct alignment between the goals regarding the green transition within the EU, and investment in the production and supply of energy.[22]

[17] IBID
[18] IBID
[19] (European Union, n.d.)
[20] (European Commission, n.d.)
[21] (ACER, n.d. b)
[22] (Fit for 55, n.d.)

While REMIT II is not an entirely new regulation, such as the energy packages and the introduction of REMIT in 2011, the amendments included within the new regulation, introduced several key changes to the wholesale energy market, which will be further covered within this thesis.

2.2 – Technical Context of Wholesale Energy Trading

Wholesale energy trading is the act of buying or selling energy related products. The products can vary depending on the context, but in this chapter, we will use power as the example.

Wholesale power is traded on what is known as the day-ahead market and the intraday market. Each market serves its own role in the European power market, but also serves one common purpose, which will be covered later.

The day-ahead market:

The purpose of the day-ahead market is to provide a transparent mechanism for setting electricity prices and ensuring the security of supply, utilizing forecasts for demand, and matching it with available production capacity. Production capacity can come from power plants or renewables such as wind or solar parks.

The day-ahead market essentially works by participants submitting their bids for selling power and offers for buying power based on the aforementioned forecasts. The market operator uses these bids and offers to create two separate curves. One for supply and one for demand.

Because the market price is determined by the intersect point, producers will attempt to submit their bids at the lowest possible price (usually the marginal price), in order to gain the highest possible profit. This in turn results in renewables having an advantage on the day-ahead market, since their marginal price is typically lower than their non-renewable counterpart. This mechanism secures the lowest possible prices for end consumers and incentives investment into renewable energy sources. At a certain, point however, an over-saturation of renewables will result in the intersect point being shifted to a point where renewables will have no profit. This is known as cannibalization. This is of course advantageous for the end consumers, but hurtful to the investments into renewables.

The day-ahead market is the reason why some electricity providers can provide end consumers with an overview of what the electricity will cost the following day for each hour.

The intraday market:

In the ideal world, there would not be a need for an intraday power market. This market serves to cover the mistakes made in the day-ahead market, particularly forecasting errors. The intraday market operates closer to the actual delivery time of the power, and trades can be made up until 15 minutes prior to delivery. This enables participants to adjust their original positions from the day-ahead market due to unforeseen fluctuations from the forecasts.

These explanations are naturally over-simplifications, and the reality is much more complex than what the scope of this thesis can encompass. Now, the reason why there must be such complex markets in place, is due to the fact that power must always be in balance.

The reason why these markets rely so heavily on forecasts is due to the technical limitations when it comes to storage of power. When it is said that power must always be in balance, it means that production must always equal consumption with almost no tolerance for error. With the introduction of renewable energy sources such as wind and solar into the larger European energy composition, their unpredictability has especially given relevance to these markets.

When weather forecasts are subject to error, energy producers who utilize renewable energy sources risk being in imbalance. If a wind park submitted a scheduled production of 100 MWh in the day-ahead market, but the erroneous weather forecast means that the park can only produce 90 MWh, then the MP will have to purchase the remaining 10 MWh in the intraday market to be in balance. If this is not done, the MP risk being subject to imbalance fees.

Imbalance fees are imposed upon MPs who are in imbalance and causes various types of production or consumption reserves to be activated.

Reserves typically consist of power plants with available production capacity. These power plants essentially promise the market operator to be at their disposal if the imbalance on the power grid becomes too great. This is called up-regulation, which is either an increase of production or, if possible, a decrease in consumption. Conversely, down-regulation is the act of decreasing production or increasing consumption. Consumers can also act as reserves. In the event that the production is too high compared to consumption, large consumers such as combined heat & power plants[23], can turn off their electricity production and start using electricity to power their large water boilers.

[23] These plants use the excess heat from electricity production to heat water for consumers.

To summarize, the European wholesale energy market is complex and incorporates different market mechanism, hence why this, although, simplified explanation is necessary for understanding the context of REMIT & REMIT II.

2.3 – Overview of partiers

REMIT refers to many different parties all participating in ensuring the transparency of the market. Below we will describe the role and responsibility of these different parties and how their work intertwines.

2.3.1 – Market Participant (MP)

MP is defined in REMIT art. 2(7) as the following:

> *"any person, including transmission system operators, who enters into transactions, including the placing of orders to trade, in one or more wholesale energy markets."*

MPs play a crucial role in the wholesale energy market as they are the ones buying and selling wholesale energy products, helping the other parties to balance the grid and to optimize social welfare in the EU.

According to REMIT Article 9(4), MPs needs to be registered with an NRA, before they can enter any transactions on the wholesale energy market. In this registration all MPs receive a unique code called an ACER code. This is to ensure that all MPs entering into orders and transactions are easy to recognize and track. MPs should register in the member state where they are established. Companies who are not established in the EU also need to register with an NRA, but they can decide for themselves which NRA to register with, cf. REMIT art. 9(1).

After registration with the NRA, the authority forwards the information to an EU wide register, where all European market participants are listed[24], cf. REMIT art. 9(3). This register makes it easy for MPs to ensure that the counterparty on their trade has been registered with an NRA. Furthermore, it gives a transparent overview of all the parties acting as MPs in the EU.

Besides being registered, all MPs need to report transactions and orders to ACER and report any inside information.[25]

As the definition of MP is very broad, ACER has made the following list of entities who normally fall under the definition:[26]

[24] (ACER, n.d. c)
[25] Article 8 and article 4 respectively. These article will be covered later in the thesis.
[26] (ACER, 2021, s. 25-26)

- Energy trading companies
- Producers of electricity or natural gas
- Shippers of natural gas;
- Balance responsible entities;
- Wholesale customers
- Final customers[27]
- Transmission system operators (TSO)
- Distribution system operators
- Storage system operators

This list is not exhaustive, as the crucial criteria is still whether the company is entering transactions and orders in the wholesale energy market, as defined in REMIT art. 2(7).

It is notable that TSOs fall under this definition as these typically do not enter into transactions on the wholesale energy market as part of for-profit activity, but rather as part of their regulatory obligations. TSOs normally only trade to ensure the balance of the grid in real time. This can for example be done by buying or selling power to traders in the balancing market. This means that these system operators fall under the same registration and reporting obligations as energy traders.

2.3.2 – Agency for the Cooperation of Energy Regulators (ACER)

ACER is the common European body for the wholesale energy market. ACER advises the EU on new regulations regarding the gas and electricity markets. Specifically for REMIT, ACER is responsible for monitoring the European wholesale energy market and helping the NRAs detect regulation breaches. Furthermore, ACER pools expertise from different member states together to make and improve common strategies to catch breaches of the regulation.[28]

According to REMIT art. 7(1), it is the responsibility of ACER to monitor trading activities with wholesale energy products and to detect and prevent market abuse. It shall do this based on the data received by the other parties, cf. REMIT art. 8. ACER shall do this monitoring in close collaboration with the NRAs. ACER can share relevant information with the local

[27] Acting as a single economic entity having a consumption capacity of 600 GWh or more per year for gas or electricity
[28] (ACER, n.d. d)

authorities in accordance with Art. 10(1). According to REMIT art. 12(1) and recital 23, it is ACER's task to make sure that the local NRAs are only given the needed data to conduct the case and to set up measures to prevent misuse and unauthorized access to the data.

Finally, it is the responsibility of ACER to ensure that NRAs interpret the regulation in a coordinated and consistent way. To ensure the above, ACER is given the obligation to publish non-binding guidelines on the definitions in REMIT art. 2 to the NRAs in accordance with REMIT art. 16(1) and recital 27.

Recital 28 states the following:

"The Agency should be provided with the appropriate financial and human resources, in order to adequately fulfil the additional tasks assigned to it under this Regulation."

This is in contrast with a 2020 report by European Parliament Committee on Industry, Research and Energy (ITRE), which concluded that ACER has a structural budget shortage. The report concluded that ACER's budget on average is more than 25% under what the management has requested. It is the recommendation of the report to increase ACER's budget in the future.[29]

2.3.3 – Transmission System Operator (TSO)

TSO is defined in REMIT art. 2(11), which refers to the meaning set out in article 2(4) in Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity[30] and article 2(4) in Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas[31]. Article 2(4) in Directive 2009/72/EC is referring to electricity TSOs, while article 2(4) in Directive 2009/73/EC refers to gas TSOs. The below is the definition for an electricity TSO, set out in Article 2(4) of Directive 2009/72/EC:

"'transmission system operator' means a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the

[29] (Andrea DEMURTAS, 2023)
[30] (Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, 2009 a)
[31] (Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, 2009 b)

long-term ability of the system to meet reasonable demands for the transmission of electricity;"

It is therefore the task of the TSO to ensure the balance of the grid, by maintaining and expanding the high-voltage transmission power grid, to avoid bottle necks in the system. This can also be done by making interconnectors to other TSOs. Recently the Danish and British TSO made a new interconnector called Viking link, capable of transmitting 1400 MW between Denmark and the United Kingdom.[32] These interconnectors are used to balance both TSO's grids, as it makes it easier to transfer excess production from one country to the other, which in the end improves the social economic aspect of the European power grid.

2.3.4 – Nominated Electricity Market Operator (NEMO)

NEMO is not defined directly in the REMIT regulation, but rather Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management[33]. Art. 2(23) in regulation 2015/1222 defines NEMOs as designated entities, who are given the task of running the day-ahead and intraday coupling market within the Union. According to Article 7(1) in regulation 2015/1222, it is the task of NEMOs to receive, match and allocate trades for market participants in the market which the NEMO covers. It is furthermore the task of NEMOs to develop and maintain the market coupling algorithms between the different price zones, which is regulated by article 7(2) in regulation 2015/1222.

It is the task of the local NRA to designate the NEMO for the local day-ahead and intraday market in accordance with article 4(1) in regulation 2015/1222.

2.3.5 – National Regulatory Authority (NRA)

NRA is defined in REMIT art. 2(11) as the following:

"a national regulatory authority designated in accordance with Article 35(1) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity or Article 39(1) of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas".

Art. 35(1) in Directive 2009/72/EC states that all EU members need to designate an NRA. The responsibility of the NRA is to ensure competitive and transparent markets for electricity

[32] (Nationalgrid and Energinet)
[33] (Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (Text with EEA relevance), 2015)

within the EU in accordance with article 36 in Directive 2009/72/EC. The same applies for the natural gas markets, cf. article 39(1) in Directive 2009/73/EC.

The member states need to guarantee that the NRA and its staff are acting independently of any other private or public entity and that the NRA has the financial resources needed to ensure the responsibilities, cf. Directive 2009/72/EC art. 34.

It is furthermore the responsibility of the NRA, in close collaboration with ACER, to ensure that market participants are following the relevant rules set out in REMIT, cf. Directive 2009/72/EC art. 37.

2.3.6 – Persons Professionally Arranging Transactions (PPAT)

The role of PPATs is not defined in article 2 of REMIT, but is mentioned in article 8(4)(d):

"an organised market, a trade-matching system or other person professionally arranging transactions;"

Organized market and trade-matching systems shall therefore be seen as PPATs. Organized market is not defined in REMIT, but a definition can be found in 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 (REMIT Implementing Act).[34]

In Article 2(4) of the Act, organized market is defined as the following:

"'organized market means:

(a) a multilateral system, which brings together or facilitates the bringing together of multiple third party buying and selling interests in wholesale energy products in a way that results in a contract,

(b) any other system or facility in which multiple third-party buying and selling interests in wholesale energy products are able to interact in a way that results in a contract.

These include electricity and gas exchanges, brokers and other persons professionally arranging transactions, and trading venues as defined in Article 4 of Directive 2014/65/EU of the European Parliament and of the Council."[35]

[34] (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 tr, 2014)

[35] IBID

It should be noted that TSOs will also fall under this definition if they are arranging trades in the balancing market.

Finally, *'other person professionally arranging transactions'* falls under this definition. There are three elements to this definition.

- Person: Person is defined in REMIT art. 2(8) as any natural or legal person.
- Professionally: According to ACER, professionally should be understood as *'engaged in a specified activity as part of one's normal and regular paid occupation'*.[36]
- Arranging transactions: ACER sees arranging transactions as an activity which aims to:

"enable or assist third parties (buyer or seller) in a way that directly brings about a particular wholesale energy transaction(s) (i.e., has the direct effect that the transaction is concluded); or, provide a facility that facilitates the entering into transactions by third parties (buyer or seller) with a view to transactions in wholesale energy products. 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 PPATs"[37].

This means that sleeve trade services[38] would fall under this definition, as it would be a legal person, engaged in a specified activity as part of the normal occupation and would enable a third party in a way which brings about a particular wholesale energy transaction.

Communications facilities like internet and messaging providers would not fall under this definition. It would be a legal person engaged in a specified activity as part of one's normal and regular paid occupation, but it would not fall under the interpretation of "arranging transactions", whereas it cannot be seen as a PPAT.

The definition of PPAT is important as the role comes with obligation according to REMIT. As stated earlier, PPATs shall, like MPs, report transactions and orders to ACER. As most of the trades engaged by MPs will be with a PPAT, ACER can use the data from the PPATs to compare with the data reported from the MPs to check for any wrongly reported data.

[36] (ACER, 2015)
[37] IBID
[38] An example of sleeving: Trading Company X has an agreement with a TSO, which allows X to trade on the day-ahead market. Trading Company Y would like to also be able to trade on the day-ahead market but does not have an agreement with the TSO. X and Y agrees that Counterparty X will act as an intermediary, meaning that X will buy the requested power from the TSO and sell it to the Counterparty Y.

Furthermore, it is the role of PPATs to establish and maintain effective arrangement and procedures to identify potential breaches of REMIT article 3 and 5 for their users. If a PPAT suspects a misconduct by one of their members, they need to report this to the local NRA without further delay, cf. REMIT art. 15.

2.4 – Interplay with Other Relevant EU Legislation

Energy traders conducting trading in the EU wholesale energy market are regulated under different regulations depending on the nature of the trade. In the energy market, products are split into two sections. Products with physical delivery and products with no physical delivery, also called financial instruments. If a financial instrument's value is derived from the value of an underlying asset, it can be categorized as a derivative. Derivatives can be traded in two ways, through an exchange or through Over-the-Counter (OTC) trading.

Article 1(2) of REMIT states the following:

"Articles 3 and 5 of this Regulation shall not apply to wholesale energy products which are financial instruments and to which Article 9 of Directive 2003/6/EC applies"

Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (MAD), was replaced by MAR in 2016. According to article 37 of MAR, all references to MAD shall be seen as references to MAR, with the changes set out in MAR Annex II. Annex II states that the first paragraph of Article 9 in MAD shall be referring to article 2(1)(a) and 2(2) in MAR. The second paragraph of article 9 in MAD shall be referring to article 2(1)(d) of MAR. Finally, Annex II the third paragraph of article 9 in MAD shall be seen as referring to article 17(1) and 18(7) in MAR.

According to MAR article 2(1) the following financial instruments falls under MAR:

"(a) financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made;

(b) financial instruments traded on an MTF, admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made;

(c) financial instruments traded on an OTF;

(d) financial instruments not covered by point (a), (b) or (c), the price or value of which depends on or has an effect on the price or value of a financial instrument referred to in those points, including, but not limited to, credit default swaps and contracts for difference."

Furthermore, article 2(3) of MAR defines that MAR applies to all transactions and orders, no matter if they have been traded on a trading venue or OTC.

Financial instruments are defined in article 3(1)(1) of MAR as a reference to the definition in article 4(1)(15) in MIFiD II. MIFiD II article 4(1)(15) refers to a list of financial instruments in Section C of Annex 1 to MIFiD II. Of the listed instruments the following can be related to the wholesale energy market:

"5) Options, futures, swaps, forwards and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;

(6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, a MTF, or an OTF, except for wholesale energy products traded on an OTF that must be physically settled;

(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point 6 of this Section and not being for commercial purposes, which have the characteristics of other derivative financial instruments;

[…]

(10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF;"[39]

Based on the above it can therefore be said that article 1(2) of REMIT sets a delimitation on the scope of article 3 and 5 in REMIT. But it should be stated that this only applies for article 3 and 5 of REMIT, meaning that the other elements of REMIT still apply to trading with wholesale energy products.

[39] (European Parliament and Council, 2014 a) Section C in Annex 1

This means that the data reporting requirement mentioned in article 8 of REMIT is also still relevant. MPs need to be aware if they are required to report the same numbers to both the supervising body for REMIT and MAR, ACER and European Securities and Markets Authority (ESMA) respectively. It is stated in article 8(3) of REMIT that the date reporting obligation in REMIT is not applicable if the MP has already reported its data to a European authority according to other EU reporting requirements. However, as the scope of data reporting differs from REMIT and other financial regulations, it is important for MPs to know in advance how to report their transactions.

2.5 – Definition of Wholesale Energy Products

The following chapter will cover the meaning of 'wholesale energy products' (WEPs) as defined in REMIT. It is necessary to fully understand this definition prior to dissecting REMITs most central provisions, namely its prohibitions on insider trading and market manipulation, which will be covered later in this thesis, as these prohibitions utilize the definition in their wording and highly depend on the underlying meaning of the concept.

Firstly, it should be noted that despite REMIT containing a specific article relating to subject matter, *scope* and relationship with other EU legislation, cf. REMIT Art. 1, the following definition defines not only the meaning of WEPs but also acts as a definition of both the material and territorial scope of the regulation. This is due to the aforementioned provisions on insider trading and market manipulation and their dependency on the concept, which will become more evident later in the thesis. Furthermore, Art. 1(2) limits the scope of REMIT to "*...trading in wholesale energy products.*" and thus draws its meaning from the following definition.

In REMIT, all definitions are contained within Art. 2 of the regulation. WEPs is specifically defined in Art. 2(4) as the following:

> *"'wholesale energy products' means the following contracts and derivatives, irrespective of where and how they are traded:*
>
> *(a) Contracts for the supply of electricity or natural gas where delivery is in the Union;*
>
> *(b) Derivatives relating to electricity or natural gas produced, traded or delivered in the Union;*
>
> *(c) Contracts relating to the transportation of electricity or natural gas in the Union;*
>
> *(d) Derivatives relating to the transportation of electricity or natural gas in the Union.*

Contracts for the supply and distribution of electricity or natural gas for the use of final customers are not wholesale energy products. However, contracts for the supply and distribution of electricity or natural gas to final customers with a consumption capacity greater than the threshold set out in the second paragraph of point (5) shall be treated as wholesale energy products;"

It is worth noting that despite the name of the regulation referring to the wholesale energy market, the regulation exclusively considers electricity and natural gas contracts and derivatives, thus excluding other energy products such as coal, oil and hydrogen. It should be noted that the wording 'natural gas', according to ACER's non-binding guidelines, also includes liquefied natural gas (LNG) products in their liquid state, as well as biogas and gas from biomass or other types of gas, as long as said gases can technically and safely be injected into and transported through the natural gas grid.[40] Thus, the material scope is derived from this definition to only include energy products related to natural gas and electricity.

The Commission has proposed to introduce a new regulation, which would add hydrogen to the REMIT framework.[41] This is part of a bigger regulation update, which shall help facilitate the penetration of low-carbon gas and hydrogen into the European power market.[42] If this proposal is approved, it would help future proof the REMIT framework, for the big global market potential of Power-to-X, which is estimated to be over 400 billion EUR.[43] By including hydrogen into REMIT as early as possible, it will help drive these investments, as the hydrogen market will become more transparent from the start.

Additionally, the territorial scope is clearly outlined in the definition and is strictly limited to the production, trading, delivery and transportation of said products in the EU. It should be noted that transit through the EU, but with origin and destination outside the EU also will be caught by the scope of REMIT, as the physical transportation of the product is taking place in the EU, cf. REMIT art. 2(4)(c).

Art. 2(4) of REMIT also contains an exception to the definition of WEPs and thus the scope. Given that REMIT only regulates the wholesale energy market, naturally any supply or distribution to final consumers must be excluded from the scope, cf. REMIT art. 2(4).

[40] (ACER, 2021, s. 15)
[41] (General Secretariat of the Council, 2023, s. 187)
[42] IBID Recital 4
[43] (Ramboll, n.d.)

Furthermore, the paragraph includes an exception to the exception stating that contracts for the supply and distribution of electricity or natural gas to final costumers whose consumption capacity is greater than the threshold set out in the second paragraph of article 2(5) of REMIT (600 GWh per year), shall be treated as wholesale energy products, despite the recipient of the product being the final customer. This is due to such consumers potentially having a significant impact on the wholesale energy market where non-inclusion in the scope would pose a threat to possible abuse. For instance, an electrolysis station[44] for the production of hydrogen could potentially significantly affect the price of electricity by adjusting its consumption, and possibly trade on the market based on this information, thus gaining an unfair advantage and participating in insider trading. This will become more evident in the following chapter, where the concepts of reporting and inside information will be covered.

2.6 – Inside Information

Article 3(1) in REMIT states the following:

"Persons who possess inside information in relation to a wholesale energy product shall be prohibited from:

(a) using that information by acquiring or disposing of, or by trying to acquire or dispose of, for their own account or for the account of a third party, either directly or indirectly, wholesale energy products to which that information relates;

(b) disclosing that information to any other person unless such disclosure is made in the normal course of the exercise of their employment, profession or duties;

(c) recommending or inducing another person, on the basis of inside information, to acquire or dispose of wholesale energy products to which that information relates."

To continue with the analysis of this prohibition it is necessary to expand on the definition of inside information. Article 2(1) of REMIT defines inside information as the following:

"Information of a precise nature which has not been made public, which relates, directly or indirectly, to one or more wholesale energy products and which, if it were made public, would be likely to significantly affect the prices of those wholesale energy products."

[44] A method of producing hydrogen using electricity.

The above definition contains five cumulative conditions which need to be fulfilled in order for information to be considered as inside information. To truly understand the definition, these will be clarified in the following.

1. Information:

REMIT defines information in article 2 (1) (a)-(d) as the following:

"(a) information which is required to be made public in accordance with Regulations (EC) No 714/2009 and (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations;

(b) information relating to the capacity and use of facilities for production, storage, consumption or transmission of electricity or natural gas or related to the capacity and use of LNG facilities, including planned or unplanned unavailability of these facilities;

(c) information which is required to be disclosed in accordance with legal or regulatory provisions at Union or national level, market rules, and contracts or customs on the relevant wholesale energy market, in so far as this information is likely to have a significant effect on the prices of wholesale energy products; and

(d) other information that a reasonable market participant would be likely to use as part of the basis of its decision to enter into a transaction relating to, or to issue an order to trade in, a wholesale energy product."

This means that information which does not fall under point A-C, will go through the "reasonable market participant test" in section D. ACER has expanded on this in section 3.2 of their guidance. ACER elaborates that all reasonable MPs should be judged equally, even though they might trade based on different experience and trading strategies. This means that information which one reasonable MP is likely to use in a trading decision, will be seen as likely to be used by all other reasonable MPs. ACER refers reasonable to cognitive elements in the decision of the trader. This means that if the trader bases his trades only on his instinct, he cannot be seen as reasonable.

2. The information is of a precise nature.

Article 2(1) of REMIT states the following:

"Information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence, or an event which has occurred or may reasonably be expected to do so, and if it is specific enough to enable a

conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of wholesale energy products."

The important thing is therefore, based on the factors available at the time of assessment, if there is a realistic chance of the event happening.

In the guidelines, ACER refers to a scenario, where a generation unit finds out about a potential strike, which could affect the unit's generation output. Here the owners of the generation unit will need to look at all factors to assess if the strike has a realistic chance of happening. This can be done by looking at factors in historical strike records and comparing them with factors relating to the potential strike. If the owner assesses that the strike has a realistic chance of happening, the information can be seen as precise of nature, even though the strike might be cancelled in the future.[45]

3. The information has not been made public.

The concept 'public' is not defined in REMIT, hence why we need to look at a literal interpretation of the concept. The Cambridge Dictionary defines 'public' as the following:

"Relating to or involving people in general, rather than being limited to a particular group of people:"[46]

For information to be public, it needs to be related to people in general. The important thing is therefore to make sure that there is no asymmetry in the information of MPs. As soon as the amount of people having access to the information is limited, an asymmetry is created in the market, which means that the information is not public. So, if information is shared in an e-mail newsletter to MPs, it cannot be seen as public, as it would only be the MPs who are signed up for the newsletter, who would have access to the information. Conversely, posting of information on the MPs website can be seen as public information if it is a public website.

4. Related to Wholesale Energy Products.

For the information to be caught by the prohibition in Art. 3(1) it must be related to such products as described in chapter 2.4.

5. Likely to significantly affect the prices.

[45] (ACER, 2021, s. 36)
[46] (Cambridge Dictionary, n.d.)

The four listed conditions create a wide notion of information which could be considered inside information. The inclusion of "Likely to significantly affect the prices" narrows this notion down, to where information is important enough that they are likely to significantly affect the price. It should be noted that the information only needs to be "likely", there is no requirement that the information actually significantly affects the price.

There is no definition on when information is likely to significantly affect the price, so ACER states that it should be up to the market participant to make this assessment on a case-by-case basis.[47]

To assist the NRAs, ACER has made a non-exhaustive list of factors, which are relevant in this case-by-case analysis. Some of these include:

- *"The size of the event;*
- *the characteristics of the market (size, timeframe, market design, liquidity, type of participants etc.*
- *any other market variables likely to affect the price of the related wholesale energy product in*

the given circumstances (e.g. weather conditions, CO2, fuel prices, news on political and geopolitical developments etc.)."[48]

Based on the above, MPs will need to do this assessment ex-ante, hence why it is important that the MP use as much information as possible to make a reasonable decision. To support decisions, MPs can map out all thinkable scenarios where they could get inside information and build a framework on which information should be checked in each scenario to check if the information would be likely to significantly affect the price.

To validate if the MP's assessment is correct, ACER allows NRAs to use ex-post information to check if the presumption was correct, but ACER also establishes that the NRA cannot fine an MP who made a reasonable assessment on the information available at the time.[49]

[47] (ACER, 2021, s. 39)
[48] IBID
[49] IBID

2.6.1 – Prohibition of Trading on Inside Information.

Article 3 (1)(a)

As stated earlier, article 3(1)(a) of REMIT prohibits persons who poses inside information from:

> *"(a) using that information by acquiring or disposing of, or by trying to acquire or dispose of, for their own account or for the account of a third party, either directly or indirectly, wholesale energy products to which that information relates; "*

Section (a) includes both cases where a market participant trades on inside information, but also cases where a market participant tries to trade based on the inside information. This prohibition is also presented in recital 12, which states:

> *"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."*

The prohibition in article 3(1)(a) of REMIT consists of four conditions:

- Acquiring or disposing
- Own account or for the account of a third party
- Directly or indirectly
- Wholesale energy Products

Acquiring or disposing

An analysis of the words "acquiring" and "disposing" in relation to energy trading, refers to the sale or purchase of energy. As there is no set delimitation in the wording, it must be expected that all types of actions related to the purchase or sale of wholesale energy products, will fall under the prohibition. Furthermore, attempts to purchase or sell based on inside information will also fall under this prohibition. As there are no subjective conditions to the prohibitions, both deliberate and unintentional trading is prohibited.

Based on the wording of the prohibition it can also be discussed if there is a presumption that an MP who holds inside information always will be in breach of the prohibition if they make a trade.

From the wording of the prohibition, it seems like this presumption should be made, as there are no subjective conditions. It is only important that the market participant had inside information and made a trade in the market.

This same view can be found in European Court of Justice Case C-45/08[50], which interprets the prohibition of trading on inside information in article 2 of MAD. In paragraph 54 the European Court of Justice stated that: [51]

> *"It follows that the fact that a primary insider who holds inside information trades on the market in financial instruments to which that information relates implies that that person 'used that information' within the meaning of Article 2(1) of Directive 2003/6, but without prejudice to the rights of the defense and, in particular, the right to be able to rebut that presumption."*

Based on the above it can be said that there is an assumption that a market participant who holds inside information and trades will be in breach of article 3 of REMIT. But it should also be noted, as it is also stated in the ruling, that the accused always has the right to defend and rebut the stated presumption.

Own account or for the account of a third party

In the energy sector it is normally a natural person acquiring/disposing wholesale energy product.[52] However, as this natural person normally is acting on behalf of the account of the third party, the energy trading firm, they will also fall under the prohibition in article 3 of REMIT.

Furthermore, some energy traders are managing portfolios of other legal persons. In this case article 3 of REMIT prohibits both trading on their own and the third party's accounts.

Directly or indirectly

The inside information can be used both directly and indirectly to trade. Directly is when the person possessing the inside information does the trade itself.

Indirectly is when the person possessing the inside information trades through a third party. This could for example be through a daughter company.

Wholesale energy products

The definition of Wholesale energy products is already expanded on in section 2.5.

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[50] In the case Spector, a publicly traded company, issued stock options to their employees. To get the stocks, Spector had to buy back their own stocks in the market. This was done through May to August in 2003. This was just before a strong earnings report, which the European Court of Justice saw as trading on inside information.

[51] (Court of Justice of the European Union (CJEU), 2009)

[52] Each trader gets a unique trader ID, which tracks all the trades. It is normally therefore the natural person who enters the trade on behalf of the company.

Article 3 (1)(b)

Where article 3(1)(a) of REMIT prohibits MPs from trading on the inside information themselves, article 3(1)(b) of REMIT prohibits MPs from disclosing the inside information to other parties:

"disclosing that information to any other person unless such disclosure is made in the normal course of the exercise of their employment, profession or duties;"

Article 3 (1)(b) of REMIT has two conditions:

- That the disclosure of the inside information is to any other person
- That the disclosure of the inside information is not made in the normal course of their employment, profession, or duties.

That the disclosure of the inside information is to any other person

All information which can be seen as inside information will fall under this section if the information is disclosed. As the word disclosing is not delimited in the regulation, all forms of disclosure must fall under the prohibition.

Furthermore, the prohibition is disclosing information to "any person". As person is defined in article 2(6) of REMIT as any natural or legal person, it does therefore not matter if the information is shared with a competitive company, to another team within your company or with a colleague. Furthermore, it does not matter if the information is shared with people who have knowledge in the energy field. As the prohibition is simply the disclosure, and not trading based on the disclosure, it is the disclosure in itself that is forbidden. The reason for this is that disclosure can also lead to a trader not entering an order they otherwise would have. If the was a requirement for a trade, these situations would not fall under the prohibition, which would be against the goals of the regulation.

The disclosure of the inside information is not made in the normal course of their employment, profession, or duties.

The exemption to the prohibition in article 3(1)(b) of REMIT is if the disclosing of inside information is done in the normal course of their employment, profession, or duties.

The best example of this in practice, would be the requirement to report inside information, according to article 4(1) of REMIT. As all disclosures fall under article(3)(1)(b) of REMIT, this publication would be prohibited, if it was not for this exception. As it is required to make these disclosures by law, it falls under the normal course of the duties of a market participant.

Furthermore, if a redispatch team sees that a power plant has been shut down, they are allowed to inform their compliance team, so that the team can prepare to publish the inside information according to article 4 of REMIT. A practical example could be if the engineer in the redispatch teams calls his wife to say he will be home later because of the sudden shut down of the power plant, it will be a breach of article 3(1)(b) of REMIT if the inside information has not been published, as the disclosure cannot be seen as normal course of the employment.

Article 3 (1)(C)

The final prohibition in article 3 of REMIT is the prohibition to inform other MPs on the basis of inside information:

"Recommending or inducing another person, on the basis of inside information, to acquire or dispose of wholesale energy products to which that information relates."

- Recommending or inducing another person
- Acquire or Dispose
- Wholesale energy products
- To which that information relates.

Recommending or inducing another person

Where article 3(1)(b) of REMIT covers a situation where an MP shares inside information with another person, it does not cover the situation where an MP recommends a person to make a trade, without sharing the inside information. Once again, the regulation refers to "person", which should be seen as all natural or legal persons. The redispatch team would therefore not be allowed to call the trading team and say that something is happening whereas they should cancel all orders. But as one of the conditions is that the person should "Acquire or Dispose" wholesale energy products, it is unclear if the situation where a person had planned to do an order, but where informed by an MP to not issue the order. If we look at the wording of the prohibition, the person would then not have acquired or disposed wholesale energy products but would still have gotten an advantage in the market. This would be against the goals of REMIT to build integrity in the market. In the guidelines ACER states that:

"Article 3(1)(c) of REMIT 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."[53]

[53] (ACER, 2021, s. 60)

This should also be the clear teleological interpretation of the article, but if the verbatim interpretation of the article is used, the person needs to "acquire or dispose" wholesale energy products, which is not the case if the person did not do any actions. As there is no case law surrounding this potential issue, it is unclear how the NRAs would have treated a breach.

Exceptions to the prohibition

Art. 3(3)

Article 3(3) of REMIT sets out an exception for TSOs regarding the prohibition in article 3(1)(a) and 3(1)(c) of REMIT. TSOs shall be allowed to trade based on inside information and recommending other market participants to trade on this information, if the trading is needed to ensure the safe and secure operation of the grid. It is worth noting that the TSOs are still regulated by article 3(1)(b) of REMIT in this case, meaning that they are not allowed to share what the inside information is, when recommending MPs to make trades.

Art. 3(4)

Article 3(4) of REMIT lists 3 exceptions to the whole of article 3:

"(a) transactions conducted in the discharge of an obligation that has become due to acquire or dispose of wholesale energy products where that obligation results from an agreement concluded, or an order to trade placed, before the person concerned came into possession of inside information"

Article (3)(4)(a) of REMIT allows trading on inside information, where the MP has made an obligation to buy or sell the WEP before the inside information was known and where the MP already entered an order before the inside information was in its possession. In the last example, the MP would not be allowed to cancel the order or make any amendments, as this would then be removing their order after they got the knowledge, which would fall under the prohibition, cf. REMIT art. 3(1)(a).

"(b) transactions entered into by electricity and natural gas producers, operators of natural gas storage facilities or operators of LNG import facilities the sole purpose of which is to cover the immediate physical loss resulting from unplanned outages, where not to do so would result in the market participant not being able to meet existing contractual obligations or where such action is undertaken in agreement with the transmission system operator(s) concerned in order to ensure safe and secure operation of the system. In such a situation, the relevant information relating to the transactions shall be reported to the Agency and the

national regulatory authority. This reporting obligation is without prejudice to the obligation set out in Article 4(1);"

To use the exception in article (4)(b) of REMIT the following requirements needs to be in place:

- The MP is a producer/importer of WEPs.
- The inside information trade is to cover the immediate physical loss resulting from an unplanned outage.

Finally, one of the requirements needs to be in place:

- If the MP did not trade it would not be able to live up to its existing contractual obligation.
- The trade has been agreed upon with the TSO.

The use of this exception is debated in practice, as some MPs think that it is unclear when the exemption is valid and safe to use.[54] Normally, in the case of a sudden outage, the MP would be able to buy the needed WEP on the intra-day market, after they have published the inside information, in accordance with article 4 of REMIT. It would therefore be a situation where the MP would either not be able to buy the needed amount in the intra-day or where the MP has agreed on the trade with the TSO.

"(c) market participants acting under national emergency rules, where national authorities have intervened in order to secure the supply of electricity or natural gas and market mechanism have been suspended in a Member State or parts thereof. In this case the authority competent for emergency planning shall ensure publication in accordance with Article 4."

Trading on inside information can be allowed if the local NRA declares a state of emergency. This is very rarely seen in practice.

Finally, there is one more exception in the recitals. In recital 12 it is stated that:

"Information regarding the market participant's own plans and strategies for trading should not be considered as inside information."

[54] (Nord Pool Group, 2020, s. 33)

This means that even though an MP will have inside information, as they are aware of their own orders and strategies, this does not qualify as inside information.

2.7 – Publishing of Inside Information

It is the obligation of MPs to publish inside information they may obtain. This obligation is regulated by article 4(1) of REMIT, which states the following:

> *"Market participants shall publicly disclose in an effective and timely manner inside information which they possess in respect of business or facilities which the market participant concerned, or its parent undertaking or related undertaking, owns or controls or for whose operational matters that market participant or undertaking is responsible, either in whole or in part. […]"*

2.7.1 – Effective and Timely Manner

The first obligation of the MP is to make sure that the inside information is published in an effective and timely manner.

Effective

It is not generally stated in REMIT when publication of inside information can be seen as effective, but it is stated in article 4(4) of REMIT that:

> *"The publication of inside information, including in aggregated form, in accordance with Regulation (EC) No 714/2009 or (EC) No 715/2009, or guidelines and network codes adopted pursuant to those Regulations constitutes simultaneous, complete and effective public disclosure."*

Art. 15 of Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity[55] sets out the basis of the requirements for TSOs to publish data relevant for the market[56]. Historically there was no common platform for reporting, but this changed with Commission Regulation (EU) No 543/2013 of 14 June 2013 on submission and publication of data in electricity markets[57], where article 3 sets out for the establishment for a common information

[55] (Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (Text with EEA relevance), 2009 c)

[56] This includes information on available transfer capacity on the cables, forecast demand/generation, actual demand/generation, etc.

[57] (Commission Regulation (EU) No 543/2013 of 14 June 2013 on submission and publication of data in electricity markets and amending Annex I to Regulation (EC) No 714/2009 of the European Parliament and of the Council Text with EEA relevance, 2013)

transparency platform, operated by the European Network of Transmission System Operators for Electricity (ENTSO-E). The TSO now had to submit the required transparency information to ENTSO-E, who would publish it on the platform.[58]

Article 4(4) of REMIT therefore excludes data which has already been made public on the ENTSO-E platform from the requirements in article 4(1) of REMIT.

But as the ENTSO-E platform does not publish all data, including unavailability of production/consumption assets, article 4(1) of REMIT is still relevant. It is therefore important to know how an MP can make sure their publication is made to the public in an effective manner. In the REMIT guidance, ACER believes that all inside information should be published on Inside Information Platform (IIP) to ensure the effectiveness of the publication.[59] IIPs are platforms which live up to a set of minimum requirements set by ACER.[60] A list of all current approved IPPs is listed on ACER's website.[61] The use of IPPs gives MPs the possibility of tracking all importation publications of inside information in the market on a common website, without having to track an unspecific number of webpages.

It should be noted that even though the IPP platforms are widely used in practice, it is not a requirement in the current regulation that these platforms are used. If MPs decide to publish this information on their own website, it is up to them to make sure that the publication will be seen as efficient.

Timely manner

Beside the obligation of effective publication, the publication also needs to be done in a timely manner.

Like with effective manner, there is no wider definition of this as article 4(4) of REMIT only mentions simultaneous, complete, and effective public disclosure. It does not mention timely disclosure.

Regulation 543/2013 which sets out the TSOs reporting obligation towards ENTSO-E, sets out timelines for when the different data should be reported to ENTSO-E. The most common timeline for the TSOs is one hour after the TSO has gained knowledge of the inside information,

[58] (ENTSO-E, n.d.)
[59] (ACER, 2021, s. 44-45)
[60] IBID – page 46
[61] (ACER, n.d. g)

cf. Regulation 543/2013 art. 6(2)(a), art. 7(2), art. 11(3), art. 12(2)(a), art. 13(2)(a), art. 15(2) & art. 16(2)(b)

ACER considers that market participants should follow the same general timeline and therefore expects MPs to post inside information within one hour, for the publication to be considered published in a timely manner. This is the case if there is no regulation giving a longer deadline.[62]

2.8 – Definition of Market Manipulation

One of the most crucial provisions in REMIT is the prohibition of market manipulation. The prohibition can be found in article 5 of REMIT which contains the following wording:

"Any engagement in, or attempt to engage in, market manipulation on wholesale energy markets shall be prohibited."

However, to understand the meaning of article 5 of REMIT, one must look towards the definition of 'market manipulation' and 'attempt to manipulate the market' in article 2(2) & 2(3) of REMIT respectively. Starting with article 2(2) of REMIT, this provision is separated into article 2(2)(a) & 2(2)(b), whereas the first describes a type of market manipulation related to entering transactions or issuing orders on an order book, such as the ones found on organized markets such as exchanges (on-market manipulation). The wording of article 2(2)(a) defines 'market manipulation' as:

"(a) entering into any transaction or issuing any order to trade in wholesale energy products which:

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

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

[62] (ACER, 2021, s. 48)

(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;"

Firstly, it is clear that the main area of interest in this provision is the *supply of, demand for, or price of wholesale energy products*. Secondly, it is evident that success is not a factor in whether the definition captures a given action as being market manipulation or not, and it is the likelihood of a given effect that is the deciding factor.[63]

Article 2(2)(a) of REMIT is further split into 3 provisions. Article 2(2)(a)(i) & 2(2)(a)(ii) captures situations where a single or multiple MPs acts on an organized market such as an exchange. An example of an article 2(2)(a)(i) situation could be the type of market manipulation known as 'spoofing'.

Example of spoofing:

An MP has a sell-order placed, priced at 25€/MWh on a power exchange. Currently, the best bid is on 24€/MWh and is placed by the victim. The MP then places a large non-genuine buy-order at 24€/MWh, indicating to the victim that there is a higher demand than what is actually the case. The victim then decides to fill the MPs sell-order at 25€/MWh in anticipation of an upwards market trend. The MP then cancels its non-genuine buy-order at 24€/MWh.

Article 2(2)(a)(ii) also considers '*persons acting in collaboration'* ensuring that the provision captures both parties in any sort of cooperation, with the intent to secure the price of one or several wholesale energy products at an artificial price level.

The above covers what can generally be considered as 'on-market manipulation'. However, REMIT also considers and prohibits off-market manipulation. Article 2(2)(b) of REMIT captures situations where information is disseminated. In other words, article 2(2)(b) additionally defines 'market manipulation' as:

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

[63] (ACER, 2021, s. 70)

Firstly, it should be highlighted that the wording of the article explicitly mentions the inclusion of dissemination of factually incorrect information in the latter part of the paragraph. Conversely, one must therefore assume, that factually correct information also can get caught by this definition. However, only if such information is disseminated in a way that is likely to mislead other MPs or relevant stakeholders. Likewise, dissemination of factually incorrect information also requires a condition to be true, namely that the disseminating person knew, or ought to have known, that the information was false or misleading. This last condition ensures that pure neglect cannot be used as an excuse or possible method of circumvention of the provision.

Secondly, it is noteworthy that the medium through which the information is disseminated is of non-importance. The provision does explicitly mention the internet as a possible medium of dissemination, but then goes on to also include any other means.

This wording leaves much for interpretation in a practical situation, such as when a person ought to know that information is false, or whether factually correct information was presented in a way that was likely to mislead the market. However, the wording is also incredibly broad and should not leave any possibility for circumvention.

2.9 – Reporting of REMIT Data

While the main prohibitional provisions in REMIT, regards market manipulation and trading based on inside information, respectively, The EU also has in place multiple different tools in the REMIT framework, which ACER can use in order to ensure compliance with the regulation in general.

One of the central provisions, that assists ACER in their task of supporting the NRA's in ensuring compliance with REMIT, is article 8, which directly imposes MPs to report trading data directly to ACER and the NRA, or have any such authority as defined in article 8(4)(b) to article 8(4)(f) report on their behalf:

"Market participants, or a person or authority listed in points (b) to (f) of paragraph 4 on their behalf, shall provide the Agency with a record of wholesale energy market transactions, including orders to trade…"

This is a very direct way of ensuring that ACER and the NRA's have direct and transparent access to the actual data on the wholesale energy markets, which can help identify cases of both market manipulation and inside information. Another benefit of such a provision is that

all relevant data should always be available when needed, in case of ACER or an NRA investigating a potential breach.

It is important to note, that under article 8 of REMIT, such reporting obligations also includes the reporting of orders, which is essential when dealing with some types of market manipulation, such as spoofing and layering, in which, it is specifically the orders that are inherently defined as market manipulation, since the orders are never executed.

In practice, MPs, especially those which might not have the resources or capabilities needed in order to directly report their own activities, depend solely on using reporting services from the Registered Reporting Mechanisms (RRMs) for automated reporting of trading data related to any trading activities related directly to this RRM.[64]

While this significantly lowers the needed resources and time dedicated to the reporting of transactions within the wholesale energy market, this is only a possibility when MPs are trading directly on exchanges, that are also registered under REMIT as an RRM.[65] In any other case in which an MP is actively executing or placing orders within the wholesale energy markets, the reporting, such as when engaging in OTC trading, the parties involved in such trade are solely responsible for ensuring that such trades are reported in accordance with REMIT.

With current developments in the market and the significant increase in the use of algorithmic trading increasing the number of total trades exponentially,[66] reporting of data in the wholesale energy markets has never been more important. In order for both ACER and the NRAs to continuously fulfill their tasks in regard to REMIT, the continued focus on adequate reporting of activities on the wholesale energy market is crucial.

3 – Proposed Amendments to REMIT

Regulation (EU) 2024/1106 of the European Parliament and of the Council of 11 April 2024 amending Regulations (EU) No 1227/2011 and (EU) 2019/942 as regards improving the Union's protection against market manipulation on the wholesale energy market [67] (REMIT II), contains the final amendments which entered into force in May 2024, and introduces several significant changes to the existing REMIT framework and Regulation (EU) 2019/942

[64] (EEX, n.d.)
[65] (ACER, n.d. e)
[66] (EPEX SPOT, 2022, s. 12)
[67] (Regulation (EU) 2024/1106 of the European Parliament and of the Council of 11 April 2024 amending Regulations (EU) No 1227/2011 and (EU) 2019/942 as regards improving the Union's protection against market manipulation on the wholesale energy market (Text , 2024)

of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators[68] (ACER Establishment Regulation).

In the following chapter, key changes to subjects, such as the definitions covered earlier in this thesis, as well as newly introduced mechanisms will be covered. These include additions related to the regulation of algorithmic trading on the wholesale energy market and additional enforcement mechanisms.

3.1 – Changes as a Result of the Introduction of REMIT II

3.1.1 – Amendments to the Definition of 'Inside Information'

The first amendment to be covered is the revision of the definition of inside information in article 2(1) of REMIT as covered previously in section 2.6. The following section will systematically cover the changes to highlight the key elements and their subsequent legal implications.

Though the number of changes is relatively few, as there are only two additions to the definition, it is noteworthy that said additions likely will have a large impact on the interpretation of the definition.

The first change is the addition of point (ca) to the second subparagraph of article 2(1) of REMIT containing the list of categories of inside information, cf. REMIT II art. 1(2)(3)(i). The wording of the point is as follows:

> *"information which is conveyed by a market participant, or by other persons acting on the market participant's behalf, to a service provider trading on the market participant's behalf and relating to the market participant's pending orders in wholesale energy products, which is of a precise nature and relates directly or indirectly to one or more wholesale energy products"*

With the addition of point (ca), the regulation now covers information exchanged between MPs and their service providers concerning the MPs pending orders. This addition might seem trivial at first but fills a significant gap in the previous version of REMIT.

'Service providers trading on the market participant's behalf' in this context primarily refers to brokers, who facilitate trades on behalf of the MP. 'Pending orders' refer to an MP's submitted, but not yet placed, order to either buy or sell a product on the exchange. This means that the

[68] (REGULATION (EU) 2019/942 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a European Union Agency for the Cooperation of Energy Regulators , 2019)

MP has requested for the order to be placed, but that the order is yet to be placed on the order book and become visible to other MPs. Before this addition, it was arguably possible for an MP to submit an order on the exchange which would be of a significant enough size to affect the price of a product. The broker could then possibly informally disclose this information to select clients or even benefit from it themselves, causing what is known as front-running and benefitting from the subsequent effect on the price.[69]

By adding this point to the categories of inside information, the scope of the definition is broadened to ensure that service providers, like brokers, cannot benefit from their position as an insider nor can any potential clients of said service providers.

Furthermore, REMIT II amends the definition of inside information by replacing the third subparagraph of article 2(1) of REMIT, cf. REMIT II art. 1(2)(3)(ii). The replacement expands the definition of what constitutes information of a "precise nature".

The addition now includes the following wording together with the previously existing wording:

"[...] Information may be considered to be of a precise nature if it relates to a protracted process that is intended to bring about, or that results in, particular circumstances or a particular event, including future circumstances or future events, and also if it relates to the intermediate steps of that process which are connected with bringing about or resulting in those future circumstances or future events.

An intermediate step in a protracted process shall be considered to be inside information if it, by itself, satisfies the criteria of inside information as referred to in the first subparagraph of this point.

For the purposes of the first subparagraph of this point, information shall be considered to be directly or indirectly related to the wholesale energy product if it has a possible effect on the demand, supply or prices of a wholesale energy product, or on the expectations of the demand, supply or prices of a wholesale energy product.

For the purposes of the first subparagraph of this point, information which, if it were made public, would be likely to significantly affect the prices of the wholesale energy products means information that a reasonable market participant would be likely to use as part of the basis of his or her decision concerning trading with wholesale energy products;"

[69] (MITCHELL, 2022)

With this addition, the definition now explicitly considers information related to protracted processes and intermediate steps that is intended to, or will bring about an effect on the price, supply or demand of wholesale energy products.

A possible example of this, could be a developer of a new underground gas storage facility with the capacity to affect the price, supply or demand of natural gas prices on the wholesale market. Any steps and processes in the development of said storage facility, with this addition to the definition, will be considered as inside information, including regulatory approval, construction and eventual operational commissioning, given that information regarding these intermediate steps has not been made public and otherwise fulfil the criteria for inside information, as covered in section 2.6.

Overall, these additions to the definition of inside information, is a considerable broadening of the scope and will help ensure a more transparent and integral wholesale energy market. However, the broadening of the scope will also require much more stringent measures for MPs to ensure compliance on the area.

3.1.2 – Amendments to the Definition of 'Market Manipulation'

With the proposal of REMIT II also comes amendments to the previously covered definition of market manipulation in article 2(2) of REMIT. This section will systematically cover the key elements of the changes to the wording of the definition.

The first element to consider in the amendment is the addition of the wording 'engaging in any other behaviour relating to wholesale energy products' added to subparagraph (a) of article 2(2) of REMIT, cf. REMIT II art. 1(3)(b). The wording is as follows:

> *"…entering into any transaction, issuing any order to trade or engaging in any other behaviour relating to wholesale energy products which…"*

This addition broadens the scope of what is considered market manipulation. Whereas the previous wording only considered entering into transactions or issuing orders to trade wholesale energy products, the new wording ensures that the definition encompasses any potential attempts to circumvent the definition. This is a catch-all phrase that would open the definition to interpretation in edge-cases.

Another amendment to the definition is the addition of subsection (c) which explicitly mentions manipulation of benchmarks as a type of market manipulation. The wording of subsection (c) in article 1(3)(b) of REMIT II is as follows:

"transmitting false or misleading information or providing false or misleading inputs in relation to a benchmark where the person who made the transmission or provided the input knew or ought to have known that it was false or misleading, or engaging in any other behaviour which leads to the manipulation of the calculation of a benchmark."

A benchmark in commodity trading is a standard or reference point of the price or performance of a given commodity like natural gas. In Europe, the most commonly used benchmark is called the Title Transfer Facility (TTF).[70]

While benchmark manipulation arguably already was caught by article 2(2) of REMIT, the addition of the explicit inclusion reduces any ambiguity of what constitutes illegal activity. The addition also gives regulators a much clearer legal basis for imposing legal enforcement upon perpetrators.

Lastly, the amendment adds a final subparagraph to art. 2(2) with the following wording:

"Market manipulation may designate the conduct of a legal person, but also, in accordance with European Union or national law, of the natural persons who participate in the decision to carry out activities for the account of the legal person concerned."

Previously, it was not clear whether natural persons could become liable for the actions performed by a legal person under their control. The question had never been tested in practice either, hence why it recently came as a shock to the industry when 8 employees of a Danish energy trading company was arrested under the allegations of having participated in market abuse.[71]

At the time of writing, the case has still not been closed. No matter the result however, this will be overridden by the addition of the subparagraph to the definition of market manipulation, and it will be clear that not only legal persons can become liable for breaches of REMIT. What the sanctions towards natural persons will look like is still unclear at the time of writing.

Overall, the amendment to the definition makes it much broader in its scope, and much more aggressive in its attempt to deter market abuse by holding natural persons liable.

[70] (Gasuine, n.d.)
[71] (HAW, 2023)

3.1.3 – Publishing of Inside Information

Another amendment to the previous version of REMIT is the revision of the obligation to report inside information as covered in section 2.7. The following section will systematically cover the changes to highlight the key elements and their subsequent legal implications.

Article 4(1) of REMIT will be updated with the addition of the following paragraph, cf. REMIT II art. 1(5)(a):

"Market participants shall disclose the inside information through IIPs. The IIPs shall ensure that the inside information is made public in a manner which enables fast access, including access through a clear application programming interface, and a complete, correct and timely assessment of the information by the public."

This new paragraph adds the already existing practice of reporting on IPPs directly into the regulation. This clear limitation on how you can report inside information could formerly only be found in ACER's guidelines. With the addition of this new section in article 4 of REMIT, there is little to no room for interpretation of how to effectively report inside information. The new regulation does, however, not expand on when inside information reporting can be seen as made in a timely manner. Why the parliament decided to only include one of these two obligations directly into the regulation is unclear.

Formerly ACER had their requirements for IPPs in the guidelines, whereas IPPs were not defined or regulated in REMIT. In REMIT 2, authorization and supervision of IPPs is added to REMIT as article 4a, cf. REMIT II art. 1(6). Furthermore, a definition of IPPs is added to REMIT in art. 2(17), cf. REMIT II art. 1(3)(g).

The addition of article 4a(1) to REMIT sets out a requirement that all IPPs need to be registered with ACER, to ensure they live up to the requirements. Section (2) to (4) of the inserted article 4a sets out the main requirements for the IPPs. Finally, section (5) gives ACER the power to withdraw IPPs from the register if they do not live up to the requirements.

The changes to article 4 of and the addition of article 4a to REMIT, will help make it clearer for market participants how and where they can report inside information, to make sure they live up to the obligation of "effective manner". It does however not clarify the "timely manner" aspect, which is still up for debate, as will be apparent in the case law covered in chapter 4 of this thesis. As this aspect has now been seen in multiple cases, it could have made sense to include a definition of this aspect in the new regulation to potentially avoid misinterpretation of these rules in the future.

3.2 – Additions as a Result of the Introduction of REMIT II

3.2.1 – Algorithmic Trading

Algorithmic trading is playing an increasing role in wholesale energy trading. 83% of all submitted orders on EPEX SPOT's continuous market is through application programming interfaces (APIs), which accounted for about 53% of the volume on the continuous market.[72] With the use of algorithmic trading, it is as important as ever to make sure these algorithmic trading models do not manipulate the market. Formerly these models were a part of the normal prohibitions in article 3 & 5 of REMIT, but as these models can make multiple trades per second, they require much more data, to investigate potential breaches. This could potentially lead to a less transparent market, which is against the goals of REMIT.

Definition

A definition of algorithmic trading is added to article 2(18) of REMIT, cf. REMIT II art. 1(3)(g):

> *"'algorithmic trading' means trading in wholesale energy products where a computer algorithm automatically determines individual parameters of orders to trade such as whether to initiate the order, the timing, price or quantity of the order or how to manage the order after its submission, with limited human intervention or no such intervention at all [...]"*

This is the same wording as is already seen in article 4(1)(39) of MIFiD II, which helps to align REMIT with other financial EU regulation and ensure consistency in the interpretation.

Article 5a(1)

The addition of article 5a(1) to REMIT, as added by REMIT II art. 1(7), sets obligations for MPs who engage in algorithmic trading:

> *"A market participant that engages in algorithmic trading shall have in place effective systems and risk controls suitable to the business it operates to ensure that its trading systems are resilient and have sufficient capacity, are subject to appropriate trading thresholds and limits and prevent the sending of erroneous orders to trade or the systems otherwise functioning in a way that may create or contribute to a disorderly market. The market participant shall also have in place effective systems and risk controls to ensure that the trading systems comply with this Regulation and with the rules of an organised market place to which it is connected. The market participant shall have in place effective business*

[72] (Savecenko, 2023)

continuity arrangements to deal with any failure of its trading systems and shall ensure its systems are fully tested and properly monitored to ensure that they meet the requirements laid down in this paragraph."

The addition of article 5a(1) to REMIT does not give a further description of what lies in the word effective. It is to be expected that ACER will update their guidelines, with further information on how MPs best can ensure to have effective systems in place. For now, we can look at the already existing guidelines for MIFiD II.

To help MPs with setting up an effective system for algorithmic trading within MIFiD II, Commission Delegated Regulation (EU) 2017/589 of 19 July 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the organisational requirements of investment firms engaged in algorithmic trading (RTS) was adopted.[73] The regulation sets out regulatory technical standards specifying the operational requirements for MIFiD II market participants.

Article 5 to 7 of RTS requires the MP to have a safe testing environment, where algorithmic trading systems can be tested, and it can be ensured that they do not behave in an unintended manner.

Hereafter RTS set up some design requirements in article 12 to 17. Besides the requirements already mentioned in the inserted article 5a in REMIT, like trading thresholds, limits and erroneous order avoidance, RTS mentions the need for an emergency measure, which can instantly turn off the algorithmic trading model, typically referred to as a kill-switch.

RTS could give REMIT MPs some inspiration until ACER issue new guidelines, which hopefully expands on these requirements. It is important to note that RTS is not necessarily binding for REMIT MPs, as it is made in relation to MIFID II.

Art. 5a(2)

The addition of article 5a(2) in REMIT requires the MPs to register with their local NRA and to keep records of their algorithmic trading systems:

"A market participant that engages in algorithmic trading in a Member State shall notify this engagement to the national regulatory authorities of its Member State and to the Agency.

[73] (Commission Delegated Regulation (EU) 2017/589 of 19 July 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the organisational requirements of investment firms eng, 2016)

The national regulatory authority of the Member State of the market participant may require the market participant to provide, on a regular or ad-hoc basis, a description of the nature of its algorithmic trading strategies, details of the trading parameters or limits to which the trading system is subject, the key compliance and risk controls that it has in place to ensure that the requirement laid down in paragraph 1 are satisfied and details of the testing of its trading systems.

The market participant shall arrange for records to be kept in relation to the points referred to in this paragraph and shall ensure that those records are sufficient to enable its national regulatory authority to monitor compliance with this Regulation"

MPs therefore need to have records with a description of their trading models. This includes what the strategy of the model is, which limits it has in place and how it secures general compliance, as set out in article 5a(1) of REMIT. There is no template set out for this description, but it is important that the descriptions are precise enough, that all trades can be tracked down to a specific algorithmic model and that the description can explain why the model made the respective trades.

Furthermore, it is a requirement that the MPs keep a record for their trading models. It is not specified how long these records shall be kept for. In the guidance, ACER expects PPATS to keep records of their compliance documents for at least 5 years.[74] It can be expected that ACER will mandate similar record-keeping timelines for all MPs in relation to article 5a of REMIT.

3.2.2 – Fine Levels

While fine levels were previously separately regulated by the specific NRAs in each member state, with the implementation of REMIT II, this will change slightly going forward. This has led to some significant differences and discrepancies across the fine levels imposed in the different member states of the EU.[75]

With a higher level of harmonization in the fine levels imposed upon breaches of the regulation, as well as specific upper and lower limits for the fine levels, two primary issues within the regulation will be addressed:

[74] (ACER, 2021, s. 115)
[75] (ACER, n.d. a)

- Harmonization between member states will potentially result in assuring that there are no geographical advantages for wholesale trading companies, between different member states, resulting in a fair market within the EU.
- Minimum levels for fines can be used to ensure that the fines imposed have a tangible effect on the behavior of the market participants that act under the scope of the regulation.

The addition of fine levels is directly regulated by the EU, but still leaves room for the NRAs to individually assess the severity from case to case, as well as a general fine level for the breach of the different punishable provisions in REMIT.

The minimum levels of maximum fines, within the regulation is added in article 18 of REMIT cf. REMIT II art. 1(22):

"With regard to legal persons, maximum administrative fines referred to in paragraph 3, point (e), shall be as follows:

(a) for breaches of Articles 3 and 5, at least 15 % of the total annual turnover in the preceding business year;

(b) for breaches of Articles 4 and 15, at least 2 % of the total annual turnover in the preceding business year;

(c) for breaches of Articles 8 and 9, at least 1 % of the total annual turnover in the preceding business year."

Besides minimum levels of maximum fines, there are also two other legally specified fine levels in article 18 of REMIT, cf. REMIT II art. 1(22):

"Notwithstanding paragraph 3, point (e), the amount of the administrative fine shall not exceed 20 % of the total annual turnover in the preceding business year of the legal person concerned. Where the legal person has directly or indirectly benefited financially from the breach, the amount of the administrative fine shall be at least equal to that benefit."

While the addition of a more harmonized framework for fine levels could result in a more cohesive and consistent use of the regulation in practice, it is unclear how close the issued fines from NRAs will be to said minimum and maximum levels, when sanctioning MPs within the scope of REMIT. The approach of further harmonization might result in a more transparent and fair market for MPs, but it is unclear how significant these additions to the regulation will be in practice.

3.2.3 – On-site Inspections

While the other amendments introduced by REMIT II is primarily applicable by the specific NRA within the member states, that are specifically in charge of imposing the regulation on relevant MPs when there are breaches, the addition of article 13a to REMIT, gives ACER direct access to conduct on-site inspections when investigating breaches, cf. REMIT II art. 1(17). The wording of the inserted article 13a(1) is as follows:

> *"The Agency shall prepare and conduct on-site inspections in close cooperation and in coordination with the relevant authorities of the Member State concerned."*

It is unclear how frequent the use of this specific addition will be in practice, but such additional powers display an increased participation in the market from an EU level. In practice, the use of the addition to REMIT can only be carried out if such inspections are not explicitly denied by the NRA in the respective jurisdiction, where the market participant is registered, cf. REMIT art. 13a(9) as amended by REMIT II art. 1(17). This could potentially lead to some NRAs directly choosing to prevent ACER from conduction these on-site inspections within the NRA's specific jurisdiction.

With a varying level of acceptance towards the EU carrying out its powers directly in the member states across the different jurisdictions, there is a potential risk of some, especially more EU sceptical countries, simply denying the use of the provision in practice. This is a result of the wording within the new provision, which states that such inspections are only conductible, when these are not directly denied by the relevant NRA. Furthermore, the powers of sanctioning any relevant MP, on behalf of such investigation, is still solely the responsibility of the NRA within the jurisdiction, meaning that the provision in practice, directly depends on a close cooperation between the NRA and ACER.

Such on-site inspections are in many ways similar to dawn raids and can be executed without any notification beforehand towards the MP, which is a crucial element, intending to ensure that the relevant MP does not have the opportunity to attempt to either hide or destroy potentially relevant information. After the execution of such on-site inspection, ACER will report any relevant findings to the NRA, which is then solely responsible for potentially sanctioning the MP if relevant, meaning that the local interpretation of REMIT, in addition to any national regulation, will be applicable.

On top of these challenges regarding the practical implementation of this amendment to the regulation, there are still some questions regarding the budget of ACER, which is far below the

levels demanded by the rising number of MPs and trades on the European wholesale energy markets. While giving ACER more tools to be a direct part of the market makes sense in theory, it is hard to imagine exactly how ACER will be utilizing this option, with very limited budgetary means, as further elaborated upon in section 5.2.

4 – Case Law

The following chapter will cover relevant case law related to REMIT prior to the introduction of REMIT II. The case law will be used to demonstrate REMIT's historical application, as case law in relation to the REMIT II amendments is yet to be seen.

The chosen case law is carefully selected to demonstrate cases related to REMIT's primary provisions, namely article 3 & 4, 5, 8 & 9, as well as including a decision resulting in acquittal.

4.1 – Art. 3 & 4

4.1.1 – CORDIS DECISION No. 01-40-23

On the 14th of February 2024, the dispute panel of the French NRA Commission De Regulation de L'Energie (CRE), Comité de règlement des différends et des sanctions (CoRDiS) published a decision finning the MP, Engie, 500.000 EUR for infringement of article 3 and 4 of REMIT in the period January 2019 to December 2020.[76]

CRE accused Engie of 22 breaches of article 4 of REMIT, by not having published inside information in due time or by publishing information in an ineffective manner. All the breaches were in relation to the unavailability of Engie operated power plants DK6-T1 and DK6-T2.[77] Furthermore, CRE accused Engie of being in breach of article 3 of REMIT, by having shared inside information, which led to a trade.[78]

Engie argued against this, by claiming the information was not precise in nature, as it was relating to the unavailability or restart of a production unit. Furthermore, they argued that the information would not be likely to affect the prices in the market, as there was free production capacity in the market that could take over the unavailability at a similar price.[79] With these arguments Engie meant that the information could not be seen as inside information according to article 2 of REMIT, whereas the conditions for articles 3 and 4 are not met.

[76] (CoRDiS, 2023 a)
[77] IBID – Section 1.4
[78] IBID – Section 4.2
[79] IBID – Section 5

CoRDiS started the investigation by determining whether the information can be classified as inside information. Hereafter the dispute court went through the four conditions of inside information, which has been covered in depth in section 2.6.

The two disputed conditions were the condition of the information being precise in nature and that that the information would be likely to significantly affect the prices.

CoRDiS argued that information relating to evolving circumstances, such as unavailability of production volumes, can be precise in nature in accordance with article 2(1) of REMIT, as the information could be used by other MPs to make positions in the market. Furthermore, Cordis found in its investigation that the outage in the investigation had precisely identified volumes. CoRDiS therefore concluded that the information was of precise nature.[80]

CoRDiS furthermore argued that the other disputed condition of being "likely to significantly affect the price" is also met, as it is not important if the information actually affected the price, only if the information was probable to affect it. CoRDiS stated that the unavailability of the production happened at a time of increased volatility in the French intraday market. Hereafter CoRDiS went through a technical analysis of the market, ending in the conclusion that the outage would be likely to significantly affect the price.[81]

Based on the above CoRDiS concluded that all conditions for the definition of inside information was in place. Hereafter CoRDiS investigated if Engie had acted in breach of article 4 and 3 of REMIT.

Regarding article 4 of REMIT, Engie had published the inside information to the market between 1.5 hours to 12 hours after the start of the unavailability. As mentioned in section 2.7.1 of this thesis, inside information needs to be disclosed in a timely manner.

CoRDiS interprets 'in a timely manner' close to the interpretation of ACER in the non-binding guidelines. CoRDiS finds the 1-hour limit in the guidelines to be reasonable and non-arbitrary conciliation between, on one side the pressure to have inside information public as soon as possible and on the other hand the cost and human resources needed to publish the inside information.[82]

CoRDiS emphasizes that publishing after the 1-hour deadline will not necessarily be a breach, but it will be the responsibility of the MP to justify why it did not meet this requirement.

[80] IBID – Section 7.2.1.1.2
[81] IBID – Section 7.2.1.1.3
[82] IBID – Section 7.2.1.2.1

CoRDiS also emphasizes that it is not an excuse that the MP was not aware of the deadline given in the guidelines, as it the responsibility of the MP to be aware of the requirement set out in REMIT.

Hereafter CoRDiS concludes that Engie did not give objective reasons on why it did not report within the 1-hour timeline and their activities was therefore in breach of article 4 of REMIT.

Finally, CoRDiS had to process the alleged breach of article 3 of REMIT by Engie trading on inside information. Engie was accused of having breached article 3(1)(a) of REMIT on 234 occasions. Furthermore, they were accused of having breached article 3(1)(b) of REMIT on one occasion.

Regarding the article 3(1)(b) breach CoRDiS elaborates that the breach is in relation to a netting note sent from Engie's dispatch team to its short-term power trading team. Netting notes are normally sent from dispatch teams to trading teams to ensure that the trading team can close imbalances in the intraday market. In this case the netting note had information of outages, which had not yet been published to the market, whereas it could be seen as inside information.[83]

CoRDiS argued that because the information in the netting note had not been made public to the market, Engie was not allowed to share this information to any other "person", as stated in article 3(1)(b) of REMIT. "person" is as formerly mentioned defined in article 2(8) of REMIT as any natural or legal person. Engie argued that the transfer of information happened within two departments of the company, whereas it was not sent to another person. CoRDiS responded to the argument that Article 3(1)(b) would have no use in practice if it allowed for the transmission of inside information within different departments of the same company. Finally, CoRDiS argued that the transfer of information could not be seen as part of the normal exercise of the duties of a dispatch team. CoRDiS therefore concluded that Engie had acted in breach of article 3(1)(b) of REMIT.[84]

The final investigation by CoRDiS was about the breach of article 3(1)(a) of REMIT. It is not disputed from Engine that 234 market transactions happened in the period 2 to 5pm on the 3rd of August 2019 in relation to the power plant DK-6. At the same time, Engie had not informed the market of this power plant's closure, which was concluded as a breach of article 4 earlier in the judgment. Engie argued that the orders had been placed before the outage of DK-6, which

[83] IBID Section 7.2.2
[84] IBID – Section 7.2.2.1

would place it under the exemption in article 3(4)(a) of REMIT. CoRDiS noted this argument but concluded that the information given by Engie was not enough to prove that the orders had been placed before the outage. CoRDiS therefore concluded that Engie had acted on information, which was not made public in the market, which is a breach of article 3(1)(a) of REMIT.[85]

Based on the above, and the fact the CoRDiS could not prove that Engie had gained anything from their breaches, CoRDiS decided to fine Engie 500,000 euros.

4.2 – Art. 5

4.2.1 – Engie Global Markets in breach of REMIT art. 5

The following section will cover an example of case law, where Engie Global Markets (EGM), an energy trading firm based in France, had been found to be in breach of article 5 of REMIT.[86] The decision was ruled by the British NRA, the Office of Gas and Electricity Markets (Ofgem), on 5 September 2019.[87]

As covered in section 2.8 of this thesis, article 5 of REMIT is the prohibition of engaging in market manipulation.

In November 2016, Ofgem was alerted by an MP that it had noticed suspicious behaviour on the wholesale gas market for Great Britain. The activity was related to EGM and a subsequent investigation was launched, which found that EGM had engaged in market manipulation in breach of article 5 of REMIT over a 3-month period between June and August 2016.

The type of market manipulation used by EGM in this case was the type called ‘spoofing’ as described earlier in section 2.8 in this thesis. The specific market where in which the manipulation had taken place was the market for month ahead contracts for the delivery of natural gas at the National Balancing Point (NBP) on the OTC wholesale energy market.

EGM had, during the period, issued a number of both bid and offer orders to trade with no intention of executing said orders (non-genuine orders). This would have been accompanied by EGM having orders on the opposite side of the order book (genuine orders), which in turn were fulfilled as a result of the manipulation, whereafter the non-genuine orders would have been cancelled.

[85] IBID
[86] (Ofgem, 2019 b)
[87] (Ofgem, 2019 a)

This all means that EGM was successful, on multiple occasions, in securing the price of the traded product at an artificial level, hence why the actions were caught by the definition of market manipulation as set out in article 2(2) of REMIT.

It is worth noting that even though the manipulation was carried out by a single natural person, working for EGM as a trader, Ofgem found that EGM is liable for the manipulation and thus ruled decision to impose a fine of approximately £2.1 million. This the second smallest fine imposed on a company by Ofgem demonstrating the serious consequences of engaging in such market abuse.

4.2.2 – CORDIS Decision No. 02-40-21

There are a limited number of decisions where an NRA investigation has led to the MP being found innocent. One of these cases is a French decision from September 2023, where the Danish MP, Danske Commodities A/S (Danske), were found not guilty of trading in breach of article 5 of REMIT, manipulating the electricity market.[88]

Danske was participating in the French balancing market in 2015, where the French TSO pays MPs to help balance the grid. In this case Danske was paid to deliver energy to France on the interconnector between France and Switzerland. This meant that Danske would be short in Switzerland and long in France. To regain balance in the portfolio Danske decided that the most effective solution would be to buy the power on the French intraday market and export it back to Switzerland, which would result in Danske having a balanced portfolio in France.[89]

The French NRA, CRE, claimed that the purchases on the French Intraday market could be seen as a fictious device, in violation of article 5 of REMIT, as the purchases in the French intraday market did not lead to a net power contribution to the French market, as Danske was buying the same volume as they had imported from Switzerland. CRE argued that Danske therefore acted in a fictious way by claiming to be helping the French TSO balance the grid, without actually injecting additional electricity into the French grid.

Danske claimed that the purchase of power on the French intraday market led to the physical production of electricity in France, whereas they lived up to the contract with the French TSO.

The disagreement between the NRA and Danske ended in the French dispute panel, CoRDiS.

[88] (CoRDis, 2023 b)
[89] IBID - Section 1.2

The dispute panel firstly found that actions like Danske's, where the trading does not result in an injection of more volume into the French grid can be a fictious device, it first needs to be established that the TSO had already included the imports in their calculation of the system balance. In this case it had not been investigated if the French TSO had included the volumes in the grid balance. CoRDiS therefore decided that it could not be concluded that the conduct had been fictious in this case.[90]

Furthermore, the dispute panel found that the wording of the national regulation at the time, did not require MPs in the French balancing mechanism to get the power from foreign production. The acts of Danske could therefore not be seen as misleading, as they did not act in a way which was prohibited by the market rules.[91]

The dispute panel therefore decided to acquit Danske of all charges.

After the disputed trading activities from Danske in 2015, the national regulation was changed in 2018, adding the prohibition of participating in the French balancing market for interconnectors, by importing electricity which was acquired in France. The dispute panel therefore also concluded that similar activities conducted after 2018 could be seen as both fictious and misleading, as the new rules were so clear in the wording.[92]

4.3 – Art. 8 & 9

4.3.1 – ARERA Decision number no. 64/2024/gas

A decision was published in the start of 2024, in which a Swiss MP was penalized for breaching both article 8 and article 9 of REMIT simultaneously, meaning that the MP, Energy Clean SA, was neither registered in any national REMIT registry, nor was reporting their activity on the wholesale energy market.[93] As the breaches were detected in relation to the MP's activity on the Italian wholesale energy market, primarily the Italian Day-Ahead and Intraday markets, the Italian NRA (Arera), was the NRA penalizing the Swiss MP.[94]

Before the publication of this specific breach, only the Spanish NRA, CNMC had ever penalized a market participant due to a breach of art. 9, meaning that either MPs in other jurisdictions simply has not been active within the market without registration or the Spanish NRA is the only authority that actively penalizes MPs due to lack of registration in the national

[90] IBID - Section 7.2.7 & 7.2.8
[91] IBID – Section 7.2.9 to 7.2.14
[92] IBID -Section 7.2.11 & 7.2.14
[93] (ARERA, 2024, s. 2)
[94] IBID – page 3

registry.[95] A similar situation is apparent in relation to breaches of article 8 of REMIT, which have only been actively penalized by the Czech and Hungarian NRAs..

First and foremost, this specific breach opens a question, regarding the high number of breaches in Spain, in which MPs has consistently been penalized due to lack of registration under article 9 of REMIT, but none of these MPs were simultaneously penalized due to their lack of reporting under article 8 of REMIT. It is a prerequisite for REMIT reporting to register as an MP. This shows an apparent difference in the approach to the use of article 8 of REMIT, at least between the two NRAs that has actively penalized MPs for breaches regarding the specific provision so far.

Secondly, it seems highly unlikely that no MPs has ever been in breach of article 9 of REMIT in any other jurisdiction than Spain, and the singular breach in Italy, as well as the lack of breaches of article 8 of REMIT in any other jurisdiction than Hungary and the Czech Republic. A high level of inconsistency between the NRAs within the EU could be a result of unclear guidance and direction from ACER, or simply a lack of practical implementation or interpretation of the articles within the NRAs. Whether either scenario is the case in practice is hard to determine, but the disparity between usage of articles within REMIT shows issues regarding the consistency in use of the regulation in practice.

Inconsistent and even lack of usage of specific provisions within the regulation, is undoubtedly an example of lack of effectiveness in how REMIT regulates the MPs and NRAs within the wholesale energy market in the EU. It is important for a Union-wide regulatory framework such as REMIT to be able to be implemented somewhat consistently within all EU jurisdictions, for the regulation to be considered truly effective. To this point, it is important to note that there are apparent differences between jurisdictions, which could potentially lead to disparities in the use of specific provisions of any regulation, but the significance of inconsistency in regard to the use of article 8 and 9 of REMIT, is hard to simply write off, as a result of the nature of activity within the jurisdictions themselves.

5 – Discussion

The following chapter will discuss challenges faced by REMIT and REMIT's effectiveness in achieving its goals in ensuring integrity and transparency on the European wholesale energy

[95] (ACER, n.d. a)

market. This will be based on the findings uncovered in the previous chapters. Additionally, the chapter will discuss whether said challenges can be expected to be addressed effectively by the amendments introduced by REMIT II.

5.1 – Transparency in Case Law Related to REMIT

Contrary to the previously covered case law, not all enforcement decisions related to REMIT are equally thoroughly described. Take for instance the Romanian NRA (ANRE). A press release published by ANRE in September 2022 listed all the fines that had been issued by ANRE as a result of non-compliance with REMIT in the period between 2019 and 2022.[96] The list covers all fines given in the time span but does not elaborate further on the circumstances in each case.

The lack of elaboration on the circumstances and reasoning behind each enforcement decision introduces a question about the effectiveness of the regulation and the enforcement decisions related to it. It is worth remembering that the purpose of enforcement decisions ultimately is to produce a deterring effect towards other potential perpetrators and thus preventing future breaches.

In a landscape as complex as the wholesale energy market and its accompanying regulations, the circumstances can be vastly different from case to case and different principles may come into play. Especially in edge-cases, where a deeper understanding behind the reasoning leading to a decision is required, it is crucial that these reasonings are available to other MPs to learn from. This is especially relevant in the case of REMIT which, in many cases, is subject to interpretation by both regulators and MPs.

An important consideration is also whether this practice lives up to the purpose and goals of REMIT. REMIT Recital 1 states the following:

> *"It is important to ensure that consumers and other market participants can have confidence in the integrity of electricity and gas markets, that prices set on wholesale energy markets reflect a fair and competitive interplay between supply and demand, and that no profits can be drawn from market abuse."*

For consumers and MPs to have confidence in the integrity of the electricity and gas markets, it is absolutely crucial that enforcement is completely transparent. Furthermore, a homogeneous approach across the EU towards REMIT breaches is essential to ensure that

[96] (ANRE, 2022)

certain member states are not more lenient towards breaches than others. If that is the case, then MPs will potentially seize any opportunity to avoid enforcement on the area by basing themselves in the more lenient member state. Ultimately, this can all be narrowed down to the last part of the wording in REMIT Recital 1, stating that no profits can be drawn from market abuse, which cannot be guaranteed if breaches and enforcements are not properly documented.

5.2 – Jurisdictional Problems

With the introduction of REMIT in 2011 also came new obligations for the NRAs to carry out investigations on potential market abuse and enforce the provisions of REMIT. The first paragraph of article 13 of REMIT mandates the following:

"National regulatory authorities shall ensure that the prohibitions set out in Articles 3 and 5 and the obligation set out in Article 4 are applied.

Each Member State shall ensure that its national regulatory authorities have the investigatory and enforcement powers necessary for the exercise of that function by 29 June 2013. Those powers shall be exercised in a proportionate manner."

Furthermore, the paragraph states that:

"Those powers may be exercised:

(a) directly;

(b) in collaboration with other authorities; or

(c) by application to the competent judicial authorities."

It is unclear what is meant by *'in collaboration with other authorities'* in this context. Neither the regulation nor the guidelines provided by ACER elaborates on this wording. It is therefore uncertain whether the point refers to other authorities within the jurisdiction of the NRA (e.g. a financial authority) or other NRAs in different jurisdictions.

This lack of certainty becomes evident when potential market abuse starts to be related to cross-border transactions. Given that the European energy grid is deeply interconnected, it is extremely common for transactions to take place across jurisdictions, hence why there is a large pool of potential cases that can be considered to be of a cross-jurisdictional nature.

The lack of clarity in the wording of article 13(1)(b) of REMIT therefore poses a significant gap in the practical enforceability of the regulation, which is evident by the fact that ACER estimates that more than 10% of cases are prematurely dismissed without sanctions, due to

jurisdictional issues.[97] These jurisdictional issues can either relate to situations where multiple NRAs claim jurisdiction or where no NRA will claim jurisdiction. An example of this could be where an MP based in Germany acts through its Danish branch to trade on the Italian market.

The fact that more than 10% of cross-border cases are dismissed prematurely is further worrying considering that ACER interacts with cases on potential market abuse more than 500 times per year.[98]

REMIT II

As covered previously in section 3.2.3 of this thesis, one of the amendments to REMIT as a result of the introduction of REMIT II, is the provisions allowing ACER to perform on-sight inspections with MPs. These powers attempt to solve parts of the aforementioned jurisdictional issues.

By allowing ACER to perform such inspections, the burden of investigatory duties during cross-border cases of potential market abuse, could be allocated the cross-state entity that is ACER.

However, whether ACER will have an appetite for performing these on-sight inspections seem increasingly unlikely due to budgetary constraints that the agency is facing as of the time of writing. In a 2020 report requested by the European Committee on Industry, Research and Energy it was concluded that ACER was assigned 26% less financial resources and 31% fewer staff than requested. The gap between the requested and allowed resources was higher than that for other EU agencies.[99] The report recommends further allocation of the necessary resources to the agency, arguing that the increasing amount of responsibility, that ACER is facing, is not proportionally reflected in its allocation of resources. With the addition of the responsibility to carry out investigatory measures as set out in REMIT II this argument is more relevant than ever.

Furthermore, the expansion of ACERs power is solely limited to performing the aforementioned on-sight inspections. REMIT II does not give any legislative powers for ACER to issue fines or other enforcement acts if a breach of the regulation is identified. This will potentially result in a status quo from the regulation in its pre-amended state where multiple or no NRA will claim responsibility for issuing enforcement decisions.

[97] (Florence School of Regulation, 2023) – Timestamp 20:000
[98] (ACER - Coordination with relevant authorities, n.d. f)
[99] (Andrea DEMURTAS, 2023, s. 63)

Lastly, ACERs investigatory powers are further limited by the fact that the NRA in the member state, where the investigated MP is situated, can deny ACER the ability to perform said on-sight inspections.

The jurisdictional gaps, that has historically been present in REMIT, poses a severe threat to the market integrity of the European wholesale energy market. Not only may there be cases where market abuse to varying degrees could have gone unpenalized and thus do not provide a deterring effect, but MPs could also learn to exploit this issue to perform market abuse freely. If this becomes the case, REMIT would have ultimately failed in its ambitions on securing European wholesale energy market integrity, which in turn would not only hurt other MPs but ultimately also the end consumer.

While REMIT II clearly attempts to address these issues, it seems unlikely that the changes will have any significant impact on the issue, if any impact at all, given that the root cause of the issue remains untouched by the amendments presented in REMIT II.

5.3 – Non-binding Guidelines

As the main regulatory body overseeing REMIT on a Union-level, ACER regularly publishes guidelines on the regulation. These guidelines are directly relevant both for the NRAs, which are responsible for impeding the regulation towards the MPs in their respective jurisdictions, but also for the individual MPs, which can lean towards the suggested behaviour within the guidelines, when trading on the wholesale energy markets within the EU.

The ACER guidelines on the REMIT framework, are directly mandated by article 16 of REMIT, which states that ACER shall publish non-binding guidelines regarding the application of specifically article 2 of REMIT.[100] While ACER is particularly mandated to publish guidelines regarding article 2 of REMIT, they are also mandated to secure that NRAs carry out their tasks in a coordinated and consistent manner as per article 16 of REMIT.

While the direct interpretation of article 16 of REMIT, which mandates the creation of the non-binding ACER guidelines regarding the REMIT framework, only directly suggests that ACER publishes guidelines in relation to the interpretation of article 2 of REMIT, this is far from the reality. ACER publishes guidelines regarding most of the central provisions in the REMIT framework, which results in a set of guidelines that is much broader than the scope of article 16 of REMIT.

[100] (ACER, 2021, s. 3)

It is also relevant to notice that ACER claims that the guidelines are drafted and provided in "non-legal terms", since they are not intended to be binding towards the NRAs nor MPs.[101] While the intention of providing very detailed guidance regarding the central provisions of REMIT seems logical in theory, there are multiple problematic elements in the use of the guidelines in practice.

First and foremost, ACER is technically not given powers within the REMIT framework to publish public guidance regarding the provisions of the regulation, except for such guidelines regarding the interpretation of article 2 of REMIT. The ACER guidelines have been published in multiple editions over the years and is currently published as its 6th edition. It is also expected that ACER will also be publishing guidelines in correlation with the REMIT II amendments being implemented.[102] The ACER guidelines are very extensive and goes into depth regarding specific provisions, which is way beyond the scope of article 16 of REMIT when this provision is directly interpreted.

While the prior approach from ACER regarding their direct, public guidance on REMIT goes significantly beyond the intended scope of article 16 of REMIT, it is relevant to consider the consequences of a stricter approach from ACER in regard to their interpretation. Without a comprehensive and in-depth set of guidelines, it is unclear how the more complex aspects of REMIT would have been interpreted on a national level in the respective member states. The non-binding ACER Guidelines regarding REMIT has a high frequency of usage in practice, as depicted in section 4.1.1.

The discrepancy between the actual scope of the original article 16 and the practical implementation of ACER guidelines is potentially what has led to amendments to the provision with the introduction of REMIT 2. Within REMIT 2, the addition of article 16b states that ACER shall publish guidelines regarding article 3 to 5a, 8, 9 & 10(1). This is a significant increase in scope from the prior regulation. While it is not directly clear whether such amendment is a result of an acceptance towards the in-practice broadened scope of the ACER guidelines since REMITs inception, or simply a change in approach from the EU in regards to its perspective on the tasks and responsibilities of ACER, it is clear that such increase in obligations for ACER, leads to a legal scope that is closer to the actual practical approach from ACER, in regards to the contents of their non-binding guidelines.

[101] IBID
[102] (ACER, 2014)

Another problematic aspect of the practical implications of the non-binding ACER Guidelines, is whether the NRAs actually interpret the guidelines as non-binding in practice or whether MPs are expected to directly follow the content within the guidelines when acting within the scope of REMIT, as depicted in section 4.1.1. Within the literal interpretation of the guidelines, it is obvious that these are intended to be of a non-binding nature, which is not truly the case in all instances. As the non-binding guidelines are published in a public manner, all MPs have direct access to the content in practice and should be able to act within the wording of the guidelines.

Even if all MPs in theory could act within the wording of the guidelines, it is still not, by literal interpretation, the intention that a "breach" of such non-binding guidelines should be the premises on which the MPs are considered to be in breach of REMIT itself, as it is depicted in section 4.1.1. This results in uncertainty in the wholesale energy market for MPs, since they are in theory only obligated to act within the scope of the actual regulation itself, but are in practice, in some cases, being penalized due to "breaches" of the guidelines, due to the approach of some NRAs directly imposing the wording on the MPs from the non-binding guidelines. This begs the question whether the non-binding ACER guidelines are in practice directly binding towards the MPs, which is far beyond the intended purpose of the authority given to ACER within the wording of REMIT.

6 – Conclusion

Since its implementation, REMIT has been a central part of the European wholesale energy market. It has been pivotal in the shaping of how MPs act on the market. From preventing manipulative behaviour to increasing transparency and thus the efficiency of the market.

Overall, the key elements of REMIT are the prohibitions of market manipulation in article 5 and trading based on inside information in article 3. To support these key elements, the regulation applies provisions to increase the effectiveness of said elements. For instance, the prohibitions in article 3 & 5 necessitates the use of article 2 to define the meaning of the prohibitions. Furthermore, provisions like articles 4 & 8 contribute to effective enforcement of the prohibitions. Likewise, Article 9 support the measures presented by articles 4 & 8. It is evident that REMIT is structured in a way that applies multiple provisions with the goal of increasing the enforceability and therefore the effectiveness of the regulation.

Despite this structure, it is evident that the measures to ensure effectiveness of the regulation has not been sufficient. This is evident by the necessity for ACER to issue the amount of non-

binding guidelines on the regulation that has been seen so far. Even with the non-binding guidance from ACER, cases such as decision No. CORDIS 02-40-21 demonstrates that REMIT still contained gaps which had to be covered on a national level.

Additionally, the aforementioned decision as well as decision No. CORDIS 01-40-23 demonstrates the NRAs heavy reliance on the interpretations presented by the non-binding guidelines.

Furthermore, some of the apparent issues regarding both the definitions within the original REMIT framework as well as inconsistencies within the case law regarding REMIT breaches, are directly addressed within the newly introduced REMIT II framework. With the introduction of a higher level of inclusion in enforcing the framework on a Union level from the side of ACER, as well as specific changes within some of the key definitions in the framework, it is apparent that multiple issues regarding the effectiveness of REMIT is directly being addressed in multiple ways.

First and foremost, the addition of an algorithmic trading provision, outlining the requirements towards MPs utilizing such algorithms in their activities on the wholesale energy markets, shows an interest in conforming the regulation in relation to the technological advancements that has already occurred and will continue to expand going forward. In order for REMIT to continuously be effective in its purpose to ensure integrity and transparency within the market, it is important that the regulation acknowledges and directly contains provisions regarding such developments, in order to maintain effectiveness in enforcement of behaviour within the wholesale energy market.

Secondly, the new provision regarding on-site inspections by ACER, shows the need to align the regulation with the broader focus on cross border cases. Within the REMIT framework, ACER primarily played a more guiding role within the market, both towards the MP's and the NRAs. Within REMIT II, ACER will potentially play a more direct role in the enforcement of the regulation, due to the addition of on-site inspections. But the actual role of ACER is highly based on the voluntary cooperation of the NRAs, as they are directly able to deny the access to conduct on-site inspections and the judicial powers still lies solely with the NRAs.

Thirdly, REMIT II introduces consistent fine levels across member states. This aims to ensure consistent punishments for breaches of the regulation across all states, meaning that it should not be possible to speculate in which market to conduct market manipulation or insider trading

in. However, the regulation primarily seeks to harmonizes the maximum fine levels, still leaving room for discrepancies between the member states.

Overall, REMIT has undoubtedly contributed significantly to ensuring the integrity and transparency of the European wholesale energy market. The regulation is taken seriously by all relevant parties. ACER has contributed with thorough guidance, NRAs have issued a number of significant enforcement decisions and both NEMOs and MPs have in collaboration published reports on best practices on the area.

Despite this, it is evident that REMIT in its original form has not proven sufficient in ensuring complete integrity and transparency. EU legislators have tried to address the gaps in REMIT by adopting amendments to the regulation in the shape of REMIT II. Although REMIT II correctly addresses some of the issues with REMIT, it is not completely flawless. Ultimately however, the effectiveness of REMIT II is subject to uncertainty and will heavily depend on how it will be applied in practice.

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