The 6th Edition of the ACER Guidance

REMIT Forum 2021
Antonio Santos
ACER - Market Surveillance and Conduct Department
Thursday, 28 October 2021 / 14:00 – 16:30 CET
• The aim of the ACER Guidance

• The history

• The rational for the revamping

• The new structure
What is the aim of the ACER Guidance?

- ACER has a coordination role under REMIT
  - Ensuring cooperation among NRAs on the application of the provisions
  - Ensuring an adequate allocation of potential REMIT breach cases

- ACER aims at ensuring consistency in the application of the market abuse regime
  - Same rule, similar reasoning, equivalent decision
  - Ensure level-playing-field across Europe
  - Article 1(3) of REMIT

- The publication of the ACER Guidance is also a legal obligation:
  - Article 16(1) of REMIT
The history of the ACER Guidance

1st Edition of the ACER Guidance
- Inside information (II)
- Possible signals of insider trading and market manipulation

2nd Edition of the ACER Guidance
- REMIT scope
- Definitions of: WEP; WEM; MP
- Obligation to disclose II
- Types of market abuse

3rd Edition of the ACER Guidance
- Registration of MPs
- Inside Information
- Obligation to disclose II
- Definitions of WEP

4th Edition of the ACER Guidance
- PPAT obligations (Article 15)

5th Edition of the ACER Guidance
- Inside Information
- Obligation to disclose II

6th Edition of the ACER Guidance
- New structure
- REMIT scope
- Market manipulation
- Insider trading
The rationale for the revamping

• **Structural improvements were necessary**
  • During the last 10 years, several new chapters and add-ins were introduced but the structure remained untouched
  • This created some structural misalignments and unveiled the need to update some of the older chapters
  • ACER received criticism from external stakeholders for the evident lack of update of some sections and misalignment between sections
  • ACER is currently revamping its external communication strategy and structurally improving the Guidance is a must
## The new structure

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List of Abbreviations
Thank you!

More info?

REMIT Portal: www.acer-remit.eu
ACER website: www.acer.europa.eu
New Chapter 2 of the ACER Guidance – REMIT Scope

REMIT Forum 2021
Dimitris Lelovitis
ACER - Market Integrity and Transparency Department
Thursday, 28 October 2021 / 14:00 – 16:30 CET
2.1. Introduction

2.1 Introduction

2.2 Products and markets in scope
   2.2.1 Wholesale energy products (WEP)
   2.2.2 Wholesale energy markets (WEM)

2.3 Geographical scope
   2.3.1 Delivered in the Union - for contracts for the supply under Article 2(4)(a) of REMIT
   2.3.2 Produced, traded and delivered in the Union - for derivatives under Article 2(4)(b) of REMIT
   2.3.3 Transportation in the Union – for transportation contracts under Article 2(4)(c) and derivative contracts under Article 2(4)(d) of REMIT
   2.3.4 Located in the Union – for contracts for the supply and distribution to final customers with a consumption greater than 600 GWh/year

2.4 Legal and natural persons in scope

2.5 Exceptions to the general scope

2.6 Examples of REMIT scope
2.1. Introduction


- Identifying the exceptions to the general scope and illustrating the rationale of such exceptions.

- Overview of the chapter structure.
2.2. Products and markets in scope

• Definition of WEP

• New table summarising the categories of products in the scope of REMIT

• Insertion of two practical examples:
  • concept of ‘Wholesale energy market’ – this example keeps the existing definition under previous Section 3.3;
  • concept of ‘Contract of the final customer’ - this example keeps the existing definition under previous Section 3.2.

• In addition, text from the Q&As, namely Q&A 3.3.20, 3.3.23, and 3.3.32
2.3. Geographical scope

- Clear definition of the concepts of ‘produced, traded and delivered in the Union’: incorporating existing text from Q&As – i.e. Q&A 3.3.24, 3.3.34, 3.3.36 - and/or TRUM (e.g. Annex III) and/or FAQs

- Explanation of the nuance on this criteria across the different articles:
  - 2(4)(a) : ‘delivered in the Union’;
  - 2 (4) (b) :‘produced, traded and delivered in the union’;
  - 2(4) (c) and 2(4)(d) : ‘relating to transportation in the Union’
2.3. Geographical scope - Subsections

- 2.3.1: Delivered in the Union - for contracts for the supply under Article 2(4)(a) of REMIT

- 2.3.2: Produced, traded and delivered in the EU - for derivatives under Article 2(4)(b) of REMIT

- 2.3.3: Transported in the EU – for transportation contracts under Article 2(4)(c) and derivative contracts under Article 2(4)(d) of REMIT

- 2.3.4: Consumption plants located in the EU – for contracts for the supply and distribution to final customers with a consumption greater than 600 GWh /year
2.4. Legal and natural persons in scope

- Identification of the type of natural or legal persons that may fall in the scope of REMIT.

- Determination of the personal scope in respect to each of the five main prohibitions and obligations defined in REMIT towards legal and natural persons:

  - (i) Prohibition of insider trading - Article 3(1) of REMIT;
  - (ii) Obligation to publish inside information under Article 4(1) of REMIT;
  - (iii) Prohibition of market manipulation - Article 5 of REMIT;
  - (iv) Obligation to report REMIT data - Article 8 of REMIT and
  - (v) Obligation to register - Article 9(1) of REMIT.
2.5 Exceptions to the general scope

- Chapter 2 updated with the legal references (Articles 3 and 5 and the concept of financial instruments)

- Article 1(2) of REMIT draws a brighter line among the scope of application of the market abuse prohibitions of Articles 3 and 5 of REMIT and the market abuse prohibitions of MAR.

- Accordingly, Articles 3 and 5 of REMIT shall not apply to wholesale energy products which are financial instruments and to which Article 9 of Directive 2003/6/E (and as of the 3 July 2016, Article 2 of MAR)

- Article 1(2) of REMIT does not exclude the application of other Articles of REMIT to any type of wholesale energy product (including the ones that are also financial instruments)
Thank you!

More info?

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New Chapter 5 of the ACER Guidance – Insider trading

REMIT Forum 2021
Michal Miko
ACER - Market Surveillance and Conduct Department
Thursday, 28 October 2021 / 14:00 – 16:30 CET
5.1. Introduction

- Explains the main goals/structure of this new Chapter:
  - More clarity on each of three types of insider trading
  - Provides an updated list of indicators
  - Clarifies the scope of the prohibition
  - Explains the exemptions
5.2. Forms of insider trading

- Includes a table summarising the different forms of insider trading:
  - **On** market vs. **Off** market
  - **Effect** form vs. **Attempted** form of insider trading

<table>
<thead>
<tr>
<th></th>
<th>Attempted form</th>
<th>Effect form</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>On-market</strong></td>
<td>Using inside information by trying to acquire or dispose wholesale energy products</td>
<td>Using inside information by acquiring or disposing of wholesale energy products</td>
</tr>
<tr>
<td><strong>Off-market</strong></td>
<td>Disclosing inside information</td>
<td>Recommending or inducing to acquire/dispose wholesale energy products</td>
</tr>
</tbody>
</table>
5.2. Definitions of insider trading (i)

- Introduces the **legal text** of the insider trading prohibition provision under REMIT.

- Includes new text explaining **each of the 3 types** of behaviour defined in Article 3(1) of REMIT together with examples:

  - **Using** inside information:
    - (i) acquiring or disposing of **wholesale energy product** (or trying to do so);
    - (ii) for its own **account** or for the account of a third party;
    - (iii) **directly or indirectly**;
    - (iv) wholesale energy products to which that **information relates**.

  - **Example:**
    - Using inside information by entering into transactions - **Lack of updates** on Urgent Market Message while trading;
    - Using inside information by trading - **Front running**.
5.2. Definitions of insider trading (ii)

- **Disclosing** inside information:
  - (i) disclosure of (inside) information to any other person; and
  - (ii) disclosure is not made in the normal course of the exercise of their employment, profession or duties.
  - **Example:** Disclosure of inside information from the power plant director to the trade union representative

- **Recommending or inducing trading** on the basis of inside information
  - **Example:** Chief Technology Officer recommendation to an energy trader working at a different company to buy electricity forwards
5.3. List of indicators

• Includes the list of indicators of insider trading.

• Introduces signals and practices:
  
  • Possible signals (isolated elements of actions and market movements that can indicate insider trading):
    
    • Relevant or/and sudden changes in the traded volumes;
    • Relevant and/or sudden change in the prices;
    • Change in the trading behaviour of a market participant;
    • Profit (potential) increase or change;
    • The lack of compliance with other REMIT obligations on inside information.

  • Types of practices (more typified and recurrent combinations of actions that can indicate the possibility of insider trading):
    
    • Front running or pre-positioning;
    • Double Printing.
5.4. Scope of the provision

- Explains who is ‘insider’.

- A non-exhaustive list of examples of the five categories of insiders listed in Article 3(2) of REMIT is provided:

<table>
<thead>
<tr>
<th>Categories of insiders</th>
<th>Non-exhaustive list of examples</th>
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</thead>
</table>
| Members of the administrative, management or supervisory bodies of an undertaking | - Chief executive officer or other members of the management of an undertaking who are exposed to facts that can qualify as inside information;  
- Managers of the control centre deciding on the rescheduling of planned outages;  
- Procurement managers responsible for the purchase/service contracts of the critical parts of a power plant;  
- Members of the supervisory board who are exposed to facts that can qualify as inside information. |
| Persons with holdings in the capital of an undertaking | - Shareholders (natural or legal persons) of the market participant who may be informed about the company’s non-public information;  
- The legal person which possesses information with respect to business or facilities which its parent undertaking or related undertaking, owns or controls or for whose operational matters that legal person or undertaking is responsible, either in whole or in part. |

<table>
<thead>
<tr>
<th>Categories of insiders</th>
<th>Non-exhaustive list of examples</th>
</tr>
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</table>
| Persons with access to information through the exercise of their employment, profession or duties | - A market participant which possesses information with respect to businesses or facilities which it owns or controls or for whose operational matters that market participant or undertaking is responsible, either in whole or in part;  
- A natural person, acting on behalf of the market participant, which possesses information with respect to businesses or facilities which the market participant, 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;  
- PPATs introducing and/or executing orders in the wholesale energy markets on behalf of their clients. |
| Persons who have acquired such information through criminal activity | - IT hackers stealing information from the IT system of the market participant or the IT system of the PPAT used by the market participant;  
- Market participant competitors that may have had access to that information through industrial espionage. |
| Persons who know, or ought to know, that it is inside information | - Administrative staff that deals with the administrative processes regarding power plant unavailabilities;  
- The spouse or friend of an employee of the market participant which typically possesses information with respect to businesses or facilities which the market participant, 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), and that are aware or should be aware of the type of activity that the employee is responsible for and the sensitivity of the information he/she deals with. |
5.4. Scope of provision

• Explains the responsibility of the company (legal person) vs. that of the trader (natural person) emphasising the need for Chinese walls between the traders and operational staff.

• From these categories, it can be concluded that the concept of persons who possess inside information included in REMIT goes well beyond the one of market participants or natural persons acting on their behalf. It is also explicitly acknowledged in Article 3(5) of REMIT, that where the person who possesses inside information is a legal person, the prohibitions laid down in Article 3(1) of REMIT shall also apply to the natural persons who take part in the decision to carry out the transaction for the account of the legal person concerned.

• This puts a particular responsibility on the traders acting on behalf of market participants and invites market participants to have proper compliance measures in place to ensure an appropriate workflow for the inside information handled […].
5.5. Exemption

- Article 3(3) of REMIT provides an exemption for the TSOs from two forms of insider trading, but only ‘when purchasing electricity or natural gas in order to ensure the safe and secure operation of the system in accordance with their obligations under points (d) and (e) of Article 12 of Directive 2009/72/EC or points (a) and (c) of Article 13(1) of Directive 2009/73/EC’.

- Article 3(4) of REMIT grants an exemption from all three forms of insider trading to:
  
  - (a) transactions conducted in the discharge of an obligation […] where that obligation results from an agreement concluded, or an order to trade placed, before the person concerned came into possession of inside information;
  
  - (b) transactions entered into by electricity and natural gas producers, […] 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 TSO(s) concerned in order to ensure safe and secure operation of the system […];
  
  - (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 mechanisms have been suspended in a Member State or parts thereof […].”
Thank you!

More info?

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New Chapter 6 of the ACER Guidance – Market Manipulation

REMIT Forum 2021
Marie-Judith Moriconi
ACER - Market Surveillance and Conduct Department
Thursday, 28 October 2021 / 14:00 – 16:30 CET
6.1. Introduction

- Main goals and structure of this new Chapter:
  - Clarification of the definitions of market manipulation and attempted market manipulation
    - Focus on the four types of manipulation (false/misleading signal, artificial price, use of deception/contrivance, dissemination of false information)
  - Updated list of indicators of market manipulation
    - Signals
    - Types of practices
  - Clarification of the scope of the prohibition
  - Explanation of the exemptions
### 6.2. Definitions of market manipulation and attempted market manipulation

<table>
<thead>
<tr>
<th>Intention</th>
<th>Effect</th>
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<tbody>
<tr>
<td></td>
<td>Likely effect</td>
</tr>
<tr>
<td><strong>On-market</strong></td>
<td></td>
</tr>
<tr>
<td>Giving false/misleading signals</td>
<td></td>
</tr>
<tr>
<td>Securing artificial price</td>
<td></td>
</tr>
<tr>
<td>Using fictitious devices/deception/contrivance</td>
<td></td>
</tr>
<tr>
<td><strong>Off-market</strong></td>
<td></td>
</tr>
<tr>
<td>Disseminating false or misleading information</td>
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</table>

* ‘O/T’ stands for ‘orders or transactions’

**FALSE SIGNAL**

**ARTIFICIAL PRICE**

**MARKET MANIPULATION:**

**INTENTIONAL OR NOT (ERRONEOUS O/T)”**

**BENEFITS OR NOT**
6.2.1. False/misleading signals

Identification of suspicious O/T

Further assessment

- Market participant’s rationale for trading
- Context of the trading activity
- Non-genuine O/T
  - Uneconomical
  - No intention to execute
  - No real interest in buying/selling energy
  - Erroneous
  - ...

False/misleading signals
6.2.1. False/misleading signals

- State of the market before/after the O/T
- Giving false/misleading signals
- Market developments imputable to the suspicious O/T?
- Price level/volume of following O/T
- Characteristics of the suspicious O/T
- Likelihood to give false/misleading signals
- Views of other market participants
- Circumstances at the time of the trading activity
6.2.2. Artificial prices

- No genuine interplay between supply and demand
- Price not reflecting market fundamentals
- Price deviates from the price absent the manipulation (counterfactual price)
- Irrelevant: direction, size, duration of the price deviation
6.2.3. Fictitious devices/deception

- No exclusive focus on the considered O/T
- Any other behaviour giving a fictitious representation of the reality
- Two-legged behaviours: both on-market or a combination of on-market and off-market
- The other leg can precede or follow the considered O/T
- Gives/likely to give false/misleading signals
6.2.4. Dissemination of false information

- Gives/Likely to give false/misleading signals
- ‘Information’ under REMIT
- The person knew or ought to have known
- News providers/market analysts are in scope
- Specific case of journalism – if respect of the press codes
- Direct/indirect link between the information and a WEP
6.3. List of indicators

**SIGNALS**
- Transactions with no change of beneficial ownership
- O/T at/around the opening/closing/settlement time
- Proportion of O/T in the daily volumes

**NON-EXHAUSTIVE LISTS**
- O/T at/around the opening/closing/settlement time
- Proportion of O/T in the daily volumes

**TYPES OF PRACTICES**
- Wash trades
- Transmission capacity hoarding
- Layering
- Quote stuffing
- Phishing

**NOT MARKET MANIPULATIONS PER SE**

List of signals also designed taking into account the Annex I of MAR

List of indicators also designed taking into account the Annex II of Reg. 2016/522
6.4. Scope of the provision

**PERSONS**
- Any natural/legal person
- Public authorities
- Persons using/designing algorithms
- News providers
- PPATs
- etc.

**MARKET MANIPULATION and OTHER BEHAVIOURS**
- Money laundering, corporate or VAT fraud

**Competition law**
6.5. Exemptions

- Securing an artificial price (or attempting to)
- Legitimate reasons
- Accepted market practices
- Case by case assessment

EXEMPTIONS
Thank you!

More info?

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