

REMIT Enforcement

An overview of the cases in the first decade

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REMIT obligations in a nutshell

- REMIT provides a regulatory framework specific to wholesale energy markets that:
- defines market abuse, including market manipulation, attempted market manipulation or insider trading
- explicitly prohibits market abuse
 - See Art 2 for key definitions and extensive ACER guidance
- requires effective and timely public disclosure of inside information by market participants
- obliges firms professionally arranging transactions to report suspicious transactions.

What can be sanctioned?

- **Art 3 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.
- **Art 5 Prohibition of market manipulation**
- Any engagement in, or attempt to engage in, market manipulation on wholesale energy markets shall be prohibited.

These are complex provisions that are applied in a changing market - are they being properly enforced?

Who can sanction and how

- Sanctions lie with NRAs – national legal framework applies -> variation
- **Art 13 Implementation of prohibitions against market abuse**
- 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
- **Art 18** - the penalties provided for must be effective, dissuasive and proportionate, reflecting the nature, duration and seriousness of the infringement, the damage caused to consumers and the potential gains from trading on the basis of inside information and market manipulation.

Proper enforcement –requires proper surveillance

- *Article 7 Market monitoring*
- ACER to monitor trade in energy products to detect and prevent trading based on inside information and market manipulation. It shall collect the data for assessing and monitoring wholesale energy markets (Article 8)
- Division of roles and responsibilities is complex
- between ACER, NRAs
- Between ACER and ESMA
- Between NRAs, NCAs and FSAs

Detection- internal/External

- **Internal NRA detection** - based on monitoring market conditions, as well as on tools aimed at monitoring market segments to detect specific scenarios and behaviour of market participants.
- **External detection** - based on STRs received by various sources and until now, first and foremost, PPATs ->obligation to notify the NRA without delay if they have reason to suspect a breach of REMIT Arts 3 and 5].
- From late 2017, ACER sends alerts to NRAs on a monthly basis highlighting transactions that it deems unusual/suspect. Identify unusual transactions for NRA follow up [CRE reports 394 alerts in 2020]

Changes to market structure->changes to surveillance responsibilities

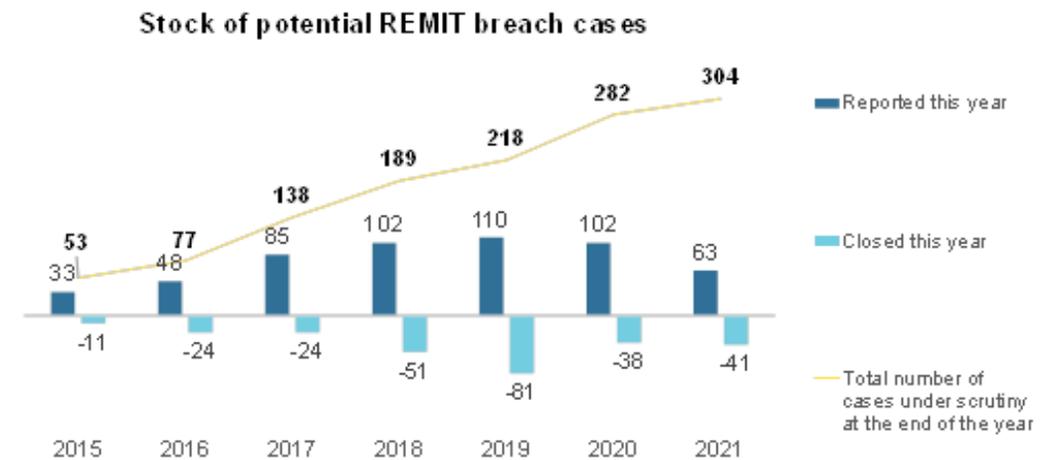
- In 2020 French PEx were integrated into its shareholder EEX. German financial regulator, BaFin is now in charge of monitoring the French futures gas markets for financial support products (already the case for French futures electricity markets).
- This new organization leads to the development of new relationships between CRE, EEX, BaFin and BNetzA

Wholesale energy markets evolving fast – REMIT scope evolves

- Balancing market integration - European secondary reserve (aFRR) will evolve towards market mechanisms, and tertiary reserve (mFRR) contracting will be closer to real time - lead to the development of new markets
- Balancing markets are considered as wholesale energy product trading markets so that the actions of participants on these markets are as such subject to obligations and prohibitions defined under the REMIT Regulation.
- ACER has communicated examples of practices -See ACER REMIT Quarterly, nr 24 Q1 2021

REMIT enforcement is dynamic process

- ACER data reporting centralisation, continuous quality improvements already has impact on surveillance [Impact of REMIT Implementing Regulation 2014]



Snapshot of cases to date

- See for full list:
<https://extranet.acer.europa.eu/en/remit/REMITATACER/Pages/Enforcement-decisions.aspx>
- Important national court decisions emerging – eg VITOL
- Several key cases under appeal

Record fine for InterGen in 2020

- UK NRA - InterGen fined 37.2 million GBP for breaches of Article 5.
- The breach relates to activity in the winter of 2016 - misleading notifications to the ESO.
- The activity occurred on four occasions, and comprised:
 - Submitting misleading Physical Notifications (PN)
 - Submitting misleading Stable Export Limit (SEL) information
- The fine of £35m was reduced to £24m for early settlement. Disgorgement of £12.7m was paid to the operator. There was no separate fine for grid code breach.

INTERGEN/2

- The 4 companies under the InterGen name were deemed to be responsible for violation.
- InterGen deliberately sent false or misleading signals to the British TSO by (i) sending physical notifications that were unrepresentative of their best assessment of the expected generation levels of power plants for a defined period of time
- (ii) sending false or misleading information about specific operational capabilities of their power stations by submitting declarations to the British balancing mechanism in an attempt to boost profits from its business.

VITOL – Euro 5 mil fine

- 5 October 2018, the CRE's CoRDIS held that VITOL S.A. had engaged in market manipulations on the French Southern virtual Gas Trading Point (« PEG Sud »), in breach of Article 5. VITOL S.A. carried out, over the course of 65 cases spread over 54 trading days a modus operandi consisting of the following steps:
 - - First, VITOL S.A. would issue multiple sell orders, generally at the beginning of the trading day (especially before 3 p.m.), when liquidity was low. As the day moves along, VITOL S.A. would issue sell orders at gradually decreasing prices. These sell orders would then decrease after 4 a.m. during the more liquid period of the day;
 - - Second, once prices had decreased, VITOL S.A. would engage in important purchases;
 - Third, after having proceeded with those purchases, VITOL S.A. would cancel its sell orders to finish the day as a net buyer.
- VITOL S.A.'s modus operandi was, on the one hand, likely to give the market misleading signals as to the supply or demand on the PEG Sud and, on the other hand, in the absence of any counter-evidence from VITOL S.A., this behaviour did not follow a rational economic logic.

VITOL/2 – appeal to French courts

- **Conseil d'Etat** considered that there was no irremediable infringement of the rights of defence, even though the defendant had **not** been:
 - informed by the CRE's President of the referral to the CoRDIS including the minutes and the company's observations, since no text provides for this information;
 - invited by the designated member of CoRDIS to present its before the notification of grievances was sent, since that it was given the opportunity to do so after the sending of this notification;
 - heard by the designated member of CoRDIS, since this possibility is an option at the discretion of that member; and,
 - informed by the designated member of the amount of the sanction he intended to propose to the CoRDIS, since article R. 134-32 of the Energy Code and article 14 of CoRDIS's bylaws only require to communicate the nature of the sanction.
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- NB Pending appeal has also been lodged with the Conseil d'Etat against the CoRDIS's fine of 1 million euros on BP Gas Marketing

Some NRAs activity both more intense and better documented

- 2014 and 2019, CRE opened 9 investigations under the REMIT Regulation, broken down as follows:
 - 2 investigations in 2014,
 - 3 in 2016,
 - 2 in 2017,
 - 1 in 2018,
 - 1 in 2019. No investigations were opened in 2020.

Takeaways

Endorsement by National Courts

- Court decisions upholding fines emerging: VITOL
- Strengthens NRAs role and confidence
- Precedents may have wider relevance beyond national boundaries

Takeaways/2

- Penalties increasing in some jurisdictions :UK
- But minor in others: Denmark ? Germany? Are uniform penalties needed?
Could ACER guidance help?
- Informal settlements still preferred? ACM/Ofgem

Takeaways/3

- **Coordination is key**
- PPATs may be active in several countries, so a coordinated approach at European level (between all regulators) may be implemented to ensure a more systematic follow-up of surveillance activities.
- Growing importance of shared monitoring on basis of centralised data collection– the digital footprint and dinosaur tracks!

Takeaways/4

- Do NRAs have sufficient resources? Note small fines in eg. Lithuania, Romania – but Denmark?
- And sufficient resolve to pursue complex cases ?
- **Do we need more centralisation -> cf financial sector**
- Cf Regulation 2019/21752, on the powers, governance and funding of the ESAs [The supervision of a critical benchmark should therefore take a holistic view of potential impacts, not only in the Member State where the administrator is located and the Member States where its contributors are located, but across the entire Union].

A final warning note – dinosaur footprints are difficult to erase



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