

(To be filled out in the EDPS' office)
REGISTER NUMBER: 1322

(To be filled out in the EDPS' office)

NOTIFICATION FOR PRIOR CHECKING

DATE OF SUBMISSION: 10/08/2015

CASE NUMBER: 2015-0657

INSTITUTION: ACER - AGENCY FOR THE COOPERATION OF ENERGY REGULATORS

LEGAL BASIS: ARTICLE 27-5 OF THE REGULATION CE N° 45/2001⁽¹⁾

INFORMATION TO BE GIVEN²

1/ NAME AND ADDRESS OF THE CONTROLLER

Agency for the Cooperation of Energy Regulators (the “Agency”)
Trg republike 3
SI-1000 Ljubljana
Slovenia

2/ ORGANISATIONAL PARTS OF THE INSTITUTION OR BODY ENTRUSTED WITH THE PROCESSING OF PERSONAL DATA

The Agency’s department in charge of processing of personal data is the Market Monitoring Department, in the person of:

Mr Volker Zuleger, Head of Market Monitoring Department,
Postal address: Agency for the Cooperation of Energy Regulators (ACER)
Trg republike 3
SI-1000 Ljubljana, Slovenia
E-mail: market.conduct@acer.europa.eu

3/ NAME OF THE PROCESSING

The reception of notifications relating to potential breaches of REMIT through the Notification Platform (“NP”) created by the Agency for this purpose.

¹ OJ L 8, 12.01.2001.

² **Please attach all necessary backup documents**

4/ PURPOSE OR PURPOSES OF THE PROCESSING

The purpose of the processing is to comply with the tasks entrusted to the Agency in Regulation (EU) No 1227/2011 of the European Parliament and the Council of 25 October 2011 on wholesale energy market integrity and transparency (“REMIT”)³. The following is an overview of REMIT and the NP.

I. Legal framework: REMIT

a. Tasks entrusted to the Agency

The Agency, in collaboration with national regulatory authorities (“NRAs”), is entrusted by REMIT with monitoring the trading activities in wholesale energy products to detect and prevent insider trading and market manipulation (Article 7 of REMIT).

Further, the Agency shall ensure coordination and consistency in the application of REMIT by NRAs at national level (Article 16).

The Agency shall at least on an annual basis submit a report to the European Commission on its activities under REMIT (Article 7(3)).

b. Tasks entrusted to other authorities/persons

(i) NRAs

NRAs shall cooperate at regional level and with the Agency in carrying out the monitoring of European wholesale energy markets. NRAs may also monitor trading activity in wholesale energy products at national level (Article 7(2) of REMIT).

NRAs shall without delay inform the Agency in as specific a manner as possible where they have reasonable grounds to suspect that acts in breach of REMIT are being, or have been, carried out either in that Member State or in another Member State (Article 16(2)).

NRAs shall inform the competent financial authority of their Member State and the Agency where they have reasonable grounds to suspect a market abuse within the meaning of Directive 2003/6/EC⁴ (Article 16(3)(a)).

NRAs shall inform the national competition authority of their Member State, the Commission and the Agency where they have reasonable grounds to suspect a breach of competition law carried out on wholesale energy markets (Article 16(3)(d)).

REMIT entrusts NRAs with the implementation of REMIT at national level (Article 13). They shall have the investigatory and enforcement powers necessary to ensure that the market abuse prohibitions set out in REMIT are applied.

(ii) Competent financial authorities of the Member States (CFAs)

Competent financial authorities of the Member States shall inform the European Securities and Markets Agency (“ESMA”) and the Agency where they have reasonable grounds to suspect that acts

³ Regulation (EU) No 1227/2011 of the European Parliament and the Council of 25 October 2011 on wholesale energy market integrity and transparency (“REMIT”). See **supporting document 1**.

⁴ Directive 2003/6/EC of the European Parliament and the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0006&from=EN>.

in breach of REMIT are being, or have been, carried out on wholesale energy markets in another Member State (Article 16(3)(c)).

(iii) Persons professionally arranging transactions (“PPATs”)

Pursuant to Article 15 of REMIT, any person professionally arranging transactions in wholesale energy products who reasonably suspects a breach of REMIT shall notify the national regulatory authority without further delay.

PPATs are encouraged to comply with their reporting obligation using the Agency’s NP, so that the Agency can also be notified the suspicious breach, what is primordial for the Agency to be able to ensure that NRAs perform their activities under REMIT in a consistent way (as required by Article 16(1) of REMIT).

(iv) Market Participants (“MPs”)

In some cases, MPs willing to benefit from the exemptions/delays provided for in REMIT are subject to notification obligations.

Pursuant to Article 3(4)(b) of REMIT, the prohibition of insider trading shall not apply to 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**.

Pursuant to Article 4(2) of REMIT, a market participant may under its own responsibility exceptionally delay the public disclosure of inside information so as not to prejudice its legitimate interests provided that such omission is not likely to mislead the public and provided that the market participant is able to ensure the confidentiality of that information and does not make decisions relating to trading in wholesale energy products based upon that information. In such a situation the market participant **shall without delay provide that information, together with a justification for the delay of the public disclosure, to the Agency and the relevant national regulatory authority** having regard to Article 8(5).

c. Breaches of REMIT

Breaches of REMIT are liable to penalties (Article 18). In practice, these penalties can be either administrative or criminal depending on national procedural arrangements.

d. Confidentiality and professional secrecy

According to the requirements set out in Article 12(1) of REMIT, the Agency shall ensure the confidentiality, integrity and protection of the information collected under REMIT. An equivalent obligation applies to the authorities receiving such data from the Agency.

In accordance with Article 17(1) of REMIT, any confidential information received, exchanged or transmitted pursuant to this Regulation shall be subject to professional secrecy conditions detailed in this Article.

Confidential information received in compliance with REMIT may not be divulged to any other person or authority, except in summary or aggregate form such that an individual market participant or market place cannot be identified, without prejudice to cases covered by criminal law, other provisions of this Regulation or other relevant Union legislation (Article 7(3) of REMIT).

II. The NP: a secure notification channel

The NP is a web application through which the NRAs, the CFAs, the MPs and the PPATs can notify incidents to ACER and NRAs.

As described above, reports on the NP shall either relate to :

- justifying benefitting from an exemption or delay (MPs)
- notifying information relating to potential breaches of REMIT (NRAs, CFAs, PPATs).

The purpose of establishing the NP is to collect within one system all the information relevant to the suspected breaches of REMIT as notified by NRAs, CFAs or PPATs, and centralize information from MPs relevant to delayed disclosure of inside information and to the exemption from the prohibition of insider trading.

5/ DESCRIPTION OF THE CATEGORY OR CATEGORIES OF DATA SUBJECTS

The following categories of data subjects can be identified:

- Group 1 - **Agency's staff members and NRAs' staff members** authorised to use the NP.
- Group 2 - The person, in case it is a natural person, **submitting the notification on the NP**, it being related to :
 - benefitting from an exemption or delay (MPs)
 - **a possible REMIT breach** (NRAs, CFAs, PPATs, MPs)
- Group 3 – **The person(s), in case it is a natural person, involved in, or associated with, the possible REMIT breach.**

6/ DESCRIPTION OF THE DATA OR CATEGORIES OF DATA

(including, if applicable, special categories of data (Article 10) and/or origin of data)

The Agency will process the following personal data of the Agency's and NRAs' staff members (Group 1):

- Full name of the staff member;
- Organisation concerned;
- Professional title of the staff member;
- Contact details of the staff member (Business Address, Phone and Email).

The Agency will process the following personal data of the person submitting the notification on the NP (Group 2):

For MPs justifying benefitting from an exemption or delayed disclosure:

- Full name of the person submitting the notification;
- Contact details of the person submitting the notification (Business Address, Phone and

Email);

- Full name of the MP concerned;
- The ACER code of the MP.

For NRAs, CFAs, PPATs or MPs notifying information relating to potential breaches of REMIT:

- Full name of the person submitting the notification;
- Organisation of the person submitting the notification;
- Contact details of the person submitting the notification (Business Address, Phone and Email);
- Role of the notifying party;
- ACER code of the notifying party, if any;
- Identification of the PPAT (*unique identification code - EIC,BIC,LEI,GLN,VAT,ACER,MIC*).

The Agency will process the following personal data of the person involved in the potential breach or any other person associated to the possible breach (Group 3):

- Full name of the person(s) involved in /associated with the potential breach;
- Identification code type of the person(s) involved /associated to the potential breach (*unique identification code - EIC,BIC,LEI,GLN,VAT,ACER,MIC*);
- Identification of the PPAT (*unique identification code - EIC,BIC,LEI,GLN,VAT,ACER,MIC*).
- Other details of the natural person(s) involved in /associated with the potential breach, that may be relevant to the case (e.g., the fact that the person is acting on behalf of another, etc.);
- Contact details of the person(s) involved in /associated with the potential breach (Business Address, Phone and Email);
- Details about the potential breach.

7/ INFORMATION TO BE GIVEN TO DATA SUBJECTS

In compliance with Section 4 of Regulation (EC) No 45/2001, the different categories of data subjects will be given different information, depending on the way the Agency has obtained their personal data:

- Agency and NRAs' staff members and persons submitting notifications on the NP (**Groups 1 and 2**) provide themselves their personal data to the Agency.

These data subjects are informed that their data will be processed by the Agency. A data privacy statement will be included:

- For NRAs and Agency's staff members (**Group 1**), in the "Privacy Statement- using the NP" to be consulted and accepted by the NP's users when activating their user account (*see supporting document 2*). Note: for users who have already activated their user account, the Privacy Statement – using the NP will be sent by email;
- For persons submitting notifications on the NP (**Group 2**), in the "Privacy Statement – notifying through the NP" accessible through a link on the NP (*see supporting document 3*).

In these privacy statements, the Agency provides data subjects with information on:

- The identity of the controller in practice, and his/her contact details;
 - The purpose of the processing;
 - The lawfulness of the processing operation;
 - The recipients of the data processed;
 - Categories of data collected and processed;
 - Data storage and data retention policy;
 - Data subject rights.
- Data on person(s) involved in or associated with possible REMIT breaches (**Group 3**) will be collected on the NP from sources other than the data subjects.

This is so because these data subjects are suspected to be involved in or associated with possible infringements of the REMIT Regulation, detected by third parties. If these data subjects were informed on the processing of their data, and could access it, they would have the opportunity to destroy evidence, which would compromise any investigation and eventually the enforcement of REMIT.

In order to safeguard the “effet utile” of the REMIT Regulation, the Agency considers that the processing of data on person(s) involved in or associated with possible REMIT breaches should fall within the exemption scope of Article 20(1) (a) and (e) of Regulation (EC) No 45/2001. Indeed, restricting the application of the Regulation (EC) No 45/2001 Articles listed in its Article 20(1) (a) and (e) (and notably of Article 12 on the provision of information to data subjects) constitutes a necessary measure to safeguard the prevention, investigation, detection and prosecution of REMIT breaches⁵, as well as the monitoring, inspection and regulatory tasks connected with the enforcement of REMIT.

8/ PROCEDURES TO GRANT RIGHTS OF DATA SUBJECTS (Rights of access, to rectify, to block, to erase, to object)

The rights of data subjects are defined by Regulation (EC) No 45/2001. In particular, data subjects have the right of i) access, ii) rectification, iii) blocking of data, and iv) erasure (if such needs arise and are duly supported by evidence) of their personal data.

The data privacy statements mentioned in Section 7/ above make a reference to the data subjects’ rights as defined by Regulation (EC) No 45/2001, and recall data subjects that they can exercise them contacting/consulting either (i) the Agency’s controller; (ii) the Agency’s data protection officer; or (iii) the European Data Protection Supervisor, using the contact details provided therein.

As developed in Section 7/ above, in order to safeguard the “effet utile” of the REMIT Regulation and the possibility for NRAs to enforce this Regulation, restrictions to the rights described above should apply to the data subjects involved in or associated to possible REMIT breaches, in accordance with Article 20(1) (a) and (e) of Regulation (EC) No 45/2001.

9/ AUTOMATED / MANUAL PROCESSING OPERATION

The different kinds of data processed through the NP, which is an IT-tool, are subject to automated processing operation.

⁵ REMIT breaches might qualify as criminal offences in the jurisdiction of certain Member States. In other Member States, they qualify for administrative penalties, considered by analogy as criminal penalties when it comes to the application of the “fair trial” principles embodied within Article 6 of the European Convention of Human Rights.

Only the transfer of the data to another competent authority not having access to the NP (so other than ACER and NRAs), as provided for by REMIT cooperation obligations (see the list of other competent authorities to whom the data might be disclosed in section 12/ below), might be realised manually (by secured post).

10/ STORAGE MEDIA OF DATA

The data processed in the NP is stored in the application's database. The NP application is hosted in the Agency's Data Centre at which the services are provided by an external supplier under a Framework Contract.

The user data of ACER's staff and NRAs' staff is also registered in the database of the Agency's Service Management tool, used by the Central Service Desk (CSD) agents in order to identify and verify users' identity when the latter request support via phone and/or email.

The personnel authorised to access and process the data is strictly limited to duly authorised ACER's and NRAs' staff. External contractors in charge of the service development and maintenance of the storage media are bound by the confidentiality rules and data protection provisions established according to the Framework Contracts in place.

All data is stored by an external contractor on magnetic and SSD (solid-state drive) storage media. In order to protect the data in case of a natural disaster, the data will be stored at two different secure premises.

11/ LEGAL BASIS AND LAWFULNESS OF THE PROCESSING OPERATION

In line with Article 5 (a) and (b) of Regulation (EC) No 45/2001, the processing is necessary for the performance of a task carried out in the public interest and for compliance with a legal obligation to which the controller is subject pursuant to a Regulation of the European Parliament and of the Council (REMIT), adopted on the basis of the Treaty on the Functioning of the European Union.

The legal basis (stemming from the REMIT Regulation) of the processing operation through the NP are extensively described in Section 4/ of this document.

12/ THE RECIPIENTS OR CATEGORIES OF RECIPIENT TO WHOM THE DATA MIGHT BE DISCLOSED

In line with the purposes of data processing, personal data in the NP might be disclosed to the following recipients or categories of recipients:

- Authorised staff from the NRAs;
- Authorised staff of the Agency working at the Market Monitoring Department, the Head of the Market Monitoring Department and the Agency's Director;
- Other competent authorities with which the Agency or NRAs are required to cooperate pursuant to REMIT (Article 1(3) and 16 of REMIT):
 - Competent financial authorities (Article 16(3)(a) and (b) of REMIT);
 - The European Securities and Markets Agency (ESMA) (Article 16(3)(b) of

REMIT);

- National competition authorities (Article 16(3)(d) of REMIT);
- The European Commission (Article 16(3)(d) of REMIT);
- Other authorities or competent judicial authorities also entrusted with investigatory and enforcement powers as per Article 13(1) of REMIT.

On an exceptional basis and after the Agency's prior consent, personal data might also be disclosed to the following entities:

- Contractors responsible for the development and maintenance of the NP;
- Contractors providing hosting services for the NP; and
- Contractors managing the Central Service Desk of the Agency.

Disclosure of personal data to these companies is realised in the execution of Framework and Specific Contracts. Contractors are bound by the confidentiality rules and data protection provisions established therein.

If appropriate, access will be given to the European Court of Auditors, the European Ombudsman, the European Data Protection Supervisor, the General Court of the European Union, the European Court of Justice and the Civil Service Tribunal. If requested, personal data can also be disclosed to the European Anti-Fraud Office (OLAF).

13/ RETENTION POLICY OF (CATEGORIES OF) PERSONAL DATA

The data retention period is foreseen:

- For data subjects of Group 1, for 10 years after not being a user of the NP;
- For data subjects of Groups 2 and 3, for 10 years after the notification containing the personal data.

Different limitation periods for the prosecution of breaches of REMIT are applicable across the European Member States. As a result, it is necessary to retain the data for a period long enough for NRAs to prosecute such breaches.

13 A/ TIME LIMIT TO BLOCK/ERASE ON JUSTIFIED LEGITIMATE REQUEST FROM THE DATA SUBJECTS *(Please, specify the time limits for every category, if applicable)*

Personal data will be erased after a 10 years period (for more information on data retention period please see Section 13/ above). This is without prejudice to the data subjects' rights (within Groups 1 and 2) to request the blocking or erasure of their data before the expiry of this 10 years period if they are legitimate to do so pursuant to Regulation (EC) No 45/2001.

14/ HISTORICAL, STATISTICAL OR SCIENTIFIC PURPOSES

(If you store data for longer periods than mentioned above, please specify, if applicable, why the data must be kept under a form which permits identification)

Despite the fact that statistical purposes do not explain the 10 years retention period (which is justified by the necessity to ensure that REMIT breaches can be properly investigated and prosecuted), data in the NP might be used to create statistics on the number of notifications received by the Agency and their originating geographic area, to be for instance published in the Agency's

annual report on REMIT.

15/ PROPOSED TRANSFERS OF DATA TO THIRD COUNTRIES OR INTERNATIONAL ORGANISATIONS

Not applicable.

16/ THE PROCESSING OPERATION PRESENTS SPECIFIC RISK WHICH JUSTIFIES PRIOR CHECKING (*Please describe*)

AS FORESEEN IN:

Article 27.2.(a)

(Processing of data relating to health and to suspected offences, offences, criminal convictions or security measures,)

In the NP, data related to possible REMIT breaches will be processed. These data are thus related to “suspected offences, offences, criminal convictions” in the sense of Article 27(2)(a) of Regulation (EC) No 45/2001.

Article 27.2.(b)

(Processing operations intended to evaluate personal aspects relating to the data subject,)

Article 27.2.(c)

(Processing operations allowing linkages not provided for pursuant to national or Community legislation between data processed for different purposes,)

Article 27.2.(d)

(Processing operations for the purpose of excluding individuals from a right, benefit or contract)

Other (general concept in Article 27.1)

17/ COMMENTS

As a general comment, the Agency would like to stress the importance, in view of safeguarding the “effet utile” of the REMIT Regulation, the investigation and enforcement possibilities of NRAs, for Article 20 of Regulation (EC) No 45/2001 on exemptions and restrictions to apply to the data concerning persons suspected of REMIT breaches.

Any disclosure related to the processing of data to the suspected parties might endanger the investigations, hinder the application of REMIT and eventually the integrity and transparency of wholesale energy markets.

PLACE AND DATE: LJUBLJANA, SLOVENIA; 10 AUGUST 2015

DATA PROTECTION OFFICER: MS. KATE BOUSFIELD-PARIS

INSTITUTION OR BODY: AGENCY FOR THE COOPERATION OF ENERGY REGULATORS (ACER)

1322/2015-0657