

(To be filled out in the EDPS' office)

NOTIFICATION FOR PRIOR CHECKING

DATE OF SUBMISSION: 29/06/2015

CASE NUMBER: 2015-0545

INSTITUTION: ACER

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 the personal data is the Market Monitoring Department.

Mr Volker Zuleger, Head of Market Monitoring Department,
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¹ OJ L 8, 12.01.2001.

² **Please attach all necessary backup documents**

3/ NAME OF THE PROCESSING

The exchange of information between the Agency and national regulatory authorities (“NRAs”) relating to potential breaches of 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 through the Case Management Tool (the “CMT”).

4/ PURPOSE OR PURPOSES OF THE PROCESSING

The purpose of the processing is to comply with the tasks entrusted to the Agency and NRAs in REMIT. The following is an overview of REMIT and the CMT.

I. Legal framework: REMIT

a. Tasks entrusted to the Agency and NRAs

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

REMIT entrusts NRAs with 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.

b. 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.

In respect of breaches of REMIT, various cooperation obligations between the Agency and NRAs are foreseen (Article 16). In particular, NRAs shall cooperate with the Agency and with each other, including at regional level, for the purpose of carrying out their duties in accordance with REMIT (Article 16(1) para 3). Further, 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)).

In accordance with Article 16(4), if the Agency suspects a breach of REMIT, it shall have the power to :

- Request one or more NRAs to supply any information related to the suspected breach;
- Request one or more NRAs to commence an investigation of the suspected breach, and to take appropriate action to remedy any breach found;
- Where it considers that the possible breach has, or has had, a cross-border impact, establish and coordinate an investigatory group consisting of representatives of concerned NRAs.

c. Confidentiality and professional secrecy

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**.

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 CMT: a secure and reliable communication channel

The CMT is an IT-tool through which the Agency and NRAs shall exchange information relating to potential breaches of REMIT.

In order for the Agency and NRAs to exchange information relating to potential breaches of REMIT (the “Case(s)”), a secure and reliable communication channel is needed. The CMT is thought to be such a tool.

a. Characteristics of the CMT

- Coordination: the CMT allows participants to interact and share information within a single IT-tool. Reduces dependency on email systems and unmanaged file share.
- Consistency: Process-led case lifecycle management internal to the system. All Cases go through the same workflow and are labelled with the same metadata for ease of comparison, filtering and searching.
- Completeness: the CMT enables notification mechanisms to assure submitters of Case-related data that information is complete before the Case file is transitioned to the next phase of the process.
- Security: the CMT introduces auditing and tracking opportunities to determine which (natural) persons had access to specific information and what actions those individuals took during the process. The application will be independently tested and certified for IT security.
- Access: user rights management allows only authorised users to access the appropriate information for them.
- Timeliness: the CMT enables communication between those creating, updating and approving Cases. Whenever an action is needed from any of these parties, a deadline can be associated with it in the system.

b. Use of the CMT

Specifically, the CMT will be used by the Agency and NRAs to:

- Receive/send information on Cases and related actions as foreseen in Article 16 (4) of REMIT;
- Access Case materials and Case-specific information; and/or
- Upload and/or download information; and/or
- Retrieve relevant information; and/or
- Perform analysis related to specific information and requests.

The CMT will enable the Agency and NRAs to follow the Cases’ lifecycle from their opening to their closing (either because the Case has been dismissed, or because a NRA has issued a final decision).

c. Purpose of using the CMT

The use of the CMT will enable:

- Implementation of the Multilateral Memorandum of Understanding between the Agency NRAs concerning cooperation and coordination of market monitoring under REMIT⁴;
- NRAs and the Agency to coordinate actions, interacting and sharing information via a single platform;
- NRAs and the Agency to exchange and store Case materials in a secure and consistent manner;
- The Agency to establish and maintain a customised application ensuring a coordinated and consistent approach to market abuse on European wholesale energy markets.

5/ DESCRIPTION OF THE CATEGORY OR CATEGORIES OF DATA SUBJECTS

The following categories of data subjects can be identified:

- **Group 1 - NRAs' staff members** authorised to use the CMT system, including the:
 - Functional Administrator: has administrative rights and serves as a first point of contact for the Liaison Officer and the Case Handler in case of technical issues;
 - Liaison Officer: serves as a single point of contact that facilitates the communication and collaboration on case handling between ACER and the NRA;
 - Case Handler: has operational responsibility for the case.

and Agency's staff members assigned to the treatment of the Cases, the:

- Case Handler : is responsible for the day-to-day tasks of Case management;
 - Legal Case Counsellor: advises on Case-related legal issues;
 - Team Leaders for the Market Monitoring Department.
- **Group 2 - The person**, in case it is a natural person, **submitting the notification of a possible REMIT breach**. This group may include persons professionally arranging transactions (PPATs), when acting in compliance with Article 15 of REMIT.
 - **Group 3 – The person(s), in case it is a natural person, involved in, or associated with, the possible REMIT breach**. The person(s) could be a PPAT.

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 NRAs' and Agency's staff members (Group 1):

- Full name of the staff member;
- Organisation concerned;
- Professional title of the staff member;
- Function in relation to the CMT/the particular Case;
- Contact details of the staff member (Business Address, Phone and Email).

⁴ Multilateral Memorandum of Understanding between the Agency for the Cooperation of Energy Regulators and National Regulatory Authorities and market monitoring bodies concerning cooperation and coordination of market monitoring under Regulation (EU) No. 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency (REMIT). **See supporting document 2.**

The Agency will process the following personal data of the person notifying about a possible REMIT breach (Group 2):

- Full name of the person submitting the notification;
- Organisation of the person submitting the notification;
- Professional role of the person submitting the notification;
- Contact details of the person submitting the notification (Business Address, Phone and Email);
- In case this person is a PPAT:
 - PPAT category (*Select the type of the PPAT involved : Energy Exchange, Broker, Cross border capacity allocation platform/ TSO organising gas trades, Sleeve, Other*);
 - Identification of the code type of the PPAT (*Select the correct type of the 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;
- In case of a PPAT: PPAT category (*Select the type of the PPAT involved : Energy Exchange, Broker, Cross border capacity allocation platform/ TSO organising gas trades, Sleeve, Other*);
- Identification code type of the person(s) involved /associated to the potential breach (*Select the correct type of the 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:

- NRAs and Agency's staff members, persons submitting notifications of a possible REMIT breach (Groups 1 and 2) provide themselves their personal data to the Agency.

These data subjects will be informed that their data will not be publicly available. A data privacy statement will be included:

- For NRAs and Agency's staff members, in the "Privacy Statement- the Case Management Tool" to be consulted and accepted by the CMT users when activating their user account (*see supporting document 3*);
- For persons submitting notifications of a possible REMIT breach, including PPATs, in the "Privacy Statement" communicated along with the acknowledgement of receipt of the notification or information provided (*see supporting document 4*).

In this data privacy disclaimer, the Agency will provide 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 CMT 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 disclaimers 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 CMT, which is an IT-tool, are subject to automated processing operation.

Only the transfer of the data to another competent authority not having access to the CMT, as provided for by REMIT cooperation obligations, might be realised manually (by secured post).

10/ STORAGE MEDIA OF DATA

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.

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

Similarly, the Service Management tool is also hosted in the Agency's Data Centre and services are provided by an external contractor under a Framework Contract.

The personnel authorised to access and process the data is strictly limited to duly authorised NRAs and ACER 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 storage media. In order to protect the data in case of a natural disaster, the data will be stored at two different 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 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 CMT 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, and depending on the peculiarities of the Case at stake, personal data in the CMT might be disclosed to the following recipients or categories of recipients:

- Authorised staff from the NRAs (Case Handler, his/her hierarchy, Liaison Officer, Functional Administrator);
- 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 :
 - 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 CMT;
- Contractors providing hosting services for the CMT; 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 CMT;
- For data subjects of Groups 2 and 3, for 10 years after the closing of the Case.

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 CMT might be used to create statistics on the number of Cases (opened, pending or closed) dealt with 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

Pursuant to Article 19 of REMIT, the Agency may develop contacts and enter into administrative

arrangements with supervisory authorities, international organisations and the administrations of third countries in so far as it is necessary to achieve the objectives set out in REMIT.

These arrangements might provide for the cooperation and exchange of information between the Agency and the concerned authority, so as to enable a proper investigation and enforcement of REMIT.

These arrangements (such as the Memorandum of Understanding concluded between the Agency and the United States Federal Energy Regulatory Commission⁶) always contain confidentiality and data protection provisions.

In compliance with Article 9 of Regulation (EC) No 45/2001, the Agency will proceed to the transfer of data solely to allow tasks covered by the competence of the controller to be carried out, and when the adequate level of protection is ensured in the country of the recipient.

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 CMT, 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)

⁶ See supporting document 5.

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; 26 JUNE 2015

DATA PROTECTION OFFICER: MS. KATE BOUSFIELD-PARIS

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