



This is an English translation of the fining decision in case number ACM/20/042695 (reference ACM/UIT/577822). Please note that, although every effort has been made to ensure this translation is accurate and consistent, it is for informational purposes only. In case of any dispute or inconsistencies, the Dutch version is authentic.

## Decision

Our reference : ACM/UIT/582701  
Case number : ACM/20/042695  
Date : April 29, 2022

## Summary

All European member states have the same rules aimed at preventing insider trading and market manipulation in the wholesale energy market. These rules are laid down in REMIT. Article 4 of REMIT requires market participants to publicly disclose inside information in an effective and timely manner. This obligation ensures that market participants have equal access to information, so that they can estimate supply and demand in the wholesale energy market properly. ACM has established that, on several occasions, PZEM failed to publish in an effective manner, in a timely manner and/or failed to publish at all inside information regarding the production capacity of a power plant. On the basis of these violations of Article 4 of REMIT, ACM has decided to impose a fine of 150,000 euros on PZEM.

## 1 Course of the procedure

1. On October 29, 2020, the Energy Department of the Netherlands Authority for Consumers and Markets (ACM) published a statement of objections, which states that PZEM Energy B.V. (hereinafter: PZEM) committed several violations of Article 3 and Article 4 of Regulation (EU) no. 1227/2011 of October 25, 2011, on wholesale energy market integrity and transparency (hereinafter: REMIT). The statement of objections was sent to PZEM on October 29, 2020.
2. ACM's Energy Department handed over the statement of objections to ACM's Legal Department. On November 10, 2020, this department sent the file associated with the statement of objections to PZEM.
3. On February 5, 2021, PZEM submitted a written opinion in response to the statement of objections.
4. In 2021, ACM and PZEM explored whether a simplified procedure was feasible. These exploratory discussions produced no concrete result.
5. On March 15, 2022, a hearing took place at the offices of ACM. At that hearing, PZEM was given the opportunity to explain its opinion in greater detail. The minutes of the hearing were sent to PZEM on April 4, 2022.

## 2 Statement of objections

6. The statement of objections (hereinafter: the statement) describes several practices of PZEM in connection with inside information on the availability (or unavailability) of the Sloecentrale in multiple self-contained incidents/periods. PZEM owns the Sloecentrale jointly with Electricité de France S.A. (hereinafter: EDF) and is jointly responsible with EDF for the production of electricity from the Sloecentrale. The Sloecentrale has two production units, each with a nominal maximum capacity of 435 MW.
7. The statement identifies nine practices of PZEM, namely practices 1A, 1B, 2A, 2B, 3A, 3B, 3C, 3D and 4. In this decision, ACM assesses whether the use of its fining power is appropriate with regard to practices 1A and 3B. With regard to the other practices, ACM will not initiate any follow-up actions in connection with the practices described in the statement. A brief summary of practices 1A and 3B is given below, together with their legal qualification in the statement. Section 2 provides an overview of the facts relevant to the assessment.
8. Practice 1A relates to the failure to publish and failure to publish in a timely manner a production restriction. According to the statement, information regarding this market restriction is information that could have significantly affected the prices of energy products; other market participants would be likely to use this information as part of the basis of their trading decisions if they could access it. This information is therefore considered inside information within the meaning of Article 2 of REMIT.
9. According to the statement, PZEM violated the obligation to disclose its inside information in an effective and timely manner, as referred to in Article 4 of REMIT, by:
  - not publishing information on the market restriction for Sloe 10 until May 5, 2017, whereas it had already been aware of the imminent restriction for a considerable time and was already trading in energy products to which that inside information was relevant;
  - not publishing information on the must run of Sloe 20 described below in Marginal 12.
10. Practice 3B relates to the incorrect publication of the time of the end of the unavailability of production facilities and to failure to publish the partial availability in the afternoon. The statement characterizes this information as information that could have a significant effect on the prices of energy products; other market participants would be likely to use this information as part of the basis of their trading decisions if they could access it. This information is therefore considered inside information within the meaning of Article 2 of REMIT.
11. According to the statement, on January 10, 2019 PZEM violated the obligation to disclose its inside information in an effective and timely manner, as referred to in Article 4 of REMIT, by:
  - at the beginning of the afternoon of January 10, 2019, publishing information on the expected end time of the full unavailability of Sloe 20 that deviated from the inside information that it held on this matter, and by not publishing its inside information on the limited availability / partial unavailability of Sloe 20.
    - Whereas PZEM was aware that Sloe 20 would produce electricity from 13:00 to 16:15 with limited available capacity (and was therefore partially unavailable), it published information at 12:42 stating that the unavailability of the capacity of Sloe 20 would end at 13:30; PZEM did not publish any information on the significantly limited availability / partial unavailability of Sloe 20 in the afternoon.
  - failing to disclose the published inside information in a timely manner, i.e. at least before trading in energy products to which that inside information was relevant.

### 3 Facts and circumstances

### 3.1 Relevant facts of practice 1A (publication of TenneT market restriction)

12. On January 24, 2017 the national transmission system operator TenneT requested PZEM to quote prices for a production restriction (referred to in practice and hereinafter as a market restriction) of the Sloecentrale in weeks 19 - 21 of 2017. This was in connection with maintenance on the TenneT network. In order to give TenneT a price quotation, PZEM's trading department carried out price calculations based on simulation models in February 2017. PZEM sent TenneT the requested price quotation on March 1, 2017. The quotation was adjusted in the following weeks in response to a change in the restriction requested by TenneT. On April 14, 2017, at 15:23, agreement was reached with TenneT on the market restriction for the Sloecentralet and the fee that TenneT would pay PZEM for it. An agreement was signed to that effect on April 20, 2017. The market restriction meant that one of the Sloecentrale's production units (it has two: Sloe 10 and Sloe 20) was not permitted to generate power from May 8, 2017 to May 20, 2017 and from May 22 to May 24, 2017; the other production unit had to generate power during this period with a capacity between a minimum of 220 MW and a maximum of 400 MW (a must run).
13. PZEM disclosed information on this market restriction – also on behalf of EDF – for the first time on May 5, 2017 by publishing it on its website for REMIT notifications. It did so after EDF had informed PZEM that its traders had warned that the market restriction had not yet been published. However, the information that PZEM subsequently published was limited to the information that Sloe 10 was unavailable during the period of the market restriction. PZEM never disclosed information on the must run of Sloe 20. It also follows from the statement that PZEM entered into various transactions in relevant products in the period between April 14, 2017 and May 5, 2017.<sup>1</sup>

### 3.2 Relevant facts of practice 3B (publication of Sloe 20 operating plan)

14. Sloe 20 started up on January 10, 2019 after being unavailable from January 7 to January 9. This start-up failed. Another attempt was made to start up Sloe 20 later that day. At 08:30 PZEM published information stating that the restriction of the available capacity of Sloe 20 would end at 14:00. The Sloecentrale informed PZEM at 12:25 that it would start up Sloe 20 around 13:00 and that PZEM could (therefore) expect the first production around that time. The Sloecentrale stated that it would not manage full availability of Sloe 20 at 14:00; the capacity of Sloe 20 would only reach the level of minimum stable generation (MSG, around 220 MW) from 16:15. The Sloecentrale entered information in the TAMS information system – that is shared by the Sloecentrale, EDF and PZEM for mutual settlements, among other things – stating that Sloe 20 had no available capacity until 16:15 and would be fully available again from 17:00. At 12:42 PZEM published information stating that the restriction of the available capacity of Sloe 20 would end at 13:30 (i.e. half an hour earlier than published at 08:30). Shortly after 12:50, the Sloecentrale began the start-up of Sloe 20, with production in line with the significant restriction of available capacity until 16:15.
15. PZEM did not disclose the information that Sloe 20 would only be fully available from 17:00 and prior to that would be significantly restricted. Between 12:59 and 15:12, PZEM traded in electricity products to which that inside knowledge was relevant.

## 4 Assessment of practices

### 4.1 Practice 1A

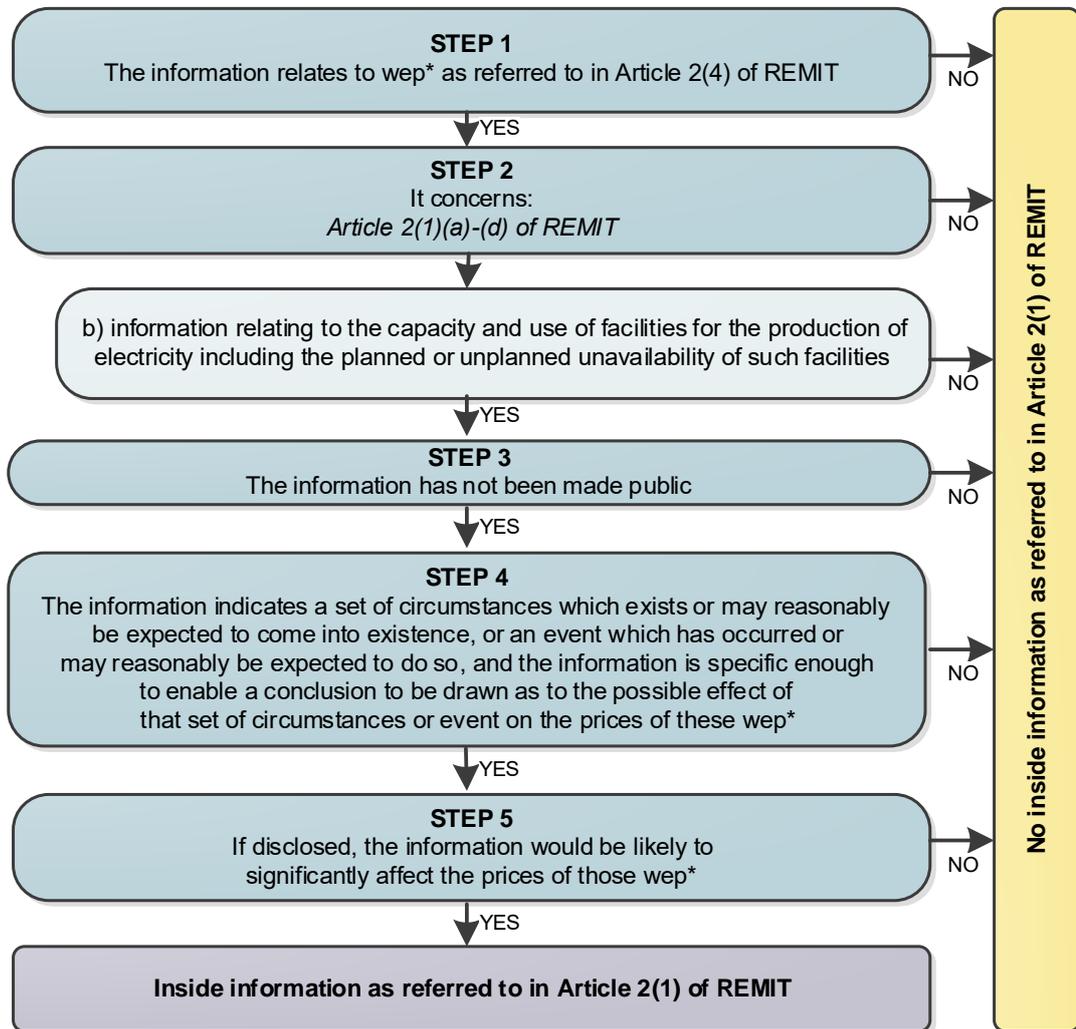
<sup>1</sup> See Tables 4, 5, 6 and 7 on pages 85 and 86 of the statement of objections.

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16. In this section, ACM assesses whether practice 1A described in Section 3 qualifies as a violation. ACM has taken account of PZEM's opinion in response to the statement of objections.

#### 4.1.1 Is there inside knowledge?

17. ACM assesses first whether the information on the market restriction qualifies as inside information within the meaning of Article 2(1) of REMIT.
18. Article 2(1) of REMIT defines inside information for the application of REMIT. This definition is summarized in a flowchart on the next page. This chart omits Article 2(1)(a)(c) and (d) of REMIT because those sections do not arise in this decision.

Flowchart on inside information



wep\*: wholesale energy product(s)

The flowchart consists of five steps. These steps describe the elements that make up the definition of inside information. In each step, it is determined whether or not that element is present. If an element does not exist, there is no inside information within the meaning of article 2 paragraph 1 of REMIT. If all steps can be taken, meaning that all elements are present, there is inside information within the meaning of article 2 paragraph 1 of REMIT. The five steps of the flowchart are explained next. In order to establish inside information, there must be, according to step 1, information that relates to wholesale energy products within the meaning of article 2 paragraph 4 of REMIT. According to step 2, there must be information that falls under article 2 under a through d of REMIT. The case at hand concerns information within the meaning of article 2 under b of REMIT, which is information regarding the capacity and utilization of facilities for the production of electricity including the planned or unplanned unavailability of these installations. According to step 3, this information cannot have been made public. Step 4 stipulates that it must concern information that indicates a set of circumstances that exists or may reasonably be expected to come into existence, or an event that has occurred or may reasonably be expected to do so, and the information 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 the wholesale energy products. According to step 5, it must be about information that, if disclosed, would likely to have a significant effect on the prices of these wholesale energy products.

Step 1

19. The statement of objections has established that the information on the market restriction is related to a wholesale energy product. After all, the market restriction affected the forward demand for and/or the forward supply of electricity in the Union, and was thus related to long-term contracts for electricity produced, traded or delivered in the Union. In addition, the market restriction may have affected the production capacity available to the market in the short term. The information on the market restriction was therefore also related to short-term contracts for the delivery of electricity in the Union. Step 1 of the flowchart is therefore fulfilled.

Step 2

20. The statement of objections has established that the information on the market restriction is information within the meaning of REMIT. After all, the information concerns the planned unavailability of the capacity of the Sloecentrale production units (one unit fully unavailable, the other partly unavailable because it was capped at 400 MW). This is information as referred to in Article 2(1)(b) of REMIT. Step 2 of the flowchart is therefore fulfilled.

Step 3

21. The statement of objections also establishes that the information was not disclosed for a certain period. The information on the unavailability to the market of one unit of the Sloecentrale during the market restriction was not publicly disclosed until the publication on May 5, 2017. The fact that the other unit had to be kept in operation during the market restriction with a capacity between a minimum of 220 MW (MSG) and a maximum of 400 MW was never disclosed. Step 3 of the flowchart is therefore fulfilled.

Step 4

22. The question of whether Step 4 of the flowchart is fulfilled in the case of practice 1A is a matter of debate between ACM and PZEM. The question is whether the information should be considered precise within the meaning of Article 2(1) of REMIT and, if so, from what time. In this regard ACM considers the following.
23. Under Article 2(1), final paragraph, of REMIT, information is considered to be precise if:
- it indicates an event which has occurred or may reasonably be expected to do so, and
  - it is specific enough to enable a conclusion to be drawn as to the possible effect of that event on the prices of wholesale energy products.

On the basis of case law relating to the identical criteria in financial regulations, it must be assumed that in order to fulfil these criteria it is sufficient that the information is precise or specific enough to form the basis for an assessment as to whether the situation or event to which it relates can affect prices. According to this case law, this means that only vague or general information from which no conclusions can be drawn as to its possible effect on prices is excluded from the definition of inside information.<sup>2</sup>

24. ACM considers that the information on the market restriction must be considered precise within the meaning of Article 2(1) of REMIT in any case from 15:23 on April 14, 2017. At that time, a commercial agreement was in place concerning the market restriction: TenneT stated on April 14, 2017, at 15:23, that it agreed to the deal sheet and the price for the market restriction. ACM explains

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<sup>2</sup> See ECJ March 11, 2015, ECLI:EU:C:2015:162, C-628/13 (Lafonta), legal grounds 30/31, in which the Court found that the wording of the definition of inside information did not mean that information "of a precise nature" refers only to information on the basis of which it is possible to determine the likely direction of the price effect. It is sufficient that the information is precise or specific enough to form a basis for the assessment as to whether the situation or event to which it relates can affect prices. Accordingly, on the basis of this provision, only vague or general information from which no conclusions can be drawn as to its possible effect on prices is excluded from the definition of inside information.

this judgement below on the basis of both criteria.

25. Criterion (a) is fulfilled because, in any event from April 14, 2017, the information indicates an event that could reasonably be expected to occur, namely the market restriction from May 8, 2017 to May 20, 2017 and from May 22, 2017 to May 24, 2017. Insofar as PZEM has indicated in its opinion that the market restriction had not yet been contracted on April 14, 2017, ACM notes the following. The market restriction was contracted on April 20, 2017 in the sense that at that time an agreement was signed between all the parties. The documents show that the signing of this agreement was a formality. There was in any event agreement on the essential features of the agreement from April 14, 2017. ACM therefore considers that in any event from that date it could be reasonably expected that the market restriction would occur.
26. Criterion (b) is fulfilled because the information is sufficiently precise to enable a conclusion to be drawn with regard to the possible effect of the market restriction on prices. After all, the information held by PZEM specified the existence of a market restriction, the period of the market restriction and its consequences for the capacity available (to the market) and the actual production by the Sloecentrale. On this basis market participants could estimate the effect of the market restriction on supply and demand for electricity during that period, and hence the possible effect on prices.
27. The sufficient precision of the information is also demonstrated by the fact that PZEM used it in its optimization model. It follows from the statement of objections that the quant developer of PZEM adapted the MATLAB-Sloe model to the market restriction with effect from April 14, 2017.<sup>3</sup> The MATLAB-Sloe model is a simulation model. PZEM traders use the results of the MATLAB-Sloe model in a software tool. This software tool contains aggregated information and assists PZEM traders in taking their trading decisions.

#### Step 5

28. There is also a debate on whether Step 5 of the flowchart is fulfilled in the case of practice 1A. The question is whether the information on the market restriction, if it were publicly disclosed, could have a significant effect on the prices of wholesale energy products. In this regard ACM considers the following.
29. In answering the above question it is relevant whether the information concerned would be likely to be used by a reasonable market participant as part of the basis of its decisions to trade in wholesale energy products. ACM has derived this “reasonable market participant test” from financial regulation<sup>4</sup> and case law<sup>5</sup>. The test makes clear that the question is not whether a certain, individual market participant would use information, but that it is an objective criterion based on a rational market participant. It must be determined *a priori* and on the basis of the context of the information whether the information could have a significant effect. It is not necessary to investigate whether its disclosure actually had a significant effect on prices.<sup>6</sup>
30. The change in the capacity of the Sloecentrale available to the market resulting from the market restriction was a few hundred MW. Keeping one production unit offline reduces the available capacity by (a nominal amount of) 435 MW. The requirement to keep the other production unit online during the market restriction (the must run) involved between 220 MW (the MSG level) and 400 MW. If there had been no must run, this may not have been offered in the market. Without a must run, PZEM would have decided on the basis of (actual or expected) market prices whether or not to produce.

<sup>3</sup> Marginal 162 of the statement of objections.

<sup>4</sup> Cf. Article 7(4) of MAR.

<sup>5</sup> Cf. for example ECJ, December 23, 2009, Case C-45/08 (Spector Photo).

<sup>6</sup> Cf. legal grounds 67 to 69 of case C-45/08 (Spector Photo).

31. Moreover, PZEM itself applies a policy whereby information on a reduction of capacity of around 100 MW or over and/or reduced availability for longer than 24 hours and/or another reduction (including below 100 MW) that could have a significant effect on the price in the energy market must be published as inside information. Under PZEM's policy, an outage of around 100 MW or more is assumed to have such a significant price effect.
32. ACM market research shows that market participants base decisions on a range of market circumstances, including the availability of production units. Market participants also state that in all cases they must be informed of new information in order to weigh its relevance in the light of the other market circumstances.<sup>7</sup> The market research also shows that traders in general consider changes in available capacity of 50-100 MW and over to be relevant to the Dutch market.<sup>8</sup> In view of this and Marginals 30 and 31, ACM considers that the above information on the Sloecentrale capacity available to the market as a result of the market restriction is information that a reasonable market participant would be likely to use as part of the basis of its decisions on trade in wholesale energy products.
33. Insofar as PZEM has argued in its opinion that the information on the market restriction had scarcely any effect on the electricity prices in May 2017, ACM notes as follows. Having regard to the "reasonable market participant test" described above, a relevant point is whether, prior to the market restriction itself, the information concerned could have had a significant effect on prices of wholesale energy products. PZEM's analysis of electricity prices in May 2017 ignores this. PZEM's analysis is based partly on data that were only available during and after the market restriction, namely data on residual demand in May 2017. To that extent, PZEM's analysis answers a question that does not need to be investigated, namely whether the information actually affected electricity prices.
34. In view of the foregoing, the conclusion is that the information on the market restriction qualifies as inside information within the meaning of Article 2(1) of REMIT.

#### 4.1.2 Was the inside information disclosed in an effective and timely manner?

35. Under article 4(1) of REMIT – to the extent relevant here – market participants must publicly disclose in an effective and timely manner inside information that they hold in respect of business activities or facilities that the market participant concerned owns or controls or for whose operational matters that market participant or undertaking is responsible, either in whole or in part. Such disclosure must include information relating to the capacity and use of production facilities for electricity, including planned or unplanned unavailability of such facilities.
36. ACM has established on the basis of the statement of objections that PZEM qualifies as a market participant. ACM has also established that the inside knowledge held by PZEM related to a production facility – the Sloecentrale – which it partly owned and controlled and for which it had at least partial responsibility for operational matters. This responsibility of PZEM relates to both production units of the Sloecentrale.
37. Article 4(1) of REMIT requires market participants to disclose inside information in an effective and timely manner. According to the ACER Guidance on REMIT<sup>9</sup>, "timely" means as soon as possible

<sup>7</sup> See Summary of ACM's REMIT Interviews about the value of information on production unit availability for trading decisions, October 2019, p. 12.

<sup>8</sup> See Summary of ACM's REMIT Interviews about the value of information on production unit availability for trading decisions, October 2019, p. 18.

<sup>9</sup> ACER Guidance, 4th Edition, Section 7.3.

and at most within one hour, unless specific legislation provides for a later time of publication. In any case, the inside information must be published before any trading takes place in wholesale energy products to which that information is relevant. This guidance was available in 2017.

38. ACM considers that PZEM disclosed neither effectively nor in a timely manner the information on the market restriction that qualified as inside information in any event from April 14, 2017. This is because PZEM only disclosed on May 5 at 10:17 that the Sloe 10 production unit of the Sloecentrale would be unavailable from May 8, 2017 at 07:00 to May 22, 2017 at 17:00 and from May 20, 2017 at 07:00 until May 24, 2017 at 17:00 due to “Shut down because of Tennet restriction”. PZEM published no information on the must run of the Sloe 20 unit. It also follows from the statement of objections that in the period between April 14, 2017 and May 5, 2017 PZEM entered into various transactions that fell within the scope of REMIT and to which information on the market restriction was relevant.<sup>10</sup> In addition, the market restriction was not an exceptional case in which PZEM could delay the disclosure of the inside information.
39. Insofar as PZEM argued in its opinion that TenneT – in line with the consensus in the energy market in 2017 – should have disclosed the information on the market restriction, ACM notes as follows. Article 4(1) of REMIT creates an obligation for market participants to disclose inside information, to the extent that such inside information relates – in short – to the business activities or facilities that the market participant owns or controls, or for which the market participant bears responsibility. The obligation to publish inside information does not apply to a market participant that holds inside information with regard to the business activities or facilities of another market participant. This follows not only from the text of Article 4(1) of REMIT but also from the ACER Guidance on REMIT that was available in 2017.<sup>11</sup> TenneT was therefore not required to disclose inside information relating to the capacity of the Sloecentrale.
40. TenneT published information – in accordance with the system described above as set out in Article 4(1) of REMIT – stating that various maintenance activities would take place on its network during the market restriction.

## 4.2 Practice 3B

41. In this section, ACM assesses whether practice 3B described in the statement qualifies as a violation. ACM has taken account of PZEM’s opinion in response to the statement of objections.

### 4.2.1 Is there inside knowledge?

42. ACM first assesses – on the basis of the flowchart included above in Marginal 18 – whether practice 3B qualifies as inside information within the meaning of Article 2(1) of REMIT. To the extent necessary, ACM draws a distinction between information on the end time of the full unavailability of Sloe 20 and information on the limited availability of Sloe 20.

#### Step 1

43. The statement of objections has established that both the information on the end time of the full unavailability of Sloe 20 and the information on the limited availability of Sloe 20 is related to a wholesale energy product. A change in the availability of an electricity production unit in the Netherlands has consequences for trading in contracts for the delivery of electricity in the Union. If the planned production from the Sloecentrale has already been sold and that production is not

<sup>10</sup> See Tables 4, 5, 6 and 7 on pages 85 and 86 of the statement of objections.

<sup>11</sup> ACER Guidance, 4th Edition, Section 7.1.

achieved due to (full or partial) unavailability, PZEM will buy electricity in the market to remain in balance and the reduced availability of the production unit affects the demand side of the market. If the planned production has not yet been sold, the supply of electricity in the market decreases when availability is restricted. Conversely, if availability is greater than planned, the supply in the market increases and PZEM will sell electricity. ACM therefore considers that Step 1 of the flowchart is fulfilled.

Step 2

44. The statement of objections has established that both the information on the end time of the full unavailability of Sloe 20 and the information on the limited availability of Sloe 20 is information within the meaning of REMIT. This is because it is information on the availability or unavailability and use of the capacity of Sloe 20. It concerns in any case information within the meaning of Article 2(1)(b) of REMIT. Step 2 of the flowchart is therefore fulfilled.

Step 3

45. The statement of objections has established that the information on the end time of full unavailability was not disclosed for a certain period. At around 12:30 the Sloecentrale updated PZEM on the end time of the full unavailability of Sloe 20. At 12:42 PZEM published information stating that the unavailability of the capacity of Sloe 20 would end at 13:30. The information on the limited availability of Sloe 20 was never publicly disclosed. Step 3 of the flowchart is therefore fulfilled.

Step 4

46. On the question of whether practice 3B fulfils Step 4 of the flowchart, ACM notes as follows.
47. Under Article 2(1), final paragraph, of REMIT, information is considered to be precise if
- it indicates an event that has occurred or may reasonably be expected to occur, and
  - it is specific enough to enable a conclusion to be drawn as to the possible effect of that event on the prices of wholesale energy products.
- On the basis of case law relating to the identical criteria in financial regulations, it must be assumed that in order to fulfil these criteria it is sufficient that the information is precise or specific enough to form the basis for an assessment as to whether the situation or event to which it relates can affect prices. According to this case law, this means that only vague or general information from which no conclusions can be drawn as to its possible effect on prices is excluded from the definition of inside information.
48. On January 10, 2019, at 12:26:14, a telephone call took place between the Sloecentrale and the shift trader of PZEM. This call went as follows:

[Original text in Dutch, translation ACM]

[PZEM] *[name of shift trader]*, PZEM.

[Sloecentrale] *Hi, good day, this is [name of Sloecentrale employee] from the centrale.*

[PZEM] *Hi.*

[Sloecentrale] *Hi. We're offline. We'll be looking to start up at one o'clock.*

[PZEM] *OK.*

[Sloecentrale] *And then we expect to be on baseload around a quarter to five, if everything goes well.*

[PZEM] *Yes, OK. So start up at one o'clock, baseload at a quarter to five?*

[Sloecentrale] *Yeah, so I think you're going to get, er, some megawatts around one. It won't be that much yet, because we can't start up as fast as usual, so to speak.*

[PZEM] *No, I understand that, yeah, yeah.*

[Sloecentrale] *Just so you know what's going on.*

[PZEM] Sure, fine.  
[Sloecentrale] Yes? OK.  
[PZEM] Thanks very much.  
[Sloecentrale] Bye then.  
[PZEM] Bye.<sup>12</sup>

49. On January 10, 2019, at 12:33:20, a telephone call took place between the Sloecentrale and the shift trader of PZEM. This call went as follows.

[Original text in Dutch, translation ACM]  
[PZEM] [name of shift trader], PZEM.  
[Sloecentrale] Hi, this is [name of Sloecentrale employee], Sloe plant again.  
[PZEM] Hi.  
[Sloecentrale] I've just entered an, er, operating plan.  
[PZEM] Yes.  
[Sloecentrale] So we expect to be on MSG at a quarter past four.  
[PZEM] Yes.  
[Sloecentrale] And until then you need to bear in mind that we'll stick at 100 MW, because we need to take more time to get the boiler in order, the water and everything.  
[PZEM] OK. So a quarter past four MSG.  
[Sloe plant] You should see it ... yeah, I've put the plan in.  
[PZEM] Yes, declaration, I saw something going by.  
Yeah, yeah.  
[Sloecentrale] So a quarter past four 220, half past four 350, quarter to five 410 and after that 425, hopefully.  
[PZEM] OK. Yes, great.  
[Sloecentrale] Yes?  
[PZEM] Yes.  
[Sloecentrale] OK.  
[PZEM] Thanks again.  
[Sloecentrale] Bye.<sup>13</sup>

50. At 12:41:24 the shift trader and the Sloecentrale spoke to each other again. This call went as follows:

[Original text in Dutch, translation ACM]  
[Sloecentrale:] Sloecentrale, [first name].  
[PZEM:] Yes, power plant, [surname of shift trader], PZEM.  
[Sloecentrale:] Good day.  
[PZEM:] I'm going to adjust the REMIT notification to half past one, so ... because around that time you're also going to produce a few megawatts again aren't you?  
[Sloecentrale:] Yes, actually a bit earlier, I think.  
[PZEM:] Earlier, OK.  
[Sloecentrale:] Yes, around one to a quarter past one.  
[PZEM:] OK. Yes, we've discussed it here and as soon as there's production, that REMIT notification can end.  
[Sloecentrale:] Yes, it can come out then. I'd forgotten to say that, yes.  
[PZEM:] No, no problem, we'll close it here then. Thanks!  
[Sloecentrale:] OK.

<sup>12</sup> ACM/UIT/526888, Report of Official Acts improved transcripts of voice logs, transcript with serial number 108.

<sup>13</sup> Ditto for serial number 114.

[PZEM:] Bye.

[Sloecentrale:] Bye.<sup>14</sup>

51. ACM considers that the information on the end time of the unavailability of Sloe 20 meets the criteria (a) and (b) described above. From the calls described above it follows that PZEM obtained specific information from the Sloecentrale on the end time of the full unavailability of Sloe 20. The information from the Sloecentrale indicated that the unavailability of Sloe 20 would end between 13:00 and 13:15 and hence that an event could reasonably be expected to take place (criterion (a)). The information is also of a sufficiently precise nature to form the basis for the assessment of whether the situation or event to which it relates can affect prices (criterion (b)). PZEM itself also considers the information on the end time of the unavailability of Sloe 20 to be precise, as evidenced by the fact that at 12:42 it published an update on the end time of the unavailability of Sloe 20.
52. ACM also considers that the information on the limited availability of Sloe 20 after start-up meets the aforementioned criteria (a) and (b). It follows from the calls described above that the Sloecentrale shared an operating plan with PZEM. According to this operating plan – which was also entered in the TAMS joint information system – Sloe 20 would have limited availability on the afternoon of January 10, 2019. The information thus indicates an event that can reasonably be expected to take place (criterion (a)). Contrary to what PZEM has argued in its opinion, this operating plan can be distinguished from a possible (arbitrary) start-up curve for the plant. Generally, there are different start-up curves for the plant. The duration and course of such a start-up curve depend on various circumstances. A relevant point, for example, is how long the production unit has been offline. The information shared by the Sloecentrale is more specific, however. The Sloecentrale did not indicate a possible start-up curve that could apply to Sloe 20, but it did give information to PZEM on production volumes at specific times, related to bringing this production unit into order after a previous failed start-up on January 10, 2019. It was therefore clearly described and precise information.
53. The information on the limited availability of Sloe 20 is also of a sufficiently precise nature to form the basis for the assessment of whether the situation or event to which it relates can affect prices (criterion (b)). The expected reduced availability of Sloe 20 on January 10, 2019 was substantial and could thus affect demand for and the supply of electricity and its prices.

#### Step 5

54. There is a debate on whether Step 5 of the flowchart is fulfilled in the case of practice 3B. With regard to the information on the end time of the unavailability of Sloe 20, PZEM argues in its opinion that it was working on the reasonable assumption that Sloe 20 would still not be producing a significant volume of electricity until 13:30. ACM understands this opinion in the sense that PZEM is arguing that the information in question cannot have a significant effect on wholesale prices of energy products until 13:30.
55. Information can have a significant effect on prices if it is information that a reasonable market participant is likely to use as part of the basis of its decisions to trade in wholesale energy products. ACM has derived this “reasonable market participant test” from financial regulation<sup>15</sup> and case law<sup>16</sup>. The test makes clear that the question is not whether a certain, individual market participant would use information, but that it is an objective criterion based on a rational market participant. It must be determined *a priori* and on the basis of the context of the information whether the information could have a significant effect. It is not necessary to investigate whether its disclosure actually had a

<sup>14</sup> Ditto for serial number 116.

<sup>15</sup> Cf. Article 7(4) of MAR.

<sup>16</sup> Cf. for example ECJ, December 23, 2009, Case C-45/08 (Spector Photo).

significant effect on prices.<sup>17</sup>

56. Having regard to the “reasonable market participant test” described above, a relevant point is whether the information, if it were made public, could, *a priori*, have a significant effect on the prices of wholesale energy products. ACM notes in the first place that the information from the Sloecentrale on the end time of the unavailability of Sloe 20 was an update. PZEM had previously published information stating that Sloe 20 would be fully unavailable until 14:00. ACM also notes that this updated information that the Sloecentrale shared with PZEM on the end time of the unavailability of Sloe 20 provides no basis for the assumption that Sloe 20 would not produce a significant volume of electricity until 13:30. On the contrary. The minutes of the call at 12:41:24 indicate that PZEM wanted to amend the end time of the REMIT publication to 13:30, but that the Sloecentrale responded that energy would be produced before 13:30. When PZEM inquired further, the Sloecentrale stated that energy would be produced between 13:00 and 13:15.
57. In addition, it does not follow from the documents that production from Sloe 20 was insignificant up to 13:30. According to the telephone calls recorded in Step 4, production was around 100 MW. Having regard to the information set out in Marginals 31 and 32, production of such a volume would generally be 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.
58. With regard to the information on the limited availability of Sloe 20, ACM notes as follows. On the basis of the telephone calls recorded in Step 4, PZEM could infer that availability between 13:00 and 16:15 would be around 100 MW and would then rise to full availability around 17:00. According to the PZEM publication of 12:42, Sloe 20 was fully available from 13:30. There is a substantial difference between this published availability and the actual planned availability of Sloe 20. Between 13:30 and 16:15 it was around 330 MW. After 16:15 the difference decreased to zero. Such a difference in availability would generally be information that a reasonable market participant would be likely to use as part of the basis for its decision to enter into a transaction relating to, or to issue an order to trade in, a wholesale energy product.
59. In view of the foregoing, the conclusion is that both the information on the end time of the complete unavailability of Sloe 20 and the information on the limited availability of Sloe 20 qualifies as inside information within the meaning of Article 2(1) of REMIT.

#### 4.2.2 Was the inside information disclosed in an effective and timely manner?

60. Under article 4(1) of REMIT – to the extent relevant here – market participants must publicly disclose in an effective and timely manner inside information that they hold in respect of business activities or facilities that the market participant concerned owns or controls or for whose operational matters that market participant or undertaking is responsible, either in whole or in part. Such disclosure must include information relating to the capacity and use of production facilities for electricity, including planned or unplanned unavailability of such facilities.
61. ACM has established on the basis of the statement of objections that PZEM qualifies as a market participant. ACM has also established that the inside knowledge held by PZEM related to a production facility – the Sloecentrale – which it partly owned and controlled and for which it had at least partial responsibility for operational matters. This responsibility of PZEM relates to both production units of the Sloecentrale.

<sup>17</sup> Cf. legal grounds 67 to 69 of case C-45/08 (Spector Photo).

62. Article 4(1) of REMIT requires market participants to disclose inside information in an effective and timely manner. According to the ACER Guidance on REMIT, “timely” means as soon as possible and at most within one hour, unless specific legislation provides for a later time of publication. In any case, the inside information must be published before any trading takes place in wholesale energy products to which that information is relevant. According to the ACER Guidance on REMIT, “effective” means that the inside information is published fully and accurately.
63. ACM considers that PZEM did not disclose the inside information on the end time of the unavailability of Sloe 20 in an effective manner. It follows from the telephone calls recorded in Section 3.2.1 that PZEM knew that the unavailability of the Sloecentrale would end earlier than 13:30. It also follows from the telephone call of 12:41:24 that PZEM knew that an adjustment to the REMIT notification of the end time of the unavailability of the Sloecentrale from 14:00 to 13:30 would be incorrect. After all, PZEM stated that it was going to amend the end time to 13:30, but the Sloecentrale replied that energy would be produced earlier than 13:30. When PZEM inquired further, the Sloecentrale stated that energy would be produced between 13:00 and 13:15. Nevertheless, at 12:42, PZEM adjusted the REMIT notification by changing the end time of the unavailability to 13:30. PZEM thus did not publish the end time in an effective manner, because it published an incorrect end time.
64. ACM also considers that PZEM did not disclose the inside information on the limited availability of Sloe 20 after start-up in an effective manner. PZEM’s adjustment to the REMIT notification at 12:42 contained no information on the limited availability of the Sloecentrale on the afternoon of January 10, 2019. To that extent too, this publication was incorrect and incomplete and hence not effective.
65. Finally, ACM considers that PZEM did not disclose the inside information on the limited availability of Sloe 20 after start-up in a timely manner. ACM points to the fact that on January 10, 2019, between 12:59:47 and 15:12:19, PZEM traded in wholesale products relating to the inside information on the limited availability of the Sloecentrale by placing purchase orders and entering into transactions for different hourly products and quarter-hourly products for delivery to the Dutch grid on that same day between 14:00 and 16:15.

## 5 Violator

66. ACM has established on the basis of the statement of objections that PZEM Energy B.V. committed violations 1A and 3B. PZEM Energy B.V. is a market participant as referred to in Article 4(1) of REMIT. PZEM Energy B.V. is also a person as referred to in Article 3 of REMIT. For the sake of completeness, ACM notes that to the extent that the violations established in Section 4 of this decision were committed through the acts and omissions of individual employees of PZEM Energy B.V., these practices can reasonably be imputed to PZEM Energy B.V. The practices occurred as part of these employees’ normal activities for PZEM Energy B.V., they were expedient for PZEM Energy B.V. and PZEM Energy B.V. took insufficient steps to guarantee that the identified violations could not take place.

## 6 Fine

67. In this section, ACM sets out the grounds for the fine it imposes on PZEM for violations 1A and 3B.
68. In setting the level of a fine to be imposed under Sections 5:41 and 5:46 of the Dutch General Administrative Law Act, ACM must consider the imputability of the violator. ACM must also take into

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account the seriousness of the violation and the circumstances under which it was committed. The proportionality principle laid down in Section 3:4 of the Dutch General Administrative Law Act must also be respected.

69. Violations 1A and 3B are violations of Article 4 of REMIT. Under Section 77i(1), preamble and (b), of the Dutch Electricity Act, ACM may also impose on the violator an administrative fine of a maximum of 900,000 euros for each violation of Article 4 of REMIT or, if greater, 10% of the violator's turnover. In determining the level of the fines that ACM imposes, it applies the policy laid down in the ACM Fining Policy Rule 2014. That policy rule, however, does not state how ACM determines the level of the fine for violations of REMIT. ACM therefore assesses the level of fine that it considers fitting and appropriate in this case on the basis of the aforementioned articles. To that end it considers the following.
70. The violations can be attributed fully to PZEM. With regard to the seriousness of the violations, ACM points out that the goal of REMIT is increased integrity and transparency of energy markets with the ultimate aim of fostering open and fair competition in wholesale energy markets for the benefit of final consumers of energy.<sup>18</sup> If a market participant does not comply with its publication obligation under REMIT, the proper operation of the wholesale energy market may be jeopardized. The violations of Article 4 of REMIT therefore weigh heavily and are serious by their nature. On the other hand, there is no evidence of aggravating or mitigating circumstances for fines. In addition, PZEM has informed ACM that it has taken a number of compliance measures to prevent any repeat of violations of Article 4 of REMIT. PZEM took these compliance measures after ACM began an investigation into the various practices.
71. Having regard to the foregoing, ACM considers in this specific case a fine of 75,000 euros per violation of Article 4 of REMIT to be fitting and appropriate. Since PZEM violated that provision on two occasions, ACM is imposing a total fine of 150,000 euros on PZEM.

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<sup>18</sup> Recital 2 of REMIT.

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## 7 Decision

The Netherlands Authority for Consumers and Markets imposes a fine of 150,000 euros on PZEM Energy B.V.

The Hague, **April 29, 2022**

Netherlands Authority for Consumers and Markets,  
on its behalf:

M.R. Leijten  
Member of the Board

*If you are a directly interested party, you may lodge an objection to this Decision. Send your substantiated statement of objection to the Netherlands Authority for Consumers and Markets, Legal Department, PO Box 16326, 2500 BH The Hague. You must do this **within six weeks** of the day on which this Decision was announced. In your notice of objection, you may request the Netherlands Authority for Consumers and Markets to agree to filing an appeal with the Dutch Trade and Industry Appeals Tribunal directly.*