
8-in-8 Recent Trends in European Law and Policy Alert Series: Energy Market Manipulation in the EU

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This is the third issue of WilmerHale's 8-in-8 Recent Trends in European Law and Policy Alert Series. In this series, our attorneys share insights on current and emerging issues affecting companies doing business in Europe and across the Atlantic. Attorneys from across various practice groups at the firm will offer their take on issues ranging from Brexit to Big Data to EU energy market regulation. WilmerHale has offices in key European capitals, including Brussels, Berlin, Frankfurt and London, as well as lawyers qualified in a range of European countries. With one of the leading European law and policy practices in the world, we follow and work on a broad range of EU legal and policy issues, including data protection and privacy, competition, trade, technology, intellectual property, financial services, and a range of other EU and transatlantic regulatory and policy challenges that our clients face. Read [all issues](#) in this series and our other recent publications.

Until 2011, the EU did not have specific rules addressing energy market manipulation on European wholesale energy markets (gas and electricity).

Previously, some cases were dealt with by antitrust authorities i.e. European Commission ("EC") and National Competition Authorities ("NCAs") using antitrust rules. For instance, in 2008 the EC investigated E.ON for allegedly withholding energy capacity in order to raise prices in Germany. The EC closed its investigation after E.ON offered commitments to divest a significant part of its generation facilities (see [here](#)).

At a national level, in 2004 the Spanish Competition Authority ("SCA") also imposed fines on several generators for allegedly withholding capacity in order to shift supply into higher-priced energy services (see [here](#)). However, some of these decisions were overturned on appeal by the Spanish courts because they considered that the NCA had failed to prove that the generators knew that the capacity withheld was required by the market (see [here](#)).

Other cases were caught by market manipulation rules in the financial sector i.e. the 2003 Market Abuse Directive ("MAD") to the extent that they applied to derivatives traded on regulated markets.

Then, in 2011 the EU adopted the Regulation on Wholesale Energy Market Integrity and Transparency ("REMIT"), which bans market manipulation in electricity and gas wholesale markets.¹

Key Influences

When adopting REMIT, the EU was significantly influenced by US law. Notably, the EC [relied](#) on an American case called *Amaranth* (see [here](#)). This case involved cross-market manipulation and led to investigations by the Federal Energy Regulatory Commission (“FERC”) and the Commodities Futures Trading Commission (“CFTC”). According to the EC, a similar case in Europe would have been very hard to detect because EU regulators generally did not have the information to deter and prosecute such cases.²

Nord Pool, the Nordic Power Exchange dealing with physical trading, was also an important precedent. Nord Pool had its own private, contractual rules prohibiting market manipulation and insider trading before REMIT.

Otherwise, many of the REMIT rules are based on their equivalents in MAD, partly because the concepts are similar and partly because there can be an interplay between the two regulations (i.e. where physical market manipulation affects derivatives trading and vice-versa).

Key Features of REMIT

REMIT’s key features are five:

- REMIT bans market manipulation³ and insider trading⁴ and requires disclosure of inside information;⁵
- market participants who trade wholesale energy products in the EU are required to register⁶ and to report transactions and orders to trade to energy regulators (resulting in huge amounts of data being submitted daily); and to keep a record of such transactions/trades;⁷
- the implementation of these prohibitions⁸ and setting of sanctions is at EU Member State level;⁹
- the EU Agency for Cooperation of Energy Regulators (“ACER”) receives the data concerned and centralises the monitoring of EU wholesale energy markets, notifying suspicious behaviour to the relevant National Regulatory Authorities (“NRAs”);¹⁰ and
- NRAs prosecute the market abuses and impose sanctions.

Prohibition of Market Manipulation (REMIT, Article 5)

There are four categories of market manipulation under REMIT: (i) false or misleading transactions; (ii) price positioning; (iii) transactions employing fictitious devices, deception or contrivance; and (iv) dissemination of false and misleading information.¹¹ REMIT also bans attempts to manipulate the market.¹²

The key points are six:

First, the prohibition applies wherever a transaction or order to trade in wholesale energy products takes place, if there is EU impact. So, even if a trader is based in Geneva or New York, the EU rules may apply.

Secondly, REMIT applies to contracts for the wholesale supply and transmission of electricity and natural gas delivered in the EU (and to final customers with important consumption capacity – i.e. at least 600 GWh per year) *and* related derivatives (insofar as not already caught by MAD).

Thirdly, REMIT applies to the manipulation of physical supplies and the manipulation of exchange trading. REMIT is concerned with practices to manipulate supply from pivotal facilities at peak times to raise prices *and* trading practices familiar to financial law (like “marking the close” of a trading window) to manipulate the reference price for a derivative on a collateral market.

Fourthly, for market manipulation in EU law, a manipulative act is required, typically a transaction or other act which secures prices at an artificial level. However, *attempts* to manipulate are also caught, in which case no actual effect has to be shown.

Fifthly, for market manipulation, generally intent does not have to be shown (except for attempts to manipulate). However, in practice intent is still highly relevant insofar as it may be an integral part of showing that an act was artificial or not.

Sixthly, market manipulation is a strict standard. Notably, EU regulators consider that even erroneous trading (through a malfunctioning algorithm) could be caught if it gives, or is likely to give, false or misleading signals (see [here](#)).

Role of ACER

ACER is based in Slovenia. ACER plays a key role, not only by monitoring EU markets and by notifying suspicious behaviour to the relevant NRAs, but also by publishing [guidance](#) for NRAs on market manipulation. It has published general guidance on REMIT. It has also recently published detailed guidance on two categories of market manipulation:

- Wash trades: Transactions where “*there is no change in beneficial interests or market risk, or where the transfer or beneficial interest or market risk is only between parties who are acting in concert or collusion*”. The concern is that by “washing each other out” transactions between different companies in a group, or others acting collusively, could give the impression that trading activity is occurring when it is not.
- Transmission capacity hoarding: “[T]he act of a market participant [...] acquiring all or part of the available transmission capacity [...] without using it or without using it effectively”. The concern here is that in EU intraday electricity markets, interconnectors between different EU Member States, or between different bidding zones within an EU Member State are artificially blocked, denying their use to others and/or artificially maintaining different prices between zones.

Centralised Monitoring and Decentralised Enforcement and Sanctions under REMIT

The EU Member States decide on the specific enforcement powers of NRAs and on the penalties to be imposed for market manipulation under REMIT. Penalties can include administrative fines and criminal sanctions on traders and/or the companies for which they work.

One of the most developed jurisdictions is the UK, with important levels of energy trading in

liberalised markets. OFGEM is particularly active and has published important guidance on market manipulation (see [here](#)).

However, there are agencies across Europe. For example, the latest transmission capacity hoarding investigation reported was in Denmark in March 2018. The Danish Energy Regulatory Authority (“DERA”) sent two cases to the Danish State Prosecutor to initiate criminal proceedings against two companies for transmission capacity hoarding. DERA states that it suspects that these companies acquired all available transmission capacity by trading with themselves and therefore secured prices at an artificial level (see [here](#)).

Financial Rules and Market Manipulation

In parallel to REMIT, in 2014 the EU adopted the new Market Abuse Regulation (“[MAR](#)”), substituting MAD. MAR extends significantly the financial instruments and markets under the scope of the financial market abuse rules. As a result, certain commodity derivatives which are deemed to be financial instruments under [MiFID II](#)¹³ and traded (or admitted to trade) in Multilateral Trading Facilities or Organised Trading Facilities, or traded directly between parties or through dealers (“Over The Counter”), may now fall under MAR.

As a result, where energy derivatives are concerned, companies and traders need to think about both sets of rules (which are similar). A case could fall under one or the other or possibly both.

Enforcement and Cases

Since REMIT, there have been multiple investigations and some sanctions for market manipulation.

The most relevant case under REMIT is *Iberdrola* (see [here](#)). In November 2015, the Spanish Markets and Competition Authority (*Comisión Nacional de los Mercados y de la Competencia*, “CNMC”) imposed a €25 million fine on electricity generator Iberdrola for withholding capacity from the wholesale electricity market, finding that it had reduced the quantity of electricity dispatched from its hydroelectric plants in the day-ahead market, which was not justified by any exhaustion of its hydroelectric capacity or by expectations of future prices.

According to the CNMC, this strategy was intended to cause entry by higher-priced Combined Cycle Gas Turbine plants during the manipulation period, thereby securing a higher market price to the benefit of Iberdrola. (Iberdrola has brought an appeal against the CNMC’s decision, which is pending.) In May 2017, the Spanish Prosecutor’s Office also opened criminal investigations on these facts (see [here](#)).

In June 2016, the Italian NRA (*Autorità per l'Energia Elettrica il Gas e il Sistema Idrico*, “AEEGSI”) launched investigations under REMIT against power generators *Enel* and *Sorgenia* for allegedly withholding capacity from the day-ahead electricity market. The Italian NRA then referred the case to the Italian antitrust authority (*Autorità Garante della Concorrenza e del Mercato*, “AGCM”) (see [here](#)), which in May 2017 settled the case after ENEL offered commitments (see [here](#)). Proceedings under REMIT are understood still to be ongoing before the AEEGSI.

Coordination and Double Jeopardy

After REMIT and with the new MAR, manipulation of wholesale energy markets may fall at the same time under *at least two sets of rules*: REMIT, MAR and antitrust law.

The EU regulations provide for extensive coordination between the regulators on such interventions.¹⁴ It will be interesting and important to see how this evolves. In other words, whether the regulators will decide amongst themselves which is best placed to prosecute or, whether more than one will do so (as has happened in the *LIBOR* and *Forex* market manipulation cases).

Clearly the latter is controversial if it means sanctioning the same entity for the same conduct by more than one regulator (e.g. NRA and the EC or a NCA) under different rules (e.g. REMIT and antitrust law), as contrary to the principle of *ne bis in idem*, enshrined in the Charter of Fundamental Rights of the European Union¹⁵ and in the European Convention of Human Rights.¹⁶

Conclusions

- Companies trading or supplying gas and/or electricity in EU wholesale markets must be aware of the new concepts and rules re. market manipulation under REMIT.¹⁷
- Those rules apply not only to specific practices on exchanges, but also market conduct (up to now only caught by antitrust law).
- Serious sanctions, which are set at EU Member State level, can apply to companies and traders and be administrative and criminal.

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1. With thanks to Álvaro Mateo Alonso.
 2. Amaranth did not lead to any formal finding of market manipulation. After jurisdictional disputes, the case against the trader was settled by the CFTC with a fine of \$750.000. See *Hunter v. Federal Energy Regulatory Commission*, 711 F.3d 155 (DC Cir 2013) and Consent Order for Civil Monetary Penalty and Other Equitable Relief Against Brian Hunter, *CFTC v. Brian Hunter*, 07-Civ-6682 (RA), (S.D.N.Y., Sept. 15, 2014).
 3. REMIT, Article 5.
 4. REMIT, Article 3.
 5. REMIT, Article 4.
 6. REMIT, Article 9.
 7. REMIT, Article 8.
 8. REMIT, Article 13.
 9. REMIT, Article 18.
 10. REMIT, Article 7.

11. REMIT, Article 2(2).
12. REMIT, Article 2(3).
13. MiFID II, Annex I, Section C.
14. REMIT, Article 1(3) ; MAR, Article 25.
15. Article 50.
16. Article 4 of Protocol No. 7(1).
17. John Ratliff is currently editing and preparing a book on REMIT, with others, which is scheduled for publication later this year.