

REMIT - EU Legislation on Insider Trading and Market Manipulation in Wholesale EU Energy Markets Adopted

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On 10 October 2011, the European Council of Ministers adopted the Regulation on "wholesale energy market integrity and transparency", the so-called "**REMIT**". The Regulation will enter into force in the 27 EU Member States 20 days after publication in the EU Official Journal, which is expected to occur in November 2011.

Earlier this year we outlined the main points of the Regulation when it was still a Commission proposal.ⁱ

The Regulation involves essentially five different obligations:

1. **A prohibition on insider trading** in relation to wholesale energy products in the EU. (Article 3)
2. An **obligation to publish inside information** which market participants possess in respect to business or facilities owned or controlled by them, or their parent or related undertaking. The obligation also covers inside information related to the business or facilities for whose operational matters market participants are responsible. (**Article 4**)
3. A **general prohibition of market manipulation and attempts to manipulate**, which is mainly defined as entering into any transaction, or issuing any order to trade, in wholesale energy products that:
 - gives, or is likely to give, **false or misleading signals** as to the supply of, demand for, or price of wholesale energy products; or
 - **secures, or attempts to secure, the price of wholesale energy products at an artificial level, unless the reasons for doing so are legitimate and the transaction or order to trade conforms to accepted market practice on the wholesale energy market concerned**; or
 - **employs, or attempts to employ, a fictitious device or any other form of deception or contrivance which gives, or is likely to give, false or misleading signals regarding the supply of, demand for, or price of wholesale energy products.** (See Articles 5 and 2.2)ⁱⁱ

4. REMIT establishes **a system of market monitoring** by a newly established **Agency for the Cooperation of Energy Regulators** ("ACER"). The idea is that market participants (and/or others, such as third parties acting for them or other trade reporting systems or trade repositories) will have to provide extensive data concerning transactions and trading activities to ACER and that this will be made available also to national regulators supervising energy markets and other authorities (such as competition authorities and financial regulators) as appropriate (see **Articles 7 and 8**). These data collection obligations are currently broad and generic, but will be clarified through so-called "implementing acts" on what data has to be provided in what form, and when.

5. REMIT requires **market participants** to register with national regulatory authorities in the EU, either where they are established or resident, or if they are not established or resident in the EU, in a Member State in which they are active. (**Article 9**)

The specific obligations on insider trading and market manipulation require prompt attention, because the Regulation is binding and directly applicable from the day it enters into force. This means that it can then be invoked before the national and European courts in the EU.

Otherwise, the overall scheme of enforcement will take some time to take shape, since the EU Member States have to adopt implementing legislation for their national regulatory authorities. ACER itself is still recruiting staff to deal with what is expected to be an enormous volume of collected data. Clearly, putting together the required data systems, monitoring processes and necessary security measures will also take some time.

From the perspective of the industries affected (i.e. those dealing with **electricity and gas** in the EU), many are now focussing on the precise wording in order to determine which transactions are affected in practice and precisely what the various standards set out in the prohibitions and related definitions actually mean.

There are a number of initial tensions insofar as this legislation is clearly inspired by previous EU "Market Abuse" legislation, which was directed at **financial trading**, and it is an open question as to how well adapted the legislation is to the **specificities of the energy sector** (even though the Regulation itself acknowledges the need to take such specificities into account) and, in particular, to **real energy transactions** as opposed to financial ones.

Further, some argue that the nature of the Regulation is more adapted to **electricity**, where supply is through grids, whereas it needs more thought in relation to gas supply, where a significant amount of the trading is not through organised markets, but "over the counter" and through various types of physical delivery, for example, in LNG supply ships, or through pipeline and related storage systems.

There is also underlying concern as to whether all of this was justified in the energy sector, where there appear to have been few reported cases of market manipulation, and even those are either controversial or alleged cases, rather than full decisions. For example, the European Commission,

in presenting the proposal for the Regulation, only focussed on a 2006 US case involving hedge fund **Amaranth Advisors LLC**ⁱⁱⁱ and a 2008 EU Competition law case involving **E.on**, where the European Commission alleged that E.on had withdrawn capacity in order to move the supply price up the merit order of plant supply/price, resulting in an overall higher price. E.on settled the case by committing to sell either plants or drawing rights in relation to capacity along the merit curve.^{iv}

Practically, apart from focusing on the implications of the new definitions and obligations, the next agenda should see the involvement of the industry in the secondary legislation and guidance to come: the European Commission "delegated acts" and "implementing acts" and future "non-binding guidance" which the European Commission and/or ACER are to provide on future developments of the markets concerned, the specific functioning of the various energy markets, the interaction between commodity markets and derivative markets, and how the relevant definitions should be applied.

There is also a parallel process underway, updating the **EU Market Abuse** legislation referred to above (the **Market Abuse Directive ("MAD")** and the **Markets in Financial Instruments Directive ("MIFID")**). There are also provisions in REMIT for the various definitions to be aligned with those in MAD and MIFID through secondary legislation.

In addition, there are important questions of allocation of responsibilities to watch, e.g. whether the European Securities Market Authority ("ESMA"), which is meant to enforce the coming revised Market Abuse Regulation, will deal with financial instruments dealing with energy trading, while ACER will deal with other energy trading. There is also the question as to where the European Commission and other national competition authorities in Europe fit into the overall scheme, with concern by market participants that they may be subject to multiple and differing obligations as to conduct and information supply, and multiple investigations with different possible consequences.

This area is therefore one that will continue to develop and that will require close watching and industry involvement.

ⁱ See WilmerHale Alert of 24 February 2011, available at www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9721.

ⁱⁱ Please note that this is just part of the definition. The full text, referred to by the Council Press Release, is available at <http://register.consilium.europa.eu/pdf/en/11/pe00/pe00034.en11.pdf>.

ⁱⁱⁱ See the European Commission Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council on Energy Market Integrity and Transparency, p. 14 et seq., available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:1510:FIN:EN:PDF>.

^{iv} Id., p. 9.