

Briefing note
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New EU market abuse, reporting and registration rules for wholesale energy markets

A new Regulation on Energy Market Integrity and Transparency (REMIT) will impose for the first time EU-wide rules on insider dealing and market manipulation for wholesale electricity and natural gas markets (including derivatives), based on the existing Market Abuse Directive (MAD). In addition, REMIT creates an EU-wide reporting and registration regime for persons dealing in wholesale energy products. The Regulation will come into force shortly, but transitional provisions delay the immediate impact of the reporting and registration regime.

Although some commodity derivatives transactions are covered by existing market abuse regulation under MAD, where they are admitted to trading on regulated markets, there is currently no equivalent EU-wide regime in place for the underlying commodity markets or for many other transactions in commodity derivatives. Similarly, although there are national registers of energy traders in many jurisdictions, there is currently no EU-wide registration system. REMIT will require national regulatory authorities to create and maintain a register of market participants, and to transmit the information in their register to the Ljubljana-based Agency for the Co-operation of Energy Regulators (ACER).

REMIT sets out a framework for a market abuse, reporting and registration regime, but much of the detail is left to the European Commission to decide through implementing and delegated acts.

Timing

The Commission presented its legislative proposal for REMIT on 8 December 2010. The negotiated text of REMIT was adopted by the European Parliament at first reading on 14 September 2011 and by the Council on 10 October 2011. REMIT is expected to be published in the

Official Journal within the next couple of months, and will come into force on the 20th day after publication.

Because REMIT is a Regulation, rather than a Directive, it is directly applicable in all Member States. As a result, it will become law in each Member State as soon as it comes into force, without the need for Member States to pass implementing legislation.

However, the new reporting requirements will only apply from six months after the date on which the Commission adopts implementing acts setting out the scope, content and timing requirements for the reports. In addition, because the new registration requirement is triggered by the reporting requirement, this requirement will also only come into effect at this point. Member States have until three months after the Commission's adoption of the implementing acts setting the scope of the reporting regime to establish the national registers.

The Regulation also gives Member States 18 months to adopt penalty regimes for infringements of REMIT and to give their national authorities the investigatory and enforcement powers necessary to enforce compliance with the market abuse regime. The penalties must be effective,

dissuasive and proportionate and should be in line with the penalties adopted under MAD.



Scope

REMIT applies to trading in **wholesale energy products**, defined as the following contracts and derivatives, irrespective of where and how they are traded:

- Contracts for the supply of electricity or natural gas where delivery is in the EU;
- Derivatives relating to electricity or natural gas produced, traded or delivered in the EU;
- Contracts relating to the transportation of electricity or natural gas in the EU; and
- Derivatives relating to the transportation of electricity or natural gas in the EU.

Contracts for the supply and distribution of electricity or natural gas for the use of final customers are not wholesale energy products, except where they are with final customers whose consumption capacity exceeds 600 GWh per year.

Energy market abuse regime

The market abuse regime in REMIT uses many of the same concepts as MAD, including:

- Prohibition of **insider trading**: persons who possess inside information in relation to a wholesale energy product are prohibited from:
 - using the information to acquire or dispose of (or trying to acquire or dispose of) the wholesale energy products to which the information relates;
 - disclosing the information except in the normal course of their employment, profession or duties; and
 - recommending or inducing another person, on the basis of the information, to acquire or dispose of the wholesale energy products to which the information relates.



- Obligation to **publish inside information**: all market participants (defined as persons who enter into transactions in EU wholesale energy markets) must disclose publicly any inside information they possess relating to their group's business or facilities, including information relevant to the capacity and use of facilities. This differs from the equivalent obligation under MAD, which only imposes disclosure obligations on issuers of financial instruments admitted to trading on regulated markets. Market participants may delay disclosure to avoid prejudicing their legitimate interests if the delay does not mislead the public and if they can keep the information confidential and do not use it for trading purposes, but only if they notify ACER and the relevant national regulator and provide a justification for the delay.
- Prohibition of **market manipulation**: any engagement in, or attempt to engage in, market manipulation on wholesale energy markets is prohibited. The definition of market manipulation includes entering into a transaction or issuing any order to trade which may give false or misleading signals or

which secures prices at artificial levels, and disseminating false or misleading information.

- Obligation to **report suspicious transactions**: any person professionally arranging transactions in wholesale energy products who reasonably suspects that transaction may breach the prohibition on insider trading or market manipulation must notify without delay the national electricity or gas market regulator (but the Regulation does not indicate how to identify which national regulator the market participant shall report to). It must also establish effective compliance arrangements and procedures for this purpose.

The current definition of inside information in MAD in relation to commodity derivatives is limited to non-public information of a precise nature that is routinely made available to market users or is required to be disclosed on the derivatives market or underlying commodity market. In contrast, REMIT defines inside information to mean any non-public information of a precise nature that would be likely to significantly affect the prices of wholesale energy products. REMIT only somewhat restricts the breadth of this definition by defining

information to include a range of publicly disclosable information and “any 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”.

However, the recitals do indicate that information on a market participant’s own plans and strategies for trading should not be considered as inside information, which may limit the scope of the insider trading rules and the publication requirements to a degree. In addition, there is a limited exemption from the insider trading offence for producers and operators of storage and import facilities for certain trading to cover loss from unplanned outages and for action under national emergency rules. There are also limited exemptions from some of the insider trading and publication rules for certain transmission system operators (and from the publication requirements for certain classified information on critical infrastructure).

REMIT does not describe other defences that might be available in relation to the insider trading prohibition (e.g. where information is held behind Chinese walls) or how the prohibition takes account of recent judicial interpretations of the insider trading prohibition in MAD. However, where a wholesale energy product is already subject to MAD, it will not also be subject to the insider trading and market manipulation provisions in REMIT (although the publication and reporting obligations still apply).

Reporting requirement

Market participants are required to report all transactions in wholesale energy products (including orders to trade) to ACER. The Commission will adopt implementing acts setting out the contracts and derivatives which are to be reported, appropriate de minimis thresholds for reporting, and the timing and form of the reports.

Persons who have reported information relating to these transactions under the Markets in Financial Instruments Directive (MiFID) or the planned EU regulation on OTC derivatives (EMIR) will not be required to report the same information again (but duplication could result from differences in scope or content requirements). However, trade repositories, competent financial authorities and the European Securities and Markets Authority (ESMA) will be required to report the transactions to ACER. As a result, ACER should have a complete record of all reportable transactions.

“Information on a market participant’s own plans and strategies for trading should not be considered as inside information”

Market participants are also required to report information to ACER and national electricity and gas market regulators on the capacity and use of production, storage, consumption and transmission facilities, to be determined by implementing acts adopted by the Commission.

ACER may make information that it receives publicly available provided that commercially sensitive information on individual market participants, transactions or market places is not disclosed and cannot be inferred.

Registration requirement

Market participants who enter into transactions which are required to be reported under REMIT are required to register with the national electricity or natural gas market authority in the Member State in which 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. Market participants must submit a registration form to the relevant national

authority prior to entering into a transaction which is required to be reported.

As mentioned above, persons who are required to report transactions under MiFID or EMIR will not be required to report the same information again to ACER. As a result, someone who carries out transactions which are only reported under MiFID or EMIR will not need to register under REMIT.

Under REMIT, market participants are only required to register with one national authority. If they are already registered in one Member State, they should not be required to re-register in any other Member State. However, REMIT does not state that Member States must remove any existing registration or licensing regimes that they currently have in place and so the registration regime may not create an energy “passport” for the EU.

There are no additional ongoing conduct of business or other requirements applicable to registered firms. However, registered entities are required to notify their national regulatory authority promptly of any change in the information provided in the registration form. REMIT does not prescribe a standard registration form.

Other current reforms

The Commission is expected to publish shortly its legislative proposals for reforms of MiFID and MAD and the EU institutions are in the final stages of negotiations on EMIR. These instruments will have an impact on the scope and application of REMIT. In particular, it seems likely that the proposed reforms of MAD may take different approaches to the definition of insider trading and market manipulation. However, the Commission has powers to align the definitions of inside information and market manipulation in REMIT with other EU legislation as well as to take account of future developments on wholesale energy markets.

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