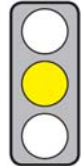


## MAIN ISSUES

**Objective of the Regulation:** Insider trading and market manipulation on wholesale energy markets are to be stopped throughout the EU.

**Parties affected:** Energy producers and traders, energy regulators.



**Pros:** (1) An EU-wide legal framework to prevent market abuse is appropriate as wholesale energy markets are becoming increasingly international.

(2) The central data collection carried out by the EU agency ACER reduces the REMIT implementation costs for the affected companies.

**Cons:** (1) Companies which only operate in wholesale energy markets to a limited extent should be explicitly exempted.

(2) How the details covered by the Regulation are to be defined is an essential decision which must not be taken by the Commission through delegated acts.

## CONTENT

### Title

**Proposal COM(2010) 726** of 8 December 2010 for a **Regulation** of the European Parliament and of the Council **on energy market integrity and transparency** ("REMIT")

### Brief Summary

#### ► Background and objective

- According to the Commission, price formation on functioning wholesale energy markets for gas and electricity also serve to:
  - send a clear signal to power plants, households and businesses regarding optimal energy use,
  - provide orientation for reasonable investments into energy infrastructure and
  - foster efficient energy use.
- Unfair practices on wholesale energy markets ("market manipulation")
  - cause high price volatility,
  - lead to increased energy prices for end consumers (both citizens and companies) and
  - undermine the confidence of potential investors in energy plants and infrastructure projects.
- The proposed Regulation ("REMIT" – Regulation on Energy Market Integrity and Transparency) establishes an EU-wide legal framework to prevent market abuse and thus reinforce the transparency and integrity of wholesale energy markets for gas and electricity.

#### ► Object and scope

- The Regulation prohibits "market abuse". According to the Commission this involves "insider trading" (Art. 3) and "market manipulation" (Art. 4) in wholesale energy products.
  - "Wholesale energy products" (Art. 2 Abs. 4) means
    - contracts for the supply of natural gas or electricity ("goods market"), unless they relate to the end user supply;
    - derivatives relating to natural gas or electricity or their transportation. ("Derivative markets": Derivatives are financial contracts whose value is derived from an underlying value. Should a predefined event occur in the underlying contract, partners are entitled to payment or the right to purchase or sell. Derivatives are used for risk hedging or speculative purposes).
  - REMIT covers both stock exchange dealing and over-the-counter transactions (OTC).
  - REMIT does not affect the scope of the Market Abuse Directive (MAD – 2003/6/EC), the Financial Instruments Directive (MiFID – 2004/39/EC) nor EU Competition Law with regard to their application to practices covered by REMIT (Art. 1).
- The prohibition of insider trading (Art. 3) and market manipulation (Art. 4) does not apply to wholesale energy products which are authorised as "financial instruments" in at least one Member State according to Art. 9 of the MAD directive on trading in regulated markets (Art. 1).

#### ► Prohibition of insider trading

- "Inside information" means precise information concerning wholesale energy products which has not been made public and which, if made public, could significantly affect the prices of said products (Art. 2 (1)).

- Persons who possess inside information are prohibited from (Art. 3 (1)):
    - using that information to acquire or dispose of wholesale energy products for their own account;
    - disclosing such information to any third party, unless such disclosure is made in the “normal course” of the exercise of their employment, profession or duties (in which case they must make “complete and efficient” public disclosure of that information);
    - recommending or inciting any other person to acquire or dispose of wholesale energy products on the basis of such information.
  - The prohibition of insider trading applies in particular to persons (Art. 3 (2)),
    - having access to the information through the exercise of their employment, profession or duties, or
    - persons “who know, or ought to know,” that it is inside information.
  - Market participants must, “either in whole or in part”, publicly disclose inside information in respect of business or facilities which the participant concerned owns or controls, or for which the participant is responsible (Art. 3 (4)). Such information includes in particular information on the capacity of facilities for production, storage, consumption or transmission of electricity or natural gas.
- **Prohibition of market manipulation**
- Market manipulation on wholesale energy markets is prohibited (Art. 4).
  - “Market manipulation” means (Art. 2 (2))
    - entering into transactions or the issuing of orders to trade in wholesale energy products which
      - give or are likely to give false or misleading signals as to the price of wholesale energy products; or
      - affect, by one or several persons, the price of one or several wholesale energy products as to reach an “abnormal or artificial” price level; or
      - employ fictitious devices or any other form of deception; or
      - disseminate information (e.g. rumours) which give or are likely to give false or misleading signals.
- **Specification of scope through definitions**
- The Commission has the power to specify terms such as “inside information”, “market manipulation” or “wholesale energy products” through delegated acts (Art. 290 TFEU) in order to adjust them to “future developments” on wholesale energy markets (Art. 5 in conjunction with Art. 15–17).
- **Market monitoring**
- In order to detect and prevent market abuse, the EU Agency for the Cooperation of Energy Regulators (ACER; see [CEP Compass](#), p. 20, in German only) monitors wholesale energy markets.
    - ACER reports to the Commission at least once a year on flaws in market rules, standards and procedures which could facilitate market abuse or impede the single market (Art. 6 (3)).
    - ACER may recommend to the Commission which transactional data they believe need to be collected for effective and efficient market monitoring (Art. 6 (3)).
  - ACER should cooperate with national regulatory authorities in carrying out the monitoring (Art. 6 (2)).
- **Data collection**
- ACER collects data on transactions on wholesale energy markets (Art. 7 (1)) to be provided by market participants, trade matching systems, trade repositories or financial authorities (Art. 7 (3)).
  - ACER collects information on the capacity of facilities for production, storage, consumption or transmission of electricity or natural gas of market participants (Art. 7 (4)).
  - The Commission defines the content, form and time of data collection and “where appropriate” thresholds for the reporting of transactions through delegated acts (Art. 290 TFEU, Art. 7 (2) and 4 in conjunction with Art. 15–17).
  - ACER must ensure the confidentiality, integrity and protection of the collected data (Art. 9 (1)).
  - ACER may publish information that do not release “commercially sensitive” data on individual market participants or transactions (Art. 9 (2)).
  - ACER is to share information with national regulatory authorities, the financial and competition authorities of Member States and other relevant authorities (Art. 8 (1)).
- **Enforcement of the market abuse prohibition**
- The investigatory powers of the national regulators for the enforcement of the market abuse prohibition include in particular (Art. 10 (2)) the right to:
    - demand information “from any person”,
    - carry out on-site inspections,
    - require the cessation of infringements of REMIT,
    - request a court to sequester assets; or
    - request temporary prohibition of professional activity.
  - The national regulatory authorities must cooperate with each other and with ACER (Art. 11 (1)).
    - The national regulatory authorities must notify ACER of suspected breaches of the REMIT carried out in their or any other Member State (Art. 11 (2)).

- In the case of suspected breaches of the REMIT, ACER may (Art. 11 (4) and (5))
  - request that the national regulatory authority provides information on the suspected breach, take appropriate action or remedy any such breach; or
  - in the case of breaches with cross-border impact convene an investigatory group consisting of representatives of national regulatory authorities.
- The Member States lay down the rules on penalties applicable to infringements against REMIT which must be “effective, proportionate and dissuasive” (Art. 13).

### Changes Compared to the Status Quo

To date, there is no EU-wide rule regarding market abuse on energy markets.

### Statement on Subsidiarity by the Commission

The Commission stresses that EU energy markets are increasingly gaining cross-border relevance in terms of where their trading, production and consumption takes place. To this end, cases of market abuse “inevitably” (p. 4) impact the whole of the EU. Individual Member States cannot fully monitor the entire market situation in order to detect market abuse efficiently and to take deterrent counter-action. Moreover, there is a risk of “proliferating” (p. 4) initiatives in Member States, which could lead to conflicting and uncoordinated regimes. Therefore, an EU-wide legal framework is required.

### Policy Context

Though the directive on market abuse (MAD, 2003/6/EC) and the directive on markets for financial instruments (MiFID, 2004/39/EG) do regulate market abuse, they are mainly tailored to financial markets and not to energy markets and therefore do not take into account energy-specific cases such as energy scarcity.

### Status on Legislation

08.12.10 Adoption by the Commission  
 Open Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force.

### Options for Influencing the Political Process

Leading Directorate General:	DG Energy
Committees of the European Parliament:	Industry, Research and Energy (leading); Economic and Monetary Affairs; Internal Market and Consumer Protection
Committees of the German <i>Bundestag</i> :	Economics and Technology
Decision mode in the Council:	Qualified majority (approval by a majority of Member States and at least 255 out of 345 votes; Germany: 29 votes)

### Formalities

Legal competence:	Art. 194 (2) TFEU (Energy)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure; ex-Art. 251 TEC)

## ASSESSMENT

### Economic Impact Assessment

#### Ordoliberal Assessment

**A large part of the transactions on wholesale energy markets is currently not covered by the existing EU legislation for financial markets.** Due to the special nature of energy markets, financial regulations should not be extended to energy transactions. **Therefore, a tailor-made legal framework is necessary for wholesale energy markets,** in addition to the already existing regulations for financial markets. Electricity, for instance, cannot be stored on an industrial scale, which is why market prices strongly react to the actual or expected energy production capacity at a certain time. Due to the grid-bound nature of natural gas, gas prices also react to the capacity available at a certain time, though to a lesser degree, as gas is storable. Since gas, however, is also used to produce electricity, gas and electricity markets are closely linked; market abuse on one market can therefore also affect the other.

#### Impact on Efficiency and Individual Freedom of Choice

In order to keep to a minimum the costs incurred by companies when they comply with reporting obligations, the data collection conducted by ACER is appropriate in principle. However, to prevent the volume of data from growing too large, not all orders to trade should be filed with ACER; the mere reporting of actual

transactions suffices. Where there is solid reason for suspicion, national regulatory authorities are anyway entitled to access relevant files.

Companies which only operate in wholesale energy markets to a limited extent do not have systematic impact on market prices due to their insignificant trade volumes. However, it is precisely these companies that are disproportionately burdened through report requirements. For them, the Commission's impact assessment [SEC(2010) 1510, p. 44] therefore favours exemptions. The proposed regulation, however, only allows that the Commission may define "thresholds for the reporting of transactions" (Art. 7 (1)) through delegated acts "where appropriate". This is doubly inappropriate: for reporting capacity of facilities (Art. 7 (4)) absolutely no reference to any thresholds is made at all. Besides, at least the criteria for the definition of thresholds should be legislatively prescribed. Therefore, **for companies with low trade volumes the Regulation should explicitly set out** the criteria for the individual design of reporting obligations, including **de minimis exemptions**.

**As wholesale energy markets are closely linked to markets for CO<sub>2</sub> emissions allowances** under the framework of EU emissions trading, **compatible market supervision rules would be reasonable**. Several markets for emissions allowances are already subjected to EU-wide market regulation under the MAD (2003/6/EC), the MiFID (2004/39/EC) and the EU Emissions Trading Scheme (No. 1031/2010) [see [CEP Policy Brief](#)]. Spot trading, however, is currently not regulated at EU level, so that different rules apply in the single Member States. The harmonisation and coordination of market supervision rules for energy markets would help prevent bureaucratic parallel structures with different reporting systems.

#### Impact on Growth and Employment

Manipulated energy markets tend to lead to a better quality and higher energy price volatility. Protection against market abuse would therefore lower energy costs and thus have a positive impact on growth and employment.

#### Impact on Europe as a Business Location

Transparent energy markets protected against market abuse increase the quality of Europe as a business location.

## Legal Assessment

### Legislative Competence

Unproblematic. The EU has the power to adopt energy policy measures in order to ensure the functioning of the energy market (Art. 194 TFEU).

### Subsidiarity

Due to advancing development of the internal energy market, more and more wholesale energy market transactions are taking place across borders. As it is already not possible for these transactions to be adequately monitored by the single Member States, an EU-wide legal framework is necessary.

### Proportionality

Unproblematic.

### Compatibility with EU Law

Due to the principle of democracy (Art. 2 and Art. 10 (2) TEU), EU legislative bodies must take important decisions themselves. Therefore, they may grant the Commission the power to adopt delegated acts only for the purpose of amending or supplementing "non-essential elements" of a regulation (Art. 290 (1) TFEU). Essential is in particular the definition of the objects covered by a regulation. **The definition of essential terms**, such as "insider information", "market manipulation" or "wholesale energy market products" (Art. 2) **must therefore not be** made through a "specification" (Art. 5) **based on a delegated act**. For the same reason, the Regulation itself must define the criteria according to which it determines the thresholds for transaction reporting (de minimis exemptions, Art. 7 (1)).

That ACER provides information on market activities (Art. 9 (2)) is in principle unproblematic. However, it should be clarified within the Regulation which information ACER may make publicly available and in which form.

### Compatibility with German Law

Unproblematic.

## Conclusion

That wholesale energy markets should have a tailor-made market abuse law is appropriate, as energy markets are characterised by specific criteria which are not adequately covered by the financial market legislation. Since traders on the wholesale energy market operate to a large extent at cross-border level, an EU-wide regulation is necessary. How the details covered by the Regulation are to be defined is a substantive decision that must be taken by the EU legislator in the Regulation and not by the Commission through delegated acts. Moreover, there are no criteria for de minimis exemptions to release companies which are only active on wholesale energy markets to a limited extent from reporting obligations. Since energy markets are closely linked to markets for CO<sub>2</sub> emissions allowances under EU ETS, coordinated market monitoring rules would be reasonable.