

EU REGULATION ON ENERGY MARKET INTEGRITY AND TRANSPARENCY

On September 14, 2011, the European Parliament approved the Regulation on Energy Market Integrity and Transparency (“REMIT”), a new set of rules creating an EU-wide legal framework to prevent market abuse and reinforce the transparency and integrity of wholesale energy markets.¹ The EU Council of Ministers is expected to approve the version adopted by the European Parliament.

REMIT extends to the EU wholesale energy markets the prohibitions against insider trading and market manipulation that are already in force in the securities markets. REMIT complements proposals to expand the scope of the Market Abuse Directive (“MAD”)² to cover derivatives, including energy-linked commodity derivatives, and emissions trading. REMIT also introduces new reporting and registration obligations on market participants and monitoring and enforcement mechanisms at both national and European levels.

REMIT’s prohibitions against market abuse will likely become applicable in mid-2013 (18 months plus 20 days after publication in the EU Official Journal). REMIT’s reporting and monitoring requirements will enter into force six months after the Commission adopts implementing measures on the collection of market data.

I. MARKET ABUSES ON WHOLESALE ENERGY MARKETS

REMIT will prohibit insider trading and market manipulation in relation to wholesale energy markets. REMIT builds on the prohibition of insider trading and market manipulation set out in the Market Abuse Directive but is designed to address the specificities of the energy markets. For instance, the notion of “inside information” includes information related to the capacity and use of facilities for production, storage, consumption

¹ The text voted by Parliament is available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0376+0+DOC+XML+V0//EN&language=EN>.

² See Commission Consultation document at http://ec.europa.eu/internal_market/consultations/docs/2010/mad/consultation_paper.pdf

or transmission of electricity or natural gas or related to the capacity and use of LNG facilities, including planned or unplanned unavailability of these facilities. Similarly, the definition of “market manipulation” encompasses conduct related to the availability of electricity generation capacity or gas availability or the availability of transmission capacity, where such information affects or is likely to affect the price of wholesale energy products.

REMIT applies to contracts and derivatives for the supply and/or the transportation of natural gas or electricity for delivery in the EU. REMIT applies regardless of where and how trading takes place, *i.e.*, on regulated markets or multilateral trading facilities or in over-the-counter transactions. However, REMIT’s prohibitions of insider trading and market manipulation will not apply to wholesale energy products that are treated as financial instruments under the MAD regime.

II. REPORTING AND REGISTRATION

REMIT will impose far-reaching reporting duties on market participants. They will be required to provide the European Agency for the Cooperation of Energy Regulators (“ACER”) with records of wholesale energy market transactions, including the wholesale energy products bought and sold, the price and quantity agreed, the dates and times of execution, the parties to (and, in case the transactions are carried out by brokers, the beneficiaries of) the transaction, and any other relevant information. The Commission, by means of implementing acts, will draw up a list of the contracts and derivatives to be reported and adopt uniform rules. The Commission may also define *de minimis* thresholds under which market participants would be exempt from reporting requirements.

Market participants entering into reportable transactions will be required to register with the national regulatory authorities (“NRAs”) 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. A market participant will only register with one NRA; Member States will not require a market participant already registered in another Member State to register again. This information will then be used to draw up a European register.

Unlike the prohibitions of insider trading and market manipulation, trading in financial instruments related to the wholesale energy markets is not excluded from REMIT’s reporting obligations.

III. MONITORING AND ENFORCEMENT

ACER and the NRAs will cooperate to monitor the relevant markets. ACER is a European Union body established in 2010 to provide a framework for NRAs’ cooperation, but it has decision-making powers over certain issues with a cross-border dimension.

ACER will analyze the information provided by market participants and decide further steps with respect to enforcement. ACER may

- Request one or more NRAs to commence an investigation of a suspected breach and take appropriate action to remedy any breach found; or
- Where it considers that the possible breach has, or has had, a cross-border impact, establish and coordinate an investigatory group consisting of representatives of concerned NRAs.

The penalties for breach of REMIT will be decided by Member States. These penalties must be effective, dissuasive and proportionate, reflecting the nature, duration and seriousness of the infringement, the damage caused to consumers and the potential gains from trading on the basis of inside information and market manipulation.

The information collected under REMIT may also be used to enforce competition law and financial regulations, as such information will be shared with financial and competition authorities.

IV. CONCLUSION

REMIT is a first step in the extension of traditional prohibitions of insider trading and market manipulation to EU physical commodities markets. The Commission has stressed the linkages between markets for wholesale commodities markets and derivatives linked to those commodities. As such, REMIT will work hand-in-hand with the MAD regime, which is expected to extend these prohibitions to the emissions markets as well as to financial instruments.

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If you have any questions, please feel free to contact any of your regular contacts at the firm.

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