

Focus

- Market Abuse on the Energy Markets

4 June 2013, the Danish Parliament adopted an [act](#) (link in Danish) which changes the electricity and natural gas supply laws and lays down maximum penalties for violations of the REMIT Regulation's rules on market abuse. The Act also vests the Danish Energy Regulatory Authority with the investigation and enforcement powers which the Energy Regulatory Authority must have in order to be able to enforce the REMIT Regulation in Denmark. In this newsletter, we take a close look at the REMIT Regulation, the obligations it entails, and the recently adopted maximum penalties as well as the investigation and enforcement powers.

Who and what is affected by the REMIT Regulation?

REMIT affects anyone involved in transactions, including the placing of trade orders on one or several wholesale energy markets.

All manufacturers, distributors, operators of storage facilities, transmission systems operators, and many more should already now be prepared for the new reality introduced by the REMIT Regulation.

Companies should in particular ensure to work out internal procedures and training programmes in order to comply with the ban on market abuse, insider trading and disclosure of inside information.

Further, companies should have adequate procedures for managing the new disclosure obligations, including, and in consideration of the company's work load, a procedure preventing any information made public pursuant to one set of rules from being made public pursuant to another set of rules, unless it is required.

Finally, the affected companies (which also include agents that only trade in wholesale energy products for speculative purposes) must ensure the required registration with the Energy Regulatory Authority and the ongoing reporting to ACER.

In conclusion, the REMIT Regulation is of great significance to the wholesale energy market participants who on the other hand (hopefully) may, in time, expect that the effectiveness, liquidity and transparency of the wholesale energy markets will increase to an extent creating new possibilities for companies.

What is the Background for the REMIT Regulation?

28 December 2011, REMIT (Regulation no. 1227/2011 on wholesale energy market integrity and transparency) came into force.

The Regulation constitutes an entirely new set of rules with market abuse rules (as they are known from the financial markets) applicable to the electricity and natural gas wholesale energy markets. Anyone involved in transactions, including placing of trade orders on one or several wholesale energy markets, is affected by the rules in REMIT.

The creation of the Regulation is to be seen namely in light of the financial crisis and the wish to secure both the energy markets' and the financial markets' integrity by increasing transparency on the wholesale energy markets.

At the same time, the increased focus on trading in derivatives, which has also led to the EMIR Regulation (Regulation no. 648/2012 on OTC Derivatives, Central Counterparties and Trade Repositories), has called for the legislators to address the increasing trading in energy related derivatives which thus far has not been covered by the market abuse regulation.

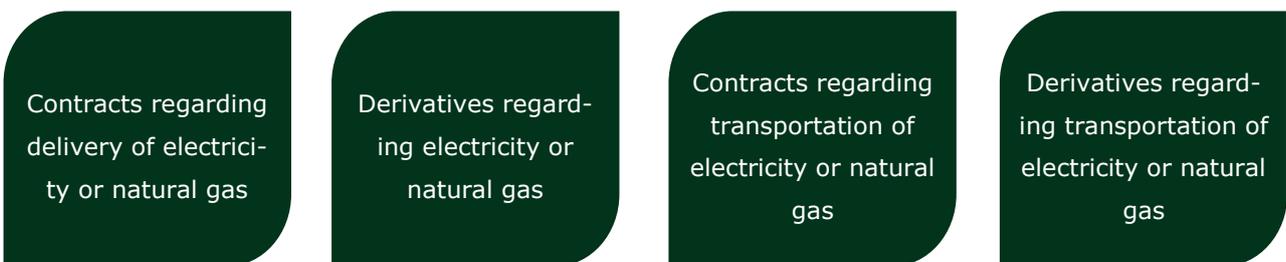
The Application of the REMIT Regulation?

REMIT applies to trade with electricity and natural gas on the wholesale energy markets within the EU and covers both trade with the natural product and derivatives therefrom.

Therefore, the Regulation does not in principle apply to the delivery to the final customer (retail customers), however, such deliveries are covered if the customer's consumption capacity exceeds 600 GWH.

The rules apply to trade with so-called wholesale energy products which are defined by the Regulation into four categories as illustrated in Figure 1.

Figure 1. Wholesale energy products



A number of the wholesale energy products covered by REMIT are also covered by the current market abuse rules in the Market Abuse Directive because the products are considered financial instruments. However, it is only the wholesale products that are derivatives and that are traded on a regulated market.

It can be difficult to define the line between the natural and the financial contracts just as it can be difficult to define which of the financial wholesale energy products are covered by the Market Abuse Directive.

However, the derivatives which are considered financial instruments are not covered by the bans against market abuse in REMIT, but are instead covered by the similar bans in the Market Abuse Directive. The remaining part of REMIT, such as the disclosure and reporting obligations, still apply to these derivatives.

As a result of the proposed revision of the Market Abuse Directive and MiFID, the field of application for REMIT changes seeing as the expansion of the field of application of the Market Abuse Directive leads to a limitation in the field of application of REMIT due to the special exemption regarding financial instruments covered by the Market Abuse Directive described above.

There is no expansion of the definition of the term financial instruments, but MiFID II's introduction of the market place term Organised Trading Facilities (OTFs) and MAD II's expansion to include trading on the OTFs mean that a series of trades which are not covered by the Market Abuse Directive today

will be going forward.

Consequently, a greater number of the trading forms which are covered by REMIT today will be covered by the market abuse rules on the financial markets. Further, it has been proposed to introduce a clearing and trading obligation implying that certain derivatives *must* be traded on a regulated market, MTF or OTF, which may lead to a further limitation of the field of application of the bans against market abuse in the REMIT Regulation.

The rules in REMIT can be divided into three main categories as illustrated in Figure 2.

Figure 2. Overall view of the rules in REMIT



The Bans in REMIT?

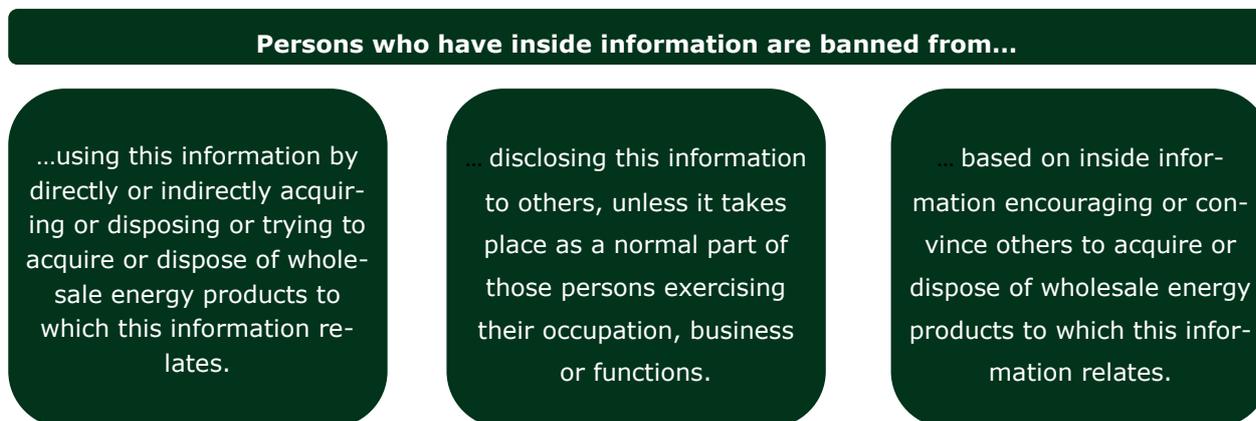
REMIT's market abuse regime includes, just as on the financial markets, three measures as illustrated in Figure 3.

Figure 3. The market abuse regime of REMIT



REMIT contains a ban against insider trading which to a wide extent corresponds to the similar ban known from the Market Abuse Directive and which applies to the financial markets. The individual elements in the ban are illustrated in Figure 4.

Figure 4. Insider trading – the banned actions



The ban implies that any person holding inside information concerning a wholesale energy product cannot use this inside information by disposing of or acquiring wholesale energy products to which this information relates.

The inside information may for instance be information regarding the capacity and use of facilities to store or produce electricity or natural gas, including any planned or unpredicted suspension of operations.

The ban against insider trading is related to the ban against unauthorised disclosure of internal inside information. In line with the Market Abuse Directive, REMIT prescribes that any disclosure of internal inside information is banned, unless it takes place as an ordinary part of the exercise of the person's occupation, business or function.

REMIT's ban against market manipulation corresponds to the ban against price manipulation as it is known from the financial markets. The market manipulation can take place by carrying out misleading actions or by providing misleading information.

The banned actions have been divided into four categories as illustrated in Figure 5. The ban applies to anyone who participates on the wholesale energy markets.

Figure 5. Market manipulation – the banned actions



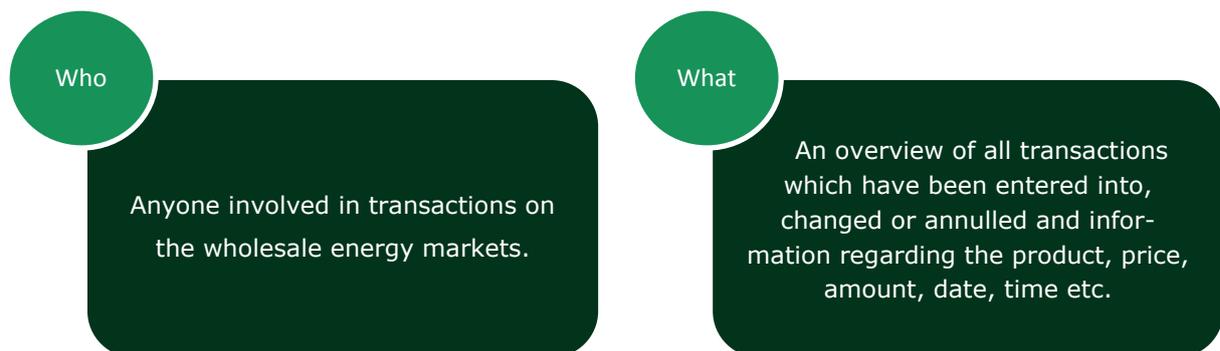
REMIT also provides the possibility of postponing the disclosure similar to the rule in the Danish Securities Trading Act, Section 27(6). The duty applies to market participants that own, control or that are responsible for the operation of companies or facilities on the wholesale energy markets. In addition to this, there are a number of other disclosure obligations which derive from the regulations on network access as well as network codes and general guidelines which have been adopted according hereto.

Reporting Requirements and Market Surveillance?

REMIT contains requirements that any activity on the wholesale energy markets must be reported to ACER (Agency for the Cooperation of Energy Regulators).

The reporting must be done within a deadline determined by the European Commission (which has not yet been determined). The content of the reporting duty has been illustrated in Figure 6.

Figure 6. The reporting duty



The overall responsibility for complying with the reporting duty rests with the market participant, while the duty is seen as complied with if for instance the market place has submitted the information.

Similar rules apply to information regarding the capacity and use of facilities for production, storing, consumption or transmission of electricity or natural gas.

The market participants involved in transactions which must be registered in accordance with the rules described below must let themselves be registered with the national regulatory authority. In Denmark, registration must be made with the Danish Energy Regulatory Authority.

All of the Regulation's bans and duties may be summarized as in Figure 7 in that importance must be attached to the fact that REMIT's way of regulation focuses more on the function a company has on the wholesale energy markets than which type of company is in question.

Figure 7. Overview of obligations and bans

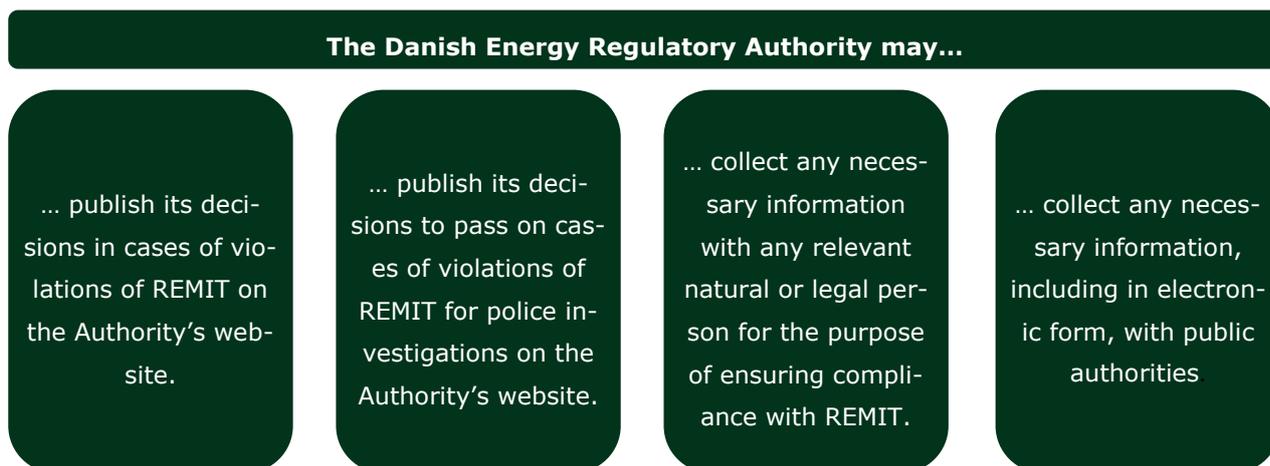
Ban/duty	Companies covered
Ban against insider trading	Any company on the wholesale energy markets in possession of inside information, e.g.: <ul style="list-style-type: none"> • Manufacturers • Distributors • Companies with an obligation of supply • Transmission system operators • Persons in charge of natural gas storage facilities • Traders and trading companies • Etc.
Ban against disclosure of inside information	
Duty to disclose inside information	
Ban against market manipulation	Anyone participating on the markets, e.g.: <ul style="list-style-type: none"> • Manufacturers • Distributors • Companies with an obligation of supply • Transmission system operators • Persons in charge of natural gas storage facilities • Traders and trading companies • Etc.
Duty to report transactions	Anyone involved in (or who through their profession carries out) transactions on the wholesale energy markets, e.g.: <ul style="list-style-type: none"> • Manufacturers • Distributors • Companies with an obligation of supply • Persons in charge of natural gas storage facilities • Traders and trading companies • Etc.
Duty to report on the capacity and use of production facilities, storage facilities etc.	The market participants that hold information on the capacity and use of facilities for production, storage, use or transmission of electricity or natural gas or on the capacity and use of LNG facilities, e.g.: <ul style="list-style-type: none"> • Manufacturers • Persons in charge of natural gas storage facilities • Transmission system operators • Companies with an obligation of supply • Etc.

Enforcement, Duty to report, and Penalty?

In Denmark, the Danish Energy Regulatory Authority enforces the REMIT rules. Pursuant to the Regulation, the necessary powers must be vested with the Authority no later than 29 June 2013, and

the bill containing the necessary additions to electricity and natural gas supply laws was adopted on 4 June 2013. Figure 8 provides an overview of the vested powers.

Figure 8. The Danish Energy Regulatory Authority's new powers



The powers may be enacted directly, jointly with other authorities, or by a petition to the relevant legal authorities.

Persons who as part of their profession carries out transactions with wholesale energy manufacturers have a duty to report transactions which have been suspected of being in contravention of the bans against insider trading and market manipulation to the Danish Energy Regulatory Authority.

The same Act introduces the penalty clauses for violations of the Regulation's rules into the relevant acts. Figure 9 provides an overview of the penalty clauses. The penalty levels have not been established as of yet.

Figure 9. The penalty clauses



When will the Rules come into Force?

The new amendments to the Act will come into force on 15 June 2013, except for the penalty clause which is to be introduced into the civil code. In this regard, the Act will not come into force until 1 July 2013.

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