

Delimitation of Energy and Financial Regulation on the EU Wholesale Energy Market

STRAHINJA OBRENOVIĆ

Abstract Wholesale energy markets in the European Union (EU) are regulated both by financial and energy legal frameworks. The introduction of the energy regulatory framework supplemented the existing regulation for the financial markets in the EU. However, subsequent changes in the financial legal regime opened some questions regarding the interplay between financial and energy regulation in the EU wholesale energy markets. The aim of this paper is to explain the growing complexity of the existing regulatory framework on the wholesale energy market in the EU. This complexity is raising concerns about possible overlaps of different legal regimes and division of competence between financial and energy regulatory authorities both at the EU and Member States levels. Nevertheless, closer cooperation and information exchange between different regulators can reduce some uncertainties and make the market functioning even more effective.

Keywords: • energy market regulation • financial market regulation • EU wholesale energy markets • physical and financial contracts • regulatory authorities

CORRESPONDENCE ADDRESS: Strahinja Obrenović, Ph.D. Candidate, Teaching Assistant, University of Belgrade, Faculty of Political Science, Jove Ilića 165, Belgrade, Serbia, e-mail: strahinja.obrenovic@fpn.bg.ac.rs.

<https://doi.org/10.4335/2023.3.13> ISBN 978-961-7124-14-9 (PDF)
Available online at <http://www.lex-localis.press>.



© The Author(s). Licensee Institute for Local Self-Government Maribor. Distributed under the terms of the Creative Commons Attribution-NonCommercial 4.0 license (<https://creativecommons.org/licenses/by-nc/4.0/>), which permits use, distribution and reproduction for non-commercial purposes, provided the original is properly cited.

1 Introduction

Wholesale energy markets in the European Union (EU) are characterized by their growing complexity. Instead of relatively isolated national wholesale energy markets that were present in the Member States for decades, the process of liberalization of energy markets brought a radical shift toward the “Europeanization” of the energy sector. With these changes, markets are playing crucial roles across the Member States. The main idea behind the process of liberalization of the energy sector was integrating national energy markets into Single Energy Market (SEM). It was obvious that the focus of new energy regulations was on retail (downstream) and midstream markets, especially in the natural gas sector. However, gaining momentum in energy liberalization brought new dynamics to energy markets. While the energy industry was largely based on long-term contractual relationships between sellers and buyers, a new phenomenon was trading on spot markets and short-term trading. In parallel to commodity trading, market players have been involved in financial energy markets. The development of energy *acquis* in the European Union was focused on the liberalization of electricity and natural gas markets, thus reducing the role of states in the markets and adopting a *laissez-faire* approach to energy trading and accessing the markets. Financial trading in energy markets was partly covered by financial regulation, while over-the-counter (OTC) trading was excluded from its scope. It was only trading on regulated markets that were initially covered by financial regulation.

A significant change came with the introduction of a new energy regulation covering wholesale energy markets in the EU and aiming to prevent market abuse and insider trading. This helped to fill the regulatory gap that existed for years in liberalized markets in the European Union. In addition, a new financial framework was introduced by revision of existing legal acts and introducing new ones. While this legislative action helped to cover some practices that were previously excluded from the scope of directives and regulations, concerns were raised about the growing complexity and potential overlapping jurisdiction. This is also reflected in the existence of separate bodies in energy and financial markets in the EU.

Given the latest energy crisis and rising energy prices, it is of particular importance to analyze the existing framework governing the EU wholesale energy markets. The aim of the paper is to present both energy and financial regulation and their delimitation on the wholesale energy market in the European Union. This includes an analysis of EU bodies established under both financial and energy frameworks, namely the European Securities and Markets Authority (ESMA) and the Agency for the Cooperation of Energy Regulators (ACER). In the paper, we argue although the delimitation between energy and financial regulation is undeniable in the EU wholesale energy markets, cooperation between financial and energy regulators is of crucial importance to overcome the complexity and prevent market misconduct.

2 Literature overview

In the last three decades, most academic interests have been directed toward the liberalization process in European markets. This trend reflected legislative actions inside the European Union. The main concern in the 1990s was primarily removing the barriers between Member States and integrating national markets into Single Energy Market. It was only in the 2000s that grand monographs appeared following the adoption of the First Energy Package. But, directives contained in the First Energy Package did not regulate wholesale energy trading, nor did the subsequent so-called energy packages – Second and Third Energy Packages. As Cameron notes, while the Electricity Directive of 1996 covered the production of electricity, the same provisions were absent from Gas Directive in 1998 (Cameron, 2007: 180). This was a direct result of the adoption of the Hydrocarbons Licensing Directive in 1994, which brought under its scope natural gas production. While electricity generation is located to large extent in Europe, the production of natural gas in Europe is not enough to meet the internal demand so countries are oriented towards imports from external suppliers. The same pattern and aim are present in the Second and Third Energy Packages.

Important legislative action regarding the financial markets in the European Union was taken with the adoption of Directive 2003/6/EC on insider dealing and market manipulation in 2002 (in further text Market Abuse Directive or MAD). The change in the financial framework was followed up by academic writing on this topic (Ferrarini, 2004), although the relationship between new financial regulation and energy trading was not prominent in the papers and books. Two reasons could be mentioned for lacking the academic interest regarding the application of the Market Abuse Directive in energy markets– first, the rules under the MAD are applicable only to financial markets and thus not to the whole energy market, and second, in the time of the adoption of MAD energy markets were still undergoing restructuring process as a part of liberalization and integration efforts. The Market Abuse Directive replaced previous Council Directive 89/592/EEC on insider trading while adding new rules on market manipulation (Siems, 2008: 39). This finally established a broad framework for financial markets and included rules on market manipulation, insider trading prohibition and disclosure obligation – something that Hansen describes as a 'trinity of market regulation' (Hansen, 2003: 88). In his paper Lannoo emphasized the role of disclosure obligation and its importance as a 'core principle of securities markets regulation' (Lannoo, 2003: 349). Alongside MAD, Simonetti explores the Markets in Financial Instruments Directive (MiFID) adopted in 2004 and its relevance for the energy sector in the Netherlands (Simonetti, 2007).

Radical shift and proliferation of academic text on the regulation of wholesale energy markets in Europe followed up the introduction of the Regulation on Wholesale Market Integrity and Transparency (REMIT) in 2011. However, it is important to understand a wider context and enhanced regulation of the energy market in the EU. Before the adoption of REMIT, the single most important event in the energy sector in Europe was

the enactment of the Third Energy Package in 2009. Although this package contains far-reaching provisions regarding many aspects of the electricity and natural gas markets (Pepermans, 2019: 9), it does not deal in detail with the functioning of the wholesale energy market. Nevertheless, it incorporates some important provisions on transparency and data disclosure (Michetti, 2011: 3). One of the most successful results was the establishment of the Agency for the Cooperation of Energy Regulators (ACER) as a part of the Third Energy Package (Haverbeke, Naesens, Vandorpe, 2010; Maggetti, 2013: 501). Its status, legal positions, and mandate were governed by Regulation (EC) No 713/2009 until it was repealed by Regulation (EU) 2019/942 in 2019. The role of ACER is very important for the European electricity and natural gas markets, as it is one of the main bodies in a complex multi-governance energy structure together with other European institutions and national bodies (Maher, Stefan, 2019: 88). Some authors further examine the duties and tasks of ACER under the REMIT (Klopčič, Hojnik, Pustovrh, 2020: 95; Papageorgiou, 2015). One of the most comprehensive analyses of REMIT and the application of anti-manipulation law to wholesale energy markets in the European Union came from Cagri Corlu, who also considers the interplay between REMIT and competition law (Cagri Corlu, 2018).

A significant event in the financial markets was the establishment of the European Securities and Markets Authority (ESMA) in 2011 which replaced the Committee on European Securities Regulators (CESR). Special attention in some of the papers was devoted to financial risks coming from energy and environmental markets and the applicable financial framework to those markets (Diaz-Rainey, Siems, Ashton, 2011). Some research rightly points out the rising interdependency and connection between physical and financial markets, especially in the context of the wholesale energy market in the European Union (Nijman, 2012: 469). This bond between financial and energy markets became more evident with further changes in financial framework, with the replacement of MiFID in 2014 with MiFID II and Markets in Financial Instruments Regulation (MiFIR), but also the replacement of MAD in 2014 with MAD II and Market Abuse Regulation (MAR). While it brought significant changes to financial markets in the European Union, it also attracted attention from academia (Lannoo, 2017; Kalss et al., 2021).

The aim of this paper is to present the chronological evolution of the regulatory framework in the European Union in order to understand how the wholesale energy markets function today. Beginning with the existing literature, this research should bring some explanation regarding different legal regimes applicable to the wholesale energy markets, but also give some reflection on the position of different regulatory bodies at both national and European levels. This complexity is likely to remain given the specific nature of the energy markets, especially the electricity and natural gas markets. The process of the energy transition is undergoing and bringing some challenges, but also provides some opportunities for both financial and energy markets.

3 Research

For decades energy markets were national in scope, and Member States had a dominant role. This situation lasted until the 1980s, and somewhere even through the 1990s. The paradigm shift from a state-centric approach to a market-oriented position was evident across the globe. It was quite similar in the European Union, where a gradual approach was taken toward market liberalization and market integration. The main concern was how to ensure competition between market players and how to regulate network access, which would in turn bring more benefits to customers. In this initial phase, the question of wholesale energy markets was not of special concern. That was evident from the rules incorporated in the so-called energy packages. European legislator was preoccupied with the proposals on unbundling, third-party access, consumer rights, the introduction of national energy regulators in Member States, and fostering cooperation at the EU level (Johnston, Block, 2012: 25). Even the ambitious Third Energy Package, which brought detailed regulation to electricity and natural gas markets, is not preoccupied with the wholesale energy markets and potential market abuse behavior of participants at this level of the market. Nevertheless, one of the main features of the Third Energy Package was the Regulation that envisaged the establishment of the Agency for the cooperation of energy regulators (ACER). As we will see further in the text, this agency has a prominent role in the implementation of REMIT.

Paradoxically, although the energy packages didn't address specifically wholesale energy markets until the adoption of REMIT, they prepared the ground for its adoption. While energy markets became more liberalized and integrated, the need emerged to regulate wholesale energy markets at the EU level. Some experience was also gained implementing the financial regulation, which addressed the issue of market abuse behavior in the financial sector. Growing trade on spot markets in contrast to traditional long-term contracts brought new dynamics to the markets. In parallel, there was a fast development of trade in energy derivatives. Interestingly, Energy Sector Inquiry which was undertaken under the competition provisions identified problems in the wholesale electricity and gas markets (DG Competition, 2007: 7). The picture was not so optimistic with a conclusion that wholesale energy markets are highly concentrated and still largely national in scope, while wholesale gas trade is not that developed as trading in electricity. Consequently one of the proposals was to ensure 'a monitoring system for trading on wholesale markets', which should bring confidence to the market participants and address market manipulation (DG Competition, 2007: 17). Three years later European Commission published a working document with a proposal for the adoption of Regulation on Energy Market Integrity and Transparency (European Commission, 2010). In this document, it was detected that the rules contained in the Third Energy Package are insufficient to adequately regulate wholesale energy trading. Key stakeholders agreed that the new framework was necessary to improve transparency in the wholesale energy markets and to prevent market misconduct.

Even before the REMIT, some provisions were applicable to wholesale energy trading. For instance, the Market Abuse Directive 2003 (MAD) contained rules applicable to financial instruments, including energy derivatives. All financial instruments covered by MAD were defined in art. 3, including derivatives on commodities, but also any financial instrument traded on a regulated market. According to art. 9 of MAD 2003, it is applicable to 'any financial instrument admitted to trading on a regulated market in at least one Member State', obviously limiting the scope to trade in regulated markets. This left a large part of the wholesale energy market outside the scope of MAD, rising concern about different market abuse practices, i.e. market manipulation and insider trading. This was problematic given that 'abuses of financial markets are a major concern of financial regulation' (Diaz-Rainey, Siems, Ashton, 2011: 364). Also, over-the-counter trade which was the dominant type of trade in energy markets was not covered. Additionally, financial markets were covered by another instrument – Markets in Financial Investments Directive 2004 (MiFID). This Directive provided investor protection provisions, and once again its provisions were oriented toward financial instruments. Both MAD 2003 and MiFID 2004 covered energy derivatives traded on regulated markets or power exchanges (Michetti, 2011: 3).

Those shortcomings were addressed in various reports and publications, including some findings coming from the Committee of European Securities Regulators (CESR), which was later replaced with the European Markets and Securities Authority (ESMA), and European Regulators' Group for Electricity and Gas (ERGEG), which was replaced with the Agency for the Cooperation of Energy Regulators (ACER). One of the conclusions of these bodies, supported by the Union of the Electricity Industry (EURELECTRIC), was that 'it would be inappropriate to expand the scope of MAD to the physical markets' and that was caused by differences that exist between physical and financial markets (Eurelectric, 2008).

The ultimate result was the adoption of Regulation on Wholesale Market and Integrity in 2011, as a general framework or in Cagri Corlu's words 'tailor-made' framework for wholesale electricity and gas markets (Cagri Corlu, 2011). The structure and provisions of REMIT are comparable to those in MAD, and as Nijman correctly points out 'REMIT is largely analogous to MAD' (Nijman, 2012: 472). Obviously, integrity and transparency were problematic in wholesale energy markets and European institutions answered with a new regulatory instrument that would complement existing rules in financial markets. Three pillars of REMIT include prohibitions of market manipulation and insider trading, but also data disclosure obligations. This Regulation also defines what market manipulation and insider trading represent. It is interesting that under REMIT not only engagement in market manipulation is prohibited, but also any 'attempt to engage in' such behavior (art. 5 REMIT). Prohibition is also placed on any 'person who possesses inside information in relation to a wholesale energy product' (art. 3 REMIT). Extensive rules are envisaged for data disclosure, effective monitoring, and registration of market participants, but also cooperation at the national and EU level.

The question is how the REMIT operates together with financial regulation on the wholesale energy markets in the European Union. We already said that the financial framework is applicable to some extent to wholesale energy markets. The main task of the European Commission was to cover all transactions and trade in the wholesale energy markets (Michetti, 2011: 4). This failure was obvious in the electricity and natural gas markets. The trend in recent years was not only increasing trade in physical commodities, but also financial instruments and energy derivatives. While financial rules were helpful in the case of financial contracts, clear market abuse provisions were missing for physical contracts. Article 1 (2) of REMIT defined the scope of Regulation, and it 'applies to trading in wholesale energy products'. From the same paragraph, it is clear that the Regulation doesn't exclude the application of Directive 2003/6/EC (MAD) and Directive 2004/39/EC (MiFID), but also competition rules. What falls under wholesale energy products is defined in art. 2(4) and includes: contracts for energy (i.e. natural gas and electricity) supply where the delivery point is in the European Union; derivatives related to energy (i.e. natural gas and electricity) produces, traded, or delivered in the European Union; contracts that are connected to the transportation of energy (i.e. natural gas and electricity) in the European Union; derivatives relating to the transportation of both electricity and natural gas in the European Union. As the Regulation is explicit in the enumeration of these contracts, it also left out the scope of supply/distribution contracts of electricity and gas intended for the final consumers, but only under the certain consumption threshold set in the Regulation.

The Regulation is explicit that articles on the prohibition of insider trading and market manipulation are not applicable to 'wholesale energy products which are financial instruments' and instead the provisions of MAD are in place and regulating this situation. It is interesting to note that obligation to publish information (art. 4 REMIT) is not excluded from the scope as is the case with art. 3 and art. 5 of REMIT when provisions of MAD are applicable. However, trade in financial instruments (energy derivatives, options, swaps) falls under the scope of REMIT if that trade is happening outside the regulated markets or exchanges. As we already said, over-the-counter (OTC) trade was very common in the energy markets which is left outside regulated markets.

The world economic crisis in 2008 was a real test for financial markets. One of the consequences of this crisis was a move from over-the-counter trading toward regulated markets because the first one came under greater regulatory scrutiny (Nijman, 2012: 470). In the European Union stakeholders were debating on the necessity to change the existing financial framework and regulation, and soon came up with a proposal to update the legal framework (Kudrna, 2016: 259). This issue was also seriously taken at the G20 Summit in Pittsburgh in 2009, where the participants agreed to act and improve the situation in financial markets (Alexander, Maly, 2015: 243).

In the European Union, one of the first measures was the introduction of the Regulation on OTC derivatives, central counterparties, and trade repositories (European Market Infrastructure Regulation or EMIR) in 2012. This new legal act introduced a requirement for standardised derivative contracts to be traded on exchanges or at least on a transparent electronic platform (Alexander, Maly, 2015: 245). Also, one of the aims is to promote standardised OTC contracts, while imposing extensive reporting obligations (Francioni, Freis, Hachmeister, 2017: 267-277). Another important step was the decision that both MAD 2003 and MiFID 2004 need to be updated and revised. The ultimate result was the adoption of the Market Abuse Directive 2014 (MAD 2014), Market Abuse Regulation (MAR), Markets in Financial Instruments Directive II (MiFID II), and Markets in Financial Instruments Regulation (MiFIR) in 2014. These legal acts significantly change the regulatory framework in financial markets, intervening more in these markets and introducing far-reaching obligations.

As a result of MiFID II and MiFIR enactment in 2014, the application of rules is not limited to regulated markets, but also to financial instruments traded in organised platforms, such as MTFs (multilateral trading facilities) and OTFs (organised trading facilities). The real novelty was the introduction of organised trading facilities as a trading venue in the legislation (Busch, 2018: 127), while the main purpose of this wider scope was to bring OTC transactions under regulatory scrutiny and organised trading venues. In comparison to the previous regulatory framework, some of the aims of the new regulation focused on strengthening the provisions on transparency and investor protection. In line with MiFID II and MiFIR 2014, the Market Abuse Directive 2014 and Market Abuse Regulation brought significant changes to financial markets and market players. The first one was adopted in the form of a directive, leaving some discretion to the Member States in implementing it. Criminal sanctions are envisaged by MAD 2014 for all participants in the markets who violate the provision on insider trading and market manipulation prohibition, and it was a step to harmonize sanctions between Member States (Alexander, Maly, 2015: 245). In fact, the Market Abuse Regulation (MAR) replaced the previous Market Abuse Directive 2003. As a result of changes that were brought by MiFID II and MiFIR, the Market Abuse Regulation's provisions are applicable not only to trade in regulated markets but also to other trading venues like MTFs and OTFs. This effectively broadens the scope of application of this Regulation compared to MAD 2003. It is important to say that the widening scope of MAR had consequences for the REMIT application and scope, and certain financial energy products that fell under the REMIT provisions are now regulated under the financial framework.

4 Discussion

In the previous part of the paper we analyzed former and existing legal frameworks applicable to the EU wholesale energy markets. Although we primarily focused on energy and financial regulation, it would be wrong to perceive these frameworks isolated from the wider context and other relevant rules. The overall picture has a few more dimensions

– competition and sector-specific rules applicable to the energy markets. The adoption of REMIT came only after the adoption of three energy packages in the European Union. Liberalization and integration of national markets was an important task for the European Union and its Member States after decades of a state-centric approach to energy markets. This process was accompanied by rising complexity in regulation. The open question was not only the appropriate legislative framework for energy markets but also the appropriate enforcement of these rules through the establishment of competent authorities. The Member States are obliged to establish national regulatory authorities (NRAs) for the electricity and natural gas markets, and all of them have at least one NRA at the national level (Johnston, Block, 2012: 126). Similar provisions are contained under the financial framework in the European Union, where competent authorities play an important role in financial markets.

In parallel to national bodies in charge of financial and energy markets, separate bodies are created at the EU level. In the 1990s when the liberalization and integration process just started at the EU level in energy markets, important venues for Member States, regulatory authorities, market participants, and industry stakeholders were forums in Florence and Madrid. Those informal meetings although non-institutionalized were important for discussion, information exchanges, consensus building, and laying the ground for some important decisions in the future (Eberlein, 2008: 78). The continuation of meetings between Member States was further formalized through the establishment of the Council of European Energy Regulators (CEER) and three years later through the European Regulators' Group for Electricity and Gas (ERGEG). The latter was dissolved after the establishment of the Agency for the Cooperation of Energy Regulators (ACER) in 2011. Although the Agency for the Cooperation of Energy Regulators was a product of sector-specific rules contained in the Third Energy Package, it is also relevant to the wholesale energy markets. Its importance and relevance are explicitly stated under REMIT, recognizing ACER's expertise regarding the functioning of electricity and natural gas markets but also giving monitoring powers to ACER at the EU level. While ACER has powers at the EU level, national regulatory authorities retain monitoring powers at the national level. Monitoring at both EU and national levels is a *conditio sine qua non* for effective market functioning and ensuring its integrity and transparency. If effective monitoring is in place it helps to detect market abuse in the wholesale energy markets and also contributes to the prevention of such practices.

Similar to energy regulation, financial regulation largely relies on the activities of different authorities in national and EU markets. Already Market Abuse Directive 2003 and Markets in Financial Instruments Regulation 2004 envisaged important roles of competent authorities in the implementation of provisions. The growing importance of financial markets and financial instruments brought new challenges to the regulation. In 2011 the Committee of European Securities Regulators (CESR) was founded as a part of the so-called *Lamfalussy process*, together with the Committee of European Banking Supervisors (CEBS) and the Committee of European Insurance and Occupational

Pensions Supervisors (CEIOPS). During its existence, CESR contributed to an efficient implementation of financial market rules by fostering cooperation between securities regulators. The global financial and economic crisis raised some important questions regarding financial regulation and effective monitoring of financial markets. One of the first responses to the crisis was the establishment of the European Securities and Markets Authority (ESMA) as a part of the *European System of Financial Supervision* and which replaced CESR in 2011. The powers of ESMA are further strengthened to ensure investor protection, better cooperation, and coordination between competent authorities, with the ultimate aim to improve the situation in financial markets in the European Union (Schammo, 2011). This authority is also known informally as the ‘securities watchdog’ or ‘financial markets watchdog’ in the European Union, which tells a lot about its position and importance for financial and securities markets. Some of the powers granted to ESMA include imposing decisions on market actors but also issuing guidance, recommendations, and opinions (Moloney, 2011: 65).

We already analyzed financial and energy rules governing wholesale energy markets in the European Union. The complex nature of the applicable rules is evident from the existence of separate but interconnected financial and energy regulations. Some authors tend to argue that large and complex systems need some degree of centralization in terms of regulatory, technical and economic functions or ‘functional centralization’ (Vasconcelos, 2019: 3). Although the financial provisions were applicable to some types of energy markets and trade in regulated markets, it soon became evident that further rules are necessary to address market abuse practices in the wholesale energy markets. The EU answer was the adoption of REMIT with provisions on insider trading and market manipulation prohibition and disclosure obligation on the wholesale energy market. Filling the regulatory gap, this Regulation helped to improve the functioning of the wholesale energy market. Parallel and overlapping jurisdictions became more evident with the reform of financial regulation in the EU. While REMIT complemented the previous financial framework established under MAD 2003 and MiFID 2004, changes in financial regulation brought a more interventionist approach to wholesale markets and limited the scope of REMIT in practice. Now under the financial framework is not only trade in regulated markets and energy/power exchanges but also trade in other venues such as MTFs (multilateral trading facilities) and OTFs (organised trading facilities). This creates a risk of overlapping competencies and regulatory uncertainty for market players and other actors.

Coordination and cooperation between different regulatory authorities and agencies are thus crucial for the effective implementation of the existing energy and financial provisions. In a context of complex and multiple frameworks, this collaboration is even more important (Mathieu, Matthys, Verhoest, Rommel, 2020: 1). It is unlikely that wholesale energy trading would be covered by a single piece of regulation, which is also reflecting the different nature of contracts and products traded in wholesale energy markets. Close cooperation between ACER and ESMA is in that sense of paramount

importance, but also cooperation between national regulatory and financial authorities in the Member States. ACER's mandate is wide and is not limited only to wholesale energy markets, thus diverting some of the resources for other tasks. Some steps were taken quite early by ACER and ESMA signing a Memorandum of Understanding on the consultation and cooperation regarding their regulatory responsibilities in relation to EU wholesale energy markets (MoU, 2013). This non-binding document provided that wholesale energy markets are increasingly changing and cooperation between Agency and Authority is essential for creating functional markets. This cooperation is based on information exchange which could help in preventing market abuse practices in both commodity and derivative markets. Documents such as this MoU are helping to achieve coherent enforcement and application of energy and financial provisions. It is important to say that the relationship between ACER and ESMA is not limited by this MoU, so they are free to expand and deepen not only their mutual cooperation but also their cooperation with national (energy) regulatory authorities and financial authorities. This was expanded through the work in Energy Trading Enforcement Forum (ETEF), which is a format that gathers not only ACER and ESMA but also national energy and financial regulators, i.e. national regulatory authorities and national competent authorities.

The rising prices in energy markets that started in 2021 and continue in 2022 show how much commodity and derivative markets are interconnected. Once the prices for energy commodities are going upward it is immediately reflected in prices in derivative markets. Price volatility is nothing new in energy markets, but the current situation is challenging the existing regulatory framework and its effectiveness. In October 2022 ACER and ESMA decided to further develop their cooperation through a new joint Task Force with the aim to 'reinforce their cooperation and enhance coordination' (ACER, 2022). This is nothing unexpected given the current situation in the energy markets and growing concerns among Member States, market players, regulators, energy companies, and consumers. The current financial and energy frameworks are once again put to the test and effective implementation is needed in order to ensure the integrity of commodity and derivatives markets and prevent market abuse behaviors.

5 Conclusions

The wholesale energy market in the European Union is covered by both energy and financial regulation. That was the case for almost two decades with the adoption of a comprehensive financial framework under the Market Abuse Directive (MAD) and Markets in Financial Instruments Directive (MiFID). In parallel with financial regulation, there was vibrant legislative activity in the energy sector but not a single sector-specific rule addressed wholesale energy market integrity and transparency until the adoption of the Regulation on Wholesale Energy Market Integrity and Transparency (REMIT). This was an evident 'regulatory gap' given that the financial framework only covered trading in regulated markets. Changes introduced with the REMIT fill this gap and cover trading not regulated by the financial framework, reducing uncertainty and effectively addressing

the issue of market manipulation, insider trading, and information disclosure obligation. Monitoring task at the EU level is given to the Agency for the Cooperation of Energy Regulators (ACER), a legal body established under the Third Energy Package. The global economic and financial crisis brought significant changes to the financial markets and the rules applicable to them. One of the results was the creation of a new 'EU's financial watchdog' under the name European Securities and Markets Authority (ESMA). With that reform, the complexity of wholesale energy regulation increased even more. The scope of application of financial rules increased which ultimately resulted in a reduced scope of application of REMIT. A dividing line between financial and energy regulation has become blurred, rising concerns about overlapping jurisdiction and legal uncertainty. In order to avoid this situation, it is important to ensure a coordinated approach at both EU and national levels. Coordination between energy and financial authorities started quite early and the Memorandum of Understanding on the consultation and cooperation regarding their regulatory responsibilities in relation to EU wholesale energy markets was signed between ACER and ESMA in 2013. Although not legally binding this document proved to be very useful in terms of cooperation and mutual assistance. Both financial and energy regulations have the goal to prohibit market manipulation and insider trading. Also, commodity and derivatives markets are becoming more connected and interdependent.

The recent rise in prices in energy markets is a significant challenge to the whole 'regulatory architecture' and trust in regulation. Although price volatility is nothing new to the energy market, each crisis opens a debate on the appropriateness and effectiveness of the regulatory framework. In that sense, cooperation between regulatory bodies at both EU and Member States levels seems crucial in maintaining the coherence of the existing framework.

References:

- ACER (2022) *ACER and ESMA enhance cooperation to strengthen oversight of energy and energy derivative markets*, available at: <https://acer.europa.eu/events-and-engagement/news/acer-and-esma-enhance-cooperation-strengthen-oversight-energy-and-energy-derivative-markets> (November 10, 2022).
- Alexander, K. & Maly, V. (2015) The new EU market abuse regime and the derivatives markets, *Law and Financial Markets Review*, 9(4), pp. 243-250, <http://doi.org/10.1080/17521440.2015.1114246>.
- Busch, D. (2018) MiFID II and MiFIR: stricter rules for the EU financial markets, *Law and Financial Markets Review*, 11(2-3), pp. 126-142, <https://doi.org/10.1080/17521440.2017.1412060>.
- Cagri Corlu, H. (2018) *Application of Anti-manipulation Law to EU Wholesale Energy Markets and Its Interplay with EU Competition Law* (Alphen aan den Rijn: Wolter Kluwer).
- Cameron, P. D. (2007) *Competition in energy markets: Law and Regulation in the European Union*, 2nd edition (New York: Oxford University Press).
- DG Competition (2007) *Report on Energy Sector Inquiry, SEC(2006) 1724* (Brussels).

- Diaz-Rainey, I., Siems, M. & Ashton, J.K. (2011) The financial regulation of energy and environmental markets, *Journal of Financial Regulation and Compliance*, 19(4), pp. 355-369, <https://doi.org/10.1108/13581981111182956>.
- Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation, *Official Journal of the European Union*, L 96, 12.4.2003, p. 16–25.
- Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, *Official Journal of the European Union*, L 145, 30.4.2004, p. 1–44.
- Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse, *Official Journal of the European Union*, L 173, 12.6.2014, p. 179–189.
- Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, *Official Journal of the European Union*, L 173, 12.6.2014, p. 349–496.
- Eberlein, B. (2008) The Making of the European Energy Market: The Interplay of Governance and Government, *Journal of Public Policy*, 28(1), pp. 73-92, <https://doi.org/10.1017/S0143814X08000780>.
- Eurelectric (2008) *Consultation Paper on CESR and ERGEG advice to the European Commission in the context of the Third Energy Package –Response to Question F.20 – Market Abuse Annex to EURELECTRIC letter of 1 September 2008*, available at: <https://www.esma.europa.eu/file/7993/download?token=hNAsAMvt> (October 10, 2022).
- Ferrarini, G. (2004) The European Market Abuse Directive, *Common Market Law Review*, 41(3), pp. 711-741, <https://doi.org/10.54648/cola2004022>.
- Francioni, R., Freis, J. H. & Hachmeister, A. (2017) Financial Market Regulation, In: Francioni, R. & Schwartz, R. A. (eds.) *Equity Markets in Transition: The Value Chain, Price Discovery, Regulation, and Beyond* (Cham: Springer), pp. 239-286.
- European Commission (2010) *Commission staff working document Impact assessment – Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on energy market integrity and transparency, SEC(2010) 1510 final* (Brussels).
- Gómez, T. & Esobar, R. (2014) *Building a European energy market: legislation, implementation and challenges* (Madrid: Funcas).
- Hansen, J. L. (2003) The trinity of market regulation: Disclosure, insider trading and market manipulation, *International Journal of Disclosure and Governance*, 1(1), pp. 82-96, <https://doi.org/10.1057/palgrave.jdg.2040015>.
- Haverbeke, D., Naesens, B. & Vandorpe, W. (2010) European Energy Markets and the New Agency for Cooperation of Energy Regulators, *Journal of Energy & Natural Resources Law*, 28(3), pp. 403-429.
- Johnston, A. & Block, G. (2012) *EU Energy Law* (Oxford: Oxford University Press).
- Kalss, S., Oppitz, M., Torggler, U. & Winner, M. (eds.) (2021) *EU Market Abuse Regulation: A Commentary on Regulation (EU) No 596/2014* (Cheltenham: Edward Elgar).
- Klopčič, L., Hojnik, J. & Pustovrh, A. (2020) ACER's Success in Establishing and Ensuring the Functioning of the Internal Energy Market: Through the Eyes of NRAs and Traders, *Managing Global Transitions*, 18(2), pp. 91-110, <https://doi.org/10.26493/1854-6935.18.91-110>.
- Kudrna, Z. (2016) Financial market regulation: crisis-induced supranationalization, *Journal of European Integration*, 38(3), pp. 251-264, <http://doi.org/10.1080/07036337.2016.1140153>.

- Lannoo, K. (2003) The Emerging Framework for Disclosure in the EU, *Journal of Corporate Law Studies*, 3(2), pp. 329-358, <https://doi.org/10.1080/14735970.2003.11419906>.
- Lannoo, K. (2017) MiFID II and the new market conduct rules for financial intermediaries: Will complexity bring transparency?, *ECMI Policy Brief*, No. 24, available at: https://www.ceps.eu/download/publication/?id=10025&pdf=ECMI%20PB%20No%2024%20K_L_MarketConductRules.pdf (October 15, 2022).
- Maggetti, M. (2013) The Politics of Network Governance in Europe: The Case of Energy Regulation, *West European Politics*, 37(3), pp. 497-514, <http://doi.org/10.1080/01402382.2013.814966>.
- Maher, I. & Stefan, O. (2019) Delegation of powers and the rule of law: Energy justice in EU energy Regulation, *Energy Policy*, 128, pp. 84-93, <https://doi.org/10.1016/j.enpol.2018.12.046>.
- Mathieu, E., Mathtys, J., Verhoest, K. & Rommel, J. (2020) Multilevel regulatory coordination: The interplay between European Union, federal and regional regulatory agencies, *Public Policy and Administration*, 36(3), Special Issue, pp. 1-18, <https://doi.org/10.1177/0952076719886736>.
- Michetti, E. (2011) *Transparency in the European Wholesale Energy Markets: Filling the Regulatory Gaps* (Florence: European University Institute), available at: <http://fsr.eu.eu> (October 10, 2022).
- Moloney, N. (2011) The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (1) Rule-Making, *European Business Organization Law Review*, 12, pp. 41-86, <https://doi.org/10.1017/S1566752911100026>.
- MoU (2013) *Memorandum of Understanding between ESMA and ACER concerning the consultation and cooperation regarding their regulatory responsibilities in relation to EU wholesale energy markets*, available at: <https://documents.acer.europa.eu/en/remit/Pages/MoUs.aspx> (October 10, 2022).
- Nijman, L. (2012) The impact of the new wave of financial regulation for European energy markets, *Energy policy*, 47, pp. 468-477, <http://doi.org/10.1016/j.enpol.2012.05.030>.
- Papageorgiou, S. (2015) Wholesale Energy Market Monitoring: ACER and the Technical Implementation of REMIT, *5th International Youth Conference on Energy (IYCE)*, pp. 1-4, <https://doi.org/10.1109/iyce.2015.7180802>.
- Pepermans, G. (2019) European energy market liberalization: experiences and challenges, *International Journal of Economic Policy Studies*, 13, pp. 3-26, <https://doi.org/10.1007/s42495-018-0009-0>.
- Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, *Official Journal of the European Union*, L 211, 14.8.2009, p. 1–14.
- Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency, *Official Journal of the European Union*, L 326, 8.12.2011, p. 1–16.
- Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, *Official Journal of the European Union*, L 201, 27.7.2012, p. 1–59.
- Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, *Official Journal of the European Union*, L 173, 12.6.2014, p. 1–61.
- Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, *Official Journal of the European Union*, L 173, 12.6.2014, p. 84–148.

- Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators, *Official Journal of the European Union*, L 158, 14.6.2019, p. 22–53.
- Schammo, P. (2011) The European Securities and Markets Authority: Lifting the veil on the allocation of powers, *Common Market Law Review*, 48(6), pp. 1879-1913, <https://doi.org/10.54648/cola2011073>.
- Siems, M. M. (2008) The EU Market Abuse Directive: a case-based analysis, *Law and Financial Markets Review*, 2(1), pp. 39-49, <http://doi.org/10.1080/17521440.2008.11427939>.
- Simonetti, S. (2007) Financial markets regulation in the energy sector. A few financial aspects of energy transactions, *Nederlands Tijdschrift voor Energierecht*, 6(1), pp. 11-21.
- Vasconcelos, J. (2019) Energy regulation in Europe: The politics of regulation and regulatory policy revisited, *Competition and Regulation in Network Industries*, 20(3), pp. 1-10, <http://doi.org/10.1177/1783591719857664>.