


FSR REGULATORY POLICY WORKSHOP SERIES 2019-2020

Market Abusive Practices: Artificial Prices, Excessive Prices and Manipulative Practices in the Internal Energy Market

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24 January 2020

Sala Europa - Villa Schifanoia, Via Boccaccio 121 - Florence

Scientific Organisers:

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Introduction

The integration of the Internal Energy Market, both in the electricity and gas sectors, relies heavily on market prices to provide the signals for the efficient use of and investment in energy infrastructure. Moreover, as electricity cannot be efficiently stored in large quantities, market prices also provide a signal for the generation of electricity. In this respect, correct price signals are essential for generation efficiency (i.e. that the least cost generation is used to serve demand, subject to network constraints).

The importance of correct (and reliable) price signals for the efficient integration of the Internal Energy Market has led to the adoption of Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency (REMIT). The aim of REMIT is to detect and deter market abuse - in the form of market manipulation, attempted market manipulation and insider trading - in EU wholesale energy markets.

Article 2(2) of REMIT defines market manipulation, *inter alia*, as “entering into any transaction or issuing any order to trade in wholesale energy products which [...] secures or attempts to secure, by a person, or persons acting in collaboration, the price of one or several wholesale energy products at an artificial level, unless the person who entered into the transaction or issued the order to trade establishes that his reasons for doing so

are legitimate and that that transaction or order to trade conforms to accepted market practices on the wholesale energy market concerned". Recital (13) of REMIT explains that "manipulation on wholesale energy markets involves actions undertaken by persons that artificially cause prices to be at a level not justified by market forces of supply and demand, including actual availability of production, storage or transportation capacity, and demand". Therefore, an artificial price is one which is "not justified by market forces of supply and demand".

It is worth noting that, under REMIT, artificial prices could be higher or lower than those justified by market forces of demand and supply and that the main aim of REMIT is not as much to protect consumers from high prices, but rather more widely to:

- "ensure that consumers and other market participants can have confidence [...] that prices set on wholesale energy markets reflect a fair and competitive interplay between supply and demand, and that no profits can be drawn from market abuse" (Recital (1) of REMIT);
- "foster open and fair competition in wholesale energy markets for the benefit of final consumers of energy" (Recital (2) of REMIT).

In this last respect, although the objectives of REMIT come close to the objectives of EU competition law (i.e. to prevent exclusionary or exploitative practices by dominant undertakings), there are some important differences. Article 102 of the Treaty on the functioning of the European Union (TFEU) can and has been applied, for instance, to deal with capacity withholding by dominant firms, but under certain well-defined conditions. This is in contrast to the application of REMIT as the relevant provisions also apply to all market participants - i.e., non-dominant undertakings. Whereas REMIT's focus is on 'integrity and transparency', Art 102 TFEU has a narrower economic focus on harm to the competitive process. In fact, the narrower scope of competition law and therefore the need to complement it to ensure integrity and transparency in energy trading was recognised by the EU legislator adopting REMIT: "Behaviour which undermines the integrity of the energy market is currently not clearly prohibited on some of the most important energy markets. In order to protect final consumers and guarantee affordable energy prices for European citizens, it is essential to prohibit such behaviour" (Recital (2) of REMIT).

Indeed the theory of harm that informs REMIT appears to be of a different order than that which underpins EU competition law, albeit this is not fully articulated or developed in academic literature.

Therefore, in this Workshop, we aim to compare how REMIT and competition law looks at "high" prices, in particular in the context of auction-based energy markets (such as the electricity day-ahead market, but also capacity markets). Under the assumption of perfect competition, the optimal strategy for market participants is to offer into the market at marginal/opportunity costs. Following this strategy, fixed costs would be recovered through the so-called "infra-marginal rent", i.e. the difference between the market equilibrium price (defined by the offered price/marginal cost of the last accepted offer) and the marginal cost as reflected in the offered price. In reality, the conditions for perfect competition are rarely met, and market participants might be tempted, in certain situations (e.g. when the margin between demand and available capacity tightens up, possibly due to network congestion), to offer above their marginal/opportunity costs to increase their revenues (towards covering fixed costs or increasing profits). The question, therefore, arises of whether the recovery of fixed costs can be considered as part of the "fair and competitive interplay between supply and demand".

Recovery of fixed costs probably sets a more stringent threshold than the concept of excessive prices in competition law, where the threshold for intervention has been set relatively high, and it has often been typical of the cases that the costs used as a point of comparison or benchmark for the alleged pricing practices at issue have been open to interpretation. Competition authorities are generally reluctant to take on the role of price regulators, and the case law/decision-making practice on 'excessive prices' is not well developed.

The recent joint guidance published by the German competition authority (BKartA) and network regulator (BNetzA) in September 2019 considers that the non-use of actually available generation which could have been sold at a price above the respective short-term marginal cost could be an indication of capacity withholding.

This approach is not without controversy. Furthermore, the experience from the Danish Elsam cases indicates that competition and regulatory authorities have struggled to devise a satisfactory cost benchmark that will withstand judicial scrutiny.

Against this background, the Workshop will explore and compare the different approaches to deal with “high” prices in auction-based energy markets under REMIT and competition law.

To address these and other related issues, the Workshop will be structured in two sessions:

- **Session 1** will spell out and compare the concepts related to “high” prices under REMIT and competition law;
- **Session 2** will look at how these concepts apply to auction-based energy trading and the available experience from recent cases.

Programme

24 January

08.30 - 08.45 *Welcome coffee*

08.45 - 08.55 Welcome Address

Jean-Michel Glachant | Florence School of Regulation

08.55 - 09.10 Introduction to the workshop

Alberto Pototschnig | Florence School of Regulation

Leigh Hancher | Florence School of Regulation; Tilburg University; Baker Botts LLP

SESSION I - "HIGH" PRICES IN REMIT AND COMPETITION LAW

Chair: Leigh Hancher | Florence School of Regulation; Tilburg University; Baker Botts LLP

09.10 - 09.35 Introduction to the session

Martin Godfried | ACER

09.35 - 10.00 Artificially high prices under REMIT

Andras Hujber | European Commission

10.00 - 10.25 Excessive prices under competition law

Johannes Luebking | European Commission, DG COMP

10.25 - 11.25 Comparing and contrasting high prices in REMIT and competition law: an expert panel

Philip Lowe | Oxera

Guillaume Dezobry | Fidal

Christoph Riechmann | Frontier Economics

11.25 - 11.55 *Coffee break*

11.55 - 12.40 Contributions from the FSR Donors - the quest for legal certainty

Aurélien Bernard | EDF

Vincent Derbali | Epex Spot

Christian Baer | Europex

Christian Ungerböck | Gas Connect Austria

Camilla Berg | NordPool

12.40 - 13.00 General discussion

13.00 - 14.00 *Lunch*

SESSION II - IMPLEMENTATION EXPERIENCE AND CASE LAW

Chair: Alberto Pototschnig | Florence School of Regulation

14.00 - 14.45 Academic roundtable

Nils-Henrik von der Fehr | Oslo University

Bert Willems | Tilburg University

14.45 - 15.05 General discussion

15.05 - 15.35 Wrapping-up the day: the main takeaways

Leigh Hancher | Florence School of Regulation; Tilburg University; Baker Botts LLP

Martin Godfried | ACER

Andras Hujber | European Commission

Johannes Luebking | European Commission, DG COMP

15.35 - 15.45 Concluding remarks

Alberto Pototschnig | Florence School of Regulation