GLOBAL COMPETITION REVIEW

The Guide to Energy Market Manipulation

Editor
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Energy Market Manipulation: A New Regulatory Regime

Gordon E Kaiser[1]

Over the last 20 years a new form of energy regulation has developed. As with most new regulation it was driven by competition. That competition in turn was driven by technology. As competition replaced monopoly regulation in energy markets throughout the world, energy regulators faced new challenges.

For over 50 years energy markets were regulated markets dominated by monopoly utilities. In most countries regulated companies were exempt from the competition laws. That proved to be a problem and energy regulators across the world reacted in different time frames with different solutions.

Many countries first attempted to deal with the new anticompetitive practices by using existing competition laws. That turned out to be a blunt instrument. The main reason was that much of the anticompetitive activity involved trading in multiple markets. The complex schemes involved in this trading first came to light in the Enron investigation in California in 2000.

The wholesale energy market is very significant in Europe as well. Trading on the Great Britain wholesale energy market is estimated to be worth £300 billion each year. A significant volume of European product is also traded through London-based brokers. The value of the European gas traded in the United Kingdom is estimated to be close to £300 billion. The United Kingdom is a trading hub for gas and the Great Britain liquid gas market is used as the reference price for gas delivered elsewhere in Europe.

This book addresses some of the regulatory concerns and provides an international review of this new regulatory regime. It is important to thank the many authors that contributed to this initiative. Two people deserve special thanks – Bob Fleishman of Morrison & Foerster in Washington, DC and George Ingledew at Law Business Research in London. Without them this book would never have seen the light of day.

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The new industry dynamics

The old world of energy regulation was largely dominated by rate regulation. The regulated parties were monopolies that produced and distributed electricity or gas to consumers. Those regulated companies were not only monopolies, they were often integrated companies that controlled the product from production through to the final distribution to the consumer.

Technology changed all that. In the last 20 years independent local electricity generators arrived on the scene. The technology that drove that was solar, wind and gas-fired generation known as CHP. Much of that was driven by the growing demand for lower carbon generation capacity. Increasingly markets became competitive and governments came to believe that competitive solutions would produce lower-cost electricity for their citizens.

Those governments soon discovered another problem. In competitive energy markets it was necessary to police competition just as governments had long done in unregulated markets through competition laws. Without some control over marketing and investment strategies, market participants would find a way to manipulate markets and increase prices.

In most countries the governments relied on principles developed under earlier regulatory regimes – competition law and securities regulation. The new regulatory regime prohibited misleading statements, insider trading, abuse of dominance, and what came to be known as 'gaming' devices that artificially increased prices through different strategies.

The wake-up call for the world came from the United States in 2000 during the California energy crisis. Electricity prices skyrocketed. The California market was as large as all of Canada. This was not an insignificant event. Market manipulation nearly bankrupted the state's two largest energy utilities. Between April and December 2000 wholesale prices increased 800 per cent. The crisis forced American Congress to expand the jurisdiction of the federal regulator through the Energy Policy Act of 2005.

In this introduction we compare how the jurisprudence developed in the different countries. This includes the different approaches to investigative powers, new remedies and settlements. All countries continually spread a wider net and amended their legislation to capture a greater number of practices. Many countries looked at extending liability to individuals, allowing private rights of action and introducing criminal sanctions – issues many countries had faced earlier in the development of competition and securities laws.

The jurisprudence develops

The legislative and case law developments in the United States, Canada and Europe are particularly important. The law relating to energy market manipulation more or less developed in that order. There is no question that the American market led the process. Nor is that surprising. The United States was the largest energy market. It was also the market that had the most aggressive enforcement record in antitrust and securities regulation. In fact the first major American legislation in this area was taken right out of American securities law. And the California energy crisis left the Americans no choice, although the Northeastern blackout of 2003 added fuel to the fire.

The United States

Although the Federal Energy Regulatory Commission (FERC) established a separate formal enforcement function in 1978, very little happened until 2005 when Congress enacted the Energy Policy Act that established the present day anti-manipulation authority. That legislation as indicated was in large part a response to the Western energy crisis in 2000. The legislation made it unlawful for any entity to use manipulation or deception in connection with the purchase or sale of electricity or natural gas.

The Act gave FERC express authority to prescribe rules and regulations necessary to protect the public interest. The legislation provided civil penalties of up to US$1 million a day. This was a significant increase from the previous civil penalty authority of US$10,000 per day. The legislation also confirmed FERC's authority to order disgorgement of unjust profits. At the same time the maximum criminal fine was raised to US$1 million.

In January 2006 FERC issued Order 670, which prohibited market manipulation. This established the new Rule 1c .2 referred to as the FERC Anti-Manipulation Rule. This made it unlawful for any entity, directly or indirectly, in connection with any FERC jurisdictional transaction to use any device or scheme to defraud to make any untrue statements of material fact or to engage in any practice that would operate as a fraud. This rule closely tracked the US Securities and Exchange Commission Rule 10b-5, which prohibited securities fraud.

In the last 10 years the total civil penalties assessed by FERC amounted to US$763 million and the total disgorgement added up to US$479 million. In 2009 FERC started handing down some very significant penalties, including the US$7.5 million fine in *Amaranth Advisors*[2] and the civil penalty of US$5 million and disgorgement of US$25 million *Energy Transfer Partners*.[3] This was followed by the civil penalty of US$135 million and disgorgement of US$110 million in *Constellation Energy*[4] in 2012 and the *JP Morgan*[5] civil penalty of US$285 million and disgorgement of US$125 million the following year. More recently we saw a US$70 million civil penalty and a US$35 million disgorgement in *Barclays Bank*[6] and disgorgement of US$40.8 million and the civil penalty of US$41 million in *GDF Suez Energy*[7] in 2017.

The details of the US enforcement issues are outlined in a number of chapters in this book. The first is by Robert Fleishman and Paul Varnado of Morrison & Foerster in Washington, DC. The second chapter is by David Applebaum and Todd Brecher of Akin Gump. To this we have added the recent FERC Staff White Paper entitled, 'Anti-Market Manipulation Enforcement Efforts Ten Years After EPAct 2005'. This is a clear and concise summary of the important developments in American energy market manipulation case law. See Appendix 1.

2 128 FERC 61,154 (2009).
3 128 FERC 61,269 (2009).
4 138 FERC 61,168 (2012).
5 144 FERC 61,068 (2013).
6 161 FERC 61,147 (2017).
7 158 FERC 61,1102 (2016).

Canada

In Canada competitive electricity markets only exist in Ontario and Alberta. In both provinces the provincial governments established agencies to guard against market manipulation. In Alberta a separate agency called the Market Surveillance Administrator (MSA) was established to conduct investigations. Applications regarding enforcement decisions, settlements and penalties can only be made by the Alberta Utilities Commission.

In Ontario the situation is more complicated. There are two bodies conducting investigations. The first is a division of the Ontario IESO. The second is the Market Surveillance Panel (MSP), which is a panel of the Ontario Energy Board, the energy regulator in Ontario.

There is a difference, however. The Market Surveillance Panel has no authority to establish penalties. It simply makes recommendations through published reports.

The IESO on the other hand not only conducts investigations, it can also determine penalties and approve settlements. This is different from Alberta where settlements and fines must be approved by the provincial regulator, the Alberta Utilities Commission. In Ontario there is no review of settlements, although fines can be appealed to the Ontario Energy Board.

To date there have been three major settlements in Ontario. In 2015 the Goreway Partnership paid a penalty of C$10 million and reimbursement of C$12 million to settle claims that they had overcharged the province under the Generator Cost Guarantee programme. The following year Resolute Canada agreed to a settlement based on a repayment of C$10.5 million to settle similar charges. Finally in 2017 Manitoba Hydro entered into a settlement in connection with trading activities on the Manitoba and Minnesota interties. That settlement amount was C$9.6 million. In all three cases the respondents did not admit any liability.

The MSP of the Ontario Energy Board also published reports on two of these cases. In the Goreway situation the MSP found that there were some C$89 million in unauthorised payments and recommended that those amounts be recovered. In the *Resolute* case the MSP found that there were C$26 million in unauthorised charges under the Generator Cost Guarantee programme and recommended that those be recovered. The difference between the MSP recommendations and the actual settlements by the IESO is the subject of some controversy. Further details on the Ontario process are set out in the first-rate chapter by Glenn Zacher and Patrick Duffy of the Stikeman firm in Toronto.

In July 2015 the Alberta Commission handed its first major decision on energy market manipulation. The Commission found that in *TransAlta* that a regulated utility had intentionally removed its generating plants from service for maintenance in a manner that would increase the price in the market. For Canada this was a landmark first decision. None of the Ontario settlements had been subject to any final adjudication. The Alberta Commission decision deals in detail with the fundamentals of energy market manipulation law in Canada. The 217-page decision followed a three-year investigation and a three-week hearing.

The hearing was conducted in two phases. The first dealt with liability. The second concerned penalties. The penalty phase was resolved by a consent order under which TransAlta agreed to pay in excess of C$56 million. This consisted of an administrative penalty of C$51.9 million and C$4.3 million in MSA costs. The administrative penalty of

C$51.9 million had two components. The first was disgorgement of C$26.9 million. The second was an administrative monetary penalty of C$25 million.

The basis for these penalties is outlined in the outstanding chapter by Randall Block and John Blair of the Borden, Ladner firm in Calgary. Both acted for the MSA in this landmark case.

Europe

Europe was slow to develop jurisprudence on energy market manipulation until 2011 when the European Commission adopted the Regulation on Wholesale Energy Market Integrity and Transparency, known as REMIT.

Initially this Regulation was limited to wholesale energy markets including contracts for the supply and transmission of electricity or natural gas delivered in the European Union, and derivatives relating to electricity or natural gas in the EU. Two years later the European Parliament adopted an amendment extending REMIT to contracts for the supply of electricity or natural gas to end use customers.

REMIT introduced an EU-wide monitoring system to detect and deter market manipulation and insider trading, which may distort wholesale energy prices. It requires disclosure of price-sensitive information regarding energy generation, storage and transmission. REMIT provides for a shared compliance responsibility between the Agency for the Cooperation of Energy Regulators (ACER) and applicable national regulatory authorities (NRAs). The applicable NRA in the United Kingdom is the Office of Gas and Electricity Markets (Ofgem).

The REMIT registration and reporting process applies to all market participants who trade wholesale energy products on any market within the European Union.

Enforcement powers and sanctions were introduced in the UK in 2013 and 2015, and rules related to data reporting became fully operational in 2016.

While ACER is responsible for ensuring that the NRAs carry out their monitoring and enforcement tasks in a coordinated and consistent way, it is the role of the NRAs to investigate market abuse cases and prosecute market participants.

NRAs are required to inform the ACER without delay if they suspect that acts which effect wholesale energy markets or the price of wholesale energy products in that Member State are being carried out in their Member State or another Member State.

The definition of market manipulation in Europe is similar to the definition in other markets. It concerns entering into a transaction that gives false or misleading signals regarding the supply, demand or price of wholesale energy products, attempts to set prices at artificial levels, or employing fictitious devices likely to result in false or misleading signals regarding the supply, demand or price of wholesale energy products.

Prior to REMIT a number of European countries had relied on the competition laws to deal with energy market manipulation. That was true of the European Commission as well.

In *E.ON* the European Commission embarked on an abuse of dominance inquiry under Article 102 of the TFEU regarding a claim that E.ON was withholding capacity from the market in order to drive up prices. Ultimately the Commission closed the investigation when it received commitments that E.ON would divest a significant portion of its generation fleet.

In the same time frame the Great Britain energy regulator, Ofgem, investigated two integrated energy companies, SSE and Scottish Power, claiming that they had withheld capacity from the wholesale market. Ofgem closed that investigation when it concluded that it could not establish the dominance of the generators under the competition laws.

A short time later the Spanish competition authorities imposed fines on a number of generators for abusing their dominance by withholding capacity from the day ahead market and later selling that capacity at much higher prices. Those decisions were overturned on appeal on the ground that the Spanish competition authorities could not establish that the generators knew that the capacity in question would be required by the market.

Four years after REMIT was introduced, European regulators handed down the first penalties under REMIT when Elering, the Estonian transmission system operator, was fined €10,000 for failing to publicly disclose inside information contrary to Article 4. Elering had performed maintenance on a undersea electricity transmission cable between Estonia and Finland that caused an outage. The Estonian competition authority concluded this work and the resulting outage constituted inside information which Elering failed to publish within a reasonable time, contrary to REMIT.

A much larger fine resulted when the Spanish competition authority issued a €25 million fine in November 2015 in *Iberdola* following a market manipulation investigation. The Spanish authority concluded that over a three-week period Iberdola had reduced the quantity of electricity from three of its hydroelectric plants even though it had sufficient water resources. The competition authority concluded that Iberdola's strategy was designed to increase prices above those that would otherwise have existed in the market. That withholding capacity constituted an infringement of Article 5.

In October 2016 the Italian competition authorities launched investigations of Enel and Sorgenia relating to their practice of withholding capacity from the day ahead market. The case was initially begun under REMIT but was transferred to the Italian competition authority that ultimately settled the case in May 2017 following commitments from Enel to cap the profitability of one of its power stations.

In the same time frame, Ofgem in Great Britain began an investigation into National Grid, the transmission operator in Great Britain, claiming the company published incorrect technical information that resulted in incorrect price information being sent to the market. Ofgem claimed that this constituted an infringement of Article 5 even if it was unintentional. In the end Ofgem closed the investigation without a formal finding.

Most of the convictions to date outside the United States relate to withholding capacity. The most detailed decision was the 200-page decision in *TransAlta* by the Alberta Utilities Commission.

One important exception was the European Commission decision in 2009 in *E.ON* and *GDF Suez* where substantial fines were imposed when the two companies participated in a market sharing agreement. The two companies combined to build a natural gas pipeline to transport natural gas from Russia to Germany and France. Each company had a monopoly in their home market and agreed not to sell into each other's market.

The jurisprudence in Europe has been slower developing than in North America. But it is catching up fast. There are number of investigations under way in at least four countries. Further details on the European situation are provided in the excellent chapters by Mark Mills of Ofgem in London and Peter Willis of Bird & Bird in London.

The legislative response

The regulation of energy market manipulation, like all regulation, is driven by the legislation and the regulatory and court decisions that interpret that legislation. Antitrust laws in North America have been in existence for over 100 years. The case law is substantial and to a large extent that case law guides corporate conduct. The regulation of energy market manipulation is very different. This legislation is barely 10 years old and turns on very general legislation and government guidelines.

Generally the legislation is very broad. The industry phrase used to describe this concept is that it is principles-based enforcement without bright line rules for liability. The leading example is the first anti-manipulation rule enacted by FERC under the US Code of Federal Regulations 2006. Under that provision the Commission is authorised to prohibit any acts or practices that would operate a fraud or deceit upon any entity in connection with the purchase or sale of natural gas or electricity or the transmission of the two products. The prohibition concerned any fraudulent device or scheme that makes a material representation or exercises any abuse of dominant power. This is quite different from the rules that developed under antitrust laws.

The Alberta legislation developed in a similar fashion. The province enacted the Electricity Utilities Act in 2003 when competition was first introduced into the Alberta energy market. At the time the Enron scandal and the Western energy crisis were raging and the province recognised the need to police anticompetitive conduct. The Market Surveillance Administrator, an independent agency, was created to investigate anticompetitive conduct with those complaints being adjudicated by the Alberta Utilities Commission.

The Alberta regulatory regime expanded in 2009 when the Province enacted the Fair, Efficient and Open Competition Regulation or FEOC. Like the FERC Anti-Manipulation Rule, this was expansive and prohibited a broad range of anticompetitive conduct.

Ontario followed Alberta but in a more cautious manner when the Province created a competitive electricity market in 2002. At the time it created the Market Surveillance Panel which ultimately reported to the Ontario Energy Board. Initially the Ontario rules were limited to technical matters. There were, however, a number of settlements that largely dealt with alleged misrepresentations to provincial regulators although no admission of guilt was made.

In 2013, Ontario authorities attempted to develop a broader prohibition similar to that developed in Alberta and in the United States under FERC. However, the General Conduct Rule (GCR) as it was described was in the end not nearly as broad as the Alberta and FERC Rules.

The GCR provided that market participants could not, directly or indirectly, engage or attempt to engage in conduct either alone or with another person that they knew or ought to know exploited IESO-administered markets or any gap or defect in the Market Rules, manipulated IESO administrative markets or interfered with the determination of market prices.

The GCR is in its infancy and has not been tested in any case to date. However, the general agreement is it was a positive addition that would address significant gaps in Ontario's compliance and enforcement regime. Time will tell.

Europe is a latecomer to the new world of energy market regulation although the European competition authorities were aggressive in the early years in a number of cases involving the withholding of capacity and a major market allocation case involving large transmitters.

It was not until 2011 when the REMIT Regulation was enacted by the European Commission that real energy market manipulation regulation began.

However, that regulation required the implementation by Member States to be phased in over number of years. For example, important enforcement powers and sanctions were introduced in the UK only in 2013 and 2015 and the rules relating to data reporting only became operational in 2016.

The REMIT Agreement provided for shared compliance responsibility between the Agency of Cooperative Energy Regulators (ACER) and the applicable NRA. In the United Kingdom the applicable NRA is Ofgem.

In September, Ofgem published an open letter setting out its views on the prohibition of market abuse under REMIT. Ofgem appears to be taking the lead in Europe. The UK authorities recently introduced criminal penalties that included individual criminal liability. The new criminal sanctions to support existing prohibitions on insider trading and market manipulation in wholesale energy products resulted from a detailed market investigation into the operation of Great Britain energy markets by the Competition and Markets Authority. Other European countries have followed. While criminal liability has existed in the United States for some time, it has only been used once. Time will tell whether that will be different in Europe.

The movement to criminal penalties is just one example of the expanding jurisdiction that is being seen in a number of countries. The next shoe to drop will be the advent of private actions, something that most countries have struggled with in the competition law area. Neither the Federal Power Act nor the National Gas Act in the United States provide private rights of action for manipulation of energy market violations; however, class actions did result in *Barclays Bank* and *JP Morgan Energy*. A class action also arose in Alberta in *TransAlta*.

The other development that counsel can expect to see over the next few years is whistleblower payments and whistleblower protection provisions. This is another area that has developed recently in competition law and most practitioners expect to see it expand to energy market manipulation. In fact the US CFTC whose jurisdiction overlaps FERC in part, not only has whistleblower protection but has paid out over $10 million to that end. The chapter by Randall Hofley and Joseph Bial offers important insights into these new developments.

The regulatory process

As things have turned out the regulatory process is proving to be a much larger issue than some thought would be the case. Legislative developments are one thing but procedural issues can be just as important and they can easily defeat effective enforcement.

A survey of energy market manipulation regulation in Europe and North America highlights a growing concern with due process in both the investigative and adjudicative phases of enforcement. This is highlighted in Canada in George Vegh's chapter on Ontario. However, the chapter on the United States by David Applebaum and Todd Brecher suggests that FERC is bending over backwards to respond to concerns. The same can be said of Ofgem, according to Mark Mills. A comparison of the chapters makes it clear that the Ontario authorities have been less conscious of the procedural irregularities than the Americans or British.

The Alberta decision in *TransAlta* considered by Randall Block and John Blair highlights many of these procedural concerns including the manner in which regulatory agencies deal with expert evidence. That topic is also addressed in the chapters by Philip Tunley and the Charles River firm.

In addition, the chapter by David Mullan calls attention to the importance of administrative law principles in these hearings. Mullan, who is without doubt Canada's leading administrative lawyer, sets out these principles clearly. They apply not just to Canada but also the United States, the United Kingdom and possibly Europe.

A growing concern in terms of regulatory process is the length of time it takes to complete investigations. In the United States this has led to increased attention to the application of the Federal Statute of Limitations. Violations of the Federal Power Act and the National Gas Act are subject to the general Federal Statute of Limitations, which requires an enforcement suit to be commenced within five years of the date the claim first accrued. In securities cases the courts have ruled that the five-year clock begins when the fraud occurred not when it is discovered. FERC has argued that this five-year period is in addition to a separate five-year statute of limitation that runs during the investigation and administrative assessment of the civil penalty. However, FERC often orders the disgorgement of unjust profits in addition to the payment of any civil penalty. FERC enforcement staff contend that disgorgement can go back further than five years. However, the Supreme Court of the United States recently held that the disgorgement remedy in an SEC securities action is a penalty for the purpose of the statute of limitations, suggesting that FERC will also be limited to five years for any disgorgement remedy.

Many jurisdictions rely on disgorgement as a remedy in addition to a fine or penalty. Counsel can expect increased attention to limitation period issues in these cases.

Guidelines and transparency

As we examine the practice and procedures developed by energy regulators, the United States stands out as a role model in terms of the different guidelines available. Examples include the 2008 Revised Policy Statement, the 2010 Revised Policy Statement on Penalty Guidelines, and the 2016 Staff White Paper on Anti-Market Manipulation Enforcement. In a world of little jurisprudence, guidelines are important and regulators have a special responsibility. These guidelines extend not just to matters of procedural fairness but also the sentencing guidelines, which are very detailed in the United States. But, as JP Mousseau points out in his chapter, they are very similar in the United States, Canada and Australia.

One of the interesting features of US Sentencing Guidelines set out in the FERC Staff White Paper in Appendix 1 is the role of compliance programmes. It is not just a question of the penalty range but the extent to which compliance programmes can reduce regulatory risk in the sector. In 2008 FERC issued a separate policy statement on compliance programmes. A number of these guidelines and policy statements are set out in Appendix 3. It is also interesting to note that when the United Kingdom introduced criminal sanctions, the Regulations required Ofgem to issue Enforcement Guidelines.

In a world of new regulation transparency is important if effective regulation is to be achieved. Regulators must step up to the bar and develop guidelines to deal proactively with procedural defects in the investigative process but also the interpretation that enforcement agencies place on different aspects of the legislation.

This is also important when it comes to settlements. As in the antitrust world, energy market manipulation is a world of settlements. For every court decision there are 50 settlements.

In a world of little case law, settlements must published on a timely basis. They should be reviewed by an independent authority; something that is missing in Ontario. They should also set out in some detail the prohibited conduct and the justification for the level of fine or disgorgement. Some jurisdictions do this better than others. Settlements become the jurisprudence and the benchmarks that lawyers look to when advising their clients. Any discussion of settlements also raises another issue now hotly debated in United States security law – should those settling be able to deny liability?

This book is a first attempt to survey a new and complex form of regulation that applies to one of the most important industry sectors in the world. The number of investigations is constantly expanding.

As the year came to an end ACER was examining 33 new REMIT cases, of which 26 involved potential infringement of Article 5. Most were notified by the NRAs, although some were reported directly by market participants. During 2017, FERC opened 27 new investigations and closed 16 pending investigations with no action or through Commission-approved settlement. There will be lots of work in this area to keep counsel busy.

Appendix 4

About the Authors

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Gordon E Kaiser is an arbitrator practising at JAMS in Toronto and Washington, DC. His practice involves domestic and international disputes in energy and technology. He served as vice chairman of the Ontario Energy Board for six years. Prior to that he was a partner in a national law firm where he appeared in the courts and regulatory agencies across the country as well as the Federal Court of Appeal and the Supreme Court of Canada.

He has advised the Ontario Energy Board, the Alberta Utilities Commission, the Commissioner of Competition, the Ontario Independent Electricity System Operator and the Competition Tribunal.

Mr Kaiser has mediated disputes on multi-year rate plans between public utilities and their major customers and long-term contracts for the pricing of gas, electricity and wireless data. He has advised the Alberta's Utility Commission and the Ontario IESO on settlements under the Market Rules and the Attorney General Canada on settlements under the Competition Act. He has arbitrated disputes dealing with the construction of transmission and pipeline facilities, power purchase agreements, gas supply contracts, the construction of power plants, and wind and solar interconnection.

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The Guide to Energy Market Manipulation is a survey of the law on market manipulation in the energy sector across nations that reflects the collective wisdom and real-life experiences of 30 distinguished practitioners from 18 different organisations.

Part I looks at legislation and jurisprudence where laws have been applied, most notably North America, but also Europe, the UK and Australia. Part II shines a light on enforcement practices, including negotiating with regulators and private actions. Part III looks at the regulatory process itself: administrative law, evidence and the use of expert evidence.

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