

# Hedging and the Protection of Consumers in the Energy Market

An overview of the powers of  
energy regulators in Ireland,  
France and Germany

Enquiry No. 2023/676

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## Abstract

This Briefing Paper provides an overview of the law relating to hedging in the European Union and outlines the powers of energy regulatory authorities/bodies in energy markets in Ireland, France, and Germany.



## Contents

Summary .....	2
Introduction .....	3
Part 1: An overview of the regulation of forward markets and hedging in the European Union and Ireland.....	4
The internal energy market in the European Union and the regulation of forward markets (hedging).....	4
The energy market in Ireland and hedging .....	11
Summary of the regulation of hedging and potential forthcoming developments .....	14
Part 2: The powers of the Commission for Regulation of Utilities (CRU) in the Irish electricity and gas markets .....	15
Potential future developments to the powers of the CRU in relation to hedging.....	20
Part 3: Comparative analysis of the powers of the energy regulators in France and Germany in the electricity and gas markets.....	21
France.....	21
Germany .....	25
Conclusion .....	28
Suggested further reading.....	29

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## Summary

This briefing paper was drafted in response to an enquiry regarding the regulation of hedging in the European Union and the powers of regulatory bodies in the energy market in Ireland, France, and Germany (the full details of the enquiry are outlined in the introduction to this paper). In preparing this paper, a range of legal sources were relied upon including European Union (EU) legislation and national legislation in Ireland, France, and Germany. In order to understand the technical aspects of hedging and the regulation in this area, information was sourced from a number of sources including, but not limited to, the European Commission, the European Parliament, European Parliamentary Research Service and various bodies such as the European Union Agency for the Cooperation of Energy Regulators, and the European Network of Transmission System Operators for Electricity.

From the research that was undertaken, the central points may be summarised as follows:

- There are a number of pieces of EU legislation that provide for hedging practices in the internal energy market. For example, Commission Regulation (EU) 2016/1719 sets out rules in relation to forward electricity markets. Further information on the regulation of hedging in the energy market in the European Union is set out in Part 1 of this briefing paper.
- There are regulators in the energy markets in Ireland, France, and Germany. All these regulators are established under national legislation. There are variances between each of these jurisdictions. However, all these regulatory systems are underpinned by EU legislation. Further information on the regulation of the energy markets in Ireland, France and Germany can be found in Parts 2 and 3 of this paper.
- Hedging practices are permitted under EU legislation in the internal energy market. In both the electricity and gas markets, market participants can hedge against short-term price uncertainties and other risks through forwards or futures contracts on the forward market. Regulations like REMIT ensure transparency and integrity in trading, including hedging transactions (See Part 1 of this briefing paper).
- From a review of the law in Ireland, France and Germany, the regulatory bodies in these jurisdictions do not appear to have a specific mandate and/or regulatory powers in relation to hedging practices (See Parts 2 and 3 below).
- From a review of the respective national legislation, the regulatory bodies in Ireland, France and Germany have an array of functions and powers in the energy market. These regulators are responsible for overseeing the operation of the electricity and gas markets and are intended to ensure that these markets are operating competitively for the benefit of consumers (See Parts 2 and 3 below).
- From a review of the national legislation governing the regulators in Ireland, France and Germany, the powers of these regulators do not appear to be specific to “price gouging” (See Parts 2 and 3 below).

It should be noted that, given the time available for producing this research paper, the literature search and review of legislation, while thorough, was non-exhaustive. Additional reading that may be useful to supplement the research examined in this paper is outlined at the end of this paper.

## Introduction

This briefing paper has been prepared following an enquiry about the regulation of hedging practices in the European Union, Ireland and comparative jurisdictions and the powers of energy regulators to protect consumers in the energy market. Further to the reference interview, the scope of the research paper was refined, and it was agreed that the paper would focus on the following:

- a. An overview of the powers and functions of energy regulators in **Ireland, France, and Germany**.
- b. The mandate and regulatory powers of regulators in these three jurisdictions to regulate hedging practices and safeguard consumers.
- c. The powers of regulators to investigate and stop possible instances of price gouging.

As this enquiry related to hedging in the energy market, it is useful to provide some context on the regulation of hedging in the European Union before examining the powers of the regulatory authorities in the requested jurisdictions. Part 1 of this briefing paper defines what is meant by hedging in the energy market and provides an overview of how hedging practices are regulated within the European Union and in Ireland.

Parts 2 and 3 of this paper then discuss the powers of the energy regulators in Ireland, France, and Germany. Specifically, part 2 of this paper focuses on the powers of the national energy regulator in Ireland (Commission for Regulation of Utilities (CRU)). The potential role of the CRU in relation to hedging under the Energy (Windfall Gains in the Energy Sector) (Cap on Market Revenues) Bill 2023 will also be examined briefly.

Part 3 focuses on the functions and powers of energy regulator in France (Commission de Régulation de L'Énergie) and the federal regulator in Germany (Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen), in relation to oversight and monitoring of the energy market for the benefit of consumers.

In addressing the powers of the regulators in each country examined, it has not been possible to definitively state whether the differences in regulatory powers have any direct implications on the retail prices charged to consumers in their respective energy markets.

This paper was prepared using the most up-to-date information available from various sources and every effort has been made to cite the current law. As an aid, the paper includes extracts from relevant legislation, links to relevant sources, and suggested sources for possible further reading.

## Part 1: An overview of the regulation of forward markets and hedging in the European Union and Ireland

### Hedging strategy

“...refers to how a business uses hedging contracts to mitigate their exposure to wholesale market risk.”

Source: Australian Competition and Consumer Commission, [Inquiry into the National Electricity Market](#), November 2022.

Energy retailers that supply consumers on the retail market are required to ensure that there is continuity of supply for their customers.<sup>1</sup> These retailers may purchase energy on the wholesale market at a “variable market price”<sup>2</sup> and may employ different hedging strategies in an attempt to mitigate the risks that occur within the energy market while ensuring continuity of supply.

For example, as electricity is “not easily storable”,<sup>3</sup> electricity retailers try to “harmonize their upstream (sourcing) and downstream (sales) portfolios of electricity”.<sup>4</sup> The energy market can also be impacted by external market forces, as seen in the rise in energy prices following the COVID-19 pandemic and in response to the Russian invasion of Ukraine in 2022.<sup>5</sup> In this respect, energy companies who supply consumers on the retail market can face risks in terms of price (“price volatility and uncertainty”), volume of supply (“unpredictability in forecast load”) and shape (“time of use load shape”).<sup>6</sup> To counteract these risks, retail companies may hedge their supply through different types of “hedging contracts”.<sup>7</sup>

### The internal energy market in the European Union and the regulation of forward markets (hedging)

Before examining hedging in the European Union, it is necessary to understand that gas and electricity in the European Union (EU) are part of an “internal energy market”.<sup>8</sup> Based on Articles 114 and 194 of the Treaty on the Functioning of the European Union,<sup>9</sup> this internal market “...constitutes the integration of EU member states’ gas and electricity markets into one single

<sup>1</sup> Depuis, D.J., Gauthier, G. and Godin, F., ‘[Short-term Hedging for an Electricity Retailer](#)’ *The Energy Journal*, vol. 37(2), 2016, pp.31-59.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Homayoun Boroumand, R., Goutte, S., Porcher, S. and Porcher, T., ‘[Hedging strategies in energy markets: The case of electricity retailers](#)’, *Energy Economics*, 51, pp.503-509.

<sup>5</sup> See Andrea Gazzani and Fabrizio Ferriani, [The impact of the war in Ukraine on energy prices: Consequences for firms’ financial performance](#) (last accessed 15 June 2023).

<sup>6</sup> Australian Competition and Consumer Commission, [Inquiry into the National Electricity Market](#), November 2022 (last accessed 15 June 2023).

<sup>7</sup> Ibid.

<sup>8</sup> European Parliament, [Internal Energy Market](#) (last accessed 16 June 2023).

<sup>9</sup> Ibid.

market based on the free movement of goods, services, capital and persons”.<sup>10</sup> In the 1990’s, the electricity and gas markets across the EU were “monopolies” but a decision was made to “open these markets gradually to competition”.<sup>11</sup> Since the ‘90s, a number of Energy Packages have been proposed and adopted at EU level to govern the operation of the internal electricity and gas markets.<sup>12</sup>

The “Third Energy Package”, as adopted in 2009, “provided the cornerstone for the implementation of the internal energy market”.<sup>13</sup> As part of this package, the current law governing the internal gas market in the EU was adopted.<sup>14</sup> [Directive 2009/73/EC](#) established common rules for the internal gas market.<sup>15</sup> [Regulation 2009/715](#) outlined rules regarding access to “natural gas transmission systems” and “LNG facilities and storage facilities”, and aimed to facilitate the wholesale market for gas and to provide “mechanisms to harmonise the network access rules for cross-border exchanges in gas”.<sup>16</sup> Under Article 6 of this Regulation, the Commission is required to propose “network codes”. These network codes set out rules regarding the “cross-border gas markets” in the EU.<sup>17</sup> For example, [Commission Regulation 2017/459](#) (“CAM Network Code”) established “a network code on capacity allocation in gas transmission systems” and sets out rules regarding the offering of “yearly, quarterly, monthly, daily and within-day standard capacity products” for auction on the internal gas market, including the process for companies (“network users”) to bid on contracts for the transport of gas (“capacity product[s]”) offered by “transmission system operators” who supply gas.<sup>18</sup>

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<sup>10</sup> Radostina Primova, ‘The EU Internal Energy Market and Decarbonization’ in Claire Dupont and Sebastian Oberthür, eds, *Decarbonization in the European Union: Internal Policies and External Strategies* (Palgrave MacMillan 2015) pp.25-45.

<sup>11</sup> European Parliament, [Internal Energy Market](#) (last accessed 16 June 2023). The aim of the internal energy market is to “build a more competitive, customer-centred, flexible and non-discriminatory EU electricity and gas market with market-based supply prices”.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> European Commission, [Third energy package](#) (last 19 June 2023).

<sup>15</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94 (last accessed 19 June 2023).

<sup>16</sup> [Regulation \(EC\) 2009/715](#) of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 [2009] OJ L211/36 (last accessed 19 June 2023), Article 1.

<sup>17</sup> For more information, see European Commission, [Gas network codes](#) (last accessed 19 June 2023). Network codes set out “specific instructions on how to implement a single energy market”. See Anna Wolska, [How does cross-border electricity trade work in Europe?](#) (last accessed 19 June 2023).

<sup>18</sup> Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013 [2017] OJ L72/1 (last accessed 19 June 2023). See discussion in Gaslink, [Capacity Allocation Mechanisms \(CAM\) at Interconnection Points: Implementing Regulation EU 984/2013 Code Modification No. A062](#) (last accessed 21 June 2023); Gas Networks Ireland, [EU Network Code Implementation Project: Frequently Asked Questions Version 3.0](#) (last accessed 22 June 2023).



In relation to the electricity market, the legislation governing the internal electricity market was revised in 2019 with the adoption of the “[clean energy package](#)”.<sup>19</sup> [Regulation 2019/943](#), which was introduced as part of this package, established “principles for the operation of EU electricity markets”.<sup>20</sup> [Regulation 2019/943](#) in combination with three European Commission regulations ([Commission Regulation \(EU\) 2016/1719](#), [Commission Regulation \(EU\) 2015/1222](#) and [Commission Regulation \(EU\) 2017/2195](#)) govern the operation of the electricity market in the EU.<sup>21</sup>

The wholesale electricity market in the EU is divided into “Bidding Zones”,<sup>22</sup> which allow “market participants [to]...trade electricity in different markets for different timeframes”,<sup>23</sup> and the aforementioned regulations govern the different “timeframes” which allow “market participants [to] exchange energy with different lead times”.<sup>24</sup> In particular, [Regulation 2019/943](#) provides a legislative basis for these timeframes and includes provisions regarding “the balancing market, day-ahead, intraday and forward markets”.<sup>25</sup> The three Commission regulations then apply to the different timeframes in the wholesale electricity market, as follows:

- **Balancing timeframe:** Electricity Balancing Regulation ([Commission Regulation 2017/2195](#)) sets out “common principles for procuring, activating and exchanging of the balancing services”.<sup>26</sup> The market relates to the “real time balancing of supply and demand”.<sup>27</sup>
- **Intraday and Day-ahead timeframe:** Capacity Allocation and Congestion Management Regulation ([Commission Regulation \(EU\) 2015/1222](#)) outlines “binding rules for the

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<sup>19</sup> Agnieszka Widuto, European Parliamentary Research Service, [Briefing Paper: Improving the design of the EU electricity market](#), April 2023 (last accessed 16 June 2023).

<sup>20</sup> [Regulation \(EU\) 2019/943](#) of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity [2019] OJ L158/54 (last accessed 16 June 2023).

<sup>21</sup> European Union Agency for the Cooperation of Energy Regulators, [Market Rules](#) (last accessed 20 June 2023).

<sup>22</sup> A bidding zone is “defined as the largest geographical area in which market players can trade electricity without any restriction due to internal bottlenecks”. For further information, see Nicolas Hary, Deloitte, [Talking points: Delimitation of bidding zones for electricity markets in Europe and the consideration of internal congestions](#) (last accessed 06 July 2023).

<sup>23</sup> European Union Agency for the Cooperation of Energy Regulators and Council of European Energy Regulators, [ACER and CEER Draft Policy Paper on the Further Development of the EU Electricity Forward Market](#) (last accessed 19 June 2023); European Union Agency for the Cooperation of Energy Regulators, [ACER has decided on alternative electricity bidding zone configurations](#) (last accessed 19 June 2023). See also, Antonopoulos, G., Vitiello, S., Fulli, G. and Masera, M., European Commission Joint Research Centre, [JRC Technical Reports: Nodal pricing in the European Internal Electricity Market](#) (last accessed 19 June 2023).

<sup>24</sup> European Union Agency for the Cooperation of Energy Regulators, [Market rules for different electricity market timeframes](#) (last accessed 20 June 2023).

<sup>25</sup> Recital 9 states that “To ensure full transparency and increase legal certainty, the main principles of market functioning and capacity allocation in the balancing, intraday, day-ahead and forward market timeframes should also be adopted pursuant to the ordinary legislative procedure and incorporated in a Union legislative single act”. See [Regulation \(EU\) 2019/943](#) of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity [2019] OJ L158/54 (last accessed 16 June 2023).

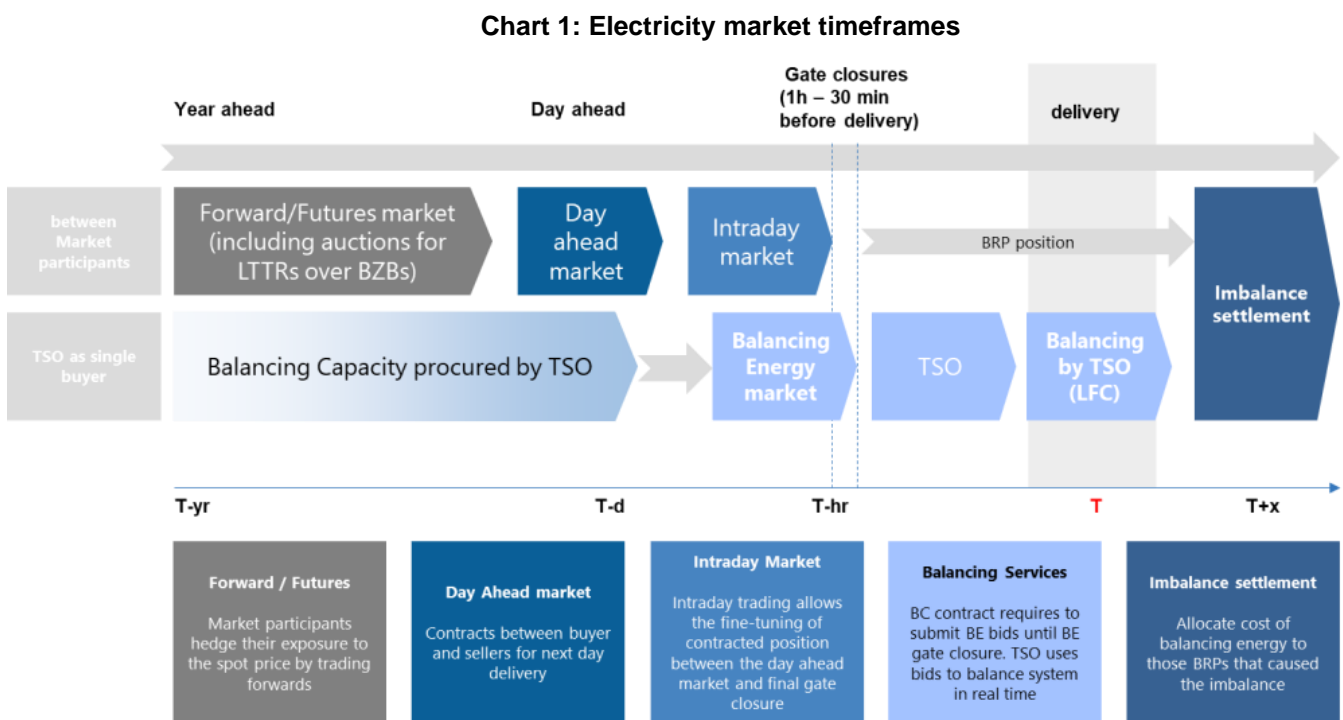
<sup>26</sup> European Union Agency for the Cooperation of Energy Regulators, [Electricity Balancing](#) (last accessed 20 June 2023).

<sup>27</sup> Directorate-General for Internal Policies, European Parliament, [Competition Policy and an Internal Energy Market](#) (last accessed 21 June 2023).

implementation and operation of EU-wide single market coupling in the day-ahead and intraday timeframes”.<sup>28</sup>

- **Forward timeframe:** Forward Capacity Allocation Regulation ([Commission Regulation \(EU\) 2016/1719](#)) outlines “rules on cross-zonal capacity calculation and allocation in the forward timeframe”.<sup>29</sup>

A visual overview of the wholesale EU electricity market as it relates to time of trading can be seen in **Chart 1** below. Additional information on the trading of electricity for these timeframes can be found in this [Market Report](#) by the European Network of Transmission System Operators (ENTSO-E).



Source: European Union Agency for the Cooperation of Energy Regulators, [Market rules for different electricity market timeframes](#)

For the purposes of this research query, it is the **forward electricity market**, mentioned above, that is most relevant to hedging, as it is this market that offers “market participants hedging opportunities against short-term (e.g. day-ahead) price uncertainties”.<sup>30</sup> The forward market relates

<sup>28</sup> European Union Agency for the Cooperation of Energy Regulators, [Capacity allocation and congestion management](#) (last accessed 20 June 2023).

<sup>29</sup> European Union Agency for the Cooperation of Energy Regulators, [Forward Capacity Allocation](#) (last accessed 20 June 2023).

<sup>30</sup> Economic Consulting Associates, [European Electricity Forward Markets and Hedging Products – State of Play and Elements for Monitoring: Final Report](#) (last accessed 20 June 2023).



to “transactions from years to weeks ahead of delivery, precisely a “forward” contract is considered any electricity transaction concluded more than a day before delivery”<sup>31</sup> and may encompass trades of “futures” and “forward” products. An overview of the possible products is provided in Table 1 below.<sup>32</sup>

**Table 1: Types of products that may be traded in Europe’s electricity forwards markets**

Products	Definition
<b>Electricity forwards</b>	These are “bilateral contracts between a buyer and a seller to make/take a physical delivery of electricity at some time in the future at a specified price”.
<b>Electricity futures</b>	A futures contract is “a legally binding agreement on a recognised exchange to make or take a specified commodity or instrument at a fixed date in the future at a price agreed upon at the time of dealing.”
<b>Electricity swaps</b>	A swap is “paper exchange of a fixed price for a floating price. A swap allows a client to lock in a fixed price for its purchase or sale of a commodity for an agreed quantity, over an agreed period of time.”
<b>Contract for Differences</b>	A Contract for Difference (CfD) is a forward “on the spread between an area price and the system price.”
<b>Electricity Price Area Differentials (EPADs)</b>	Electricity Price Area Differentials permit market participants to hedge against the “price area risk” (which is the risk of “difference between the area price at the market participant’s physical location and the system price”).
<b>Spreads</b>	Spread relates to the trading by market participants of the “price differences between the different Markets” on a trading platform.
<b>Electricity options</b>	“An option gives the buyer of the option the right, but not the obligation, to purchase (“call option”) or sell (“put option”) a specific quantity of the commodity at a fixed price in the future.”

Source: Economic Consulting Associates, [European Electricity Forward Markets and Hedging Products – State of Play and Elements for Monitoring: Final Report](#)

According to a 2022 [Policy Paper](#) published by the European Network of Transmission System Operators for Electricity, there are two “forward/futures markets” open to market participants to “hedge their positions” within and between Bidding Zones within the internal electricity market.<sup>33</sup> These are:

<sup>31</sup> Michal Glowacki, Glowacki Law Firm, [Forward electricity markets](#) (last accessed 20 June 2023).

<sup>32</sup> European Network of Transmission System Operators for Electricity, [ENTSO-E Policy Paper: EU’s Electricity Forward Markets](#) (last accessed 20 June 2023).

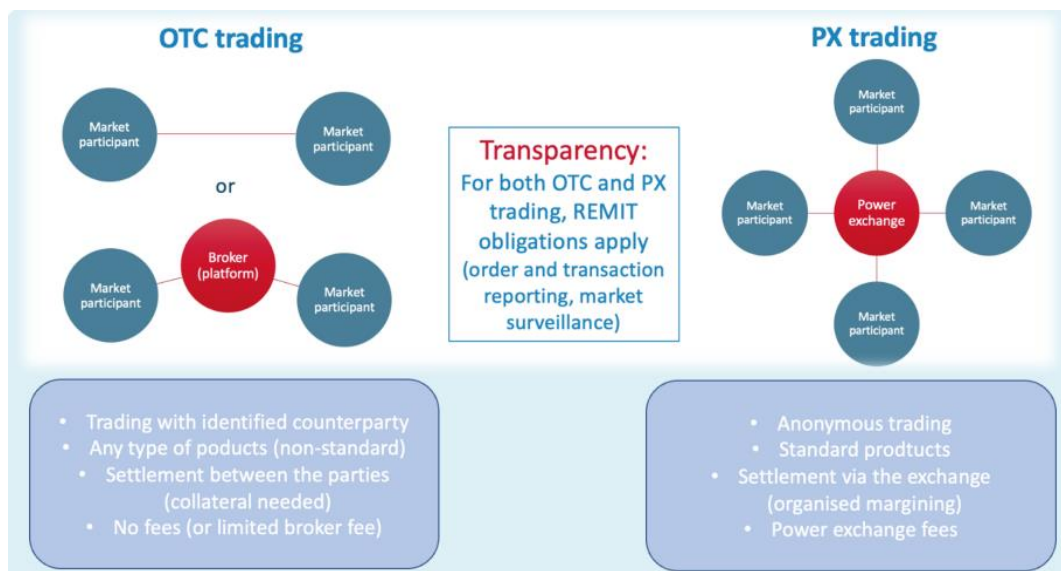
<sup>33</sup> European Network of Transmission System Operators for Electricity, [ENTSO-E Policy Paper: EU’s Electricity Forward Markets](#) (last accessed 20 June 2023).

- “...electricity forwards markets”, where “electricity derivative products are traded for most [Bidding Zones], where the underlying is typically given by the BZ day-ahead price”, and
- “Long-Term Transmission Rights” markets or “LTTRs markets”, where “Transmission rights are issued long-term to allow...the hedging of the price differential” between Bidding Zones in order “to support bilateral cross-border transactions where no physical interconnection capacity is allocated explicitly” and “the transfer of the effect of hedges obtained in any given [Bidding Zone] to a different (neighbouring) [Bidding Zone]”.<sup>34</sup>

Further information on the operation of forward markets in the European electricity market and hedging can be found in Appendix 1 of ENTSO-E [2022 Policy Paper](#).

It should be noted that electricity can be traded between two parties (called “Over The Counter” (OTC)) or can be traded through an energy or power exchange “where many buyers and sellers are brought together”.<sup>35</sup> OTC contracts are “bilateral transactions” between two parties (potentially with a broker involved) and these are “private contracts”.<sup>36</sup> Transactions on a Power Exchange (PX) involve market participants trading on a power exchange (see Chart 2 below).<sup>37</sup>

**Chart 2: OTC Trading and PX Trading in the Electricity Market**



Source: European Federation of Energy Traders, [EFET Insight into Forward Trading in Wholesale Electricity Markets](#)

<sup>34</sup> Ibid.

<sup>35</sup> European Federation of Energy Traders, [EFET Insight into Forward Trading in Wholesale Electricity Markets](#) (last accessed 20 June 2023); Directorate-General for Internal Policies, European Parliament, [Competition Policy and an Internal Energy Market](#) (last accessed 21 June 2023).

<sup>36</sup> Ibid; Economic Consulting Associates, [European Electricity Forward Markets and Hedging Products – State of Play and Elements for Monitoring: Final Report](#) (last accessed 20 June 2023).

<sup>37</sup> Ibid.

Like electricity, gas can also be traded through “exchanges” or “OTC”.<sup>38</sup> From a regulatory perspective, both transactions should be transparent as both private bi-lateral agreements and trades of electricity and gas made on exchanges are subject to reporting obligations under the Regulation on Wholesale Energy Market Integrity and Transparency (REMIT).<sup>39</sup> REMIT ([Regulation \(EU\) 1227/2011](#)) provides a “legal framework to identify and penalise insider trading and market manipulation in European wholesale markets”<sup>40</sup> and applies to trading in both the wholesale electricity and gas markets.<sup>41</sup> Under this regulation, the European Union Agency for the Cooperation of Energy Regulators (ACER) “in collaboration with national regulatory authorities” is responsible for “the monitoring of wholesale energy markets”.<sup>42</sup> ACER is an “independent body”, established in 2011 under the Third Energy Package, which is responsible for “foster[ing] the integration and completion of the European Internal Energy Market for electricity and natural gas” and for “ensur[ing] that the integration of national energy markets and the implementation of legislation in the Member States are met according to the EU's energy policy objectives and regulatory frameworks”.<sup>43</sup>

Under Article 8 of REMIT, market participants are required to provide ACER with “a record of wholesale energy market transactions” and under Article 7, national regulatory authorities have a duty to “cooperate at regional level and with the Agency in carrying out the monitoring of wholesale energy markets”.<sup>44</sup> Thus, under REMIT, there is oversight from ACER and national regulatory authorities of the trading (including trades on the forwards market) of electricity and gas in the internal energy market in the European Union.<sup>45</sup>

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<sup>38</sup> Nina Chestney, Reuters, [Explainer: How natural gas is traded in Europe](#) (last accessed 21 June 2023). See also European Securities and Markets Authority, [TRV Risk Analysis: EU natural gas derivatives markets: risks and trends](#) (last accessed 21 June 2023). This report focuses on gas market derivatives and thus, there may be some nuances regarding the trading of physical gas products that are not captured in this report.

<sup>39</sup> Per 2021 guidance issued by the European Union Agency for the Cooperation of Energy Regulators, contracts that are “intermediated by persons”, “traded bilaterally and/or over the counter (OTC)” and “intra-group transactions” fall within REMIT. See European Union Agency for the Cooperation of Energy Regulators, [ACER Guidance on the application of Regulation \(EU\) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency](#) (last accessed 21 June 2023).

<sup>40</sup> Directorate-General for Internal Policies, European Parliament, [Competition Policy and an Internal Energy Market](#) (last accessed 21 June 2023).

<sup>41</sup> European Union Agency for the Cooperation of Energy Regulators, [ACER Guidance on the application of Regulation \(EU\) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency](#) (last accessed 21 June 2023). Although, REMIT does not apply to “wholesale energy products which are financial instruments”. See Article 1 of [Regulation \(EU\) 1227/2011](#).

<sup>42</sup> [Regulation \(EU\) 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency](#) [2011] OJ L326/1 (REMIT), Article 1.

<sup>43</sup> European Union Agency for the Cooperation of Energy Regulators, [About ACER](#) (last accessed 06 July 2023).

<sup>44</sup> [Regulation \(EU\) 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency](#) [2011] OJ L326/1 (REMIT), Articles 7 and 8.

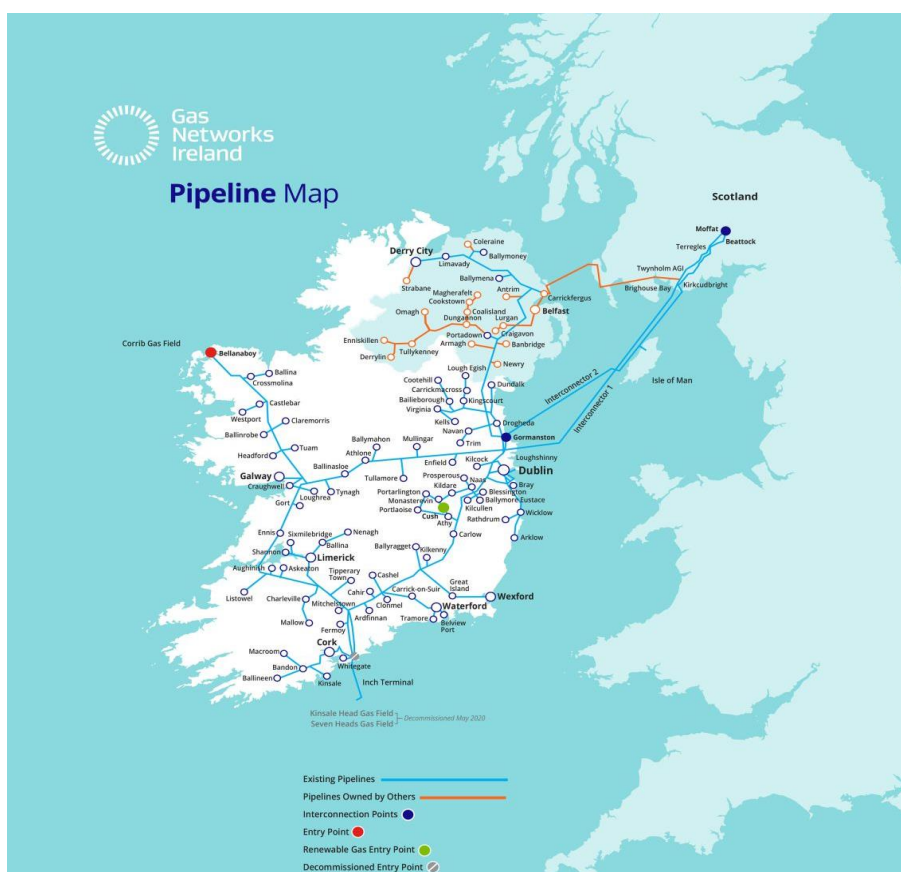
<sup>45</sup> See European Union Agency for the Cooperation of Energy Regulators, [ACER Guidance on the application of Regulation \(EU\) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency](#) (last accessed 21 June 2023). Note that futures in the energy market are subject to financial market regulation. See discussion in relation to futures in electricity in European Network of Transmission System Operators for Electricity, [ENTSO-E Policy Paper: EU's Electricity Forward Markets](#) (last accessed 20 June 2023).

In summary, hedging practices are permitted under EU legislation in the internal energy market. In both the electricity and gas markets, the forward market allows participants to hedge against short-term price uncertainties and regulations like REMIT ensure transparency and integrity in trading, including hedging transactions.

## The energy market in Ireland and hedging

In Ireland, there is a national gas network which is operated by Gas Networks Ireland, which is a public body owned by the State.<sup>46</sup> Currently, approximately 75% of Ireland's gas is imported from the UK and around 25% is supplied through "indigenous supplies" through the Corrib gas field.<sup>47</sup> A visual overview of the gas market supply in Ireland is outlined in the chart below, an interactive map can be found [here](#).

**Chart 3: Gas network in Ireland**



Source: [Gas Networks Ireland](#)

<sup>46</sup> Department of the Environment, Climate and Communications, [Gas](#) (last accessed 21 June 2023). Gas Networks Ireland and its' UK subsidiary are licenced to operate in the market by the Commission for Regulation of Utilities (CRU), the Utility Regulator in Northern Ireland and the Office of Gas and Electricity Markets (Ofgem) in the UK. See Gas Networks Ireland, [Regulatory Compliance](#) (last accessed 22 June 2022). Gas Networks Ireland "is responsible for the management of access to the Irish natural gas pipeline system for all Shippers". See Gas Networks Ireland, [Services for Shippers & Suppliers](#) (last accessed 06 July 2023).

<sup>47</sup> Mr David Kelly, Director of customer and business development, Gas Networks Ireland, [Biomethane Renewable Gas: Discussion](#), *Joint Committee on Agriculture, Food and the Marine*, 03 May 2023 (last accessed 21 June 2023).

An understanding of the origins of Ireland's gas supply is important, as this supply can impact the wholesale pricing of gas on the Irish market.<sup>48</sup> Indeed, according to the Commission for Regulation of Utilities (CRU), the "wholesale price of gas in Ireland is set by reference to the wholesale price at the trading hub in Britain, the National Balancing Point (NBP) plus the cost of transport to Ireland via the interconnectors".<sup>49</sup> In relation to the operation of different timeline markets and hedging in the gas market in Ireland, the CRU in their *Energy and Monitoring Report for 2021*, stated the following on the gas market in Ireland:

"As gas is sold for delivery at different times, suppliers develop hedging strategies which aim to smooth the impact of buying gas at different prices and allow price stability for customers. This can include Month Ahead, Day Ahead and Within Day wholesale gas products. Wholesale gas prices are set in Sterling and gas at the NBP is sold in pence/therm. Therefore, Euro/Sterling currency fluctuations influence wholesale gas prices in Euro in Ireland."<sup>50</sup>

The CRU is the "independent energy regulator" in Ireland and "is responsible for the economic regulation of the Irish gas network".<sup>51</sup> The powers and functions of the CRU will be explored in more detail in Part 2 of this paper. However, for the purposes of this section, the CRU oversees both gas and electricity in Ireland and their role is to "maintain security of supply, ensure efficient network delivery and promote competition and innovation in the generation and supply of electricity and supply of natural gas".<sup>52</sup> The CRU also "jointly regulates the all-island wholesale Single Electricity Market with its counterpart in Northern Ireland, the Utility Regulator".<sup>53</sup>

The Single Electricity Market (SEM) is the wholesale electricity market for the island of Ireland.<sup>54</sup> The SEM was initially established in 2007 and in October 2018, "new operational arrangements were put in place" to establish the Integrated Single Electricity Market (I-SEM).<sup>55</sup> The I-SEM is the new wholesale market which is comprised of "multiple markets or auctions, each spanning different trading time frames, with separate (although related) clearing and settlement mechanisms,

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<sup>48</sup> The supply of gas from the UK also has an impact on the security of the gas supply in Ireland. See Gas Networks Ireland, [Winter Outlook 2022/23](#) (last accessed 22 June 2023).

<sup>49</sup> Commission for Regulation of Utilities, [Energy and Water Monitoring Report for 2021](#) (last accessed 22 June 2023).

<sup>50</sup> Ibid. The Gas Network Ireland [Code of Operations](#) addresses the auctions of capacity at a technical level. However, an overview of the timeline of auctions of gas capacity is explored in: Gas Networks Ireland, [EU Network Code Implementation Project: Frequently Asked Questions Version 3.0](#) (last accessed 22 June 2023).

<sup>51</sup> Department of the Environment, Climate and Communications, [Gas](#) (last accessed 21 June 2023).

<sup>52</sup> Commission for Regulation of Utilities, [What We Do](#) (last accessed 22 June 2023).

<sup>53</sup> Ibid.

<sup>54</sup> SEM Committee, [Market Overview](#) (last accessed 22 June 2023).

<sup>55</sup> Ibid.



covering both energy and non-energy commodities”.<sup>56</sup> The I-SEM was “designed to integrate the all-island electricity market with European electricity markets”<sup>57</sup> and following the establishment of this market, companies that generate electricity and electricity suppliers can “purchase/sell electricity via the I-SEM markets (Day Ahead, Intraday, Forwards and Capacity Markets)”.<sup>58</sup>

In addition, companies can also “hedge their electricity risk” in the Forwards Market using “Contract-for-Difference”.<sup>59</sup> In their report on [Hedging electricity in the Irish market](#), KPMG explained hedging on the Irish electricity market in the following way:

“I-SEM also enables market participants to hedge their electricity price risk using Contract-for-Difference (“CfD”) in the Forwards Market (as defined by I-SEM). Directed Contracts, which are a form of CfD, are offered by ESB as the counterparty and enable energy companies to hedge the price (or a component of it) at which energy is purchased/sold in the future.”<sup>60</sup>

A Contract for Difference (CfD) is “a financial instrument in which a price is agreed upon (the “strike price”) for a quantity of an underlying on a future day. On settlement, the contract holder receives or pays the difference between the contract strike price and the spot price (Day-ahead price) of the underlying (“reference price)”.<sup>61</sup> According to the report from KPMG, the “pricing methodology, pricing formula and quantity of Directed Contracts (“DC”s) being offered in the I-SEM, are decided by the Regulatory Authorities” (the CRU and the Utility Regulator in Northern Ireland).<sup>62</sup> In particular, the “terms of these contracts, including the strike prices against the day-ahead market price” are set by these regulators.<sup>63</sup>

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<sup>56</sup> Eirgrid plc, [Quick Guide to the Integrated Single Electricity Market: The I-SEM Project Version 1](#) (last accessed 22 June 2023).

<sup>57</sup> Ibid. An visual map of the European Electricity Grid can be found at: European Network of Transmission System Operators for Electricity, [ENTSO-E Transmission System Map](#) (last accessed 22 June 2023). It should be noted that Brexit had implications for the operation of electricity trading and is discussed in more detail at: Mason, Hayes & Curran, [The Irish Electricity Market at the End of the Brexit Transition Period](#) (last accessed 22 June 2023).

<sup>58</sup> KPMG, [Hedging electricity in the Irish market](#) (last accessed 22 June 2023).

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> See the submission on Ireland by Mason Hayes and Curran to the publication by Lexology on Electricity Regulation: Eoin Cassidy, Peter McLay and William Carmody, [Electricity Regulation 2022: Ireland](#) (last accessed 22 June 2023).



## Summary of the regulation of hedging and potential forthcoming developments

As described above, forward markets and hedging practices exist and are permissible in the Irish and EU electricity and gas markets. In these markets, hedging can be seen as a positive practice, as it has the potential to safeguard consumers from the volatility of pricing in the market.<sup>64</sup>

It should be noted that the volatility of pricing in the electricity market and the protection of consumers is currently being considered by the European Commission. In March 2023, the Commission announced their proposal to reform the EU electricity market.<sup>65</sup> In particular, the European Commission proposed, among other things, to “make consumer bills less dependent on volatile fossil fuel prices” and to “better protect consumers from future price spikes”.<sup>66</sup> The proposed reform would include the alteration of several pieces of EU legislation mentioned above, including the Electricity Regulation, the Electricity Directive, and the REMIT Regulation. The proposed reforms would also include, but would not be limited to, the following:

- The option for consumers to “**lock in secure, long-term prices** to avoid excessive risks and volatility.”
- The possibility of permitting Member States to “**extend regulated retail prices** to households and SMEs in case of a crisis.”
- The facilitated “deployment of more **stable long-term contracts** such as Power Purchase Agreements (PPAs) – through which companies establish their own direct supplies of energy and thereby can profit from more stable prices of renewable and non-fossil power production.”
- “...the reform will boost liquidity of the markets for long term contracts that lock in future prices, so-called ‘**forward contracts**’. This will allow more suppliers and consumers to protect themselves against excessively volatile prices over longer periods of time”.<sup>67</sup>

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<sup>64</sup> It was noted by the Commission for Regulation of Utilities (CRU) in their opening presentation to the Joint Committee on Environment and Climate Action on the 09 May 2023 that “Due to supplier hedging, the majority of customers were protected from the worst impacts of the volatility and extremely high prices of 2022 when wholesale gas prices peaked at ten times the historic norms. However, the same hedging contracts and practices that protected customers can mean that the pass-through of wholesale gas price reductions to the retail market are not seen for a period of time.” See Mr Jim Gannon, Chairperson, Commission for Regulation of Utilities, [Engagement with the Commission for Regulation of Utilities](#), *Joint Committee on Environment and Climate Action*, 09 May 2023 (last accessed 15 June 2023).

<sup>65</sup> European Commission, [Commission proposes reform of the EU electricity market design to boost renewables, better protect consumers and enhance industrial competitiveness](#) (last accessed 29 June 2023).

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.* For more information, see Agnieszka Widuto, European Parliamentary Research Service, [Briefing: Improving the design of the EU electricity market](#) (last accessed 29 June 2023).

## Part 2: The powers of the Commission for Regulation of Utilities (CRU) in the Irish electricity and gas markets

The Commission for Regulation of Utilities (CRU) is the “independent energy and water regulator” in Ireland.<sup>68</sup> The CRU was originally established under the Electricity Regulation Act 1999<sup>69</sup> as the Commission for Electricity Regulation and initially its role was as the “independent economic regulator for the electricity sector”.<sup>70</sup> However, since then, the role of the CRU has been expanded through various pieces of legislation and regulations to include the “regulation of the gas sector, safety, regulation of the Single Electricity Market (SEM), and regulation of public water and waste water services”.<sup>71</sup> In 2017, the Commission was renamed to the CRU under the Energy Act 2016 to “reflect its widened responsibilities”.<sup>72</sup>

In relation to the regulation of energy, the function and powers of the CRU are derived from EU legislation and the following pieces of primary Irish legislation:<sup>73</sup>

- [Electricity Regulation Act 1999](#)
- [Gas \(Interim Regulation\) Act 2002](#)
- [Energy \(Miscellaneous Provisions\) Act 2006](#)
- [Electricity Regulation \(Amendment\) \(Single Electricity Market\) Act 2007](#)
- [Petroleum \(Exploration and Extraction\) Safety Act 2010](#)
- [Energy Act 2016](#).

As an energy regulator, the CRU has a role in maintaining “security of supply”, ensuring “efficient network delivery”, promoting “competition and innovation in the generation and supply of electricity and supply of natural gas” and in safeguarding energy consumers.<sup>74</sup> In addition, as mentioned above, the CRU “jointly regulates the all-island wholesale Single Electricity Market with its counterpart in Northern Ireland, the Utility Regulator”.<sup>75</sup> As the CRU has a broad array of functions and powers,<sup>76</sup> a summary of their functions and powers, as outlined in the [Electricity Regulation](#)

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<sup>68</sup> Commission for Regulation of Utilities, [What We Do](#) (last accessed 26 June 2023).

<sup>69</sup> [Electricity Regulation Act 1999 \(as amended\)](#), Section 8.

<sup>70</sup> Diarmuid Torney, Environmental Protection Agency, [Enabling Decarbonisation: A Study of Energy Sectors Governance in Ireland](#) (last accessed 26 June 2023). See also, Commission for Regulation of Utilities, [Annual Report 2021](#) (last accessed 26 June 2023).

<sup>71</sup> *Ibid.* Per this report, the functions of the CRU were “were expanded, inter alia, by the Gas (Interim) Regulation Act 2002, the Energy (Miscellaneous Provisions) Act 2006, the Electricity Regulation Amendment (SEM) Act 2007, the Petroleum (Exploration & Extraction) Safety Act 2010 and the Water Services Act 2013”.

<sup>72</sup> Commission for Regulation of Utilities, [Annual Report 2021](#) (last accessed 26 June 2023).

<sup>73</sup> See Law Reform Commission, [Regulatory Powers and Corporate Offences](#) (last accessed 26 June 2023); Commission for Regulation of Utilities, [Policy and Statutory Framework](#) (last accessed 26 June 2023). It should be noted that this is not an exhaustive list, and the CRU also has other powers in relation to water under the Water Services Act 2013 and the Water Services (No.2) Act 2013.

<sup>74</sup> Commission for Regulation of Utilities, [What We Do](#) (last accessed 26 June 2023).

<sup>75</sup> *Ibid.*

<sup>76</sup> An overview of the powers of the CRU are outlined in Law Reform Commission, [Regulatory Powers and Corporate Offences](#) (last accessed 26 June 2023).

[Act 1999 \(as amended\)](#), is provided in the box below. This overview is not intended to be exhaustive but is intended to provide a summary of the functions of the CRU relevant to the issues of hedging and consumer protection, which are the focus of this paper.

### **Electricity Regulation Act 1999 (as amended)**

In considering hedging in the electricity and gas markets and the protection of consumers, the following functions of the CRU under **Section 9 of the 1999 Act** are relevant:

- The CRU oversees the operation of the electricity markets including (but not limited to) establishing a “system of trading in electricity, including the supervision and review of such a system by the Commission” and publishing “proposals for a system of contracts and other arrangements, including appropriate rights and obligations, for trading in electricity”.
- The CRU oversees the operation of the gas market including (but not limited to) examining the compliance of supply prices with EU law.
- The CRU has a role in monitoring “the level and effectiveness of market opening and the development of competition in the supply of electricity and gas to final customers, which shall include but is not limited to monitoring—
  - (i) final tariffs charged to domestic customers including those on prepayment systems,
  - (ii) rates of customer switching between licensed electricity and gas suppliers,
  - (iii) disconnection and de-energisation rates,
  - (iv) charges for, and the execution of, maintenance services,
  - (v) complaints by domestic customers,
  - (vi) any distortion or restriction of competition in the supply of electricity and gas to final customers,
  - (vii) whether the development and operation of competition in the supply of electricity and gas is benefitting final [customers,]
  - (viii) the level of market opening and of competition on natural gas exchanges,
  - (ix) the impact of dynamic price contracts and of the use of smart metering systems,
  - (x) the relationship between household and wholesale prices,
  - (xi) the evolution of grid tariffs and levies,
  - (xii) the availability of comparison tools that meet the requirements set out in Article 14 of the 2019 Internal Electricity Market Directive, and
  - (xiii) the removal of unjustified obstacles to and restrictions on the development of consumption of self-generated electricity and citizen energy communities”.
- The CRU has a role in ensuring that the electricity and gas supply is competitive and of benefit to consumers and is required to cooperate with relevant competition authorities. In the exercise of their powers, the CRU must also ensure that they do not “discriminate” between licence or authorisation holders.

## Electricity Regulation Act 1999 (as amended)

### Functions continued...

#### Section 9 of the 1999 Act (continued)

- The CRU role also includes “respect[ing] contractual freedom with regard to interruptible supply contracts as well as with regard to long-term contracts provided that they are compatible with European Union law and consistent with European Union policies”. It can “have regard to the need to provide for flexibility in the trading of electricity to facilitate trading close to real time in order to better integrate renewable electricity and provide accurate price signals to the market”.
- The CRU also has a role in “contribut[ing] to the development of the internal [energy] market”, ensuring compliance with relevant EU law, and working with other regulatory authorities in the EU.
- The CRU is responsible for granting, monitoring the performance of, modifying, revoking, and enforcing a number of licences and authorisations in the electricity and gas markets.
- The CRU can “carry out investigations into the functioning of the electricity and gas markets”.
- The CRU has annual reporting duties which include a responsibility to report on the “developments in dynamic electricity price contracts, including market offers and the impact on consumers’ bills and specially the level of price volatility”.
- The CRU has a responsibility to “ensure that there is a high standard of protection for all final consumers, including in their dealings with energy undertakings”.

#### Section 9B provides for the functions of the CRU regarding the all-island energy market:

- Under this section, the CRU has a function to “participate in the development of an all-island energy market” and has related powers to direct licence holders regarding their activities in the all-island market.
- Under this section, the CRU has powers to make regulations to “establish and facilitate the operation of the Single Electricity Market, including a Trading and Settlement Code in relation to that market”. In exercising this function, the CRU is required to “monitor, supervise and keep under review the operation and effectiveness of the Single Electricity Market”.

Under the [Electricity Regulation Act 1999 \(as amended\)](#) and the [Gas \(Interim\) \(Regulation\) Act 2002](#), the CRU has the power to:

- Grant or refuse licences in the electricity market (including for generation, transmission, supply, etc.) (Section 14 of 1999 Act) and in the gas market (section 16 of the 2002 Act).
- Appoint authorised officers (section 11 of 1999 Act and section 18 of the 2002 Act)
- Give directions to the electricity board regarding the “grid code in relation to the transmission system” and the “distribution code in relation to the distribution system” (section 33).
- Carry out investigations and impose administrative sanctions (part IX).

Further to the information provided in the box above, it should be noted that as the energy regulator in Ireland, the CRU has a role in setting “price controls/reviews for network companies that operate Ireland’s gas and electricity networks”.<sup>77</sup> These price reviews and controls “limit the revenues that relevant licensees can recover” from consumers.<sup>78</sup> In particular, every five years the

<sup>77</sup> Commission for Regulation of Utilities, [Revenues and Tariffs](#) (last accessed 29 June 2023).

<sup>78</sup> Commission for Regulation of Utilities, [Revenues and Tariffs](#) (last accessed 29 June 2023).

CRU publishes a Price Review in Electricity and a Price Control in Gas which sets out the “amount of revenue” that “network companies” such as EirGrid, ESBN and Gas Networks Ireland can accrue from its customers over a five year period.<sup>79</sup> This price review/control involves the CRU examining the “business plans put forward by the network companies” and considering the “proposed spend” of these companies.<sup>80</sup> The CRU then publishes a “consultation to gather and consider the views of the public on the proposals and level of revenue that the network companies will recover over the 5-year period”.<sup>81</sup> Following their examination of the responses received to the consultation, the CRU produces a decision outlining the revenue that can be accrued annually over a five-year period (which are recovered through tariffs).<sup>82</sup> As part of these reviews, the CRU also establishes a “5-year revenue allowance” via a Price Control in Gas and a Price Review in Electricity.<sup>83</sup> As part of this process, the CRU also outlines “incentives” which are intended to “incentivise efficient costs, enable necessary investment, and hold the network companies accountable for delivering what customers need”.<sup>84</sup> The most recent Price Review for Electricity ([Price Review 5](#)) applies from 2021-2025 and Price Control for Gas ([Price Control 5](#)) applies from 2022-2027.<sup>85</sup>

As noted in the box above, the CRU are responsible for regulating licence holders in the electricity and gas markets, including the granting of licences. In particular, the CRU regulates the following “network and market operator licence holders”:<sup>86</sup>

- EirGrid: which is the “electricity transmission system operator (TSO) and electricity market operator (MO)”.
- Electricity Supply Board (ESB): which is the “electricity transmission asset owner (TAO) and electricity distribution asset owner (DAO)”.
- ESB Networks: which is the “electricity distribution system operator (DSO)”.
- Gas Networks Ireland (GNI): which is “the gas transmission system operator (TSO), gas transmission asset owner (TAO), gas distribution system operator (DSO) and gas distribution asset owner (DAO)”.<sup>87</sup>

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<sup>79</sup> Commission for Regulation of Utilities, [PR5 Regulatory Framework, Incentives and Reporting](#) (last accessed 29 June 2023); Commission for Regulation of Utilities, [Price Control 5 Strategy](#) (last accessed 29 June 2023).

<sup>80</sup> Commission for Regulation of Utilities, [Revenues and Tariffs](#) (last accessed 29 June 2023).

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Commission for Regulation of Utilities, [Revenues and Tariffs](#) (last accessed 29 June 2023).

<sup>84</sup> Ibid.

<sup>85</sup> Commission for Regulation of Utilities, [Price Control 5 Strategy](#) (last accessed 29 June 2023); Commission for Regulation of Utilities, [PR5 Regulatory Framework, Incentives and Reporting](#) (last accessed 29 June 2023).

<sup>86</sup> Commission for Regulation of Utilities, [Compliance and Enforcement](#) (last accessed 29 June 2023).

<sup>87</sup> Ibid.

In addition, the CRU (in conjunction with the Northern Ireland Utility Regulator) oversees the Single Energy Market. As a part of this role, the CRU examines the “compliance” of market participants through “scheduled reporting”, “dynamic monitoring” and “scheduled audits”.<sup>88</sup> In addition, the CRU conducts “reactive compliance monitoring” following “analyses of unusual market events” or “analyses of complaints and responses to Regulation on Energy Market Integrity and Transparency (REMIT) findings”.<sup>89</sup>

As discussed in Part 1 of this briefing paper, [Regulation \(EU\) 1227/2011](#) is the Regulation on Wholesale Energy Market Integrity and Transparency (REMIT). This regulation provides for a specific “mechanism for reporting and preventing wholesale energy market abuse”.<sup>90</sup> As a national energy regulator, the CRU has a role in monitoring the wholesale energy markets in cooperation with the Agency for the Cooperation of Energy Regulators (ACER) ([Article 7](#)) and market participants are required to “register with the CRU under REMIT” ([Article 9](#)).<sup>91</sup> In addition, under [Article 8](#) of REMIT, market participants must supply ACER with a “record of [their] wholesale energy market transactions” and must supply ACER and the CRU, as the national regulator, with information “related to the capacity and use of facilities for production, storage, consumption or transmission of electricity or natural gas or related to the capacity and use of LNG facilities, including planned or unplanned unavailability of these facilities, for the purpose of monitoring trading in wholesale energy markets”. Market participants also have reporting requirements under REMIT, including a requirement for “[o]rganisations who arrange transactions on wholesale energy products in Ireland [to] report suspicious transactions or abusive market behaviour to the CRU in a timely manner” and for all market participants to inform the CRU regarding “suspicious transactions or potential breaches of REMIT”.<sup>92</sup>

In this respect, and in light of the legislation discussed above, it can be noted that the CRU possesses a number of legislative powers to oversee the operation of the electricity and gas markets in Ireland and to ensure that they are operating competitively for the benefit of consumers. As hedging is a permitted practice in the Irish wholesale electricity and gas markets, the CRU does not appear to prevent market participants from entering into forward or futures agreements. The CRU currently supports consumers to switch providers (by [accrediting price comparison websites](#) and provides information to consumers on switching on their [website](#)). However, the CRU does not

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<sup>88</sup> Commission for Regulation of Utilities, [Compliance and Enforcement](#) (last accessed 29 June 2023).

<sup>89</sup> Commission for Regulation of Utilities, [Compliance and Enforcement](#) (last accessed 29 June 2023).

<sup>90</sup> Commission for Regulation of Utilities, [Compliance and Enforcement](#) (last accessed 29 June 2023).

<sup>91</sup> See Commission for Regulation of Utilities, [Compliance and Enforcement](#) (last accessed 29 June 2023).

<sup>92</sup> See Commission for Regulation of Utilities, [Compliance and Enforcement](#) (last accessed 29 June 2023). REMIT specifically relates to “insider trading” in the wholesale energy market.



set prices for electricity supplied to consumers in the retail electricity market.<sup>93</sup> The CRU is intended to protect consumers by “setting the quality of service standards in energy”, providing them with “information about their rights”<sup>94</sup> and by overseeing the operation of the energy market and ensuring that there is compliance with energy legislation.<sup>95</sup>

## Potential future developments to the powers of the CRU in relation to hedging

On the 21 March 2023, the Government approved the General Scheme of the Energy (Windfall Gains in the Energy Sector) Bill 2023. This Bill provides for the implementation of [Council Regulation \(EU\) 2022/1854 on an emergency intervention to address high energy prices](#), which came into force in October 2022 and relates to the collection and redistribution of windfall gains in the energy sector. There were two central aspects of this General Scheme:

- the introduction of a “temporary solidarity contribution based on the taxable profits in the fossil fuel production and refining sectors”, and
- the introduction of “a cap on the market revenues of certain generators (such as wind, solar and oil) in the electricity sector”.

[Head 20 of this General Scheme](#) included a provision in relation to “hedging operations” and proposed to provide the CRU with an oversight role in relation to hedging in relation to the cap on market revenues.

In June 2023, the first aspect of the General Scheme in relation to the temporary solidarity contribution was published as a stand-alone bill ([Energy \(Windfall Gains in the Energy Sector\) \(Temporary Solidarity Contribution\) Bill 2023](#)). The Bill is at Third Stage in Seanad Éireann (for further information, see the Bill Digest [here](#)) and did not include any provision relating to hedging. The second aspect, the cap of market revenues, is intended to be addressed in a second bill following the summer 2023 recess.<sup>96</sup> The General Scheme for this second bill has not yet been published and as such, it is not yet known how much of the original General Scheme will be included in the second bill.<sup>97</sup> However, if this second bill is drafted to include elements from the original General Scheme, it may potentially include a specific provision in relation to hedging.

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<sup>93</sup> The Commission for Energy Regulation (which preceded the CRU) did regulate retail prices but this ceased in 2011 in order to promote competition in the markets. See Commission for Energy Regulation, [CER Press Release – 21<sup>st</sup> April 2010 CER Announces Plans to End Electricity Price Regulation](#) (last accessed 29 June 2023); Diarmuid Torney, Environmental Protection Agency, [Enabling Decarbonisation: A Study of Energy Sectors Governance in Ireland](#) (last accessed 26 June 2023).

<sup>94</sup> See Commission for Regulation of Utilities, [What We Do](#) (last accessed 29 June 2023).

<sup>95</sup> See Commission for Regulation of Utilities, [Compliance and Enforcement](#) (last accessed 29 June 2023).

<sup>96</sup> Department of the Environment, Climate and Communications, [Government approves publication of legislation to address windfalls in the energy sector](#) (last accessed 29 June 2023).

<sup>97</sup> Ibid.

## Part 3: Comparative analysis of the powers of the energy regulators in France and Germany in the electricity and gas markets

### France

Established in 2000, la Commission de régulation de l'énergie (CRE) is the national regulator in France that is responsible for ensuring the “proper functioning of the electricity and gas markets in the interest of consumers, in compliance with energy policy goals set by the government and within European rules”.<sup>98</sup> The law governing the CRE is set out in the French Energy Code ([Code de l'énergie](#)). [Article L131-1](#) of this code provides that the CRE is concerned with the functioning of the electricity and natural gas markets for the benefit of consumers. The role and powers of the CRE are set out in a number of articles in this Code and are explored below. In considering the role of CRE in regulating the energy market, it is important to note the differences in the structure of supply of electricity between Ireland and France. For example, as will be discussed further below, France relies heavily on domestically produced nuclear power, whereas much of Ireland's electricity and gas supply is imported.

The following discussion is not intended to be exhaustive and is framed around the questions that were included in the research request. Furthermore, it should be noted that the Code de l'énergie is solely written in French and the references to the text of this code are translated by the author. Thus, the points outlined below should be considered as an interpretation of the Code rather than a direct legal translation.

“Pursuant to the provisions of Article L. 131-2 of the French Energy Code, CRE monitors the wholesale electricity and natural gas markets and enforces compliance, in particular, with Articles 3, 4, 5, 8, 9 and 15 of the REMIT Regulation.”

Source: Commission de régulation de l'énergie, [The functioning of the wholesale electricity and natural gas markets: Report 2020](#)

[Article L131-2](#) of the French Energy Code<sup>99</sup> provides that the CRE has a role in supervising transactions between suppliers, traders and producers of electricity and natural gas and supervising transactions on organised markets and trade at borders.

This Article explores the monitoring role of the CRE which includes the monitoring of:

- The investment plans of transmission system operators.
- The consistency of offers made by producers, traders, and suppliers.

<sup>98</sup> Commission de regulation de l'énergie, [Functioning of the wholesale electricity and natural gas markets](#) (last accessed 27 June 2023).

<sup>99</sup> République Française, [Code de l'énergie](#) (last accessed 28 June 2023).

- The implementation of dynamic pricing contracts (“des contrats à tarification dynamique prévus à l'article L. 332-7”) and their impact on consumer bills, particularly the implementation of dynamic electricity pricing contracts (“des contrats d'électricité à tarification dynamique”) and evaluates the risks of these offers.

In relation to the last point above, [Article L131-2](#) provides that the CRE will ensure that these offers do not lead to abusive practices. This provision provides that the CRE may form opinions and propose measures to promote the proper functioning and transparency, particularly regarding prices, of the retail market. It is not clear from this Article if these contracts relate to those traded on the wholesale market or if these contracts relate to supplier-to-consumer contracts. However, in a later part of the French Energy Code relating to supply contracts and offers, these contracts are referred to in the context of supply contracts from suppliers to consumers on the retail market ([Article L332-6](#)). Thus, it can be interpreted that this Article relates to contracts with consumers.

Under [Article L131-2](#), the CRE is also required to ensure compliance with the EU Regulation on the Regulation on Wholesale Energy Market Integrity and Transparency (REMIT) ([Regulation \(EU\) 1227/2011](#)) as discussed above. The CRE has, since 2006, had a specific role in relation to “market surveillance” in the electricity market and as indicated in their 2019 report on the [Functioning of the wholesale electricity and natural gas markets](#), the CRE has been undertaking their monitoring role as part of their responsibilities under REMIT since 2011.<sup>100</sup> Under [Chapter 4, Section 4](#) of the French Energy Code, the CRE also has powers to sanction breaches under the [REMIT regulation](#) and the [Regulation \(EU\) 2019/943](#) of the European Parliament and of the Council of 5 June 2019 on the internal market in electricity. More information on the role of the CRE in relation to REMIT can be found [here](#).

Under [Article L131-4](#), the CRE is responsible for publishing, on a monthly basis, the average price of natural gas supply and the average margin received by natural gas suppliers. These publications are based on information that suppliers are obliged to submit to the CRE. This duty, however, does not appear to apply to electricity suppliers. Under [Article L134-15](#), the CRE has a duty to publish a report annually regarding the compliance of electricity and gas transmission and distribution system operators with the code of conduct and an evaluation of the independence of these networks.

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<sup>100</sup> Ibid.

**Article 5(1) of [Directive \(EU\) 2019/944](#) provides:**

“Suppliers shall be free to determine the price at which they supply electricity to customers. Member States shall take appropriate actions to ensure effective competition between suppliers.”

Under [Article L134-15-1](#), the CRE is responsible for publishing a quarterly report on the functioning of the retail electricity and gas markets. This report also examines the changes in the prices paid by domestic and business consumers on the retail market. The CRE also

publishes an annual report on the compliance of the prices for the supply of electricity to consumers with Article 5 of [Directive \(EU\) 2019/944](#) (which relates to “market-based supply prices” on internal market for electricity). Where there are possible abuses of dominant positions or anti-competitive practices, the CRE should refer these to the *Autorité de la concurrence* (French competition regulator).

Under [Article L134-1](#) and [Article L134-2](#), the CRE can specify, by decision published in the Official Journal of the French Republic, the rules concerning (but not limited to):

- The operation of the public networks of the transmission and distribution of electricity and gas including the conditions for connection and access or use.
- The implementation and adjustment of calling, supply and consumptions programmes.
- The conclusion of purchase contracts and reservation contracts by transmission or distribution operators.

Ninety-five percent (95%) of supply in France is generated domestically (through nuclear generation and other sources)<sup>101</sup> and in this context, the CRE has specific powers in relation to the sale of nuclear power ([Article L134-4](#) and [Article L134-5](#)).

Other aspects of the French Energy Code provide the CRE with:

- A role in dispute settlement in relation to the use of networks for transmission and distribution (Article L134-19 to Article L134-24).
- Powers to sanction for specific breaches which relate to public transmission or distribution of electricity and gas, including suppliers of electricity and gas ([Article L134-25](#)), including powers to instil a temporary ban or impose a financial penalty ([Article L134-27](#)).
- Powers of investigation and control as necessary for the completion of the tasks of the CRE ([Chapter V](#)).

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<sup>101</sup> Commission de régulation de l'énergie, [Wholesale electricity market](#) (last accessed 27 June 2023).

It should be noted that the CRE does not have a specific role in relation to hedging under the French Energy Code. As noted above, the CRE has a role in monitoring the wholesale market, including under the REMIT regulation (Article L. 131-2).<sup>102</sup> Hedging is a permitted component of the French energy market, as it is in Ireland (further details on the trading on the French electricity and gas market can be found [here](#) and [here](#)). There are specific provisions governing the French capacity and balancing markets in the French Energy Code<sup>103</sup> and energy “products with financial settlement can be traded directly on the exchanges (mainly EEX) but also intermediated by brokers”.<sup>104</sup> In relation to futures, “the products traded in France range from a 3-year horizon (calendar product Y+3) to a day before delivery (day-ahead product)”.<sup>105</sup>

As already mentioned, when considering the comparability of the French energy market and the pricing of electricity in this jurisdiction with the regulation in the Irish energy market, it is important to note their reliance on domestic nuclear power and how this impacts electricity pricing. In their 2021 [report on the functioning of the wholesale electricity and natural gas markets](#), the CRE noted, in relation to the trading of forwards in electricity, that the “distinctly French nature of the electricity supply-side crisis materialised in the sharp rise in the price differential with Germany”.<sup>106</sup> This report further noted that “[a]lthough uncertainty was widespread in Europe, the French price reacted more strongly than its European neighbours, due to the unavailability of nuclear power” and “the availability of nuclear power plants have a major influence on the French wholesale price, and a much more limited influence on the German price”.<sup>107</sup> To this end, when considering the pricing of electricity in this jurisdiction, it should be taken into consideration that the structure and operation (i.e. pricing) of this market is quite different to the Irish energy market and thus, the prices of electricity in this market may not be directly comparable to the prices in the Irish market.

Finally, it may be noted that the CRE role in relation consumer protection appears to relate to ensuring that the markets are working properly for the benefit of consumers and this is captured

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<sup>102</sup> Commission de régulation de l'énergie, [The functioning of the wholesale electricity and natural gas markets: Report 2020](#) (last accessed 28 June 2023).

<sup>103</sup> In particular, Article L335-1 of the French Energy Code governs the “capacity obligation mechanism”. Under Article L321-10 and Article L3222-9, there is a requirement for the operator of the public transmission system and the electricity distribution system to ensure the balance of electricity in the network. Under Article L321.11, the CRE has a role in approving rules regarding the operation of the balancing market. See Commission de régulation de l'énergie, [The functioning of the wholesale electricity and natural gas markets: Report 2021](#) (last accessed 28 June 2023).

<sup>104</sup> Commission de régulation de l'énergie, [The functioning of the wholesale electricity and natural gas markets: Report 2021](#) (last accessed 28 June 2023).

<sup>105</sup> Commission de régulation de l'énergie, [The functioning of the wholesale electricity and natural gas markets: Report 2021](#) (last accessed 28 June 2023).

<sup>106</sup> Commission de régulation de l'énergie, [The functioning of the wholesale electricity and natural gas markets: Report 2021](#) (last accessed 28 June 2023).

<sup>107</sup> *Ibid.*

within their responsibility to monitor the market.<sup>108</sup> There is a separate entity called the National Energy Ombudsman (Le médiateur national de l'énergie), established under [Articles L122-1 to L122-5](#) of the French Energy Code, which is responsible for recommending “amicable solutions when disputes occur with the companies of the energy sector, as well as to inform the energy consumers about their rights”.<sup>109</sup>

## Germany

In Germany there are both federal and state regulatory bodies. The Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (“Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway”, which may be shortened to “Federal Network Agency”), is the federal regulator overseeing Germany’s “electricity, gas, telecommunications and postal infrastructures”.<sup>110</sup> At the federal level, the Federal Ministry for Economic Affairs and Climate Action has a role in overseeing the German energy market, along with the Federal Network Agency ([Energy Industry Act Teil 7](#)).<sup>111</sup> There are also “regulatory authorities ...at state level” which “mainly deal with smaller electricity networks that fall outside the scope of Federal Network Agency (that is, networks with less than 100,000 connected customers and that do not cross state borders)” (per the Energy Industry Act § 54).<sup>112</sup>

The primary legislative framework governing the energy market in Germany is [Gesetz über die Elektrizitäts- und Gasversorgung \(Energiewirtschaftsgesetz - EnWG\)](#) (which translates as the Act on Electricity and Gas Supply (Energy Industry Act - EnWG)).<sup>113</sup> This Act is “complemented by a number of legislative acts and ordinances that set out more detailed rules for the various parts of the electricity value chain, particularly to transmission and distribution of electricity”.<sup>114</sup> The following discussion focuses on the [Energy Industry Act \(EnWG\)](#) and the Federal Network Agency. This discussion is not intended to be exhaustive and is framed around the questions that were included in the research request. It should be noted that the Energy Industry Act is solely written in German and the references to the text of this Act are translated by the author using online

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<sup>108</sup> See, for example, Articles L131-1, L131-2 and L134-51 of the [French Energy Code](#) which addresses the role of the CRE in relation to final consumers. See also the discussion of the role of the CRE on their website at: Commission de régulation de l'énergie, [Who are we?](#) (last accessed 30 June 2023).

<sup>109</sup> Le médiateur national de l'énergie, [The Institution: Role and Organisation](#) (last accessed 30 June 2023).

<sup>110</sup> Bundesnetzagentur, [About us](#) (last accessed 28 June 2023); Ulrich Scholz and Hendrik Wessling, Thomson Reuters Practical Law, [Electricity regulation in Germany: overview](#) (last accessed 28 June 2023).

<sup>111</sup> See discussion of the regulatory authorities in: CMS Law, [Electricity Law and Regulation in Germany](#) (last accessed 29 June 2023).

<sup>112</sup> Bundesnetzagentur, [Energy](#) (last accessed 28 June 2023); Ulrich Scholz and Hendrik Wessling, Thomson Reuters Practical Law, [Electricity regulation in Germany: overview](#) (last accessed 28 June 2023).

<sup>113</sup> Ulrich Scholz and Hendrik Wessling, Thomson Reuters Practical Law, [Electricity regulation in Germany: overview](#) (last accessed 28 June 2023).

<sup>114</sup> *Ibid.*



translation technology. Thus, the points outlined below should be considered as an interpretation of the Act rather than a direct legal translation.

The Federal Network Agency is responsible for establishing the “prerequisites for functioning competition” on the electricity and gas grids and “ensuring non-discriminatory network access and the control of the network usage rates levied by the power supply companies”.<sup>115</sup> In addition, the Federal Network Agency undertakes a range of functions, including “the supervision of anti-competitive practices and the monitoring of the regulations concerning the unbundling of network areas and the system responsibility of the supply network operators”.<sup>116</sup> The Federal Network Agency does not set retail prices<sup>117</sup> and per §1 of the [EnWG](#), there should be no regulatory restriction of the prices of electricity on the wholesale market. However, it should be noted that under §39 of the EnWG, the Federal Ministry for Economic Affairs and Energy, in agreement with the Federal Ministry for Justice and Consumer Protection, can regulate by ordinance with the consent of the Bundesrat, the structure of the general prices of suppliers (whilst taking into account §1(1)). The Federal Cartel Office (“[Bundeskartellamt](#)”) is “responsible for verification in the case of the energy prices levied by energy suppliers operating on a nationwide basis”.<sup>118</sup>

The role of the “regulatory authority” is discussed in several provisions of the [EnWG](#), and includes:

- The authorisation and certification (including revocation of certification) of network operators and transmission system operators (EnWG §4, §4a, §4d).
- Monitoring of the planning and status of implementation of measures relating to the improvement or expansion of the transmission system (EnWG §12).
- Issuing of a number of publications including details of the revenue ceilings set by the regulatory authority in the calendar year (EnWG §23b).
- Making decisions on the conditions and methods for grid connections or access to the grid (EnWG §29).
- Pursuing actions against energy supply system operators that abuse their position (EnWG § 30 and §31).
- Monitoring across a range of areas in the energy market. For the purposes of this paper, it should be noted that this monitoring role includes monitoring the prices charged to household customers; market supply and price volatility; complaints from household customers; the effectiveness and enforcement of consumer protection measures in the electricity or gas

<sup>115</sup> Bundesnetzagentur, [Responsibility and Task Delimitation](#) (last accessed 28 June 2023).

<sup>116</sup> Ibid.

<sup>117</sup> Bundesnetzagentur, [General information on energy regulation](#) (last accessed 28 June 2023).

<sup>118</sup> Bundesnetzagentur, [Responsibility and Task Delimitation](#) (last accessed 28 June 2023).

sector, as well as the level of transparency, including wholesale prices; and the level of competition at wholesale and retail level (EnWG §35).

In relation to enforcement,<sup>119</sup> the “regulatory authority” has:

- Supervisory powers, such that they can oblige entities to cease activities that are in breach of the EnWG (EnWG §65).
- Powers to initiate proceedings (EnWG §66).
- Powers to conduct investigations (EnWG §68).
- Powers to request information and to enter premises and to seize evidence (EnWG §69 and §70).
- Power to issue interim orders (EnWG §72) or orders of immediate execution (EnWG §77).

It should be noted that the meaning of “regulatory authority” is not defined in the text of the EnWG. As the EnWG is not specific to the role of the Federal Network Agency, the powers of the other regulatory authorities at federal and state level are mentioned in certain parts of the Act. To this end, it is not clear if the reference to the “regulatory authority” in the provisions mentioned above are powers that are held by the Federal Network Agency.<sup>120</sup> There are, however, specific powers and functions for the Federal Network Agency included in the EnWG. For example, the EnWG provides that the Federal Network Agency is responsible for the enforcement of European Law in the German energy market (EnWG §56) and is required to cooperate with other regulatory authorities across the EU (EnWG §57) and within Germany (EnWG §64a). It also states that Federal Network Agency are responsible for the regional coordination centres established in the grid region as part of the internal market in electricity (EnWG §57b).

The Federal Network Agency produces annual publications on their monitoring activities under §63(3) of the EnWG.<sup>121</sup> These reports are published on their website and are produced by them in collaboration with the Federal Cartel Office (Bundeskartellamt).<sup>122</sup> These reports are lengthy and appear to comprehensively address various aspects of the electricity and gas markets, including the retail sector, cross border trading (including wholesale prices), as well as the operation of the network and the role of the Federal Network Agency under the REMIT regulation.<sup>123</sup> Comparable to the other regulatory authorities discussed above, the Federal Network Agency also has a

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<sup>119</sup> There is a number of sanctions available for breaches of the EnWG including a periodic penalty payment (§94), fines (§95) and criminal sanctions (§95)

<sup>120</sup> Although, EnWG §54(3) provides that the act does not allocate authority to a specific authority, that the Federal Network Agency shall perform the tasks and powers conferred on the authority in this Act.

<sup>121</sup> Bundesnetzagentur, [Energy Monitoring](#) (last accessed 29 June 2023).

<sup>122</sup> Ibid. The Federal Network Agency also maintains a national information platform (EnWG §111d) and a Market Master Data Register (EnWG §111e).

<sup>123</sup> See, for example, Bundesnetzagentur, [Monitoring report 2022](#) (last accessed 30 June 2023).

specific monitoring role under the REMIT regulation (which includes prohibitions on “insider trading” and “market manipulation”).

In relation to consumer protection, the Federal Network Agency does not appear to have a direct consumer protection role (other than regulation and monitoring of the market). However, §111a does require energy suppliers, metering point operators, and metering service providers to report complaints received from consumers. Arbitration between consumers and energy companies does not appear to be the legislated responsibility of the Federal Network Agency (§ 111B refers to the role of a “conciliation body”).

## Conclusion

Part 1 of this briefing paper provided an overview of the regulation of hedging practices in the European Union (EU). The examination of the EU legislation in this part suggests that hedging is a permitted practice in the internal energy market that is subject to EU legislation.

Parts 2 and 3 offered a comparative perspective on the powers of the energy regulators in Ireland, France, and Germany. From this discussion, it may be noted that the regulators operating in the energy markets in each of these countries are established under legislation. These regulators appear to have a common function in overseeing the operation of the energy market and ensuring that that market is functioning in a competitive manner. However, there are variances in regulation of energy in these countries which require consideration when comparing these jurisdictions. For example, the regulatory framework in Germany provides roles for both federal and state agencies in the energy market. This is distinctly different to the system in Ireland, where there is a single energy regulator (the Commission for Regulation of Utilities). Likewise, there are distinct differences in terms of energy supply in the different jurisdictions (in terms of sources, such as gas or nuclear power and reliance on imports or native supply) and this can impact how energy is priced. Thus, a degree of caution is advisable when considering issues arising in the energy market in different jurisdictions and in drawing comparisons with the Irish energy market.

## Suggested further reading

Directorate-General for Internal Policies, European Parliament, [Competition Policy and an Internal Energy Market](#) (last accessed 21 June 2023).

Law Reform Commission, [Regulatory Powers and Corporate Offences](#), pp. 62-66.

Eoin Cassidy, Peter McLay and Willian Carmody, [Electricity Regulation 2022: Ireland](#).

European Commission, [Commission proposes reform of the EU electricity market design to boost renewables, better protect consumers and enhance industrial competitiveness](#).

European Commission, [Energy union](#).

Nicolas Hary, Deloitte, [Talking points: Delimitation of bidding zones for electricity markets in Europe and the consideration of internal congestions](#).

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