



Council of the  
European Union

Brussels, 7 November 2023  
(OR. en)

15071/23

LIMITE

ENER 601  
ENV 1242  
CLIMA 536  
COMPET 1074  
CONSOM 398  
FISC 248  
CODEC 2058

---

---

Interinstitutional File:  
2023/0076(COD)

---

---

#### NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee
No. Cion doc.:	7435/23 +ADD1
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulations (EU) No 1227/2011 and (EU) 2019/942 to improve the Union's protection against market manipulation in the wholesale energy market - Preparation for the trilogue

#### I. INTRODUCTION

1. On 14 March 2023, the Commission presented, as part of the Electricity Market Reform, a proposal for a Regulation to improve the Union's protection against market manipulation in the wholesale energy market (so called *REMIT Regulation*). This regulation amends Regulations (EU) No 1227/2011 and (EU) 2019/942 on Wholesale Energy Market Integrity and Transparency (REMIT).
2. The Council reached a general approach on the REMIT Regulation on 19 June 2023 during the TTE (Energy) Council. The European Parliament (ITRE committee) adopted its position on 7 September 2023, which was confirmed by the plenary on 13 September.

3. On 14 June 2023, the European Economic and Social Committee adopted its opinion on the proposal and the opinion of the European Committee of the Regions is still pending.

## **II. INTERINSTITUTIONAL NEGOTIATIONS – STATE OF PLAY**

4. The first trilogue took place on 21 September 2023 and the second trilogue took place on 26 October 2023. During this second trilogue, the Council and the Parliament discussed the five political issues of the file, which consist of the following chapters:
- a) Article 9 – Registration of market participants from third countries (line 169).
  - b) Article 13 – The delimitation of cases with cross-border dimension / impact (lines 221 to 226).
  - c) Article 13 – The objection from the national regulatory authorities (NRAs) to the exercise of the investigatory powers of the EU Agency for the Cooperation of Energy Regulators (ACER) (lines 220a to 220e, line 235 and line 254a).
  - d) Articles 13a and 13c – ACER’s tools to conduct investigations (lines 234, 234a to 234f, 240, 254a, 267a and 267b).
  - e) Articles 13db and 13dc – ACER’s decision-making powers (13db) and enforcement/sanctioning powers (13dc) (lines 270f to 270u).
5. The technical teams were mandated to further work on two of the five political issues, namely the registration of market participants from third countries (Article 9) and ACER’s tools to conduct investigations (Articles 13a and 13c). Since then, intense discussions have continued at technical level between the Parliament and the Council.

## **III. PREPARATION FOR THE NEXT TRILOGUE**

6. The third political trilogue will take place on 16 November 2023. The aim of the Presidency is to cover all remaining political issues and to seek an overall agreement. The Presidency will also seek political validation of the lines and articles for which a provisional agreement is being sought at technical level, including Articles 9, 13a and 13c.

7. Considering the flexibilities already shown by the Member States at the COREPER of 25 October based on document ST 14041/23 and the outcome of the second trilogue with the Parliament, the Presidency would like to explore additional **flexibilities, in particular as regards ACER's competences to impose sanctions**, in order to achieve a political agreement with the Parliament.
8. First, as regards **ACER's decision-making powers and competence to impose sanctions**, the Parliament has stressed that there are precedents at European level of agencies with sanctioning powers. The Presidency seeks to understand whether the **Council could show any flexibility in this respect, with a focus on one or several of the following aspects**:
- a) The scope of ACER's decision-making powers:
    - i) The mandates of the Council and the Parliament allow ACER to issue decisions to conduct on-site inspections and to request information in cross-border cases, as well as to authorise or withdraw authorisations of Inside Information Platforms (IIPs) and Registered Reporting Mechanisms (RRMs).
    - ii) The mandate of the Parliament also allows ACER to issue decisions finding infringements/breaches in cross-border cases concerning the prohibition of insider trading (Article 3), the prohibition of market manipulation (Article 5) and the obligation to publish inside information (Article 4); as well as to issue decisions finding infringements/breaches concerning the obligations of persons professionally arranging or executing transactions (Article 15) (line 270g).
  - b) The scope of ACER's sanctioning powers: The mandate of the Parliament allows ACER to take enforcement measures/impose sanctions if ACER finds breaches of the prohibitions and obligations referred to “*in Article 4a(1) to (4) [IIPs], Article 7c(1) [LNG market data], Article 9a(1),(2) and (3) [RRMs], Article 13b(1) and (3) [requests for information], and in accordance with Article 13(4) [prohibition of insider trading and market manipulation], 13(4a) [obligation to publish inside information] and 13(5) [obligations of persons professionally arranging or executing transactions]*”. The obligations referred to in some of these articles (e.g. Articles 4a, 7c, 9a) may not have a cross-border impact, since the obligations set by the REMIT Regulation are not linked to this condition.

- c) The type of sanctions and enforcement measures: The mandate of the Parliament refers to periodic penalty payments and fines (line 270n). The Parliament also includes a request to bring the breach to an end (line 270l) and the issuance of public warnings or notices (line 270m).
- d) The authority imposing the fines:
  - i) The Council's mandate maintains the power to impose fines in the hands of the Member States. The mandates of the Council and the Parliament indicate that NRAs shall assist ACER to ensure compliance with on-site inspections (line 239) and requests for information (line 255). To that end, the NRAs may impose fines in accordance with applicable national law (line 255) or request the assistance of the police (line 239).
  - ii) The mandate of the Parliament also allows ACER to take enforcement measures/impose sanctions in the cases described in point b) above.

9. Considering the above components, the Presidency would like to **understand if any of the following combinations would be acceptable in relation to ACER's decision-making powers and competence to impose sanctions**:

- a) The Parliament narrows the scope of ACER's decision-making powers to on-site inspections, requests for information and authorisations or withdrawal of authorisations of IIPs and RRM; and the Council shows flexibility by conferring ACER powers to impose periodic penalty payments to ensure compliance with on-site inspection decisions and requests for information (Option presented in the document ST 14041/23, note to COREPER of 25 October).
- b) The mandate of the Parliament maintains the scope of ACER's decision-making powers as presented in its current mandate, but the imposition of sanctions remains, in all cases, in the hands of the Member States based on their national regulatory framework (new option). This option presents challenges. For example, it would require coordination between ACER and the concerned NRAs before the adoption of ACER's decision to ensure that the NRAs can impose sanctions based on such decision.

10. If the above combinations are not acceptable, the Presidency invites the Member States to suggest other combinations that could be considered acceptable.
11. Second, as regards **the delimitation of cases with cross-border impact**, during the COREPER of 25 October, several Member States requested that ACER would be allowed to prioritise cases, even if there was an obligation for ACER to review all cases that meet the cross-border impact criteria. During the second trilogue, the Parliament insisted to keep the “shall” (i.e. the obligation to review; instead of a possibility, with a ‘may’). It suggested easing this obligation by replacing “shall investigate” with “shall have a right to investigate”. The Parliament also seemed willing to give ACER the power to prioritise cases. However, the Parliament insisted to keep two Member States to determine the cross-border impact of cases. The Presidency seeks to understand whether **delegations could show any flexibility towards allowing investigations affecting two (instead of three) Member States** on the understanding that ACER will be entitled to prioritise.
12. Third, as regards **the objection from the NRAs to the exercise of ACER’s investigatory powers**, the Parliament appeared to be willing to show flexibility on this point if the Council showed flexibility as regards ACER’s competences to impose sanctions. The Presidency understands that **the components of this objection** are as follows: (i) *scope*: the objection concerns ACER’s power to conduct on-site inspections and issue requests for information; (ii) *timeframe*: the deadline to object should be 3 months; (iii) *grounds to object*: the NRA has formally opened, is conducting or has conducted an investigation on the same facts; (iv) *follow-on obligations/actions*: obligation of the NRA (that objects) to continue cooperating with ACER and ACER’s power to continue the investigation in other concerned jurisdictions (in which the NRAs have not objected). The Presidency aims to preserve these conditions.
13. As regards the other remaining political issues, the **registration of market participants from third countries** (Article 9; line 169) and **ACER’s tools to conduct investigations** (Articles 13a and 13c; lines 234, 234a to 234f, 240, 254a, 267a and 267b), the Presidency is currently discussing with the Parliament at technical level the compromise text suggested by the Commission, which remains within the mandate and flexibilities shown by Member States in the COREPER of 25 October.

#### IV. CONCLUSIONS

14. The Permanent Representatives Committee is invited to:

- reflect on the above-mentioned issues, and
  - to agree on a revised mandate for the third political trilogue on 16 November 2023, on the basis of (a) the above-mentioned issues and on (b) additional suggestions and flexibilities expressed during the meeting of the Permanent Representatives Committee.
-