CHAPTER 610

WHOLESALE ENERGY MARKET INTEGRITY AND TRANSPARENCY (ENFORCEMENT POWERS) ACT

AN ACT to establish enforcement powers as required by articles 13, 14 and 18 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.

7th April, 2020

ACT XVI of 2020.

Short title.

1. The short title of this Act is the Wholesale Energy Market Integrity and Transparency (Enforcement Powers) Act.

Interpretation.

2. In this Act, unless the content otherwise requires:

"Agency" means the Agency for the Cooperation of Energy Regulators established by Regulation (EC) No. 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators;

"inside information" means information of a precise nature which has not been made public, which relates, directly or indirectly, to one or more wholesale energy products and which, if it were made public, would be likely to significantly affect the prices of those wholesale energy products.

For the purposes of this definition, "information" means:

(a) information which is required to be made public in accordance with Regulations (EC) No. 714/2009 and (EC) No. 715/2009, including guidelines and network codes adopted pursuant to those Regulations;

(b) information relating 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;

(c) information which is required to be disclosed in accordance with legal or regulatory provisions at Union or national level, market rules, and contracts or customs on the relevant wholesale energy market, in so far as this information is likely to have a significant effect on the prices of wholesale energy products; and

(d) other information that a reasonable market participant would be likely to use as part of the basis of its

decision to enter into a transaction relating to, or to issue an order to trade in, a wholesale energy product.

Information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence, or an event which has occurred or may reasonably be expected to do so, and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of wholesale energy products;

"market manipulation" means:

(a) entering into any transaction or issuing any order to trade in wholesale energy products which:

(i) gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of wholesale energy products;

(ii) secures or attempts to secure, by a person, or persons acting in collaboration, the price of one or several wholesale energy products at an artificial level, unless the person who entered into the transaction or issued the order to trade establishes that his reasons for doing so are legitimate and that such transaction or order to trade conforms to accepted market practices on the wholesale energy market concerned; or

(iii) employs or attempts to employ a fictitious device or any other form of deception or contrivance which gives, or is likely to give, false or misleading signals regarding the supply of, demand for, or price of wholesale energy products; or

(b) disseminating information through the media, including the internet, or by any other means, which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of wholesale energy products, including the dissemination of rumours and false or misleading news, where the disseminating person knew, or ought to have known, that the information was false or misleading.

When information is disseminated for the purposes of journalism or artistic expression, such dissemination of information shall be assessed taking into account the rules governing the freedom of the press and freedom of expression in other media, unless:

(i) those persons derive, directly or indirectly, an advantage or profits from the

dissemination of the information in question; or

(ii) the disclosure or dissemination is made with the intention of misleading the market as to the supply of, demand for, or price of wholesale energy products;

"Minister" means the Minister responsible for Energy;

"person" means any natural or legal person;

"Regulation (EU) No. 1227/2011" or "Remit Regulation" means Regulation (EU) No. 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency;

"Regulator" means the Regulator for Energy and Water Services established by article 3 of the Regulator for Energy and Water Services Act; Cap. 545.

"Remit Regulation requirement" means a requirement imposed by any of the following Articles of Regulation (EU) No. 1227/2011:

(a) Article 3(1) and (5) (prohibition of insider trading);

(b) Article 4(1), (2) and (3) (obligation to publish inside information);

(c) Article 5 (prohibition of market manipulation);

(d) Article 8(1) and (5) (data collection);

(e) Article 9(1), (4) and (5) (registration of market participants);

(f) Article 15 (obligations of persons professionally arranging transactions);

(g) Article 17 (professional secrecy);

"Tribunal" means the Administrative Review Tribunal established by article 5 of the Administrative Justice Act. Cap. 490.

3. The Regulator shall exercise the investigation and enforcement powers set out in this Act for the purpose of ensuring the application and implementation of Regulation (EU) No. 1227/2011 and in particular of Articles 3, 4, 5, 13 and 15 thereof. Purpose.

4. (1) Without prejudice to any powers of the Regulator arising under any other law, in the exercise of his functions and powers under this Act, the Regulator shall have the power to Power to demand access to documents and telephone records.

have access to any documentation in any form whatsoever and to receive a copy of it and to demand the aforesaid documentation from any person, including:

(a) any person who is or was carrying on, or who appears to be or to have been carrying on a transaction or activity regulated or prohibited by any of the provisions of Regulation (EU) No. 1227/2011;

(b) any other person who appears to be in possession of relevant information or documentation; or

(c) any persons who are successively involved in the transmission of orders or conduct of the operations concerned, as well as their principals.

(2) The Regulator may, by notice in writing, require any person referred to in sub-article (1):

(a) to furnish to the Regulator, at such time and place and in such form as he may specify, such documentation as he may require including existing telephone and existing data traffic records; and

(b) to furnish to the Regulator any aforesaid documentation verified in such manner as he may specify.

In both of the cases mentioned in paragraphs (a) and (b), the person addressed shall comply with the request of the Regulator promptly by providing the Regulator with any documentation in his possession.

(3) The Regulator may take copies of any documentation furnished or provided to him or to which he has access under this article.

(4) Where the person required to provide documentation under this article does not have the relevant documentation, he shall be obliged to promptly disclose to the Regulator where, to the best of his knowledge, that documentation may be found and the Regulator may require any person, whether indicated as aforesaid or not, who appears to him to be in possession of it, to provide such documentation.

(5) Any person requested to provide information by virtue of sub-article (2), in particular the directors and managers, by whatever name designated, or any other persons who are or have been in charge of the operations or activities at issue shall assist and shall promptly collaborate with the Regulator in order to enable him to discharge his functions, and shall collate and transmit without any

undue delay such information as the Regulator may reasonably request from time to time.

Power to demand information and assistance and to summon persons for hearing.

5. (1) Without prejudice to any powers of the Regulator arising under any other law, in the exercise of his functions and powers under this Act the Regulator shall have the power to demand information in any form whatsoever and to receive a written statement of it and to demand by notice in writing the aforesaid information promptly from any person. In particular, the Regulator may require any person referred to in article 4(1):

(a) to furnish to the Regulator, at such time and place and in such form as he may specify, such information as he may require;

(b) to furnish to the Regulator any information in the form of a written statement or any information verified in such manner as he may specify;

(c) to attend before the Regulator, at such time and place as he may specify, to answer questions and provide information and documentation; and

(d) to give the Regulator any assistance which he may require and which that person is reasonably able to give.

(2) Any person requested to provide information by virtue of sub-article (1), in particular the directors and managers, by whatever name designated, or any other persons who are or have been in charge of the operations or activities at issue, shall assist and shall promptly collaborate with the Regulator in order to enable him to discharge his functions, and shall collate and transmit without any undue delay such information as the Regulator may reasonably request from time to time.

(3) Where the person required to provide information under this article does not have the requested or relevant information, he shall promptly disclose to the Regulator where, to the best of his knowledge, that information may be found and the Regulator may require any person, whether indicated as aforesaid or not, who may be in possession of it to provide such information.

Power to appoint inspectors and to conduct on-site inspections. Cap. 545.

6. (1) Without prejudice to any powers of the Regulator arising under the Regulator for Energy and Water Services Act and any other law, in the exercise of his powers under this Act, the Regulator may either act directly or he may act indirectly by appointing an inspector or inspectors being any officer or employee of the Regulator or any other person whom the Regulator deems competent for this purpose to investigate and report on the affairs of any person whose affairs or actions are being investigated in relation

to a possible breach of this Act.

(2) When appointing an inspector the Regulator may direct that the investigation shall be carried out within such time and shall be confined to such specific or general matters as the Regulator may deem fit.

(3) In the exercise of his functions, an inspector, upon producing, if required, evidence of his authority shall have the power -

(a) to investigate the affairs of any person mentioned in articles 4 and 5 if he thinks it necessary or expedient for the purposes of an investigation under this Act;

(b) to exercise all the powers conferred on the Regulator by articles 4 and 5;

(c) to carry out on-site inspections and to have reasonable access and entry to the business premises, offices, documentation and other information necessary or expedient for the purposes of an investigation under this Act;

(d) to enter premises occupied by a person for the purpose of obtaining therefrom the information or documents required by the notice in terms of articles 4 or 5, or otherwise for the purpose of the investigation, and of exercising any of the powers conferred by the said articles:

Provided that where the inspector has reasonable cause to believe that if any notice as is referred to in articles 4 or 5 were served it would not be complied with or that any documents to which it could relate would be removed, tampered with or destroyed, the inspector may enter any premises referred to in sub-article (2) for the purpose of obtaining therefrom any information or documents that could have been required under such notice referred to in articles 4 or 5.

(4) An inspector appointed in terms of this article shall:

(a) have the power to make interim reports and on the conclusion of his investigation he shall make a final report to the Regulator if so directed by the Regulator; and

(b) be subject to professional secrecy.

(5) Where the Regulator has appointed a person as inspector under this article, such person shall, for the purposes of carrying out his functions under his appointment, have all the powers conferred on the Regulator by this article and a requirement made by him shall be

deemed to be and shall have the same force and effect as a requirement of the Regulator.

(6) For the purposes of any action taken under the provisions of this article, the Regulator may request the assistance of the Commissioner of Police, who may for such purpose exercise such powers as are vested in him by law in relation to the investigation of criminal offences.

(7) In the event that it results that the investigated person may have been in breach of this Act, the Regulator shall have power to order that all reasonable expenses incurred as a result of an investigation pursuant to this article be paid by such person. Any such order which shall be communicated to the person concerned by a notice for payment shall:

(a) be in writing; and

(b) require the addressed person to pay the expenses of and incidental to the investigation before the end of such period being not less than fourteen days from the date of service of the notice, as may be specified in the notice:

Provided that any person who feels aggrieved by an order served on him in terms of this sub-article may appeal to the Tribunal against the decision of the Regulator in accordance with article 11.

Powers to give certain orders and to request a temporary prohibition of professional activity.

7. (1) Without prejudice to any powers of the Regulator arising under any other law, in the exercise and for the purposes of his functions and powers under this article and for the better implementation thereof, the Regulator shall have the power to issue such orders by notice in writing, which shall take the form of a decision as he may deem appropriate, and any person to whom the order is given shall comply with and otherwise give effect to any such order promptly or within the time and in the manner otherwise stated in the order.

(2) A decision by the Regulator under this article may require anything to be done or be omitted to be done, or impose any prohibition, restriction or limitation, or any other requirement, and confer powers, with respect to any transaction or other act, or to any assets, or to any other thing whatsoever. Without prejudice to the generality of the aforesaid, an order may require the cessation of any practice that is contrary to the provisions of Regulation (EU) No. 1227/2011, the Regulator for Energy and Water Services Act and of this Act.

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(3) The power to issue decisions under this article shall include the power to vary, alter, add to or withdraw any such order, as

well as the power to issue new or further orders.

(4) Without prejudice to the generality of the aforesaid, the Regulator may request the Court of Magistrates by means of an application to issue an order imposing on a person a temporary prohibition of professional activity. The application of the Regulator shall be acceded to, if the Court is satisfied -

(a) that there is a reasonable likelihood that any person will fail to comply with the Remit Regulation; or

(b) that any person is failing or has failed to comply with the Remit Regulation and that there is a reasonable likelihood that the failure to comply will continue or be repeated; or

(c) that there is a reasonable likelihood that any person will fail to comply with a requirement imposed by or under this Act; or

(d) that any person is failing or has failed to comply with a requirement imposed by or under this Act and that there is a reasonable likelihood that the failure to comply will continue or be repeated.

(5) Where under any of the provisions of any decision or order issued pursuant to this article, a person is prohibited from carrying out any act, he shall be prohibited from doing any such act directly or indirectly, whether personally or through the use of intermediation of another person.

(6) For the better information of the public, where the Regulator is satisfied that the circumstances so warrant, it may at any time:

(a) make public any decision it has given under any of the provisions of this article; and, or

(b) issue a public statement regarding any matter falling within its functions or powers under this Act.

(7) A person who feels aggrieved by a decision of the Regulator served on him in terms of this article may appeal to the Tribunal and in the case of an order issued under sub-article (4) to the Court of Appeal (Inferior Jurisdiction).

Attachment orders.

8. (1) Where, in the course of an investigation conducted pursuant to this Act, the Attorney General has, upon information received from the Regulator, reasonable cause to suspect that a person (hereinafter referred to as "the suspect") may be

responsible for a breach of this Act, the Attorney General may apply to the Criminal Court for an order (hereinafter referred to as an "attachment order") -

(a) attaching in the hands of such persons (hereinafter referred to as "the garnishees") as are mentioned in the application all moneys and other movable property due or pertaining or belonging to the suspect;

(b) requiring the garnishee to declare in writing to the Attorney General, not later than twenty-four hours from the time of service of the order, the nature and source of all money and other movable property so attached; and

(c) prohibiting the suspect from transferring or otherwise disposing of any movable or immovable property.

(2) Before making an attachment order, the Criminal Court may require hearing the Attorney General in chambers and shall not make such order unless it concurs with the Attorney General that there is reasonable cause as provided in sub-article (1).

(3) The provisions of article 381(1)(a), (b) and (e) and of article 382(1) of the Code of Organization and Civil Procedure shall, *mutatis mutandis*, apply to the attachment order. Cap. 12.

(4) An attachment order shall be served on the garnishee and on the suspect by an officer of the Executive Police not below the rank of inspector.

(5) An attachment order shall, unless it is revoked earlier by the Attorney General by notice in writing served on the suspect and on the garnishee in the manner provided for in sub-article (4), cease to be operative on the expiration of thirty days from the date on which it is made, and the court shall not make another attachment order with respect to that suspect unless it is satisfied that substantially new information with regard to the breach of this Act is available:

Provided that the said period of thirty days shall be held in abeyance for such time as the suspect is away from Malta and the Attorney General informs of this fact the garnishee by notice in writing served in the manner provided for in sub-article (4).

(6) In the course of any investigation of an offence in terms of article 13 the Executive Police may request to hear on oath any person who they believe may have information regarding such offence and the Magistrate shall forthwith hear that person on oath.

(7) For the purpose of hearing on oath a person as provided in sub-article (6), the Magistrate shall have the same powers as are by law vested in the Court of Magistrates (Malta) or the Court of Magistrates (Gozo) as a court of criminal inquiry as well as the powers mentioned in article 554 of the Criminal Code:

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Provided that such hearing shall always take place behind closed doors.

Freezing of funds.

9. (1) Where a person (hereinafter referred to as "the person charged") has been charged criminally with being in default of any provision of this Act and upon receiving a request from the Regulator, the Attorney General may where he deems it appropriate request that the Criminal Court issue a written order to any person (hereinafter referred to as a "freezing order") -

(a) attaching in the hands of third parties all moneys and other movable property due or pertaining to the person charged; and

(b) prohibiting the person charged from transferring, pledging, hypothecating or otherwise disposing of any movable or immovable property:

Provided that the Criminal Court shall in such order determine what moneys may be paid to or received by the person charged during the subsistence of such order, specifying the sources, manner and other modalities of payment, including salary, wages, pension and social security benefits payable to the person charged, to allow him and his family a decent living in the amount, where the means permit, of fourteen thousand euro (€14,000) every year or such greater amount as may be determined by the Minister for Finance from time to time by Legal Notice issued by virtue of this Act:

Provided further that the Criminal Court may also -

(a) authorise the payment of debts which are due by the person charged to *bona fide* creditors and which were contracted before such order was made; and

(b) on good grounds authorise the person charged to transfer movable or immovable property;

Any addressee shall promptly comply with any written order issued by the Criminal Court in accordance with the provisions of this article with regard to such funds and assets.

(2) A freezing order shall:

(a) become operative and binding on all third parties

immediately after it is made, and the Registrar of the Court shall cause a notice thereof to be published without delay in the Gazette, and shall also cause a copy thereof to be registered in the Public Registry in respect of immovable property; and

(b) remain in force until the final determination of the administrative or criminal proceedings against the person charged, as the case may be.

(3) The Criminal Court may for particular circumstances vary such freezing order, and the provisions of the foregoing sub-articles shall apply to such order as so varied.

(4) A freezing order shall contain the name and surname of the person charged, his profession, trade or other status, father's name, mother's name and maiden surname, place of birth and place of residence and the number of his identity card or other identification document, if any.

(5) Where any money is or becomes due to the person charged from any person while such order is in force, such money shall, unless otherwise directed in the freezing order, be deposited in a bank to the credit of the person charged.

(6) When such freezing order ceases to be in force as provided in sub-article (2)(b), the Registrar of the Court shall cause a notice to that effect to be published in the Gazette, and shall enter in the Public Registry a note of cancellation of the registration of that order.

(7) The Regulator shall liaise with the Attorney General on matters arising under this article and article 7 and may exchange information, subject to the obligation of professional secrecy.

Co-ordination with other authorities.

10. (1) For the purpose of securing compliance with this Act, the Regulator may coordinate its efforts and exchange information with and otherwise collaborate with -

(a) any body or authority formed or established under Maltese law on matters in respect of which such body or authority may have a regulatory, supervisory, judicial or licensing function in terms of law;

(b) any authority, foreign authority or body carrying out similar or equivalent functions or which has the responsibility to monitor the market and to detect, prevent or prosecute acts related to market abuse, insider dealing, market manipulation and, or the Remit Regulation; and

(c) any other local or foreign supervisory,

enforcement or judicial authorities whose functions include the detection, prevention or prosecution of acts related to market abuse, insider dealing, market manipulation and, or the Remit Regulation.

(2) The Regulator shall exercise powers by virtue of this article:

(a) for preventing, investigating or detecting activities which amount or are likely to amount to market abuse, insider dealing, market manipulation under this Act or foreign law;

(b) where the assistance is requested by a foreign authority for the purposes of the exercise of one or more of its regulatory functions under the Remit Regulation;

(c) where so required within the terms of Malta's international commitments; or

(d) where so required within the terms of undertakings assumed in bilateral or multilateral agreements for the exchange of information and other forms of collaboration with overseas regulatory authorities including a request arising under a memorandum of understanding concluded with the Regulator.

(3) Upon receipt of a request from a foreign authority for the purpose of carrying out its duties in the investigation and detection in terms of the Remit Regulation, the Regulator shall immediately take the necessary measures in order to gather the information required by the foreign authority. If the Regulator is not able to supply the required information immediately, it shall notify the requesting foreign authority of the reasons.

(4) The Regulator may refuse to act on a request for information where:

(a) communication might adversely affect the sovereignty, security or public policy of Malta;

(b) judicial proceedings have already been initiated in respect of the same actions and against the same persons before the courts of Malta; or

(c) where a final judgment has already been delivered in relation to such persons for the same actions in Malta.

In any case above-mentioned, the Regulator shall notify

the requesting foreign authority accordingly, providing as detailed information as possible on those proceedings or the judgment.

(5) Where the Regulator is convinced that acts contrary to the provisions of the Remit Regulation are being, or have been, carried out on the territory of another Member State or EEA State, it shall give notice of that fact to the relevant foreign authority in as specific a manner as possible.

(6) Any person, body or authority receiving information exchanged pursuant to this article shall be subject to the obligation of professional secrecy. Without prejudice to the obligations to which they are subject in judicial proceedings under criminal law, when the relevant person, body or authority receives information pursuant to this article, it may use it only for the exercise of its functions within the scope of this Act and in the context of administrative or judicial proceedings specifically related to the exercise of those functions:

Provided that where the foreign authority communicating information consents thereto, the Regulator receiving the information may use it for other purposes or forward it to any other foreign authority.

Appeals.

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11. (1) The provisions of articles 32, 33 and 34 of the Regulator for Energy and Water Services Act shall apply *mutatis mutandis* to appeals that may be brought before the Tribunal under this Act.

(2) An appeal shall lie to the Tribunal against any decision or action taken by the Regulator with respect to:

(a) any administrative fine imposed under article 12; or

(b) any order in writing issued in terms of articles 6(7) or 7.

Administrative fines.

12. The Regulator may impose an administrative fine upon any person who infringes any Remit Regulation requirement, any provision of this Act or regulations made thereunder or who fails to comply with any decision given by the Regulator in ensuring compliance with this Act, in accordance with articles 12, 13 and 14 of the Regulator for Energy and Water Services Act which shall *mutatis mutandis* apply to this Act.

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Offences and penalties.

13. (1) Any person who -

(a) wilfully or through negligence acts in breach of any Remit Regulation requirement, any provision of this Act or of regulations made thereunder;

(b) wilfully or through negligence breaches any decision or order made under this Act or of regulations made thereunder;

(c) fails to comply with any decision or order made under this Act or of regulations made thereunder;

(d) hinders, obstructs, molests or interferes or attempts to hinder, obstruct, molest or interfere with the performance of the duties of any inspector, any employee or officer of the Regulator; or

(e) makes a declaration for any of the purposes of this Act or of regulations made thereunder which is false, misleading or incorrect in any material particular,

shall be guilty of an offence against this Act and shall, on conviction, be liable to imprisonment for not more than eighteen months, or to a fine (multa) of not more than hundred thousand euro (€100,000) or to one thousand three hundred euro (€1,300) for each day during which the offence persists, or to both such fine and imprisonment.

(2) Any person who with intent to avoid detection of the commission of an offence under this Act removes, destroys, conceals or fraudulently alters any book, document or other paper, shall be guilty of an offence.

Minister's power to make regulations.

14. (1) The Minister may, after consulting the Regulator, make regulations for the purposes of:

(a) the better implementation of the provisions of this Act, any Remit Regulation requirement and any other implementing measures;

(b) the proper application of the prohibitions established under this Act;

(c) the imposition of administrative fines by the Regulator in terms of article 12;

(d) in regard to the enforcement powers required by the Regulator to perform its functions under this Act;

(e) for any aspect relating to the procedure and conditions that may be imposed in relation to any authorisation, registration or notification under this Act including where applicable the grant, renewal, transfer, suspension, cancellation and duration of any such authorisation, registration or notification, the manner in which applications for such authorisation, registration or notification

is to be made, the content and form of such applications and how they may be granted, renewed or transferred, the fees payable, and the manner in which renewals or transfers thereof is to be indicated;

(f) to give effect to any international obligation entered into by Government in relation to the Remit Regulation and to this Act;

(g) for prescribing the information to be retained by any person under this Act and the provision of statistical data by such persons, and on any other matter relating to provision of information by any person to the Regulator;

(h) for prescribing anything which may be or is required to be prescribed by this Act and in terms of any Remit Regulation requirement.

(2) Regulations made under this article may establish offences and may impose administrative fines or other administrative measures in respect of any contravention thereof or failure of compliance therewith, not exceeding:

(a) in the case of a criminal infringement, a fine (*multa*) of one hundred thousand euro (€100,000) or imprisonment for a term not exceeding one year, or both such fine and imprisonment, as the case may be; or

(b) in the case of an administrative fine, a fine (*multa*) of one hundred thousand euro (€100,000) for each contravention and, or six hundred euro (€600) for each day of non-compliance for each infringement or failure to comply, as the case may be.

(3) Regulations made under this article may also provide for the assignment of power and authority to the Regulator in order to enable it to ensure that the provisions of the regulations are properly implemented.

Power of Regulator to issue rules.

15. (1) The Regulator may, from time to time, issue rules which shall be binding on persons specified therein and such rules shall be published in the Gazette.

(2) Without prejudice to the generality of sub-article (1), the Regulator may issue rules and take all necessary measures to ensure the proper dissemination of timely and correct information to the public.