

BREXIT: “EMIR” RISK WHEN CONCLUDING WHOLESALE ENERGY CONTRACTS VIA UK BROKERS

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Due to Brexit, as of 1 January 2021, most UK brokers for gas and electricity wholesale contracts with physical delivery have transferred their business to (affiliated) EU companies or moved their registered office to the EU. Occasionally, however, brokers based in the UK can still be found providing their trading platform in the EU.

"If qualification as an organised trading facility of UK-based brokers is ruled out, physical electricity and gas supply contracts can no longer be excluded from the definition of financial instruments."

Energy trading companies in Germany should therefore be cautious when using British platforms as Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (“EMIR”) must be applied to physical electricity and gas supply contracts as of 1 January 2021.

Until the end of 2020, such broker platforms generally qualified as organised trading facilities. Therefore, forward contracts for physical electricity and gas supplies concluded via these platforms were not considered financial instruments (see Section 1 (11) sentence 6 no. 2 b) of the German Banking Act “KWG”). As a result, such electricity and gas supply contracts were only required to be reported as part of the reporting obligations under Regulation (EU) No. 1227/2011 of the European Parliament and of the Council of 25 October 2011 on Wholesale Energy Market Integrity and Transparency (“REMIT”).

With Brexit coming into effect, the qualification of UK-based brokers as an organised trading facility is now in question. There are concerns regarding this classification with potentially serious legal consequences. If qualification as an organised trading facility of such brokers is ruled out, physical electricity and gas supply contracts can no longer be excluded from the definition of financial instruments within the meaning of Section 1 (11) sentence 6 no. 2 b) KWG. As a result, the regulation of EMIR would apply.

Due to the practical relevance, as well as the sanctions in case of violations of the EMIR requirements, we recommend looking at this issue closely (especially in relation to reporting obligations under the EMIR) to minimise the risks.

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