Wind parks as merchant assets –
legal aspects to observe

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Summary

After a decade of renewable energy promotion by feed-in tariff and guaranteed grid access, the first element of compensation and profitability of renewable assets is about to disappear. After the introduction of the market premium, investors have soon experienced that it can drop to zero and does not have to stop there. As a consequence, investors, developers and operators of renewable assets are exposed to commodity risk and need to expand their view on the use of bilateral power purchasing agreements or of bringing the energy directly to traded markets.

This inevitably increases the exposure to market trading venues such as exchanges, multilateral trading facilities and brokers, which are a long-known feature for the marketing of conventional energy but less so for renewables.

Therefore, operators of renewable assets need to familiarize themselves with rules such as the Market in Financial Instruments Directive, (MiFID), the Market Abuse Regulation (MAR) and the European Market Infrastructure Regulation (EMIR) which govern the energy derivative markets as well as the Regulation on Energy Market Integrity and Transparency (REMIT) for physical wholesale market participants. This is of particular importance since MiFID will become applicable 03.01.2018 and cover a much broader spectrum of energy business than before.

If an operator of renewable assets wants to hedge its outright power position at a regulated market – be it an exchange or broker – this constitutes the use of a financial product and consequently constitutes the financial service of own account trading.

Methods

Market risk, more specifically commodity price risk, is a well-known feature in marketing conventional energy or energy commodities and is usually professionally managed by making use of traded forward markets. As a consequence, the related market transparency and integrity rules, which entail a rather strict compliance regime for market participants, need to be expanded to renewable assets and their marketers.

The presentation will investigate and elaborate on to what extent these rules apply and what the legal and organisational consequences for the companies active in these markets look like. It explicitly deals with the meaning of the terms “energy derivative” and “insider information” and their impact on the renewables market.

Results

The use of traded products brings market participants into the territory of financial market transparency and integrity. Not only do they need to have their transactions reported to a trade repository but they also have to make sure that they do not act on insider information and refrain from market manipulation.

Regulations such as MAR, EMIR, the Suspicious Transaction and Order Reporting and MiFID II apply. For the strictest consequences under MiFID II, market participants can presumably make use of exemptions but need to carefully assess their status and notify their reliance on specific legal safe harbours and take the necessary actions before 3 January 2018.

Conclusions

The renewable industry has to explore new marketing alternatives and familiarize itself with the requirements of traded markets, in particular market integrity and transparency rules. They need to be prepared from a legal and organisational standpoint to observe market rules in day-to-day operations, either by own capacity or by making use of third parties.

In total, the aspect of regulatory compliance will become a daily feature of operating renewables assets and require a corresponding skill set and organization.

Wind energy marketed on a forward basis by corporate PPAs or derivative instruments needs to observe

• MiFID II —— get licensed or exempt
• EMIR —— report derivatives and manage clearing threshold
• MAR —— observe prohibition of insider trading and market manipulation
• REMIT —— report transactions and maintain market integrity

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