# Consultation paper on CESR’s/CEBS’ technical advice to the European Commission on the review of commodities Business

## Response from the *Consultative Panel* of the CNMV of Spain

The CNMV's Consultative Panel has been set by the Spanish Securities Market Law as  the consultative body of the CNMV  This Panel is composed by market participants (members of secondary markets, issuers, retail investors, intermediaries, the collective investment industry, etc) and its opinions are independent from those of the CNMV.

**<u>Part A</u>**

**Question 1.**
In terms of volume, the main OTC commodity derivatives in Spain are derivatives on electricity. Almost all OTC instruments are financial instruments as they are forward agreements settled in cash.

In 2007 the notional volume in these OTC electricity instruments is estimated at 2.5 billion euro, for electricity representing 15% of total consumption; and in only the first half of 2008 the estimate is 2.4 billion euro.

Along with this activity, there are two types of government-driven auctions were electricity forwards and options are exchanged. These have been so far physically-settled, although options will be cash-settled in the near future. Forwards notional volume was around 2.8 billion euro for the period July 2007 to June 2008. Options notional volume was 0.8 billion euro for the same period.

Modest volumes in the regulated olive oil futures exchange also fall within MiFID (C6).

Figures on gas and emission allowances derivatives trading are either unavailable or relatively insignificant.

The participants in any of the markets are mainly producers, distributors and specialist firms, some subsidiaries of investment firms. Retail or unsophisticated investors are rare.

**<u>Part B</u>**

**Question 2.**
Yes, we agree. Moreover, corporate clients, knowledgeable of the physical commodity markets, are increasingly experienced and knowledgeable in the relevant derivatives markets too, therefore not so unsophisticated.

**Question 3.**
Informational advantages may occur mainly if the physical commodity market has a high level of concentration, and only those participants with a high market

share may be deemed to have potential informational advantages. As long as arbitrage between physical and commodity derivatives markets is possible and well functioning, information asymmetries, if any, tend to disappear. Any rule that inhibits arbitrage should be questioned, for example, any limitation for an investment firm active in the commodity market to participate in the physical market, or vice versa.

**Question 4.**
We don't think those concerns are relevant as long as only professionals participate in the markets. Possible concerns should be related to the market share concentration mentioned above.

**Question 5.**
OTC markets are by definition non-transparent, but participants are apparently just happy with that, judging by the perennial growth of OTC markets. Trying to regulate transparency in the OTC markets goes against the very nature of these markets. Only central clearing arrangements may help mitigate the lack of post-trade transparency.

**Question 6.**
No evidence can be provided, but this issue takes us again to the matter of market concentration in the underlying commodity. The higher the concentration, the larger the chances of profiting from a market power situation. In heavily regulated commodities, as electricity or gas, government decisions may potentially create grounds for market abuse.

**Question 7.**
Sorry, no information available.

**Question 8.**
We consider the level of risk to be low.

**Question 9.**
We agree with the conclusion that the level of risk is relatively low, compared with the risks generated by banks and ISD investment firms.

**Question 10.**
No difference.

## Part C

**Question 11.**
No. But see answer to Question 5. Central clearing or reporting to some kind of central information infrastructure, for the benefit of all participants, may improve transparency, at least post-trade.

**Question 12.**
Transaction reporting solves very little. It only helps regulators to supervise, and only with respect to OTC instruments identical to those traded on regulated

markets (if that is the case). But OTC instruments will generally be only similar, not identical, and therefore not reported. Additionally, even if there is any information reported, the participants will not know about it, since it is only for the use of the regulators.

**Question 13.**
No evidence.

**Question 14.**
Although we share the analysis and potential competitive distortions may exist, no evidence can be provided.

On a related matter, though outside the scope of financial markets regulation, we have identified competitive distortions due to inefficient or inconsistent VAT treatment of physically-settled (non-MiFID) commodity derivatives involving non-EU countries, leading us to note that tax considerations may also have negative impact on competition.

**Question 15.**
Yes, we agree.

**Question 16.**
Yes, we agree.

**Question 17.**
Potential for regulatory arbitrage will exist as long as implementation of EU rules varies from country to country. The fact that trading companies tend to be clustered in some countries (and not only for corporate tax reasons) gives a clue.

## Part D

**Question 18.**
Understandably, there was no enthusiasm for extending to commodity derivatives the type of pre-trade and post-trade transparency arrangements that apply to shares under the MiFID, but it would at least be of benefit for market integrity the publicity of aggregated volumes and prices, based on non-burdensome reporting requirements for all firms.

On organisational requirements, we believe that the application of MiFID requirements to the commodity derivatives business would support the intended aims of market regulation.

**Question 19.**
Some tailoring may be needed. The proposal under paragraph 182 is reasonable. We also believe that the regime for individuals need not be changed.

**Question 20.**

Yes.

**Question 21.**
All the elements of the criteria listed in the question are sufficiently clear. But we also note that the issue raised in paragraph 200 (a) is quite right, and, as mentioned in paragraph 207 (b), it is very easy to play with the characteristics of any instrument to deliberately make it financial or not, in spite of being intrinsically the same in any case.

**Question 22.**
The boundaries are clear, that's why evidence is hard to provide. The number of additive requisites is such that they will only be fulfilled if the purpose is to take the instrument *into* (rather than *out of*) financial regulation.

We only have evidence of the opposite, physically-settled options on electricity converted into a financial instrument by changing the settlement to cash, although the use and the users will remain mainly commercial as it is limited to a certain generation capacity.

**Question 23.**
Yes.

**Question 24.**
We think there is a case for retaining the exemptions, perhaps adapted on the lines discussed in paragraph 245.

**Part E**

**Question 25.**
Some energy commodities have guarantee requirements imposed by a physical deliveries organiser, like the grid operator for electricity, to address the risk exposure created by free deliveries.

Full application of the CRD large exposures regime to specialist commodity derivatives firms may be disproportionate, and an approach comparable to that of Article 45 of the CAD may be appropriate.

**Question 26.**
Yes. The proposed alternatives are reasonable and better suited.

**Question 27.**
They seem to be relevant for those affected.

**Question 28.**
Yes.

**Question 29.**
Yes.

**Question 30.**
All four options are sensible and could work out. Option 1 may be the most complete.

**Question 31.**
Yes, since it would only be an additional option.