Ref: CESR/08-509

CESR and ERGEG advice to the European Commission in the context of the Third Energy Package

Draft Response to Question F.20 – Market Abuse

Consultation Paper

July 2008

Contents

Executive Summary

This consultation paper is the result of the work of the joint group of CESR and ERGEG – under chairmanship of Johannes Kindler (ERGEG Vice President and Vice President of Federal Network Agency) and Carlo Comporti (CESR Secretary General) - following detailed consideration of the following questions on which CESR and ERGEG were requested to provide their advice to the European Commission:

> Is the scope of Directive 2003/6/EC on insider dealing and market manipulation (market abuse) such as to properly address market integrity issues in the electricity and gas markets? Would the assessment be different if greater transparency obligations in line with the analysis above[1] were adopted? What suggestions do regulators have to mitigate any shortcomings?

The Committee of European Securities Regulators (CESR) and European Regulator's Group for Electricity and Gas (ERGEG) will provide their final advice on the above question in the beginning of October 2008. This paper sets out the draft advice of CESR and ERGEG on which they invite the views of market participants. The deadline for the responses to this consultation paper is 29 August 2008.

> Q1: Is the scope of Directive 2003/6/EC on insider dealing and market manipulation (market abuse) such as to properly address market integrity issues in the electricity and gas markets?

Concerns on market integrity and similar issues have been raised by several market participants. For example, as stated in the final report of the Commission's Sector Inquiry "there [in the electricity markets] is a general perception that generation data of vertically integrated incumbents is first shared with affiliates and not necessarily at all with other market participants, which undermines confidence in the wholesale markets". This kind of information asymmetry is linked to a poor level of transparency and may lead to market abuse. Given the current degree of concentration in many Member States, physical markets for electricity and gas are also vulnerable to manipulation based on market power. Generators may be able to influence prices for electricity either by withdrawing capacity (which may force recourse to more expensive sources of supply) or by imposing high prices when they know that their production is indispensable to meet demand. Other abusive practices could be applied by market participants which relate in some cases – but not always necessarily - to the existence of a dominant position.

Directive 2003/6/EC ("Market Abuse Directive – MAD") provides a common EU framework for the disclosure of information to the market and aims at the prevention, detection, investigation and sanctioning of insider trading and market manipulation. MAD only partly covers energy markets as it is designed for the financial markets. It applies almost exclusively to financial instruments admitted to trading on a regulated market. Physical products (e.g. spot market products) are not covered and derivatives markets products are covered only if they are admitted to trading on a regulated market. **Thus the scope of MAD may not properly address market integrity issues in the electricity and gas markets.**

The scope of disclosure obligations in MAD does not apply to physical market products nor are derivatives markets covered because the disclosure obligations in MAD relate to issuers. In the context of derivatives markets the issuer of a derivative is usually the market operator which is not an issuer within the meaning of MAD.

The scope of market abuse regulations (insider trading, market manipulation) does not apply to physical markets for electricity and gas. Thus activities in these markets are not covered as long as the derivatives market is not affected. In addition, the commodity derivative specific definition of insider information in MAD is difficult to handle for securities regulators, in the absence of a clear definition of the information that users of commodity markets can expect to receive in accordance with accepted market practices on those markets.

[1] This refers to questions 11 to 19 on Transparency in the Commission Call for Technical Advice.

Q2: Would the assessment be different if greater transparency obligations in line with the analysis above were adopted?

The transparency obligations referred to in this question mainly relate to pre- and post trade transparency for electricity and gas derivatives and spot market transactions. **Even with greater trade transparency, the analysis above on the possible insufficiencies of MAD in the context of market abuse would not differ.**

Currently there are provisions in place regarding fundamental data for electricity (in Regulation (EC) 1228/2003 and Congestion Management Guidelines) and for gas (in Regulation (EC) 1775/2005 and the respective Annex 3). However, these provisions do have shortcomings regarding the degree of detail of required information. ERGEG has developed Guidelines of Good Practice on Information Management and Transparency[2] and taken forward detailed considerations through the Regional Initiative process. The Guidelines of Good practice are not legally binding and don't provide for sanction mechanisms in respect of relevant EC regulations.

Greater transparency/disclosure obligations on price sensitive fundamental data (e.g. generation, transmission, transportation, storage and capacity levels), could enhance the supply of information for both physical and derivatives markets and promote market integrity.

Q3: What suggestions do regulators have to mitigate any shortcomings?

CESR and ERGEG consider that **implementing disclosure obligations comparable to Article 6 MAD in the energy sector regulations** (bundling existing transparency obligations) would improve the situation. Sector specific disclosure obligations should oblige the relevant entities to disclose information likely to influence physical and/or derivatives markets prices in a timely manner and on a single platform. Responsibility for disclosing relevant information should primarily lie on the entity responsible for the relevant activity. Disclosure obligations should not only be legally binding, but also contain a sanction mechanism in case of non-compliance.

CESR and ERGEG are of the view that the Commission should consider developing and evaluating proposals for a basic, **tailor-made market abuse framework within the energy sector legislation for all electricity and gas products not covered by MAD, particularly in the physical markets.** Such legal framework should address the abusive practices observed or potentially applied by market participants on electricity and gas markets. Market conduct rules of Nordic Power Exchange Nord Pool could - in some aspects - serve as a model, although it is not a legal framework. Any new legal framework should take into account the specificities of the electricity and gas markets with regard to any misuse of information and support cooperation appropriate for regional markets. The competences of securities regulators, which supervise the derivatives markets for electricity and gas should also be taken into account when designing a tailor-made market abuse framework within the energy sector legislation. It should cover any kind of physical market, whether it is an "exchange" or any other kind of trading facility. Competences for combating market abuse would seem to require that the competent authority is provided with the necessary data to monitor the markets with a view of detecting and sanctioning abusive behaviours.

Generally, CESR and ERGEG recognise that market participants would incur costs of compliance with such obligations, but consider the benefits in enhancing confidence in market integrity would be valuable. Increased confidence could in turn result in an increase in participation in these markets and improve their efficiency.

A mere extension of the scope of market abuse regulations (insider trading, market manipulation) in MAD to physical products is not recommended particularly because it would not reflect the needs of the electricity and gas markets and would bear the risk of leading to an inappropriate application of MAD in other areas. CESR and ERGEG doubt the need to change the specific definition of inside information in Art. 1(1) MAD in relation to commodity derivatives if binding disclosure obligations comparable to Art.

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[2] http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_CONSULT/ARCHIVE/ELECTRICITY/GGP%20Transparency/CD/ERGEG_GGPIMT_2006-08-02.pdf

6 MAD were introduced in the sector specific energy regulation. The existing prohibition of insider trading in MAD could then be made more workable in every EU/EEA jurisdiction.

<u>Responses to the consultation paper</u>

CESR and ERGEG would welcome responses to the questions raised in this consultation paper, or other comments on the subject of this paper, which should be provided by 29 August 2008.

All contributions shall be submitted via e-mail to ERGEG (mail to fis@ergeg.org) and online via CESR's website under the heading Consultations at www.cesr.eu. Non-confidential contributions will be published on the CESR and ERGEG websites. Respondents to this consultation paper should, however, endeavour to provide any confidential material in annexes that can be separated from publishable non-confidential material.

According to the mandate of the Commission, CESR and ERGEG have focused on electricity and gas markets. However, they note that there are substantial interdependencies between electricity and gas markets and some other markets, such as emission allowances markets and other energy markets (e.g. coal and oil markets). The products in these markets are traded by the same market participants and there are interlinkages in the price formation processes of these markets. The views of the market participants on these interdependencies would also be very much of interest to CESR and ERGEG.

Background

1. On 21 December 2007, the European Commission (Commission) issued a joint mandate to CESR and ERGEG asking for technical advice pursuant to Articles 22f and 24f and Recitals 20 and 22 respectively in the two proposals for Directives amending Directive 2003/54/EC and Directive 2003/55/EC (The Third Energy Package) (see Annex).

2. The mandate requests joint advice from CESR and ERGEG on issues concerning record keeping and transparency of transactions in electricity and gas supply contracts and derivatives. Advice was also sought on a possible clarification of the scope of the Market Abuse Directive in relation to trading in energy and energy derivatives.

3. CESR and ERGEG established a Joint Group of securities and energy regulators to prepare the advice. The Joint Group is co-chaired by Mr Carlo Comporti, Secretary General of CESR, and Mr Johannes Kindler, Chairman of CEER Financial Services Working Group. The Joint CESR/ERGEG Group established four drafting teams consisting of representatives of the securities and energy regulators for the preparatory work on the respective topics of the mandate (record keeping, exchange of information, transparency and market abuse). A representative of CESR-Pol, the permanent operational group within CESR focusing on the effective implementation of MAD, accompanied the work of the MAD drafting team.

4. The advice from CESR and ERGEG is sought by the end of December 2008 with the exemption of question F.20 on market abuse and questions C.1-C.3 and E.12-E.17 which can be considered to be fact-finding questions. The response to question F.20 has to be delivered by the end of September 2008 and the response to the fact-finding questions by the end of July 2008.

5. On 18 February 2008, CESR and ERGEG issued a call for evidence asking for views on the Commission's questions. The response period closed on 18 March 2008. Nine responses were received, five of them were addressing market abuse questions.

6. CESR and ERGEG have undertaken in-depth considerations on the issue. Whereas the mandate of the European Commission addresses the electricity and gas markets, it has been noted that there are substantial interdependencies between electricity and gas markets and some other markets, such as emission allowances markets and other energy markets (e.g. coal and oil markets). The products in these markets are traded by the same market participants and there are interlinkages in the price formation processes of these markets.

7. While CESR and ERGEG drafted the response to question F.20 of the mandate, they took into account the advice already given by CESR and CEBS with regard to commodities and related derivatives markets. The purpose of this consultation paper from CESR and ERGEG is to seek comments on the findings and the advice that is proposed to be provided to the European Commission. The public consultation allows CESR and ERGEG to understand and to take into account the views of market participants.

8. Complementary to the work of the drafting team, CESR-Pol also contributed to the work of the Joint Group. In April 2008 CESR-Pol gave its contribution to question F.20 of the energy mandate for further consideration in the Joint Group. The contribution was based on a survey that was conducted among the members of CESR-Pol.

9. Preliminary options, findings and views of this paper were discussed with industry experts (the "Consultative Working Group – CWG") prior to public consultation in a meeting of the CWG on 2 June 2008. The CWG consists of technical experts from the markets and firms affected.

Public consultation and timetable

10. CESR and ERGEG invite responses to this consultation paper. In addition to general comments, we would appreciate receiving your views on the specific questions presented above. It would also be interesting to hear your views on the interdependencies between the electricity and gas markets and the other energy and energy related markets (like emission allowance, coal and oil market).

11. All contributions shall be submitted via e-mail to ERGEG (mail to fis@ergeg.org) and online via CESR's website under the heading Consultations at www.cesr.eu. Non-confidential contributions will be published on the CESR and ERGEG websites. Respondents to this consultation paper should, however, endeavour to provide any confidential material in annexes that can be separated from publishable non-confidential material.

12. The consultation closes on 29 August 2008.

13. CESR and ERGEG will consider the responses to the consultation and provide the final advice to the European Commission in the beginning of October 2008. A feedback statement to the public consultation will also be published.

Question F.20 of the mandate

14. The question F.20 of the Commission mandate consists of three subquestions (Q1-Q3):

Q1: Is the scope of Directive 2003/6/EC on insider dealing and market manipulation (market abuse) such as to properly address market integrity issues in the electricity and gas markets?

Q2: Would the assessment be different if greater transparency obligations in line with the analysis above[3] were adopted?

Q3: What suggestions do regulators have to mitigate any shortcomings?

The functioning of the electricity and gas markets

15. Following the first liberalisation steps in the nineties the electricity and gas markets have developed in the EU/EEA. These energy markets have specific characteristics which influence the market developments and the design of the markets[4]. Electricity cannot be stored economically once produced. This means that generation and consumption have to be in balance at all times. The gas market development is based on the situation where high quantities are imported from producers from outside the EU/EEA.

16. The European Commission Sector Inquiry (Ref: SEC(2006) 1724)[5] provides descriptions of the electricity and gas industry structure and market functioning. The European Commission analysed within its Sector Inquiry the structure and functioning of the electricity and gas markets. CESR and ERGEG did not participate in the Sector Inquiry and thus cannot judge the results. However, the

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[3] This refers to questions 11 to 19 on Transparency in the Commission Call for Technical Advice.

[4] A substantial development is the dematerialisation process where the electricity and gas contracts are separated from the physical delivery. This makes it possible to design physical wholesale markets and to trade on regulated markets in standardised contracts. The physical wholesale market is also the basis of the financial electricity and gas market. The dematerialisation makes it possible to enter the financial market (and even the physical market) as a financial market participant. However, different markets throughout Europe have made different degrees of and solutions of dematerialisation.

[5] Since the Sector Inquiry dates from 2006, its diagnosis might be outdated to some extent because the electricity and gas markets have undergone substantial changes in the meantime.

Sector Inquiry shows that considerable potential of market abuse exists. The descriptions of the Sector Inquiry are quoted in excerpts below.

<u>The Electricity Markets</u>

17. *"Various business models as well as various structures due to the liberalization process exist on electricity markets in the EU, ranging from stand alone generators and independent supply companies to fully integrated utilities. In more recently liberalised Member States vertically integrated companies, or very strong ownership and/or contractual links between generators and suppliers are predominant. In areas that were liberalised earlier such as the UK and Nord Pool, business strategies seem to be somewhat more diverse. In the UK, as well as the larger integrated companies a number of independent generators with their own business strategies exist. On the Nordic market(s) consisting of Norway, Sweden, Finland and Denmark independent suppliers are relatively important."*

18. *"Typically, within fully integrated utilities specialised affiliates are dedicated to the different activities such as generation, trading, supply and network operations. Usually the entire output of the generation affiliate is sold under intra-firm arrangements to the affiliated trading entity which in turn manages the undertaking's overall portfolio i.e. sells electricity to the supply affiliate(s) and sells it to or buys it from third parties through bespoke bilateral contracts or traded wholesale markets."*

19. "Generally speaking, market participants can be divided in two groups: players with inherent physical positions (generators and suppliers) and participants without inherent physical positions (traders). The interest for generators to trade stems mainly from the need to sell their generation output and optimise the operation of their generation portfolio. In a number of Member States this selling is predominantly executed on forward markets, whereas optimisation of the power plant portfolio is carried out on spot markets i.e. day-ahead or within-the-day markets. By selling electricity forward, generators can hedge themselves against spot price drops."

20. "In comparison to generators and retailers (financial) traders buy and sell to exploit differences, e.g. between two geographical areas (arbitrage) Traders also may take speculative positions, aggregate and disaggregate purchases and sales over different time horizons, or locations, thus offering to others the chance to manage their risks."[6]

21. "Depending on the delivery period, bulk electricity can be traded on spot or forward markets. Spot markets are mainly day-ahead markets on which electricity is traded one day before physical delivery takes place. On forward markets, power is traded for delivery further ahead in time."

<u>The Gas Markets</u>

22. Although the supply of gas as well as electricity is bound to transportation infrastructure for gas markets the situation is slightly different. Contrary to electricity gas is a storable good and production is by far not evenly distributed within the EU/EEA. The gas market development is based on the situation that high quantities are imported from producers from outside the EU. Due to these facts trading in gas has different characteristics. The description in the Commission Sector Inquiry (Ref: SEC(2006) 1724) reflects these differences.

23. "Natural gas is mostly transported from production to the markets through pipelines. In addition, after being cooled and condensed, it can be transported in liquefied form (LNG) by sea. Compared to other primary energy sources, transport costs for gas are high in relation to the price of the commodity. This is a key reason why gas markets have remained regional in character rather than global. Transport by pipeline remains less expensive than LNG-shipments for shorter distances. However, decreasing costs for the LNG chain have made longer transport routes economically

[6] Arbitrage arises from different valuation of the market players of the contracts based on the same underlying physical (dematerialised) commodity. Financial players take market risk and get paid for this and diversify (reduce) the risk in the total financial (capital) market. The generators and retailers want to reduce the market risk and are willing to pay for this.

viable, bringing new sources of gas to the European markets. This may mean that LNG becomes a viable alternative, displacing gas from longer pipeline routes. Nevertheless, many specific geographic factors play a role, and new pipelines are being considered to bring gas from relatively remote areas to Europe (e.g., the proposed Nabucco project that could transport gas from the Caspian region and Iran).

24. *"Some trading at wholesale level takes place through more-or-less organised trading facilities*[7]*, generally referred to as "hubs". This kind of trading is potentially more accessible to new market entrants and the non-integrated business models referred to above. Such hub trading has been, so far, slow to develop, but the future development of traded wholesale markets is crucial for market integration and competition in EU gas markets."*

25. *"Gas hubs can be "virtual" in character, allowing trading of gas that has been physically injected into any point on a national grid. This is the case for the UK hub (NBP) and the recent hubs in the Netherlands (TTF) and Italy (PSV). In these cases, gas is usually traded on an "entry-paid" basis meaning that entry capacity into the networks has been settled. Others are "physical", requiring gas to be transported to and from a particular trading point or zone. This is true for Zeebrugge (Belgium), Baumgarten (Austria) and Emden (Germany), for instance."*[8]

O1: Is the scope of Directive 2003/6/EC on insider dealing and market manipulation (market abuse) such as to properly address market integrity issues in the electricity and gas markets?

<u>Market failures in the electricity and gas markets and market abuse</u>

26. Market integrity issues in electricity and gas markets can generally arise due to asymmetric information and/or market power.

27. Information asymmetry is a market failure that arises where one group of participants has more and/or better information than another group. Two forms of asymmetric information can be distinguished depending on the exact timing at which the information asymmetry occurs, i.e. before the transaction is carried out or afterwards. In the first case, which is relevant here, the group that has less or worse information may make poor trading decisions because of this information shortfall. Information asymmetry is linked to poor levels of transparency and can lead to market abuse.

28. The final report of the Commission Sector Inquiry (Ref: SEC(2006) 1724) states in §564 (p. 188) that:
"*There* [in the electricity markets] *is a general perception that generation data of vertically integrated incumbents is first shared with affiliates and not necessarily at all with other market participants, which undermines confidence in the wholesale markets. The inquiry also revealed examples where operators seem to have withheld information regarding generation outages until after markets have closed, which may have allowed them or their affiliates to trade on electricity markets on an unfair basis.*"

29. Some market participants even advocate the behaviour not to inform the market about generation outages until the concerned group of companies has balanced its position. They argue that a generator who informs the market of a generation outage before balancing the position might be squeezed by the rest of market and therefore might have to buy at a maximum price.

30. With regard to transparency there have also been further developments since the publication of the sector inquiry. Several large generators started to publish generation data voluntarily. Energy

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[7] The term "organised trading facilities" does not correspond to the usual terminology of the EU financial regulation.
[8] Since the publication of the sector inquiry there have been further developments in the gas markets. E.g. in Germany this has yielded to eight market areas with a virtual hub on each. The most liquid H-gas (i.e. gas with a high calorific value) hub is currently located in the E.ON Gastransport H-Gas area and facilitates trading via a gas exchange.

regulators acknowledge that this is a step forward, but they share concerns raised by market participants regarding the quality and reliability of this data.

31. With regard to concerns raised above it has to be noted that generation outages constitute a change in the market fundamentals as they affect generation availability. Such changes do normally result in certain price movements (e.g. rising price in case of scarcity), thus changes in prices are in such situations a normal development.

32. Market power is a market failure which may arise where there is a lack of competition in a market. Those with power may exploit their influence on the price of the traded instrument.

33. Due to their current degree of concentration, energy markets are vulnerable to manipulation based on market power. The findings (p. 7) of the final report of the Commission Sector Inquiry (Ref: SEC(2006) 1724) say that: *"At the wholesale level, gas and electricity markets remain national in scope, and generally maintain the high level of concentration of the pre-liberalisation period. This gives scope for exercising market power."*

34. The final report of the Commission Sector Inquiry further states that (§403, pp. 132-133): "*According to market participants generators can influence prices for electricity in two main ways:*

i. *either by withdrawing capacity (which may force recourse to more expensivesources of supply); or,*
ii. *by imposing high prices when they know that their production is indispensable to meet demand."*

35. Furthermore, also numerous other abusive practices could be applied by market participants which relate in some cases – but not always necessarily - to the existence of a dominant position.[9] Potential manipulative actions could also be trade based (e.g. orders entered at end of auctions in order to influence closing prices or "window dressing" deals between two parties to secure prices) or information based (e.g. disseminating misleading information). This might also happen on the spot market.

36. A case of a trade based market manipulation in energy futures has been detected at Nord Pool in April 2008. A market participant entered offers in the exchange system in order to influence the price for an OTC-trade.[10] The case demonstrates at least the importance of a coherent monitoring approach for energy markets and OTC markets.

37. Problems related to market concentration and market power are at present more of an issue for energy than for financial markets. Since the national energy markets in Europe are often highly concentrated, there are considerable opportunities to abuse this market power. Some incumbents are so big that market power will remain an important issue even when markets will integrate.

38. The Commission Sector Inquiry describes some mechanisms that can be used to exercise market power. In §376 of the Inquiry (pp. 124-125), the European Commission writes: *"Therefore, generators with market power on spot markets have ample opportunity to also exercise their influence on forward prices. For example dominant operators could withhold a part of their generation capacity. This would not only raise spot prices but also change market participants' expectations of the development of this fundamental supply side factor resulting in higher forward prices. Generators could also increase the volatility of spot prices (without changing the overall level of prices), which would increase the value of hedging them in advance on the forward*

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[9] CESR members are not in a position to express an opinion on this.

[10] In order to reduce the market price the trader offered and sold at the exchange small contract volumes at a lower price than the existing market price. According to Nord Pool the intention was to mislead the market to give an impression of falling market prices. Other participants then offered contracts at this new price level. The market participant bought a big contract at this new price level in the corresponding OTC-market and withdrew all the bids from the exchange. The result was a small cost of selling a small contract volume at a lower price and a big profit of buying a big contract volume at this lower price.

market and may raise the premium of forward prices over expected spot prices. While pursuing these strategies might seem costly for generators, it could be outweighed by higher revenues on their total portfolio."

39. The EC also points out that day-ahead prices on the power exchange are strongly correlated with the OTC prices, as regards both profile and level (§367). In addition to withholding capacity, the Commission also keeps an eye out for excessive bidding when a player with market power drives up the price by bidding very high prices (see Conclusion, p. 150).

40. In a study about the market resiliency of a European power exchange, it is shown that during periods when markets are tight, already a small generation capacity (e.g. 250 MW) has a large impact on prices. Since the European generation market is tightening, the wholesale electricity market is becoming more and more a seller's market. This means that more and more market players will gain market power, which will increase the possibility to exercise this power.

41. Normally, this seller's market would attract new investors. However, high investment costs act like a barrier to entry. This is aggravated, since the existence of market power might deter new possible entrants, because even the possibility (or the threat) that market power might be exercised (e.g. by lowering prices temporarily[11] or withholding reserve capacity[12]) can impose too much risk for this kind of investments (even if market power is not exercised on the moment that an investment decision is taken). Additionally, complex planning and authorisation procedures affect the attractiveness of investments in generation capacity.

42. Furthermore, in this context the general issue of the practical monitoring of the markets arises. This is particularly essential since energy markets are becoming regional instead of purely national (e.g. day-ahead market coupling projects in electricity). This results in situations where price formation processes across borders – in energy and energy derivatives markets but also in transmission/transportation capacity markets – influence each other. But the competences of most authorities – if they cover these market segments at all – are national (e.g. in terms of access to data) and therefore a proper surveillance seems not to be ensured. One example where these shortcomings have been addressed is the common market on the Iberian Peninsula. Regulation and supervision for the Iberian market MIBEL is carried out through a joint coordination committee of Spanish and Portuguese securities and energy regulators. But generally, European energy legislation does not so far address these shortcomings. Thus, this is deemed as a regulatory failure.

<u>Scope of MAD</u>

43. EU/EEA market abuse legislation provides a common European framework for the disclosure of information to the market and aims at the prevention, detection, investigation and sanctioning of insider dealing and market manipulation. Comprehensive legal framework and guidelines are provided by:

    i. Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation ("Market Abuse Directive – MAD");

    ii. Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation;

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[11] Usually, an incumbent has a larger (cash) buffer than a newcomer and, more important, a larger and more diversified generation portfolio, which means that the incumbent can set prices below its long run marginal cost of production and still make profit due to its cheaper generation units, and thus it has the ability to keep up this behaviour as long as necessary. In addition many incumbents already have largely amortised their power stations during periods of regulated prices which reduce their need of operational margins. The potential newcomer has by definition a small portfolio, with in general units of high marginal costs (like gas units) and will thus most likely suffer losses when prices are below the long run marginal costs of its portfolio.

[12] As a new entrant has by definition a small portfolio, when it has an outage on a unit, it cannot compensate this outage by its own portfolio and thus it has to buy its energy elsewhere. At that time, the incumbent can withhold its reserve capacity (or offering very high prices). This means that running a small portfolio will have higher risks.

iii. Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest;

iv. Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions;

v. Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments;

vi. CESR´s Market Abuse Directive first set of CESR guidance and information on the common operation of the Directive (Ref: CESR/04-505b);

vii. CESR´s Market Abuse Directive second set of CESR guidance and information on the common operation of the Directive to the market (Ref: CESR/06-562b);

viii. CESR´s Market Abuse Directive third set of CESR guidance and information on the common operation of the Directive of the market (Consultation Paper-Ref: CESR/08-274).

44. Generally, it is important to keep in mind that MAD from its origin is principally designed for financial markets and thus has a limited scope. MAD only applies to financial instruments admitted to trading on a regulated market or for which a request for admission has been submitted irrespective of whether the transaction takes place on that market (Art. 9 (1) MAD). Neither financial instruments admitted to trading only on Multilateral Trading Facilities ("MTFs") nor financial instruments which are not admitted to trading at all, fall under the scope of MAD. However, the insider trading prohibition also applies to any financial instrument not admitted to trading on a regulated market, but whose value depends on a financial instrument admitted to trading on a regulated market (Art 9 (2) MAD).

45. Disclosure obligations (Art. 6 MAD) in MAD refer to price sensitive information and issuers. Issuers of financial instruments are in general obliged to inform the public as soon as possible of inside information which directly concerns the said issuers.[13]

46. Inside information (Art. 1 (1) MAD) is information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

47. In relation to derivatives on commodities, inside information means information of a precise nature which has not been made public, relating, directly or indirectly, to one or more such derivatives and which users of markets on which such derivatives are traded would expect to receive in accordance with accepted market practices on those markets (Art. 1 (1) MAD - the definition is supplemented by Art. 4 of Directive 2004/72/EC).

48. The prohibition of insider trading (Art. 2, 3 and 4 MAD) forbids any person who possesses inside information

[13] As an exception to this general rule, Art. 6(2) of Directive 2003/6/EC states: "An issuer may under his own responsibility delay the public disclosure of inside information, as referred to in paragraph 1, such as not to prejudice his legitimate interests provided that such omission would not be likely to mislead the public and provided that the issuer is able to ensure the confidentiality of that information."

i. to make use of inside information by acquiring or disposing financial instruments for own account

ii. to disclose or make available inside information to a third party without the authority to do so

iii. to recommend, on the basis of inside information, a third party to acquire or dispose of financial instruments, or to otherwise induce a third party to do so.

49. The prohibition of market manipulation (Art. 5 MAD) forbids any person

i. to disseminate information which gives or is likely to give, false or misleading signals to the price of financial instruments,

ii. to execute transactions or give orders to trade, which give or are likely to give, false or misleading signals to the price of financial instruments, and

iii. to manipulate the price of financial instruments via other forms of deception.

<u>Applicability of current rules to electricity and gas markets</u>

50. MAD's scope and main focus on financial instruments admitted to trading on a regulated market leaves open significant issues as regards the need to protect market integrity in the electricity and gas markets.

51. Firstly, it should be pointed out that all products which are not financial instruments are not covered by MAD. This means that spot trading or long-term physical products, which involves commodity related trading and which is at the core of the energy markets, is excluded from MAD's scope. In addition, MAD only applies to trading in a financial instrument which is admitted to trading on a regulated market. Certain power exchanges fall under the definition of a "regulated market", however, a number of important European power exchanges do not and thus a financial instrument admitted to trading only at these exchanges would fall outside the scope of the directive for this reason. Neither financial instruments admitted to trading only on Multilateral Trading Facilities ("MTFs") nor OTC financial instruments which are not admitted to trading at all, fall under the scope of MAD.

52. As the scope of the insider trading prohibition refers to financial instruments and electricity and gas are not financial instruments, the prohibition of insider trading in MAD does not cover physical (e.g. spot) markets for electricity and gas.

53. For the same reason the prohibition of market manipulation in MAD does not cover physical markets for electricity and gas. MAD only covers manipulation in the physical markets if it affects the derivatives markets. Furthermore, such type of abuses that MAD foresees do not cover all the integrity issues related to physical markets and the relationship between the physical and derivatives markets.

54. In addition, the wordings of certain articles in MAD also raise practical difficulties when applied specifically to the energy sector.

55. Disclosure obligations (Art. 6) in MAD refer to price sensitive information and issuers. In the context of derivatives markets the issuer of a derivative is usually the market operator which is not an issuer within the meaning of Art. 6 of MAD.

56. Insider trading in electricity and gas derivatives is covered by MAD if they are admitted to trading on a regulated market (Art. 1(3) MAD). However, the commodity derivative specific definition of

insider information[14] may be difficult to handle, as the information the users of energy markets can expect is not specified in legally binding provisions and/or is often not precise enough. This uncertainty makes the prohibition of insider trading in commodities derivatives difficult to handle for securities regulators in some EU jurisdictions.

Draft response to Q1:

Concerns on market integrity and similar issues have been raised by several market participants. For example, as stated in the final report of the Commission's Sector Inquiry "there [in the electricity markets] is a general perception that generation data of vertically integrated incumbents is first shared with affiliates and not necessarily at all with other market participants, which undermines confidence in the wholesale markets". This kind of information asymmetry is linked to a poor level of transparency and may lead to market abuse. Given the current degree of concentration in many Member States, physical markets for electricity and gas are also vulnerable to manipulation based on market power. Generators may be able to influence prices for electricity either by withdrawing capacity (which may force recourse to more expensive sources of supply) or by imposing high prices when they know that their production is indispensable to meet demand. Other abusive practices could be applied by market participants which relate in some cases – but not always necessarily - to the existence of a dominant position.

Directive 2003/6/EC ("Market Abuse Directive – MAD") provides a common EU framework for the disclosure of information to the market and aims at the prevention, detection, investigation and sanctioning of insider trading and market manipulation. MAD only partly covers energy markets as it is designed for the financial markets. It applies almost exclusively to financial instruments admitted to trading on a regulated market. Physical products (e.g. spot market products) are not covered and derivatives markets products are covered only if they are admitted to trading on a regulated market. **Thus, the scope of MAD may not properly address market integrity issues in the electricity and gas markets.**

The scope of disclosure obligations in MAD does not apply to physical market products nor are derivatives markets covered because the disclosure obligations in MAD relate to issuers. In the context of derivatives markets the issuer of a derivative is usually the market operator which is not an issuer within the meaning of MAD.

The scope of market abuse regulations (insider trading, market manipulation) does not apply to physical markets for electricity and gas. Thus activities in these markets are not covered as long as the derivatives market is not affected. In addition, the commodity derivative specific definition of insider information in MAD is difficult to handle for securities regulators, in the absence of a clear definition of the information that users of commodity markets can expect to receive in accordance with accepted market practices on those markets.

Questions to market participants:

1) **Do you agree with the analysis of the market failures in the electricity and gas markets as described above? If not, please provide reasons for your disagreement.**

2) **What is your opinion on the analysis provided above on the scope of MAD in relation to the three different areas: disclosure obligations, insider trading and market manipulation?**

[14] In relation to derivatives on commodities, inside information means information of a precise nature which has not been made public, relating, directly or indirectly, to one or more such derivatives and which users of markets on which such derivatives are traded would expect to receive in accordance with accepted market practices on those markets (cf. paragraph 47).

Q2: Would the assessment be different if greater transparency obligations in line with the analysis above were adopted?

Status quo

57. The questions raised by the Commission in Section E of the mandate (Transparency) mainly relate to pre- and post trade transparency for electricity and gas derivatives and spot market transactions. Even if this kind of trade transparency would be greater, this would not be sufficient in the context of market abuse. Thus the assessment of gaps and insufficiencies of MAD to properly address market integrity in the energy markets would not differ if greater pre- and post trade transparency would be introduced.

58. However, the experiences of energy regulators, the responses to the call for evidence and the discussions with market experts clearly indicated that energy regulators as well as market participants see a need for an improvement of regulatory framework with regard to the disclosure of information on fundamental data (e.g. generation, transmission, transportation, storage and capacity levels) to increase public confidence and prevent misuse of such information. These findings correspond to the results of the Commission's final report on energy Sector Inquiry (Ref: SEC(2006) 1724) which diagnoses for both the electricity and gas market an absence of publicly available fundamental data leading to distrust in the pricing mechanisms.

59. Energy regulators therefore have already elaborated recommendations for improving transparency in the electricity and gas markets. In 2006, they published for electricity "Guidelines of Good Practice on Information Management and Transparency". For the gas market the energy regulators published also considerations regarding market transparency (cf. paragraph 73).

60. In respect of greater transparency/disclosure obligations on fundamental data, energy companies are already subject to sector specific transparency/disclosure requirements according to existing European and national law.

61. For the electricity sector, the new Annex to the Regulation (EC) 1228/2003 came into force in 2006. This Annex, the Congestion Management Guidelines (CM-GL), contains publication requirements regarding fundamental data in electricity in its point 5.5. and foresees that generally, "*TSOs shall publish all relevant data concerning cross-border trade on the basis of the best possible forecast.*"[15] Moreover other market participants possessing data are obliged to make them available to TSOs for publication.

62. Some important publication requirements are shown in the following table.

Point of CM-GL	Time for publication	Information
Data on available transmission capacity:		
5.5 (a)	annually	information on the long-term evolution of the transmission infrastructure and its impact on cross-border transmission capacity
5.5 (b),(c),(d)	Annually/monthly/ weekly/daily	year-ahead, month-ahead, week-ahead and day-ahead forecast of the transmission capacity available to the market
5.5 (e)	daily	total capacity already allocated, by market time unit
Data on outages of generation units		

[15] TSO = Transmission System Operator.

Point of CM-GL	Time for publication	Information
5.5 (i)	./.	ex-ante information on planned outages
5.5 (i)	./.	ex-post information for the previous day on planned and unplanned outages of generation units larger than 100 MW.
5.7	./.	relevant information on forecast demand and on generation according to the timeframes referred to in 5.5 and 5.6.
Realised values reg. any forecasts		
5.8	time period following that to which the forecast applies or at the latest on the following day (D+1)	Ex-post realised values for the forecast information

63. The table shows that in many cases the current legal requirements are not very specific and leave room for interpretation. The Guidelines do e.g. only partly foresee specific deadlines for publication. To enable all market participants to make proper trading decisions and to understand price formation it is essential that most of the information is published in a timely manner. Further, it is essential that the data publication requirements are concrete and uniformly interpreted and applied by the various stakeholders in all Member States.

64. This has already been recognised by ERGEG. Thus, harmonised energy-specific transparency requirements are discussed as one important item in four of the seven regions within the ERGEG Regional Initiatives and should be implemented in some regions. These common interpretations of the transparency rules of the Congestion Management Guidelines are outlined in "Transparency Reports", which are not legal acts by themselves.

65. As mentioned earlier, there are several voluntary initiatives, e.g. of large generators for publication of generation data. Energy regulators acknowledge that this is a step forward but they share concerns raised by market participants regarding the quality and reliability of this data. Furthermore, this approach cannot ensure an European wide coherent transparency scheme.

66. For the gas sector, Regulation (EC) 1775/2005 foresees provisions on publication requirements of fundamental data.

67. Some important publication requirements contained in point 3 of the Annex to Regulation (EC) 1775/2005 are shown in the following table.

Point of the Annex	Time for publication	Information
Data on transmission capacity:		
3.3 (1)(a)	daily, for a period of 18 months ahead	maximum technical capacity
3.3 (1)(b)	daily, for a period of 18 months	total contracted and interruptible capacity

Point of the Annex	Time for publication	Information
	ahead	
3.3 (1)(c)	daily, for a period of 18 months ahead	available capacity
Data on availability of short-term services (day-ahead and week-ahead)		
3.3 (2)	./.	data to be based, inter alia, on nominations, prevailing contractual commitments and regular long-term forecasts of available capacities on an annual basis for up to 10 years for all relevant points
Data on historical utilisation of transmission capacity		
3.3 (4)	monthly, for the last 3 years	historical maximum and minimum monthly capacity utilisation rates and annual average flows at all relevant points for the past three years on a rolling basis

68. There are substantial shortcomings in the current European legislation in relation to publication requirements of fundamental data especially for storage facilities and LNG terminals. For these types of gas infrastructure no legally binding publication requirements exist at the moment. However, in its proposal on amending Regulation (EC) 1775/2005 the European Commission has introduced publication requirements for storage facilities and LNG terminals.

69. ERGEG has carried out two extensive monitoring exercises in 2007 that focused on the provisions of Art. 6 and the Annex to Regulation (EC) 1775/2005 in order to assess the level of compliance of TSOs with the transparency requirements outlined in that regulation.

70. On a large number of gas transmission pipelines in Europe there exists contractual congestion. Due to this contractual congestion, TSOs can usually offer only interruptible capacity contracts to new users of their infrastructure. For these users it is thus of importance to be able to assess the probability of interruption in order to plan for possible remedies in case of interruption. For that purpose, fundamental data is required on the historic utilisation of a transmission pipeline, especially information on system utilisation; in particular, information on actual daily flows including maximum hourly mean values (kWh/h) per day. This information is not a legal requirement and is therefore not published by all TSOs today.

71. Due to the so-called "3-minus shipper" rule in Art. 6 of the current Regulation (EC) 1775/2005, TSOs are able to withhold certain fundamental data from publication if there are only 1 or 2 shippers using the transmission system. The effects of the widespread application of this rule are to the detriment of most market participants and could possibly lead to market foreclosure. The European Commission, in its proposal on amending Regulation (EC) 1775/2005, has therefore proposed to delete the "3-minus shipper" rule.

72. ERGEG concluded from its transparency monitoring that the removal of the "3-minus shipper" rule which is being used extensively to constrain transparency is necessary; that improvements in the frequency of information publication, its scope and the accessibility of information to be published by TSOs needs to be improved; and that there is a need for the comprehensive and complete implementation of the current transparency requirements of Regulation (EC) 1775/2005.

73. Furthermore, ERGEG in 2005 published Guidelines for Good TPA Practice for Storage System Operators (GGPSSO) including transparency requirements for storage systems. In 2008 ERGEG

publicly consulted Guidelines for Good Third Party Access Practice for LNG System Operators (GGPLNG) which contained also transparency requirements for LNG system operators.

Analysis

74. Both findings from electricity and gas markets show that, despite a certain amount of information being published, transparency/disclosure of fundamental data has to be improved. There are several circumstances which underline this necessity. First, some existing rules are not precise enough or are not legally binding. Furthermore, sanction mechanisms are missing in the regulation. Second, for efficient wholesale markets to develop it is essential that all market participants must have access in a timely manner to price sensitive information considered necessary to trade. Under the existing legal framework, fundamental data is not disclosed:

i. on an equal and timely manner;

ii. on a single information platform; and

iii. with standardised "quality" (reliability).

75. An improvement of regulatory framework with regard to fundamental data would not only enhance the supply of information for physical markets but also for the derivatives markets.

Draft response to Q2:

The transparency obligations referred to in this question mainly relate to pre- and post trade transparency for electricity and gas derivatives and spot market transactions. **Even with greater trade transparency, the analysis above on the possible insufficiencies of MAD in the context of market abuse would not differ.**

Currently there are provisions in place regarding fundamental data for electricity (in Regulation (EC) 1228/2003 and Congestion Management Guidelines) and for gas (in Regulation (EC) 1775/2005 and the respective Annex 3). However, these provisions do have shortcomings regarding the degree of detail of required information. ERGEG has developed Guidelines of Good Practice on Information Management and Transparency[16] and taken forward detailed considerations through the Regional Initiative process. The Guidelines of Good Practice are not legally binding and don't provide for sanction mechanisms in respect of relevant EC regulations.

Greater transparency/disclosure obligations on price sensitive fundamental data (e.g. generation, transmission, transportation, storage and capacity levels), could enhance the supply of information for both physical and derivatives markets and promote market integrity.

Questions to market participants:

3) Do you agree with the conclusion above that greater pre- and post trade transparency would not be sufficient in the context of market abuse?

4) Do you agree with the analysis above on the importance of the transparency/disclosure of fundamental data? If yes, would you consider it useful to set up at the European level a harmonised list of fundamental data required to be published? Is an exhaustive list conceivable or is it necessary to publish additional data on an ad hoc basis if it is considered to be price sensitive?

5) Which information retained by specific participants of the electricity and gas markets (e.g. generators, TSO) should be published on an ad hoc basis if it is price sensitive?

[16] http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_CONSULT/ARCHIVE/ELECTRICITY/GGP%20Transparency/CD/ERGEG_GGPIMT_2006-08-02.pdf

Q3: What suggestions do regulators have to mitigate any shortcomings?

<u>Transparency/disclosure obligations</u>

Option 1: Keep status quo

76. CESR and ERGEG considered the option to keep the status quo. However, since the current legal framework does not provide all market participants with information on fundamental data and information asymmetry occurs, this option was not seen as a realistic one. Information asymmetry is linked to a poor level of transparency and can lead to market abuse. The realisation of any of the risks will tend to hamper the aims of market development and regulation.

Option 2: Amend MAD

77. CESR and ERGEG further considered the option to implement the necessary amendments in MAD. However, CESR and ERGEG concluded that transparency/disclosure obligations for the physical markets should not be implemented in MAD.

78. Disclosure rules for physical markets implemented in MAD could duplicate or even conflict with existing transparency/disclosure rules in the energy market and could then create a bigger burden/negative impact for market participants than necessary.

79. Furthermore, whilst MAD's design and concepts have proven to function well in regulated financial markets, the integration of disclosure rules for physical markets in MAD risks to lead to undesired application of MAD in other areas, which should be avoided. E.g. using MAD to drive disclosure obligations for the energy markets could also create unintended complications in other commodities markets.

Option 3: Implement disclosure obligations in energy regulations

80. Finally, CESR and ERGEG considered the option to implement disclosure obligations in energy regulation. Disclosure obligations comparable to Article 6 MAD[17] could be implemented in the energy regulations building on the existing transparency rules in sector legislation.

81. As energy is traded prevalently on unregulated markets and OTC, sector specific disclosure obligations could cover all kinds of physical markets. Disclosure obligations should oblige the relevant entities (e.g. generators, suppliers, TSOs etc.) to disclose information which is likely to influence market prices (e.g. fundamental data such as generation, transmission, transportation, storage and capacity levels) in a timely manner on a single platform (e.g. power exchanges or information providers). Responsibility for disclosing relevant information should primarily lie on the entity responsible for the relevant activity, e.g. generators should ensure that the required information on generation is disclosed.

82. Sector specific legal framework on transparency/disclosure obligations could also take into account the specifics of energy markets, e.g. in cases when a public or other legitimate interest foresees that public disclosure can be delayed under certain conditions.

83. The determination of the competent authority for a sector specific regulation would be easy and no unintended complications in other commodities markets would be created.

84. Moreover, any legal framework on transparency/disclosure obligations should not only be legally binding, but also contain a sanction mechanism in case of non-compliance by the competent authority.

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[17] C.f. paragraph 45 et seq.

85. Sector specific disclosure obligations requiring the disclosure of price sensitive information on fundamental data could also enhance the practicability of the existing obligations in MAD (e.g. prohibition of insider trading in commodities derivatives) and, at the same time, could serve as basis for a new regime protecting against market abuse in the energy regulations. New rules for transparency/disclosure in the EU/EEA in the energy markets should in any case ensure to uphold the existing level of transparency in all the existing financial and physical regulated markets.

86. CESR and ERGEG are aware that the proposed policy would have impact on both regulators and market participants.

87. The implementation of new disclosure obligations would cause incremental cost for competent authorities as increased supervision and enforcement would be needed. However, as the competent authority would probably be the national energy regulator, which is familiar with the market, CESR and ERGEG consider that additional costs would be reasonable. This refers to both set-up costs and ongoing costs.

88. Market participants would need to familiarise themselves with the new disclosure obligations. There would be some set-up costs for the implementation of an internal system and some one-off training costs associated with the need to make staff aware of the new obligations. Market participants would be likely to incur additional ongoing costs only with regard to the publication fee. As most of the market participants in the electricity and gas markets are already subject to sector specific transparency obligations and the new disclosure obligations should bundle existing obligations, the cost effect should be reasonable.

Insider trading

Option 1: Keep status quo

89. CESR and ERGEG considered the option to keep the status quo. However, as the current legal framework does not provide all market participants with information on fundamental data and information asymmetry occurs, this option was not seen as a realistic one. Information asymmetry can lead to market abuse and the realisation of that risk will tend to hamper the aims of market development and regulation.

90. Transparency/disclosure obligations as described above (cf. paragraphs 80 et seq.) can force the market participants to disclose price sensitive information without undue delay. However, they do not by themselves ban trading activities or hinder to disclose this information to a “preferred” third party beforehand.

Option 2: Expand scope of insider trading prohibition in MAD to physical products

91. CESR and ERGEG considered the option to expand the scope of insider trading prohibition in MAD to physical products of the electricity and gas markets.

92. However, this policy initiative would not address properly the observed market failure.

93. MAD is focussed on regulated markets and would not cover products which are not admitted to trading on a regulated market. As most of trading platforms for energy are not regulated markets, the mere extension of the scope of MAD to physical products would not improve the integrity of all gas and electricity markets, as a great majority of these markets are not regulated markets. Furthermore, certain examples of market behaviour which pose a threat to the integrity of the energy markets (such as certain market power practices) are not covered by MAD. In order to guarantee market integrity in the energy markets, a great deal of modifications would thus have to be made to MAD (extension to commodity products, enlargement of the scope to unregulated markets, incorporation of new examples of undesired market practices).

94. Furthermore, whilst MAD’s design and concepts have proven to function well in regulated financial markets, the integration of market abuse rules for physical markets in MAD risks to lead to undesired applications of MAD in other areas, which should be avoided.

95. Finally, energy markets also differ in their structure to a large extent from financial markets. For example, as electricity cannot be stored and has thus to be generated and delivered at the same time, restrictions on trading activities may be contrary to other relevant interests, e.g. net stability or security of supply. Any new regulation should therefore take into account the specifics of the electricity and gas markets.

Option 3: Tailor-made insider trading framework for products not covered by MAD in the sector legislation

96. CESR and ERGEG are of the view that the Commission should consider developing and evaluating proposals for a basic, tailor-made market abuse framework within the energy sector legislation for all electricity and gas products not covered by MAD, particularly in the physical markets, which would provide basic principles to secure market integrity.

97. This regulatory framework could address the above mentioned abusive practises, taking into account the specifics of the energy markets.

98. As energy is traded prevalently on unregulated markets and OTC, the new market abuse regime should cover any kind of trading facilities. Regulatory arbitrage would then not be possible. This solution would follow the already widely used concept that sector regulators have monitoring functions on physical markets and would also have less negative impact, as it would not affect other commodities than electricity or gas.

99. Market conduct rules of Nordic Power Exchange Nord Pool could - in some aspects - serve as a model, although it is not a legal framework. E.g. the market conduct rules at Nord Pool prohibit insider trading and define in an annex what is considered as inside information (e.g. planned outages or limitations of plants with more than 100 MW in the next 6 weeks period, unplanned outages or failures of plants with more than 100 MW). Market participants are not allowed to place trading orders in the Nord Pool system as long as they hold these types of insider information exclusively.

100. CESR and ERGEG are aware that the proposed policy would have an impact on both regulators and market participants.

101. The implementation of an entirely new market abuse framework for physical markets would cause incremental cost for competent authorities. Supervision and enforcement of the new rules would require additional staff, training and maybe also IT systems. As a result, besides set-up costs there would be an increase of ongoing costs to the regulator.

102. Market participants would need to implement a compliance organisation. This means the establishment of a compliance function and accompanying measures (e.g. permanent training of staff, monitoring of compliance). As most of the relevant firms are currently not within the scope of market abuse regulation CESR and ERGEG anticipate incremental cost also for market participants.

103. The overall costs and benefits of the proposed policy are difficult to estimate at this stage.

Option 4: Change the commodity derivative specific definition of insider information

104. Finally, CESR and ERGEG analysed the option to change the commodity derivative specific definition of insider information in Art. 1(1) MAD – which is linked to what "users of markets... expect to receive in accordance with accepted market practices on those markets" (cf. paragraphs 47 and 56).

105. However, CESR and ERGEG considered that if transparency/disclosure obligations as proposed above (cf. paragraphs 80 et seq.) would be introduced in the energy regulation, the link in the definition would work better. Art. 4 of Directive 2004/72/EC inter alia stipulates that users of markets on which derivatives on commodities are traded, are deemed to expect to receive information relating to such derivatives which is required to be disclosed in accordance with legal

or regulatory provisions. Bearing in mind also that any change of this definition affects commodity derivatives which are related to other underlyings than energy, CESR and ERGEG at present do not propose to amend the definition in Art. 1(1) MAD.

106. If the CESR and ERGEG proposal for a market abuse framework for physical markets covering all kinds of trading for physical products would be implemented, it might then also be considered if the scope of MAD with regard to commodity derivatives could be extended. This is due to the fact that at least with regard to electricity and gas derivatives a large proportion of trading is conducted on Multilateral Trading Facilities (MTFs). However, this would also affect other commodity derivatives than electricity and gas derivatives and should then be considered carefully.

Market manipulation

Option 1: Keep status quo

107. CESR and ERGEG considered the option to keep the status quo. But there is evidence in the gas and electricity markets that indicates the existence of market power and suggests that there is also an abuse of market power. Thus, this option was not seen as a realistic one as market abuse can hamper the aims of market development and regulation.

108. Enhancing transparency/disclosure of information would have a positive effect on the possibility to prevent and detect market abuses in regulated derivatives markets. However, additional transparency would not prevent incumbent market players to manipulate prices in the physical market. In addition, disclosure and public dissemination of detailed firm and transaction specific information can facilitate coordination in oligopolistic spot and forward markets. Regulatory supervision, surveillance and market oversight is necessary to discourage and detect potential market abuses.

Option 2: Expand scope of the market manipulation prohibition in MAD to physical products

109. CESR and ERGEG considered the option to expand the scope of the market manipulation prohibition in MAD to physical products of the energy and gas markets.

110. However, this policy initiative would not properly address the observed abuse of market power.

111. The market manipulation framework in MAD forbids information-based as well as trade-based manipulation. This covers instances where a person carries out trades to secure a dominant position over the supply of or demand of a product in order to corner the market ("market squeeze"). It has to be stressed that the current regime does not cover any action with regard to the production or generation of a product (e.g. withdrawing capacity), even when this product is admitted to trading. It is also not forbidden to make use (profit) of an existing shortness of a product. This kind of behaviour may already be forbidden under antitrust law for reasons of fair competition or could be established as new additional prohibitions in energy regulation but would not be covered by an extension of the scope of market manipulation prohibition in MAD. As stated before, certain examples of market behaviour which pose a threat to the integrity of the energy markets are not covered by MAD. In order to guarantee market integrity in the energy markets, a great deal of modifications would thus have to be made to MAD (extension to commodity products, enlargement of the scope to unregulated markets, incorporation of new examples of undesired market practices).

112. Furthermore, whilst MAD's design and concepts have proven to function well in regulated financial markets, the integration of market abuse rules for physical markets in MAD risks to lead to undesired application of MAD in other areas, which should be avoided.

Option 3: Tailor-made market manipulation framework for physical markets in the sector legislation

113. CESR and ERGEG are of the view that the Commission should consider developing and evaluating proposals for a basic, tailor-made market abuse framework for all electricity and gas products not

covered by MAD, particularly in physical markets, which would provide basic principles to secure market integrity. This legal framework should be coherent with existing securities and antitrust legislation.

114. A sector specific regulatory framework could address the above mentioned abusive practises, taking into account the specifics of the energy markets. As energy is traded prevalently on unregulated markets and OTC, the new market abuse regime should cover any kind of trading facilities. Regulatory arbitrage would then not be possible. This solution would follow the already widely used concept that sector regulators have monitoring functions on physical markets and would also have less negative impact, as it would not affect other commodities than electricity or gas.

115. Furthermore, this policy proposal would allow for a link of two important issues of physical markets and cross-border transmission capacity markets (the latter is already under the supervision of energy regulators) which is crucial because the combination of both can be a playground for abusive practises. Such a framework would therefore have to support appropriate monitoring cooperation across borders. As any manipulative act in physical markets can have an impact on derivatives markets and vice versa, cooperation between securities and energy regulators is also essential. Therefore, an interface with the competences of securities regulators, which supervise the energy derivatives markets, is needed. Cooperation obligations for competent authorities as stipulated in Art. 16 MAD could serve as a model.

116. CESR and ERGEG are aware that the proposed policy would have an impact on both regulators and market participants. As stated before, the implementation of an entirely new market abuse framework for physical markets would cause incremental costs for competent authorities and market participants.

117. Finally, it has to be noted that the proposed competences for combating market abuse would seem to require that the competent authority is provided with the necessary data to monitor the markets. Extension of competences might thus have to be accompanied by data availability. CESR and ERGEG will analyse this further in connection with the preparation of the advice to the Commission on Section D. of the mandate (record keeping and exchange of information).

Draft response to Q3:

CESR and ERGEG consider that **implementing disclosure obligations comparable to Article 6 MAD in the energy sector regulations** (bundling existing transparency obligations) would improve the situation. Sector specific disclosure obligations should oblige the relevant entities to disclose information likely to influence physical and/or derivatives markets prices in a timely manner and on a single platform. Responsibility for disclosing relevant information should primarily lie on the entity responsible for the relevant activity. Disclosure obligations should not only be legally binding, but also contain a sanction mechanism in case of non-compliance.

CESR and ERGEG are of the view that the Commission should consider developing and evaluating proposals for a basic, **tailor-made market abuse framework in the energy sector legislation for all electricity and gas products not covered by MAD, particularly in the physical markets.** Such legal framework should address the abusive practices observed or potentially applied by market participants on electricity and gas markets. Market conduct rules of Nordic Power Exchange Nord Pool could - in some aspects - serve as a model, although it is not a legal framework. Any new legal framework should take into account the specificities of the electricity and gas markets with regard to any misuse of information and support cooperation appropriate for regional markets. The competences of securities regulators, which supervise the derivatives markets for electricity and gas should also be taken into account when designing such a framework. It should cover any kind of physical market, whether it is an "exchange" or any other kind of trading facility. Competences for combating market abuse would seem to require that the competent authority is provided with the necessary data to monitor the markets with a view of detecting and sanctioning abusive behaviours.

Generally, CESR and ERGEG recognise that market participants would incur costs of compliance with such obligations, but consider the benefits in enhancing confidence in market integrity would be valuable. Increased confidence could in turn result in an increase in participation in these markets and improve their efficiency.

A mere extension of the scope of market abuse regulations (insider trading, market manipulation) in MAD to physical products is not recommended particularly because it would not reflect the needs of the electricity and gas markets and would bear the risk of leading to an inappropriate application of MAD in other areas. CESR and ERGEG doubt the need to change the specific definition of inside information in Art. 1(1) MAD in relation to commodity derivatives if binding disclosure obligations comparable to Art. 6 MAD were introduced in the sector specific energy regulation. The existing prohibition of insider trading in MAD could then be made more workable in every EU/EEA jurisdiction.

Questions to market participants:

6) **What is your opinion on the proposals of CESR and ERGEG in the three different areas: disclosure obligations, insider trading and market manipulation?**

Annex

Mandate

to the Committee of European Securities Regulators (CESR)and the Energy Regulators' Group for Electricity and Gas (ERGEG)

for technical advice pursuant to Articles 22f and 24f and Recitals 20 and 22 respectively in the two proposals for Directives amending Directive 2003/54/EC and Directive 2003/55/EC (The Third Energy Package)

This mandate requests joint advice from CESR and ERGEG on issues concerning record keeping and transparency of transactions in electricity and gas supply contracts and derivatives. The mandate is given in order to find out if additional measures are necessary with respect to transparency in energy trading, as announced by Commissioners Piebalgs and McCreevy following the adoption of the legislative proposals for the internal gas and electricity markets. It is also meant to provide to the Commission the adequate technical background to adopt the guidelines under Articles 22f/24f and Recitals 20 and 22 in the two proposals for Directives amending Directive 2003/54/EC and Directive 2003/55/EC.

This is a draft provisional mandate; it will possibly be completed by additional provisional mandates, depending on the development of the negotiation process before the Council and the European Parliament in relation to the proposed amendments to Directive 2003/54/EC and 2003/55/EC.

This mandate does not prejudice in any way the ongoing negotiations on any article in the Council and the European Parliament in the context of the co-decision procedure. A formal mandate may be sent to CESR and ERGEG once the amendments have been adopted in the co-decision procedure by the European Parliament and Council.

Advice is also sought on a possible clarification of the scope of the Market Abuse Directive in relation to trading in commodities and commodity derivatives.

The present mandate takes into full consideration the agreement on implementing the Lamfalussy recommendations reached with the European Parliament on 5 February 2002. In this agreement, the Commission committed itself to a number of important points, including full transparency. For this reason, this request for technical advice will be published on DG Internal Market's and DG Energy and Transport's web site and the European Parliament will be duly informed.

1. Background and legal framework

The European Commission is to adopt guidelines pursuant to the following:

Article 22f of the Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity relevantly states:

Article 22f

Record keeping

1. Member States shall require supply undertakings to keep at the disposal of the national regulatory authority, the national competition authority and the Commission, for at least five years, the relevant data relating to all transactions in electricity supply contracts and electricity derivatives with wholesale customers and transmission system operators.

2. The data shall include details on the characteristics of the relevant transactions such as duration, delivery and settlement rules, the quantity, the dates and times of execution and the

> transaction prices and means of identifying the wholesale customer concerned, as well as specified details of all unsettled electricity supply contracts and electricity derivatives.
>
> 3. The regulatory authority may decide to make available to market participants elements of this information provided that commercially sensitive information on individual market players or individual transactions is not released. This paragraph shall not apply to information about financial instruments which fall within the scope of Directive 2004/39/EC.
>
> 4. To ensure the uniform application of this Article, the Commission may adopt guidelines which define the methods and arrangements for record keeping as well as the form and content of the data that shall be kept. These measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27b(3).
>
> 5. With respect to transactions in electricity derivatives of supply undertakings with wholesale customers and transmission system operators, this Article shall only apply once the Commission has adopted the guidelines referred to in paragraph 4.
>
> 6. The provisions of this Article shall not create additional obligations vis-à-vis the authorities mentioned in paragraph 1 for entities falling within the scope of Directive 2004/39/EC.
>
> 7. In case the authorities mentioned in paragraph 1 need access to data kept by entities falling within the scope of Directive 2004/39/EC, the authorities responsible under that Directive shall provide the authorities mentioned in paragraph 1 with the required data.

Recital 20 states:

> 20. Prior to adoption by the Commission of guidelines defining further the record keeping requirements, the Agency for the Cooperation of Energy Regulators and the Committee of European Securities Regulators (CESR) should cooperate to investigate and advise the Commission on the content of the guidelines. The Agency and the Committee should also cooperate to further investigate and advise on the question whether transactions in electricity supply contracts and electricity derivatives should be subject to pre and/or post-trade transparency requirements and if so what the content of those requirements should be.

The same provisions apply mutatis mutandis in Article 24f and Recital 22 in the proposal to amend Directive 2003/55/EC for gas.

The mandate also asks CESR and ERGEG for their views on possible clarifications to the scope of the Market Abuse Directive in the context of the review of that directive by the Commission to be completed in early 2009.

2. Consultation and sources of advice

The Commission is to act ‘on the basis of public consultation and in the light of discussions with competent authorities’. The Commission’s White Paper on Financial Services Policy 2005-2010 set out our commitment to open and transparent consultation:18

> Open consultations (including with stakeholder groups) will continue to play a central role and will be required before any legislation is deemed necessary. The Commission will continue to publish responses received to its consultations, practical summaries and feedback statements.

In its advice CESR and ERGEG are asked to consider the advice on commodities markets and trading given separately by CESR and CEBS, the Committee of European Banking Supervisors, in the context of the Commission's ongoing review under Article 65(3) of Directive 2004/39/EC on Markets in

[18] *Op. cit.* at paragraf 2.1.

Financial Instruments, and Article 48(2) and (3) of Directives 2006/49/EC on Capital Adequacy of Investment Firms and Credit Institutions. CESR and ERGEG are also asked to consider the views expressed during the Commission's Call for Evidence on commodities and the conclusions reached in the subsequent feedback statement.[19]

3. The principles to which CESR and ERGEG should have regard

As regards its working approach, CESR and ERGEG are invited to take account of the following principles:

- The principles set out in the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001;
- CESR and ERGEG should provide comprehensive advice on the matters described in Annex I;
- CESR and ERGEG should address to the Commission any questions which arise in the course of its work;
- CESR and ERGEG should also have close regard for the respective roles and functions of their members in various EU jurisdictions, as well as the relationship and levels of cooperation there are between energy and securities regulators in each. To the fullest, they should take this into account when issuing their advice.

4. Questions in relation to which technical advice is sought

Please consult Annex I for a list of questions in relation to which advice is sought.

5. Due date

The advice from CESR and ERGEG is sought by the end of May 2008 for questions in Sections C, E and F, and by the end of December 2008 for questions in Sections D and G.

[19] http://ec.europa.eu/internal_market/securities/docs/isd/derivatives_en.pdf

Annex I

A. Introduction

Well-functioning wholesale energy markets are an essential part of efficient energy markets. As competition develops trading becomes more and more important in the energy market. This means that financial and energy market regulation increasingly intertwine to achieve the goal of an internal energy market.

The Sector Inquiry as performed by DG Competition gave rise to concerns on the trust in and regulatory oversight over trading in energy markets. It concluded that "customers have little trust in the functioning of wholesale markets. They suspect market manipulation on the spot and forward markets by large generators to be the main reason for recent price increases. Concentration is a key factor in the proper analysis of the price developments. Other factors are the developments in fuel prices and the impact of the EU Emission Trading System.

Most wholesale markets have remained national in scope. The level of concentration in generation has remained high in most Member States giving generators scope for market power. The level of concentration in trading markets is less striking than in generation, particularly on forward markets where electricity can be traded several times before delivery. However, all spot and forward markets, even the most developed forward markets, remain dependent on the few players which enjoy a net excess of generation compared to their retail supplies.

Further, an analysis of who determines the clearing price at certain power exchanges indicates that there is scope to directly influence prices by excessive bidding prices for operators in Italy, Spain and Denmark. Possibilities to move prices might also exist in other markets.

In addition to excessive bidding, large operators can push up prices by withdrawing capacity. In that respect, it appears that load factors of generation units have increased over time in Germany and in France suggesting higher efficiency levels and a tighter supply/demand balance. However, significant generation capacity – most of it with low marginal costs – was retired in Germany despite slowly increasing demand. Also, certain plants with rather low marginal costs did not operate fully at all times."

DG Competition then carried out a detailed study of the functioning of the electricity markets in six Member States and the final report was published in April. The first part of the study looks at how many operators are effectively competing on the market on an hourly basis. The second part of the study reports on the difference between what the price of the market was in the period and what it would have been if the markets in DE, ES, NL, and UK had been perfectly competitive. This difference, referred to in the study as the "mark-up", was calculated by stimulating a perfectly competitive market for each hour of the period. The study shows that the mark ups vary over time and between Member States. Mark-ups are generally higher in DE and ES, and lower in GB and NL. The mark-up identified in the study is not the same as the profit of each company.

The third part of the study looks at the relationship between the number of operators competing at a given time and the "mark-ups". This analysis shows that there is a statistically relevant correlation between the numbers of generators who have spare capacity and the mark-ups in each hour: in other words, the more needed generators are, the higher the mark-ups in the market become.

More information on the sector inquiry and the electricity study can be found via http://ec.europa.eu/comm/competition/sectors/energy/inquiry/index.html.

As prices in bilateral contracts with end-customers are increasingly linked to wholesale market prices either directly or indirectly, there will be a growing incentive for the large energy undertakings to use their market power to influence wholesale market prices. The Commission therefore proposed strengthening the transparency requirements on physical information in its legislative proposals of 19 September 2007. It is currently considering the need for additional transparency requirements on trading activities. For example, given the different degrees of transparency between transactions on trading fora, including brokers' screens, and OTC transactions, there is a risk that high priced deals could be directed through transparent fora, thus raising the official wholesale price and having a knock-on effect on end-users.

Commissioners Piebalgs and McCreevy have stated, at the time of the adoption of the legislative proposals for the internal energy market, that transparency of trading in energy markets is a topic that needs further study to see if additional measures are necessary. They have agreed to cooperate with ERGEG and CESR on this topic, and to reach a conclusion by May 2008. Therefore the Commission services have the following mandate for advice to ERGEG and CESR.

B. Definitions

Market failure: any significant sub-optimality in market functioning. For example, where applicable, evidence of this could take the form of a wide dispersion of market prices, persistent concentrated market shares, persistent excess profits, a high level of investor complaints, significant information asymmetries leading to misallocation of resources, excessive risk-taking leading to a potentially high level of systemic risk, etc.

Regulatory failure: a regulatory state of affairs (including at European or at Member State level) which has the effect of:

(i) creating significant competitive distortions; or

(ii) significantly impairing the free movement of services between Member States; or

(iii) encouraging market participants to engage in a significant degree of regulatory arbitrage.

C. Fact-Finding

1. How many of the following also fall under the definition of investment firms under Article 4(1)(1) of Directive 2004/39/EC (MiFID):

   (a) undertakings active in 'supply' of electricity within the meaning of Directive 2003/54/EC (Art 2.19)?

   (b) undertakings active in the 'supply' of natural gas within the meaning of the Directive 2003/55/EC (Art 2.7 and 2.8)?

2. What are the existing record-keeping obligations with respect to transactions in electricity and gas derivatives to which investment firms are subject by reason of MiFID? Consider both the transaction reporting obligation of firms under Article 25 of MiFID as well as the record-keeping obligations under Article 13(6) of MiFID.

3. What (regulatory) authority oversees trading activities in energy markets in EU Member States?

D. Record-keeping

4. Do regulators believe that there should be a difference between the proposed record-keeping obligations under the proposed amendments to the electricity Directive and gas Directive and the existing record-keeping obligations with respect to transactions in electricity and gas derivatives to which investment firms are subject by reason of MiFID (Articles 25 and 13(6))?

5. Pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC (the Third Energy Package), what methods and arrangements for record keeping do CESR and ERGEG consider the Commission should specify as guidelines under this legislation for:

   (a) transactions in electricity and gas supply (spot) contracts? (To the fullest extent possible this should be a harmonised specification.) If there are any deviations from the obligations relating to commodity derivatives already applicable to investment firms, these should be justified;

(b) transactions in electricity and gas derivatives contracts? (To the fullest extent possible this should be a harmonised specification.) If there are any deviations from the recommendations in a), these should be justified.

In answering this question, CESR and energy regulators are asked to consider specifying a single transaction record format based on the content and data to be provided as per Table 1 of Annex I of Regulation EC 1287/2006.

6. How would this information be most efficiently kept at the disposal of authorities as mentioned under paragraph 1 of Article 22f/24f in the case of spot transactions and non-investment firms?

7. How would securities regulators most efficiently provide information to energy regulators pursuant to paragraph 7 of Article 22f/24f?

8. Which securities regulator would most efficiently be responsible for such provision in the case of investment firms with more than one branch?

9. Would it be feasible and efficient to employ the Transaction Reporting Exchange Mechanism (TREM) or a similar electronic system to exchange this data?

10. Is there a case for data to be forwarded from energy regulators to securities regulators on an automatic basis? If so, what data?

E. Transparency

In answering the following, CESR and ERGEG are invited, where applicable, to build on the answers provided in CESR's initial advice to the Commission on commodity and exotic derivatives and related business (CESR/07-429, July 2007).

11. What guidelines and arrangements do energy regulators propose for the making available of aggregate market data by them under paragraph 3 of Article 22f/24f?

12. What requirements, deriving from national law, are currently put on energy traders, brokers or exchanges to publish information 'post-trade', for example on publishing traded volumes, prices etc?

13. What requirements, deriving from national law, are currently put on energy traders, brokers or exchanges to publish information 'pre-trade', for example on publishing bids to organised markets?

14. Is there a difference in transparency requirements for spot trading compared to future and forward trading? If so, why?

15. Is there a difference in transparency requirements for exchange trading compared to OTC trading? If so, why?

16. What information, other than required by law or regulation, is made public by energy traders, brokers, information services or exchanges?

17. Is access to information on traded volumes and prices equal for all parties active in that market?

18. If not, is unequal access to or general lack of information on trading causing distortion of competition?

19. In light of the findings in the Commission Sector Inquiry on energy and the subsequent study of the electricity wholesale markets, please consider:

a) whether, pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC, greater EU-wide pre- and/or post-trade transparency rules for electricity and gas supply contracts (physical and spot trading) and electricity and gas derivatives would contribute to a more efficient wholesale price formation process and efficient and secure energy markets;

b) whether such transparency arrangements could be expected to effectively mitigate the concerns identified in the Sector Inquiry above;

c) whether uniform EU-wide pre- and post-trade transparency could have other benefits;

d) whether additional transparency in trading could have negative effects on these markets, for example could liquidity in these markets be expected to decrease? Is there a risk that trading could shift to third countries to escape regulation?

e) If you believe that there are risks arising from additional pre- and post-trade transparency requirements, how do you believe that these risks can be mitigated (e.g. aggregation, delay in publication, anonymity)?

F. Market abuse

20. Is the scope of Directive 2003/6/EC on insider dealing and market manipulation (market abuse) such as to properly address market integrity issues in the electricity and gas markets? Would the assessment be different if greater transparency obligations in line with the analysis above were adopted? What suggestions do regulators have to mitigate any shortcomings?

G. General

21. What timelines or delays should be built into the implementation of any of the above recommendations?

Impact analysis

CESR and ERGEG should analyse the options that they identify in an initial screening for further study in terms of likely impacts (costs and benefits) on market quality, and on market users including intermediaries and consumers/suppliers of commodities.

To the extent possible, in developing their advice CESR and ERGEG should apply the framework for impact analysis recently drawn up by the 3 Lamfalussy Level 3 Committees.

Wherever possible, quantitative and statistical data and economic analysis should be provided to justify conclusions.