

Public Consultation on
Measures to ensure transparency and integrity
of wholesale markets in electricity and gas
– Response of the ECT-Group –

I. Introductory Comments

We are representing the Energy Commodity Traders Group ("ECT-Group"), a group of mostly German energy trading firms which established a joint working and discussion group for the exchange of experiences in financial and physical energy trading and for the co-ordination of the communication with German and European authorities. We would like to respond to the Public Consultation on measures to ensure transparency and integrity of wholesale markets in electricity and gas.

The ECT-Group consists of entities active in the energy trading sector; several of them pursue also banking activities or render financial services related to energy derivative products. Entities which pursue banking activities or render financial services related to commodity derivatives are according to the German Banking Act investment firms which have to apply for a license in order to carry out the banking activities or financial services related to commodity derivatives and which are supervised by the German Financial Supervisory Authority Bundesanstalt für Finanzdienstleistungsaufsicht ("BaFin"). The ECT-Group serves as a platform for such firms in order to develop common positions with respect to the financial supervision and to communicate them to BaFin and other legislative and administrative bodies. There has been a steady and successful cooperation between BaFin and the ECT-Group in order to develop an adequate supervisory regime for investment firms rendering financial services related to energy derivative products.

II. Statement

The ECT-Group supports the Commission's efforts to ensure transparency on the electricity and gas markets and enhance integrity of energy markets by expanding the prohibition of insider trading and market manipulation to the entire energy sector.

However, these aims must not be pursued in such a way that an additional regulatory regime is set up in addition to the already existing regulatory measures, thus creating dual

structures. We rather need a regime that brings together the already existing regulatory measures, so that energy market participants need to spend less time and money.

In this respect, it is important that an EU-wide standardised oversight regime for energy markets will be created including both regulations on market transparency as well as regulations on market integrity. Such a regime must be tailor-made for energy markets and should not just copy existing regulations for financial markets.

The aims to be achieved and the costs and burdens associated therewith for market participants must, at the same time, be weighed up.

It is therefore absolutely necessary that exemptions and *de minimis* regulations should exist for small and medium-sized market participants. With their generated and traded volumes, small and medium-sized market participants have no significant influence on market prices. Hence, the obligations imposed on them would not contribute to fulfilling their intended regulatory purpose. On the other hand, the regulatory costs (especially) for small and medium-sized companies would be very high: they need additional IT, additional personnel, additional legal advice and would thus have to bear considerably higher costs for their small volumes, so that they would be ousted from the market. This would lead to lower market liquidity and thus higher prices.

III. Detailed answers to the questions

In the following, we would like to respond to the questions in detail:

(1) Are there particular developments in relation to oversight of energy markets at a national, European or global level that we have not properly considered?

No.

(2) Do you agree that the current Regulatory Framework should be updated to include clear rules governing energy market oversight? Please justify your reply.

Yes. But it is not just an “update” of the current regulatory framework that is required. It is rather necessary to create a uniform and tailor-made framework at all. The currently existing rules are confusingly distributed over some laws and incomplete. Besides, the Member States have established different regulatory requirements. And many authorities (energy regulators, financial regulators, competition authorities, exchange supervisory authorities) are also only in charge of parts of the regulatory framework. In addition, there are no regulations against market abuse on energy markets.

This makes it not only more difficult for market participants to comply with all statutory obligations, but leads also to legal uncertainty. This is especially for small and medium-sized companies a barrier to entry into the market.

Hence, we would welcome the creation of a uniform regulatory framework for market transparency and market integrity tailored to energy markets, which would also result in a harmonisation of competences.

(3) Do you agree that this update should ensure integrated/coordinated oversight between financial and commodity markets and across borders.

Yes. It must be especially prevented that certain matters are covered by several regulatory systems. It might be best if the energy market regulators collect also the energy derivatives data and not the financial market regulators.

(4) Do you agree that the overlap of physical, and financial (derivative) markets, and the cross border nature of the market currently leads to sub-optimal oversight of energy markets?

Yes. We agree that there is currently only a sub-optimal oversight of energy markets (see above). The current rudimentary and fragmented regulation of energy trading in Europe takes no account of the special structures of the market: many, to some extent very different market participants, cross-border trading, derivatives markets indispensable for hedging transactions and ever-increasing liquidity require an EU-wide congruent regulatory regime clearly defining European and national responsibilities.

(5) Do you agree that definitions of market misconduct for gas and electricity markets should be consistent across EU? If not, why not?

Yes, definitions of market misconduct must be unambiguous. These definitions must also be consistent within the EU to ensure the same competitive conditions and effective market oversight. By establishing consistent definitions, the costs for a market abuse regime may be kept at a reasonable level. Consistent definitions also play a significant part in establishing legal certainty and avoiding regulatory arbitrage.

(6) Do you agree that market misconduct should follow the MAD definitions? If not, why not?

No, energy markets must have their own definition for market misconduct, since both the specific needs of energy markets and the differences between energy and financial markets

must be taken into account. Therefore, it is out of the question that MAD will be applied one-to-one to energy markets. The structure of MAD could, however, serve as a model for a market misconduct regime on energy markets. Especially the relevant basic terms such as “insider information” and “market manipulation” cannot be just interpreted in terms of energy market specificities, but must be given their own, new definitions.

For example: Insider dealing in wholesale energy trading and thus using insider information comprises a considerably larger scope of application than is allowed by the reference in MAD to financial instruments traded by financial institutions on regulated markets and exchanges. Hence, the basic definition of insider information for energy markets must have a wider scope than in MAD. It must cover the entire energy market. But it must also be tailored to the specificities of the energy sector. There are probably also independent situations of market manipulation in the very special energy commodity market. Finally, it must be clarified which groups of persons the rules on market abuse shall address. An independent definition of “energy market participant” is therefore necessary.

(7) Do you agree that specific account of the specificities of the physical energy markets should be taken of energy markets through guidance rather than in legislation? If not, why not?

No. Guidance is not appropriate to take into account the specificities of the energy market. For energy market participants it would not create sufficient clarity and definiteness of rules of law and it would contribute to legal uncertainty. Please see also our responses to questions 5 and 6.

We recommend that the necessary market abuse rules are laid down directly in a Directive/Regulation by the European Commission and that further details will then be stipulated in a second step in binding EU guidelines.

(8) Do you agree that regular market monitoring is an essential function to detect market misconduct?

Yes. We believe that regular market monitoring can help detect market misconduct in certain cases. However, in this respect the cost-benefit-ratio should be taken into account. On the one hand, not every market development on energy markets that seems to be implausible at first glance can be put down to market misconduct. On the other hand, monitoring must not place unnecessary burden upon small and medium-sized market participants the volumes of which do not have the importance to influence the market price significantly. Hence, it is necessary to provide for thresholds and exemptions for these market participants.

In addition, the various data disclosure obligations and transparency requirements should be brought together and standardised to limit the significant costs and effort for monitoring. Therefore, it would make sense to collect the data directly from the trading venues instead of from the market participants.

It is important that the term „monitoring” is laid down clearly and conclusively to ensure legal certainty and efficiency of procedures. In a first step, monitoring should comprise the collection of market data (i.e. fundamental data and data on transactions) which, in a second step, will be examined for indications of market manipulating behaviour. It is important that ACER, the European supervisory authority, receives both datasets to be able to correctly assess price developments against the background fundamental data.

(9) If yes, given the characteristics of wholesale energy markets, do you agree that market monitoring is best organised on EU level?

The answer to this questions depends on how monitoring is exactly defined. If monitoring just means the collection and analysis of data and information, the question can be answered in the affirmative.

(10) If yes, do you believe that ACER should be given the role of an EU level monitoring body for wholesale energy markets?

Yes.

(11) Do you agree that the EU level monitoring body for energy markets should have a coordinating role to ensure effective application of EU level rules for energy markets? If not, why not?

The answer to this question depends on which responsibilities shall be associated with this coordinating role. As far as such a coordinating role amounts to nothing more than initiating the harmonisation of rules and developing a common understanding for them to ensure the same competitive conditions, this can be welcomed. The possibility to decide on single cases must, however, be ruled out. The rules should be enforced by the national authorities, since they better understand the particularities of each national market.

(12) In your view, would enforcement of market misconduct rules be best organised on national level or EU level?

We believe that enforcement of market misconduct rules should be organised on national level. On national level, the factual questions to be assessed can be comprehended more easily, since national authorities are closer to market participants and the respective markets.

a) If on national level, would national energy regulators or national financial regulators be better placed to enforce compliance?

On national level, the energy regulator having better expertise and understanding of the energy markets would be better suited to enforce compliance.

b) If on European level, which institution would be best placed to enforce compliance?

On European level, ACER would be best placed, which, however, we do not recommend organizing the enforcement on the European level (see above).

(13) Do you agree that the market monitoring body for energy markets should also be able to monitor EUA transaction?

Yes. A joint regulation means that also all monitoring obligations should be complied with vis-à-vis one body to avoid an unnecessary increase of costs and effort for market participants.

(14) Would monitoring of traded carbon markets be best organised on national or on EU level?

Carbon markets should be monitored along with electricity and gas markets. Anything else would be associated with unnecessary effort for market participants and counterproductive.

(15) If on EU level, do you believe that ACER could be an appropriate monitoring body?

Yes.

(16) Do you agree that it is not appropriate, at least at present, to consider coal, oil and other commodities along with wholesale gas and electricity markets? If not, why not?

Not in the long term. Because such an approach would be inconsistent: energy-related commodity markets are linked up with each other, since the most favourable primary energy source is being increasingly used on energy markets. This inter-linkage has been especially intensified via the high costs for emission allowances. Hence, a regulatory regime considering only individual energy products would be incomplete and ineffective. We see the Commission's point that oil and coal markets are more global than other energy markets. Still we believe that in the long term it would not make sense to exclude some commodities. Energy markets could otherwise be manipulated through unregulated commodities, so that the time and money spent by market participants would not be justified. Therefore, it should at least be tried to achieve uniform rules for all energy product markets (electricity, gas, carbon, coal, oil and transport capacity rights).

(17) Do you agree that it is appropriate to apply exemptions and *de minimis* levels? If not, why not?

Yes. Exemptions and *de minimis* levels are indispensable for a working market. Otherwise the planned regulatory measures would in practice turn out to be barriers deterring small and medium-sized market participants: the technical, operational and financial burden placed on these market participants would oust them from the market. This would weaken competition, lead to lower liquidity in the markets and finally increase prices.

Imposing too strong obligations on small and medium-sized market participants would be also inappropriate, since they have no significant market relevance. Imposing on them the same obligations as on large-scale market participants would not only be inappropriate but would also not contribute to achieving the aims intended by regulation.

Against this backdrop, it is decisive that the planned *de minimis* levels are not too low to have a practical effect. In addition, general exemptions shall be made for specific groups of market participants. Both *de minimis* rules and exemptions must be easy to handle in practise and unambiguous.

(18) Do you agree that market data relating energy market transactions should be reported centrally? If not, why not?

Yes. Energy trading transactions should, in any case, be reported centrally to an EU-wide trading register. This body must be subject to the absolute oversight of ACER. ACER, in turn, should, automatically or upon request, forward these data to the national regulators. These data should be forwarded by the trading platform where the transaction was actually made (exchange or MTF). For the remaining OTC trading it is, however, decisive, that there is no reporting obligation in a timely manner. Against the backdrop that these transactions make up only a relatively small portion of the overall market, a yearly reporting timeline to round off the data should do (as indicated in footnote 11 of the Consultation). In addition, small and medium-sized market participants should not be required to meet excessive IT and data format requirements.

(19) Do you agree the body with an oversight role requires full access to fundamental data relating to carbon?

The answer to this question depends on how wide the scope of the term “fundamental data” is. The supervisory body could have access to fundamental data to the extent described in the Consultation. But it is not necessary to additionally record data on trading positions and suchlike, or other data subject to the protection of business secrets and business documents, since these have already been made available complying with the record keeping obligation and can be accessed at any time.

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