Response of RWE Supply&Trading GmbH (RWEST) to Public Consultation by the Directorate General for Energy on measures to ensure transparency and integrity of wholesale markets in electricity and gas, 31st May 2010

23.07.2010

Introduction

We support that DG Energy creates a proportionate EU market transparency and integrity regime which takes the features of the energy wholesale trading markets into account and fosters further market development. We are of the opinion that such a regime should ideally cover the whole physical energy and energy derivatives trading markets in power, gas and CO2 to create a single EU-wide harmonized regime. We believe that this should be done within the internal energy market legislation, ideally through a new Energy Market Transparency and Integrity Regulation.

If the EU Commission does not create such a single legislative measure for energy, the EU Commission should ensure that the market integrity and transparency of at least physical power, gas and CO2 markets are covered under such energy market legislation.

The Market Abuse Directive (MAD) should not be extended beyond the commodity derivative/exotic derivative markets into the underlying spot and physical energy markets.

In this context we advocate the following general principles for an EU market transparency and integrity regime for the energy wholesale trading markets:

1. The EU market transparency and integrity regime should be an **EU-wide binding regime within the internal energy market sector legislation** (hereafter the *"**EU TIR**"*). This will ensure a harmonized and EU-wide level playing field. A voluntary regime would not ensure harmonized obligation and application and hinders in practice a level-playing field across the EU, because different voluntary regimes would be created in the different Member States.

2. This EU TIR shall entail a **transparency and market integrity regime for physical energy wholesale trading markets**. The market integrity regime comprises an insider dealing and market manipulation provision as well as transaction reporting obligations. It should also provide for transparency of fundamental data and trade data.[1]

3. **In an ideal world scenario this EU TIR should be comprehensive enough to cover the whole energy trading markets and to create a single EU-wide harmonized regime.** A participant should be allowed to act on the underlying physical energy (gas, power, CO2) and energy derivatives markets without being exposed to several sets of regulation of market integrity and transparency, so that the EU TIR should cover both the physical energy and the energy derivatives markets. Under this regime, energy (power, gas) and CO_2 products would be exempt from MAD.

4. Recent EU developments[2] indicate that **EU TIR would probably cover the underlying physical power and gas markets (spot and forward) and the Market Abuse Directive would likely be extended to the energy/commodity derivatives products traded on Regulated Markets (exchanges) and Multilateral Trading Platforms ("MTFs") and certain OTC derivatives**. In addition, regulatory initiatives exist which entrust the EU and national financial regulators under the MAD with the mission of monitoring, supervising and enforcing an EU market integrity and transparency regime for CO_2.[3] If this is the outcome, these different regimes need to ensure that there is full coverage of market abuse and transparency legislation to all markets/products to guarantee a level playing field and avoid regulatory arbitrage.

5. **Whatever the outcome, we strongly support an integrated/coordinated European level oversight regime:**[4] In this oversight model ACER (Agency for Cooperation of Energy Regulators) could monitor the market integrity and transparency of the underlying physical energy wholesale trading markets and have a coordinating role to ensure harmonized and effective application of the EU TIR. National regulators would remain responsible in their jurisdiction for the supervision and sanctioning of firms and

[1] Please see our response to Question 2, Section I for a more detailed explanation of the content of a market integrity and transparency regime.
[2] Please see public consultation of DG Internal Market on a revision of the Market Abuse Directive (MAD), 25.06.2010, pages 3-4 and 6 – 7;: see under: http://ec.europa.eu/internal_market/securities/abuse/index_en.htm; please see our response to Questions 9 to 12, Section II for further explanation .
[3] Please see response to Questions 13 – 15 below.
[4] Please see response to Question 3 and Questions 9 – 12 below.

enforcement of the EU TIR. In addition, it is necessary to install an integrated/coordinated European level oversight regime between all regulations, regulators and markets. For this reason ACER and national energy regulators on one side and ESMA and national financial regulators on the other side need to exchange information, cooperate and coordinate their actions. We have attached a **graphical description of such an integrated/coordinated European level oversight regime** (see attachment).

6. In this regulatory oversight system, it should be ensured that there is neither **overlap nor duplication and contradiction** between both sets of energy and financial market regulation and **proper coordination** between energy and financial market regulators.[5]

7. This EU TIR shall be created with the aim of reaching a maximum harmonisation. **To reach a maximum harmonisation, we believe that an EU Regulation is necessary** to address the need to prevent Member States legislators from adopting super-equivalent and/or different measures regulating energy markets and transactions, once a new EU TIR is in place. Also, the European legal instrument should not only be descriptive but also exhaustive, detailed and specific, because an open-ended regime would be too vague and raise serious regulatory concerns and offer Member States possibilities to implement different rules. This could be realized through the adoption of Level 1 and 2 measures.

8. **We propose the following multi-level approach to define the EU TIR:**[6] On the first level the EU Commission should set out the EU-wide fundamental framework principles in an EU Regulation. At the second level, the EU Commission would adopt relevant binding implementing guidelines on an EU level (based on ACER guidelines): These should be binding guidelines to define the details of, for instance, trade and fundamental data transparency, insider information and market manipulation etc.[7] The advantage of this approach is for example that the guidelines can take into account the specifics of the energy wholesale trading markets, ensure coordination, harmonization and the flexibility of the regime.

9. **The main aims of the EU TIR should be clearly stated and respected in the later legislative process**: These are market transparency and market integrity to foster further

[5] See Question 9 – 12, Section II for more detailed response.
[6] Please see our response to Questions 6 – 7 below.
[7] Please see our response to Question 2, Section I. 1. and Questions 6 – 7 below

market development. The measures should aim to further improve the reliability of open and competitive energy trading wholesale markets. It shall improve the trust participants have in the market and its price building mechanisms. This is the best way to give this still not fully mature market (in some Member States even emerging market) a positive brand and would facilitate the entrance of new market participants: A brand of transparent and fair energy trading/wholesale markets would attract market participants and most likely increase liquidity. Therefore, the proposals will secure the quality of the power/gas trading market places in terms of fairness, efficiency, transparency and liquidity of the markets as well as regulatory oversight and avoidance of insider dealing and market manipulation / abuse. In doing so, more confidence in price formation is intended as well as an increase in competition, leading to competitive power/gas prices for consumers.

10. **This EU TIR shall be adapted to the specifics of the energy wholesale trading markets, its products, participants and market places.** It shall not be a "copy-paste-exercise" on the basis of the existing Market Abuse Directive.

11. **There should be a transfer of all relevant market integrity and transparency obligations into this EU TIR.** This serves the aim of clarity and consistency of regulation (better regulation approach) and avoids the integration of these measures through different instruments and comitology procedures. Therefore and as a minimum, the Record Keeping provisions of the 3rd package (see Art. 40 Power Directive; Art. 44 Gas Directive) should be transferred in the EU TIR.

12. **This EU TIR should respect the principles of better regulation, in particular it shall be appropriate and proportionate in light of its aims.** Hence, a right balance between the interest of market transparency / market integrity on the one hand and the legitimate interest of market participants and on the other hand of a still emerging EU energy wholesale trading market needs to be respected. The potential burden of regulation on small and medium-sized market participants could be addressed by "de-minimis rules" or similar regulatory mechanisms (based on specific thresholds). Also, we urge the EU Commission to perform a full cost-benefit analysis and an impact assessment.

13. **The EU TIR should not lead to regulatory arbitrage[8] and to a competitive disadvantage of EU based energy trading firms.** Any kind of regulatory arbitrage could put European players and markets places into a competitive disadvantage vis-à-vis those in non-EU jurisdiction and, as a result, put European regulatory authorities into an even less comfortable situation. Therefore, the EU TIR should only create an attractive EU market place, which can compete with other international market places.

[8] Regulatory arbitrage (under these proposals) is actually possible in a number of different ways, e.g. market participants (energy firms, banks, etc.) and/or operators of market places (exchanges, platforms) could envisage moving their activities/operations to less onerous regulatory environments, e.g. to non EU-jurisdictions.

In the following sections we respond in detail to the questions of the consultation:

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?

We are of the opinion that DG Energy has considered the relevant legal situation and expected developments, but we would really like to point out the significant differences between wholesale energy firms / businesses and the traditional financial services / businesses and demonstrate that wholesale energy trading firms do not give rise to issues of investor protection and financial stability. Consequently, we strongly oppose any simple like-for-like application of financial markets regulation to the wholesale energy trading markets, because this would contradict the aims of the energy market liberalisation, ignore the specifics of the energy wholesale trading markets, have a negative impact on electricity and gas markets and hamper the development of integrated and efficient European markets by reducing liquidity and the number of competitors. Therefore, we are of the opinion that a specific market integrity and transparency regime within energy legislation of DG Energy for the entire energy wholesale trading markets is more appropriate.

Some of the main differences are:

- **The financial crisis was not caused by non-financial energy trading companies being active on the wholesale energy markets** but evolved from bubbles in the real estate and financial markets as well as highly complex securities (CDS, ABS, etc.). This view is also shared by the report of the European Parliament's Committee on Economic and Monetary Affairs (Langen Report).[9]

- **There is no evidence that energy trading and the companies operating in this sector give rise to any systemic risk.** Unlike failures in the financial markets, the withdrawal of individual market participants from the energy sector has so far not resulted in any domino effect and market collapse. Energy traders operate on their own account and in the

[9] Report of the EU Parliament on derivatives markets: future policy actions, 7.6.2010, page 5, ref. O: "whereas most derivatives used by non-financial end-users involve limited systemic risk taken individually, and for the most part serve merely to hedge real transactions, and whereas non-financial institutions are firms that do not come within the scope of the MiFID (non-MiFID firms), such as airlines, car manufacturers and commodity dealers, which have neither created a systemic risk for the financial markets nor been directly harmed by the financial crisis".

event of failure, no public intervention is required to ensure financial stability and the protection of investors. Due to the fact that the utmost level of security of supply is always required in the energy sector, power plants have continued to operate and security of supply has never been at risk at any point of time during recent and past crises, even when individual companies had difficulties. Hence, activities of energy trading firms in the financial markets neither have created any systemic risk in the past nor is there any reason to believe that they will in future. This view is supported by the Advice of the Committee of European Banking Supervisors (CEBS) dated 10th October 2007 to the EU Commission (CEBS-Advice)[10] which clearly stated that *"systemic risk concerns … appear significantly smaller relative to the systemic risks posed by banks and ISD financial investment firms. In the commodities case studies examined in this report, systemic concerns were limited and contained."*[11] The CEBS-Advice concludes that *"it is unlikely that one participant in the energy trading market could cause the collapse of the energy industry, i.e. the production and distribution of energy commodities, despite this industry's dependence on the respective commodities markets via its 'natural' positions. There were several notable bankruptcies in recent years involving key players in the energy markets but the impact on the energy industry overall has been limited (e.g. Enron, Transworld Oil, Gatt Oil)."*[12] There has been no significant change in this position since that time and the assessment remains valid. Both CESR and CEBS are still[13] also advising the EU Commission to retain exemptions for wholesale commodity trading firms from the two core pillars of financial regulation designed to guarantee financial stability and investor protection, namely MiFID (Markets in Financial Instrument Directive)[14] and the CRD (Capital Requirements Directive)[15]. This view is also shared by the Langen Report.[16]

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[10] Please see under: http://www.c-ebs.org/getdoc/56ec266c-981c-4b95-93cf-103ab9f76b08/Commoditiesriskassessment10102007.aspx.

[11] Please see CEBS-Advice, page 2, ref. 12.

[12] Please see: CEBS-Advice, page 22, ref. 75; see also for the Enron case study: CEBS-Advice, page 31, ref. 122 et seq.

[13] Recently CESR has confirmed this assessment in consultation CESR/10-417 of 13th April 2010 on "investor protection and intermediaries" in the context of the MiFID-Review, see ref. 8, page 8; see under: http://www.cesr-eu.org/index.php?page=consultation_details&id=160. The joint CESR-CEBS-Advice (ref. CESR/08-752) of 15th October 2008 confirmed this assessment, see ref. 12, ref. 38 et seq., 213 et seq., 282 et seq.; see under: http://www.c-ebs.org/getdoc/ee9b85fa-4d64-48dc-9f45-a7350881ddac/2008-15-10-CESR-CEBS-advice-on-Commodities.aspx

[14] See exemption of Article 2.(1).k MiFID.

[15] See exemption of Articles 45 and 48 CRD.

[16] Report of the EU Parliament on derivatives markets: future policy actions, 7.6.2010, page 5, ref. O: "whereas most derivatives used by non-financial end-users involve limited systemic risk taken individually, and for the most part serve merely to hedge real transactions, and whereas non-financial institutions are firms that do not come within the scope of the MiFID (non-MiFID firms), such as airlines, car manufacturers and commodity dealers, which have neither created a systemic risk for the financial markets nor been directly harmed by the financial crisis".

- **Energy derivatives are supported by strong underlying physical markets, with prices driven by physical supply and demand.** Daily prices are determined by fundamental supply and demand. This daily or even hourly link to real supply is even more apparent when it comes to electricity which cannot be stored. Grids and power plants continued to function even when energy traders collapsed - due to sectoral regulation to ensure continuity and security of supply and bankruptcy laws/proceedings in the event of a firm failure. In contrast, there are no solid assets like commodities, power plants or grids behind financial companies and products.

- **Unlike participants in the financial market, many different companies operate in energy trading.** Apart from large players in the market (energy companies, large industrial consumers, oil corporations and banks), smaller trading partners like municipal utilities and retail companies also operate in the market. This results in a valuable market player diversity and therefore a lower level of market concentration which decreases systemic risks.

- **One key motivation for politicians to opt for more regulation of the financial sector is the fact that many private investors risked losing their savings in the banking crisis if the government had not intervened. However, a concept of consumer protection of this sort is not a valid concern in energy trading.** This is because the counterparties to energy trading transactions are generally professional traders and energy companies and not private customers. CEBS concluded that in most commodity markets there is very little direct private client participation and negligible direct contact between private clients and energy trading firms.[17] Energy trading firms do not take deposits from the public and typically present no direct exposure to depositors. Unlike some financial institutions, energy trading firms do not offer commodity linked investment products to private investors.

- **The vast majority of energy trading firms primarily use derivatives for hedging and mitigating current and future risks arising from the physical nature of their underlying operational businesses.** Non-financial energy trading firms generally have a naturally long (e.g. electricity producer is long with electricity) or short position (e.g.

[17] Please see CEBS-Advice, page 26, ref. 95 – 99.

electricity producer is short with fuel and CO_2) in the underlying physical markets. This natural position creates an associated price risk which firms have to manage. Efficient risk management means that firms seek to hedge this price and commercial risk in the market through derivative products.

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, we recommend that DG Energy creates a tailor-made market transparency and integrity regime based on the general principles and reasons explained in the introduction above.

In this context, we advocate the content of the market transparency and integrity regime, explained in Section I below.

In addition, we strongly support such a regime to avoid the shortcomings of the current regulatory situation as explained in Section II below:

I. Content of EU TIR

We propose the following contents of an EU TIR:

1. EU Transparency Regime

The transparency regime consisting of transparency in respect of fundamental and trade data as follows:

a. Transparency of fundamental data:

The EU TIR should guarantee the transparency of fundamental data. Fundamental data is the information, which has an effect on the price formation process for power, CO_2 and gas products. In general this can be data on physical production, transmission, storage and consumption of gas and electricity. We are of the opinion that the requirements for transparency of fundamental data should be the same in the gas and power sector, in particular

in respect of production data. There is no obvious reason why gas production and power production should be treated differently. Transparency of fundamental data means the disclosure of such information to the public domain by the operator of the infrastructure. We are of the opinion that fundamental data shall be published close to a real time basis.

The EU Commission has stated that this fundamental data regime can be realized through appropriate amendments to the EU Cross-Border Regulations for Power and Gas of the 3rd Energy Package[18] and the adoption of according transparency guidelines under these EU Regulations. In this context we think that it is necessary that these guidelines define the relevant fundamental data in an explicit and inclusive way and the manner of the publication as such (timing, aggregation, etc.) to guarantee clarity of the fundamental data regime and certainty for market participants. We support the fundamental data list which EFET has presented to the EU Commission[19].

However, we think that the fundamental data regime should be further strengthened in order to achieve a more consistent EU approach. Although it is correct to say that the 3rd Energy Package contains rules which allow for the adoption of legally binding guidelines in relation to data on physical production, transmission and consumption and that in the electricity sector ERGEG has been appointed to develop such guidelines, we strongly believe that such guidelines should be an integral part a wider EU TIR. Fundamental data have the most important impact on the price formation process for electricity and gas. Therefore, the fundamental data regime is absolutely essential for the energy wholesale trading markets and should be the cornerstone of the EU TIR. For this reason the EU Commission should embody the main principles in primary EU legislation, e.g. via modification of the Cross-Border Gas and Electricity Regulation or in the EU TIR.

A basic requirement of this regime is the definition of which fundamental data should be disclosed to the public and which information represents insider information before public release. In this context it shall be necessary to define explicitly and in a comprehensive way the relevant fundamental *data, who* has the duty of publication, the *manner*, (i.e. aggregate

[18] Regulation of the European Parliament and of the Council on conditions for access to the natural gas transmission networks and repealing regulation (EC) NO 1775 / 2005 and Regulation of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges in electricity and repealing regulation (EC) NO 1228 / 2003.

[19] See attached: Response of EFET to DG Tren's mandate to design an ideal world scenario for fundamental data transparency.

versus individual basis) the *timing* (i.e. close to real time versus other deadlines) of publication to ensure consistency with the timeframe for commercial and operational decisions. This should allow all market participants to have the relevant information about when to buy, when to sell, at what price and in what volume. Hence we highlight the need for transparency of fundamental data, both to create a level playing field for market participants and to let market mechanisms operate in the most efficient way. However, the level of transparency must be seen as a balance between the market's needs for transparency, better utilisation of assets and fair trading on one side and the need for giving investors sufficient incentive for constructing physical assets on the other side.

b. Post-trade transparency of trade data

The EU TIR should guarantee the post-trade transparency of trade data. Post-trade transparency refers to the publication of trade information on executed trade transactions in respect of power and gas products on a real/near real-time basis (*"Post Trade Transparency"*). Trade transactions means standardized transactions on Regulated Markets, MTFs and OTC-Markets. The post-trade transparency should not be limited to the underlying physical power and gas markets (spot and forward), but extend to all energy derivatives products. However, overlap and duplication of trade publication by firms, in particular MiFID-firms, should be avoided, for instance, by data exchange between the different trade repositories.

The disclosure of trades transacted through Regulated Markets, MTFs, broker platforms or central counterparty clearing to the public shall be made by the operators of these facilities or, if applicable, by a central trade repository. For pure bilateral OTC trades a cost effective, practicable and proportionate solution has to be found. It is also necessary to define explicitly and inclusively the relevant data and the manner of the publication as such (timing, aggregation, etc.) to guarantee clarity and certainty for market participants.

We insist that competent regulators or trade repositories must not publish commercially sensitive information which should only be accessible by duly authorised regulators.

2. Market Integrity Regime for underlying physical power and gas markets

The Market Integrity Regime shall consist of an insider dealing regime and a market manipulation regime for the underlying physical power and gas markets (spot and forward).

a. Insider Dealing Regime

The insider dealing regime forbids any person who possesses insider information

- to make use of insider information by acquiring or disposing financial instruments for their own profit;
- to disclose or make available insider information to a third party without the authority to do so; and
- to recommend, on the basis of insider information, to a third party to acquire or dispose of financial instruments, or to otherwise induce a third party to do so.

The definition of insider information needs to be tailor-made: The current general or commodity specific definition of insider information in MAD is ill-suited for commodity markets, because it applies in general to all businesses or is actually difficult to apply. It is necessary to define exactly what constitutes insider information based on the above-mentioned definition of fundamental data and on the specifics of the wholesale energy markets. Such definition should be explicit and inclusive.

The insider dealing prohibition needs to take into account the specifics of the energy industry, e.g. geographically, there is not yet one single power and gas market across the EU, but rather several regional markets (market A, B, C, …). We understand that if a power plant operator has an outage in market A, that operator or its affiliate should not be allowed to trade in market A, but could be allowed to trade with certain products in markets B, C, D,... if the power plant outage has no price effects in these markets.

b. Market Manipulation Regime

The prohibition of market manipulation forbids any person

- from disseminating information which gives or is likely to give, false or misleading signals to the price of financial instruments;
- from executing transactions or giving orders to trade, which give or are likely to give, false or misleading signals to the price of financial instruments, and
- from manipulating the price of financial instruments via other forms of deception.

An exact definition of what constitutes market manipulation is necessary to guarantee regulatory clarity and certainty for market participants and such definition should be tailor-made.

This regime needs to also address the problems of market manipulation revolving around the dispatch and pricing of power production, but should at the same time ensure that optimisation of assets is recognised as acceptable market behaviour. Otherwise there will be significant inefficiency in the operation of energy infrastructure (power plants, gas production facilities, LNG, storage etc).

c. Transaction reporting

Transaction reporting is a necessary tool for the detection of market abuse by the competent regulator (i.e. insider dealing and market manipulation).[20] Transaction reporting leads to the communication of the transaction details by market participants to the competent regulator on a frequent, periodic basis. In this context, it is necessary that the EU TIR defines in an explicit and inclusive way the relevant transaction data and the manner of the publication as such (format, timing, frequency, etc.), to guarantee clarity and certainty for market participants.

[20] Please for detailed explanation our response to Question 18.

II. Shortcomings of the current regulatory situation

The current situation is the existence of a multiple, scattered and insufficient national and EU oversight regime for energy wholesale trading markets combined with multiple national and EU regulatory authorities. It is obvious that such a multitude of regulatory bodies and their regimes, as well as the existing important regulatory gaps, is not an optimal regulatory design. This leads to overlapping and contradictory regulatory oversight and decisions and legal uncertainty for market participants. The costs of such a multitude of regimes leads to a market entry barrier and could also cause the exit of existing market participants, because market participants and new entrants have to handle these national and EU authorities and their regimes.

Therefore the current regulatory framework should be updated to

1. ***close existing regulatory gaps in respect of the wholesale energy trading markets*** and
2. ***avoid shortcomings of the current regulatory oversight over the wholesale energy trading markets***[21]**.**

In more detail:

Ad 1.) The current regulatory framework should be updated on a proportionate basis to close the following important regulatory gaps in the oversight of energy wholesale markets (power, gas, CO_2), which have been identified by CESR-ERGEG in their advice of October 2008 on Market Abuse (Ref: CESR/08-739 – "CESR-ERGEG Advice on Market Abuse") [22] and of December on Transparency (Ref: CESR/08-998 – "CESR-ERGEG Advice on Transparency") [23]:

- There is no comprehensive EU regime for the transparency of fundamental data.[24]

[21] "Energy wholesale trading markets" means wholesale markets in power, gas and CO2.
[22] Please see CESR and ERGEG advice to the European Commission in the context of the Third Energy Package Response to Question F.20 – Market Abuse – of October 2008 (Ref: CESR/08-739 – "CESR-ERGEG Advice on Market Abuse"); see under: http://www.cesr-eu.org/popup2.php?id=5270.
[23] Please see CESR and ERGEG advice to the European Commission in the context of the Third Energy Package, Questions D.4 to D.6 – record-keeping, Questions E.11, E.18 and E.19 – transparency, Questions D.7 to D.10 – exchange of information, of December 2008 (Ref: CESR/08-998 – "CESR-ERGEG Advice on Transparency"); see under: http://www.cesr-eu.org/popup2.php?id=5478.
[24] See CESR-ERGEG Advice on Market Abuse, ref. 59 et seq.

- There are no pre- or post-trade transparency obligations for firms with respect to energy and energy derivatives.[25]
- There is only transaction reporting under the MiFID for MiFID firms.[26]
- There is no transaction reporting for non-MiFID firms, only a record keeping obligation under the 3rd Energy Package which obliges energy firms (i.e. only non-MiFID firms) to keep records of their transactions and to deliver that data only on request to regulators.
- The insider dealing and market manipulation prohibitions of MAD do not apply to the physical spot and OTC markets.[27]
- The 3rd Energy Package does not comprise clear obligations to ensure the integrity of the energy wholesale markets, in particular it does not contain at all market integrity rules for energy wholesale trading markets. Also the transparency provisions of it have not been conceived specifically for those markets and their needs.

Ad 2.) An updated EU Regime is necessary to avoid the below-mentioned shortcomings of the current regulatory situation.

a) Important differences exist among the national regulations of the Member States which raise barriers to market entry and lead to a very scattered regulatory landscape:

Some Member States impose licensing and reporting requirements on energy wholesale trading market participants, others not at all: For example in Germany, no licensing and reporting obligations exist for wholesale energy transactions, whereas in France the CRE can ask wholesale market participants to report their transactions. While in Slovakia, the Czech Republic and Hungary there is a regulatory obligation of firms to apply for a wholesale trading license.

In Germany the market manipulation prohibitions apply to physical spot markets in power, gas and CO_2 whereas in most other Member States this is not the case. There exist also a political decision to install within the national competition authority a so-called "market monitoring function", which would front run and duplicate a similar regime under the EU TIR. In other Member States such proposals are not even being discussed.

[25] See CESR-ERGEG Advice on Transparency, ref. 100.
[26] See CESR-ERGEG Advice on Transparency, ref. 68.
[27] See CESR-ERGEG Advice on Market Abuse, ref. 53

b) The current MAD should not be extended beyond the commodity derivative/exotic derivative markets into the underlying spot markets or to physical trading because of its insufficiencies in the context of market abuse (insider trading, market manipulation).[28] In any case the EU Commission needs to address these insufficiencies in the context of its current review of MAD. In the following some shortcomings are explained:

- MAD is specifically designed for the financial markets, its products and market participants. Therefore, it does not take into account the specific characteristics and needs of energy wholesale trading markets.
- The insider dealing prohibition is difficult for securities regulators to apply, in the absence of a clear definition of insider information for the underlying physical energy markets: The *general definition of insider information in MAD* is ill-suited for commodity markets because insider information in the terms of this definition are those events which do not have a specific significance for the commodity/energy trading market, the prices of commodities and commodities derivatives etc., but do apply rather in general to all businesses.[29]
- Also, the more *specific definition of inside information in respect of commodity derivatives* (see Art. 1 subpara. 2 of the MAD[30] in conjunction with Art. 4 of Directive 2004/72/EC[31]) is actually creating legal uncertainty. This definition explains when users of commodity derivative markets are deemed to expect to receive information in accordance with accepted market practices on those markets – however it does not help greatly with the practical interpretation of MAD for commodities: It is difficult to apply in the absence of a clear definition of the information that users of commodity

[28] See Advice by the European Securities Markets Expert Group on commodity derivatives business, p.102 et seq.; see under: http://ec.europa.eu/internal_market/securities/docs/esme/commodity_derivatives_en.pdf; CESR-ERGEG Advice on Market Abuse, ref. 56 et seq.

[29] Such insider information is, for example, equity measures, integration, conversion, squeeze-out processes and other substantial structural transformation measures, conclusion of a control and/or profit and loss transfer agreement; take over, tender or purchase offers; dividend payments; change rating; acquisition or disposal of principal investments.

[30] See Art. 1 subpara. 2 of the MAD: "In relation to derivatives on commodities, 'inside information' shall mean 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."

[31] For the purposes of applying the second paragraph of Article 1.1 of Directive 2003/6/EC, users of markets on which derivatives on commodities are traded, are deemed to expect to receive information relating, directly or indirectly, to one or more such derivatives which is: (a) routinely made available to the users of those markets, or (b) required to be disclosed in accordance with legal or regulatory provisions, market rules, contracts or customs on the relevant underlying commodity market or commodity derivatives market.

markets can expect to receive in accordance with accepted market practices on those markets.

- Pursuant to Article 6 of the MAD, an issuer of financial instruments shall inform the public as soon as possible of inside information which directly concerns that issuer. This obligation does not function with regard to the wholesale energy trading market: The issuer of commodity derivatives in such markets is actually the operator of the market and not individual market participants, e.g. EEX future products on the EEX (European Energy Exchange).[32] This would mean that the relevant commodity (derivatives) exchange (e.g. EEX) would have to publish insider information which directly concerns the issuer. It is obvious, therefore, that such an obligation is not meaningful and does not provide any benefit.

c) There is a multitude of regulatory authorities in each Member State and across the EU with regulatory power for oversight of energy wholesale trading markets:

In many Member States, such as Germany, there are energy and financial regulators as well as a competition authority, which already have competencies within their national regulatory regime for the oversight of wholesale energy markets. These competencies will be supplemented by the future implementation of the 3rd package (e.g. record keeping) and the future financial market regulation of OTC derivatives (e.g. trade repositories). In addition, the regulatory regime of these authorities does differ in each of the Member States. Furthermore, currently DG Competition and in the future ACER (under the 3rd package for e.g. the record keeping) and ESMA (under the forthcoming EU Securities Market Regulator) respectively, will have regulatory competencies in respect of those markets. Therefore, an appropriate borderline and coordination between the different regulations and regulators must be created.

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

We champion an integrated/coordinated European level oversight regime.[33] Therefore, in an ideal world scenario, an oversight regime should ensure an integrated/coordinated oversight for the entire energy wholesale trading markets in power, gas and CO_2, i.e. the underlying

[32] See www.eex.de
[33] Please see for more explanation our response to Questions 9 to 12, Section I.

physical energy markets (spot and forward) and energy derivatives products traded on Regulated Markets and MTFs.

Recent EU developments indicate that such a European level oversight regime under the EU TIR would probably extend to the underlying physical power and gas markets (spot and forward).[34] In this oversight model ACER should monitor the market integrity and transparency of the underlying physical energy wholesale trading markets and have a coordinating role to ensure harmonized and effective application of the EU TIR, whereas national regulators would remain responsible for the supervision of firms and enforcement of the EU TIR. This regime would guarantee a equal, harmonized oversight of the physical energy wholesale trading in power and gas and, therefore, avoid potential regulatory overlaps, contradiction and arbitrage.

We oppose a pure Member States' oversight regime. This would mean that each (energy and financial) regulator would be empowered to monitor, supervise and enforce independently the EU TIR under its own national regime. This would create a multitude of oversight regimes and diverging practices and would lead to an inevitably complicated set of rules to ensure operational harmonization, cooperation and efficiency across many competent regulators and Member States. We think that the disadvantages of such a national cooperation approach would leave the situation as it is, where overlaps and multiplied requirements are increasing throughout Europe. Also, in a market with cross border trading and activities, it is difficult to assess the behaviour of a market participant by exclusively taking into account a national perspective. For an effective and appropriate monitoring activity, the regulator should consider the whole portfolio of stakeholders, including the natural physical positions and trading activities (financial and physical). This can only be reached through an integrated / coordinated EU level overview regime. However, we are of the opinion that the national competent regulators should have the power to enforce the EU TIR and sanction market participants under the EU TIR.

[34] Please see for more explanation our response to Questions 9 to 12, Section II.

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?

We agree that - based on the above-mentioned regulatory gaps and shortcomings[35] - a sub-optimal oversight of energy wholesale markets exists, which hinders further market development. The current regulatory situation, in particular, does not take into account the factual situation that energy wholesale markets are increasingly characterized by a wide range of actors (including utilities, pure traders, financial institutions and other wholesale trading market participants and platforms), cross-border trade, important derivatives markets around markets in the underlying energy products and increasing liquidity in energy wholesale trading activities. Various different national regimes and authorities do not fit to such an EU-wide wholesale trading market.

An integrated/coordinated EU level oversight regime[36] between all markets is necessary because only a corresponding EU-wide regime can create a harmonized regulatory situation and an EU level playing field; this is also necessary to guarantee a further market development:

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

Yes, we agree. The issue here is whether the same definition of market abuse (insider dealing, market manipulation) for the underlying physical energy wholesale trading shall apply across the EU, in particular if all national regulators shall apply the same definitions. We support this, because this is of paramount importance for creating an EU-level playing field and an effective oversight. This requires that regulators across all Member States monitor, supervise and enforce the EU TIR in a consistent and harmonized manner. Otherwise, the same market conduct could be assessed and treated differently, which would lead to legal uncertainties and regulatory arbitrage. To guarantee such a maximum harmonisation the EU Commission should create an EU Regulation and adopt binding guidelines for regulators.

[35] Please see response to Question 2, Section II above.
[36] Please see our response to Question 3 above and Questions 9 – 12 below.

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

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?

A market integrity regime consists of definition and prohibition of market abuse, i.e. insider dealing and market manipulation. It needs to be considered that the different participants in the energy trading markets, the different products and markets places should be subject to a comparable set of market integrity regimes and of regulators to create a level playing field for the EU-wide energy market and avoid a burdensome compliance. Otherwise the same market participant would have to comply with substantially different sets of regulations (i.e. with an EU TIR, a MAD-regime and maybe also with a specific CO_2 market integrity regime, dependent on the market place and kind of products he trades). Therefore, we champion an integrated/coordinated European level oversight regime[37] and, hence, that the definition and prohibition of insider dealing and market manipulation should be as consistent as possible.

However, the definition of market abuse under MAD cannot be applied 1:1 to the energy wholesale trading markets, because of its current insufficiencies[38] and because it was originally drafted specifically for the traditional financial markets and its instruments and market participants. Therefore, it cannot be applied appropriately to wholesale energy trading markets. Therefore, we strongly oppose any extension of the MAD beyond the energy / commodity derivatives traded at Regulated Markets and MTFs, i.e. into the underlying spot markets or to sport / forward physical trading.

Consequently, a tailor-made definition of market abuse is necessary to take into account the specific needs and characteristics of the energy wholesale trading markets as well as the differences between the energy wholesale trading markets and traditional financial markets. Therefore, a tailor-made market integrity regime should define in a specific manner what constitutes market manipulation and insider dealing in energy wholesale trading markets.

[37] Please see for more explanation our response to Questions 9 to 12, Section I.
[38] Please see above our response to Question 2, Section I. 2 b.

We recommend to the EU Commission to include provisions on market abuse directly into the EU TIR instead of leaving this to non-binding guidance from an EU oversight body. Therefore, we propose to the EU Commission the following multi-level approach to define a tailor-made market integrity regime, which offers various advantages and guarantees a better regulatory approach:

- The EU Commission shall set out the EU-wide fundamental framework principles on a first level: This first level will consist of EU Regulation (proposed by the Commission following consultation with all interested parties and adopted under the "co-decision" procedure by the Council and the European Parliament, in accordance with the EC Treaty.) In such a legislative act, the nature and extent of detailed technical implementing measures have to be decided at the following second level.
- At the second level, the relevant implementing measures shall be adopted: This should be binding EU guidelines to ensure that
    - the EU TIR takes into account the specifics of the energy wholesale trading markets;
    - a harmonized and coordinated supervision and enforcement by national regulators is guaranteed;
    - the regime is flexible;
    - technical provisions can be kept up-to-date with market developments;
    - differences in markets and market maturity across products and geographic areas can be taken into account.
- ACER and market participants should be involved on all levels: Therefore, the level 2 measures should be guidelines of ACER, which have been consulted with stakeholders (market participants, regulators, etc.). At a later stage, these guidelines could be made binding through comitology proceedings by the EU Commission, if it is necessary to ensure a level-playing field and harmonized application of the EU TIR across all Member States.

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

Yes, regular market monitoring is a necessary component to detect market abuse (i.e. insider dealing and market manipulation).

However, the EU TIR should comprise additional regulatory features to guarantee market integrity and transparency and enable competent regulators to monitor, supervise and enforce this regime. Therefore, the EU Commission should at first define the contents of an EU TIR in more detail.[39]

On that basis the EU Commission can define what effective EU level oversight means, i.e. on the one side monitoring by an European oversight body (ACER) and on the other side supervision and enforcement by the competent national regulators. In the context of the above-mentioned contents of an EU TIR,[40] we put forward the following definition of monitoring by an European oversight body (ACER):

- Monitoring means, firstly the collection of market data, i.e. fundamental data and transaction data.
- In a second stage, it analyses this information to see if there are signs of market manipulation or whether it considers that market participants have complied with the market integrity and transparency rules. An European oversight body (ACER) needs both sets of data to understand correctly the fundamentals behind the price formation processes.

[39] We advocate that the above-mentioned items should be part of the EU TIR; please see our response to Question 2, Section I.
[40] Please see our response to Question 2, Section I.

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

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

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?

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

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

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

We advocate an integrated/coordinated European level oversight regime[41] and, therefore, we strongly support the monitoring of market integrity of energy wholesale trading markets on an EU level. Setting in addition a clear responsibility at EU level for binding guidance, harmonisation and coordination would guarantee the equal application of market abuse definitions across Europe and create a level-playing field. We have attached a graphical description of such an integrated/coordinated European level oversight regime.

I. An integrated/coordinated European level oversight regime is necessary for the monitoring, supervision and enforcement of the EU TIR

In this oversight model ACER (Agency for Cooperation of Energy Regulators) could monitor the market integrity and transparency of at least the underlying physical energy wholesale trading markets and have a coordinating role to ensure harmonized and effective application of the EU TIR, whereas national regulators would remain responsible for the supervision and sanctioning of firms and enforcement of the EU TIR.

Therefore, we propose that the monitoring tasks and phase should be performed by ACER. Monitoring would mean the collection of transaction data and fundamental data and analysis of this data by ACER in the event of suspected market abuse or if ACER considers that

[41] Please see response to Question 3 above.

market participants have complied with the market integrity and transparency rules.[42] We think that ACER would be the best placed body to carry out such activity since it should be able to take into account energy specifics when performing analyses on market outcomes and it has naturally the energy specific know-how as ACER's staff and the national regulators in ACER's Board of Regulators have the necessary expertise and understanding of the energy markets.

To perform this monitoring task, ACER would need trade data for the underlying physical power and gas markets (spot and forward) as well as for energy derivatives products traded on Regulated Markets and MTFs. Therefore, we propose that ACER could operate or supervise a trade repository.[43]

ACER as well as national regulators will also need the fundamental data to perform their tasks and should get the fundamental data either upon request or automatically from the relevant transparency platform which collect and publish this data.

If the monitoring phase is accomplished by ACER, the next distinct phase of supervision, i.e. enforcement and sanctioning by the competent national regulator under the EU TIR should start. We believe that the national energy regulators are the competent regulator for these tasks. In the event that ACER finds signs of market abuse it will refer the relevant information and case to the competent national energy regulator. The energy regulator can then investigate further and, if necessary, sanction the firms.

Consequently, the national energy regulators should still be allowed to perform their own monitoring, supervision and enforcement of EU TIR independently from ACER. They need to be able to monitor and enforce the compliance of market participants with the EU TIR through appropriate measures on an ongoing basis. They should also have the power to sanction market participants who do not comply with the EU TIR and/or measure of the regulators. Therefore, we support that the enforcement of market integrity rules and sanctioning of market participants should better be organised on a national level. National energy regulators should have access to the trade data at the EU trade repository and to the fundamental data of transparency platforms to be able to perform their tasks.

[42] Please see response to Question 8 above.
[43] Please see our response to Question 18 below for further explanation.

In this context we are of the opinion that ACER needs to guarantee a common application, interpretation, supervision and enforcement of the EU TIR by national energy regulators, so that it should have a coordination role and should be able to issue guidelines, which could be made binding through comitology procedures.

II. An integrated/coordinated European level oversight regime is also necessary between the different sectoral regimes for power, gas and CO_2

Current developments suggest that there may well be three regulatory regimes for the energy wholesale trading markets in power, gas and CO_2 as follows:

- EU TIR for the underlying physical power and gas markets (spot and forward) with DG Energy responsible;
- the MAD for energy derivatives products traded on Regulated Markets and MTFs (and certain OTC derivatives) with DG Market responsible; and
- a future EU market integrity and transparency regime for CO_2 with DG Environment responsible.

This situation would be provoked by the following regulatory initiatives which would lead to separate regulatory regimes for the energy markets in addition to the EU TIR:

- DG Internal Market launched a public consultation on a revision of the MAD[44] and held a hearing on the review of MAD on 2nd July 2010[45]: It now intends to extend the present scope of MAD market abuse regulations (insider trading, market manipulation) to cover also energy/ commodity derivatives, which are traded on a MTF, and to certain OTC Derivatives.
- The EU Commission (DG Environment) has proposed a Regulation on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances under the Emissions Trading Directive 2003/87/EC[46] ("CO_2 Auctioning Regulation"), which has recently been adopted by the comitology committee. It prescribes that the MAD market abuse regulations shall apply to the primary auction of CO_2 certificates.

[44] Please see under: http://ec.europa.eu/internal_market/consultations/2010/mad_en.htm.
[45] Please see public consultation of DG Internal Market on a revision of the Market Abuse Directive (MAD), 25.06.2010, pages 3-4 and 6 – 7; see under: http://ec.europa.eu/internal_market/securities/abuse/index_en.htm.
[46] Please see under: http://ec.europa.eu/environment/climat/emission/pdf/proposed_auctioning_reg.pdf.

Furthermore, DG Environment will carry out a major study during 2011, including a wide-ranging stakeholder consultation and an impact assessment to evaluate the level of protection of the EU ETS carbon market. In addition, the so-called Prada-Report[47] recommends the creation of a regulatory framework adapted to the specifics of the CO_2 market and this option is considered as more adequate than the extension of financial regulation: Firstly, it should cover the entire range of transactions, spot or derivatives, on trading platforms or OTC. Secondly, spot and derivatives markets should fall under the remit of the same authority of regulation. Thirdly, an option should be to entrust the European system of financial regulators with the mission of supervising the CO_2 market, in close cooperation with the European system of energy regulators.

If this situation arises an integrated/coordinated European level oversight regime between all regimes, regulators, markets and across borders is even more important, because a pure Member State approach would not work anymore due to the complexity of the regulatory regimes and networks.

To ensure an effective European level oversight regime across these three regulatory frameworks, the EU Commission must

- clearly define the institutional framework for the oversight and monitoring of these wholesale energy markets. It has to be defined which regulator is competent for which market segment, e.g. energy markets regulators for the underlying physical power and gas markets (spot and forward) and financial market regulators for energy derivative products traded on Regulated Markets and MTFs.
- firmly guarantee a common application, interpretation, monitoring, supervision and enforcement among all national and EU regulators and market participants (traders, TSOs, SSOs, etc.). This would facilitate the compliance with such a regime, avoid the creation of new regulatory barriers and create a level-playing field.[48] The harmonization, cooperation and coordination of these regulatory networks should be led by both ACER and ESMA (European Securities Market Authority). They could perform a monitoring and coordinating role as well as ensure the harmonization of the rules and practices of

[47] The regulation of CO2 markets, Assignment report by Michel Prada, April 2010; see under: http://www.economie.gouv.fr/services/rap10/100419rap-prada.pdf

[48] It should be avoided that different regulators impose different obligations, or, e.g. that different market participants (Traders, TSOs, SSOs) publish data in ways that are not useful or cannot be compared between network operators etc.

supervision and enforcement by the national competent energy and financial regulators. These aims could be reached by ACER and EMSA through the adoption of binding guidelines;[49]

- clearly define interaction and relationship between / among national and EU energy and financial regulators. It is important for regulators to exchange information between themselves,[50] to observe the interactions between the underlying physical and financial markets as well as between different national markets and to supervise / monitor cross border cases;
- set-up a "one-stop-shop Regulation", respectively, a "Home Regulator". Market participants should not be obliged to handle 27 national regulators for each of the above-mentioned three regimes. For the supervision and enforcement one local competent energy and financial market regulator should be set up;
- delineatean appropriate borderline and create coordination between the different regulation, i.e. energy market, financial market and anti-trust regulation, so as to avoid duplication and overlap of regulation:
    - For example, the new EU TIR should not contradict and overlap with other relevant EU legislation, such as the MAD, the forthcoming CO_2 market integrity regime and antitrust law and the competencies of the respective regulators. Duplication/Contradiction of regulation will create uncertainty as to which legal framework should apply including the appropriate authority to pursue any cases.
    - The interaction between energy, anti-trust and financial regulators will be crucial to make any regime work effectively. Clear obligations and responsibilities must be outlined in any legislation.

[49] Please see response to Questions 6 and 7 above.
[50] Please see CESR-ERGEG Advice on Transparency, ref. 251 et seq.

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

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

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

As mentioned above,[51] the EU Commission (DG Environment) has proposed in its CO_2 Auctioning Regulation that the MAD market abuse regulations shall apply to the primary auction of CO2-certificates and will carry out a major study during 2011 to evaluate the level of protection of the EU ETS carbon market. The above-mentioned Prada-Report[52] recommends the creation of a regulatory framework adapted to the specifics of the CO_2 market, which should cover the entire range of transactions (spot or derivatives, on trading platforms or OTC) under the supervision of the EU system of financial regulators, in close cooperation with the EU system of energy regulators. In addition, most transactions are either traded via Regulated Markets (exchanges), MTFs (brokers) or centrally cleared. In this context, it is considered in the Prada Report[53] to entrust EU and national financial regulators under the MAD with the mission of monitoring, supervising and enforcing an EU market integrity and transparency regime for CO_2. In this oversight model ESMA would monitor the market integrity and transparency of the entire CO_2 market and have a coordinating role to ensure harmonized and effective application of a future CO_2 market integrity and transparency regime. National regulators would remain responsible for the supervision and sanctioning of firms and enforcement of this regime. The national financial market regulators and ESMA would also need access to trade data and fundamental data to be able for fulfil these missions. If such an approach were to be adopted, we propose that this regime should be an integrated/coordinated European level oversight regime similar to the one for the EU TIR.[54]

However, we think that CO_2 markets are strictly correlated to physical energy markets in Europe and that those markets closely interact with each other. Energy and CO_2 products are usually traded by the same market participants and there are strong links in the price formation and interaction between markets. Additionally many trading venues are available both for trading energy and CO_2. Consequently, we are of the opinion that the EU TIR should

[51] Please see our response to Question 9 – 12 above.
[52] Please see our response to Question 9 – 12 above.
[53] Please see our response to Question 9 – 12 above.
[54] Please see for a description of an integrated/coordinated European level oversight regime our response to Question 9 – 12, Section I.

cover also the market integrity and transparency of physical CO_2 markets (spot and forward). This would guarantee that the specifics of the energy wholesale trading markets are accounted for.

If the EU Commission extends MAD to the whole CO_2 markets, we urge that ESMA and national financial regulators act at least in close cooperation with ACER and national energy regulators as described above in our response to Questions 9 – 12.[55] The role of ACER / national regulators could include the analysis of CO_2 market fundamentals and their interaction with the positions taken by market players and the interactions between energy and CO_2 markets. Also, ACER should have access to all relevant transaction and fundamental data and get the support from ESMA to analyse fundamental data and power-gas related issues.

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?

We believe that coal and oil influence the price formation process of energy markets. Nevertheless, we understand that these are more global markets and the definition of a proper oversight regime would go beyond EU boundaries and imply a different timeframe by which results might be available. Additionally, they are not based on networks and this would imply an even more specific treatment. For this reason we agree that for the time being they should not be part of a tailor-made regime. However we suggest that it is important to work also in this direction, most likely with a different priority and timescale

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

For small and medium sized firms (SMEs) exemptions and *de minimis* levels would be appropriate in certain, but limited cases. The EU TIR should not pose significant burden and competitive disadvantage on smaller market participants nor should it demotivate new entrants. Nevertheless these exemptions should be limited to reporting requirements and other activities that could represent barriers to market entry and not give room to discrimination or

[55] Please see our response to Question 9 – 12, Section II.

distortion of the price formation process. However, the requirement for fundamental data transparency should not be subject to exemptions and *de minimis* levels.Possible hardship for SMEs could be taken into account when defining certain thresholds for the publication of fundamental data (e.g. capacity threshold above which outages have to be publicly released to be applied to all market players). Market manipulation and insider dealing should not depend on quantitative levels, but only on the quality of the behaviour of the relevant market participant. For example, no market players should be exempted from the prohibition to take positions on the basis of insider information before it is publicly disclosed.

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

We are strongly advocating that all energy market transactions should be reported centrally to an EU-wide trade repository. In the event that a 'trade repository' is created for the collection of trade data its scope will need to be defined clearly and we champion that the EU Commission should consider ACER to perform or at least supervise this function (in coordination with ESMA).

The reporting of trades transacted through Regulated Markets, MTFs, broker platforms or central counterparty clearing shall be made by the operators of these facilities to the competent regulator or, if applicable, to a central trade repository. We believe that an obligation on all counterparties to report transactions concluded would be inefficient, multiplying structures and costs. An obligation on trading facilities would instead preclude redundancy and mismatching and ensure harmonisation in the most efficient way.

Transactions in products concluded on a purely bilateral basis (and not cleared) should be reported in a proportionate and cost effective way (i.e. monthly/quarterly/yearly).

Moreover we think that only trades on standard products should be reported regularly. A reporting obligation concerning non-standard products would not be meaningful and would be difficult to standardise. An obligation to store and to keep this information available for competent authorities in the event of an investigation should be sufficient.

Information fed into a repository must only be mandated by electronic means and based on standardized formats and electronic data exchange standards could be adopted to facilitate communication of data.

Overlap and duplication of transaction reporting by firms, in particular for MiFID-firms, should be avoided, e.g. by data exchange between the different trade repositories.

This centralized approach would reduce the burden to provide transactional data, because there will be one set of data, one format, one reporting delay and frequency across the EU instead of potentially 27 different reporting regimes.[56] ACER could then transmit to national regulators (energy and financial regulators) and ESMA the trade data either upon request from those regulators or on an automated basis through a so-called Transaction Reporting Exchange Mechanism (TREM).[57]

In this context, we want to give a specific mention to national transaction reporting requirements that are increasing throughout Europe and also for this reason we urge the replacement of these requirements at EU level as soon as possible by the above-mentioned transaction reporting regime. Those reporting requirements are usually only in the national language, with different content and format; they cannot be automated and therefore take up a lot of time. The most important consequence we want to point out is that such reporting duties together with licensing requirements are becoming one of the main barriers that determine market players' decisions not to enter / or to step out from those markets.

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

Yes; please see our response to Question 13 – 15.

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[56] Please see. CESR-ERGEG Advice on Transparency, ref. 69 et seq for possible formats etc .
[57] Please see CESR-ERGEG Advice on Transparency, ref. 251 et seq. for exchange of information between regulators.