

# **EUROPEAN COMMISSION**

**Public Consultation by the Directorate General for Energy on measures to ensure  
transparency and integrity of wholesale markets in electricity and gas**

**31 May 2010**

## 1. BACKGROUND

European energy policy aims to give Europe's citizens access to competitive, secure and sustainable energy supplies. The creation of a true internal market in energy is crucial to each of these elements. Integrated markets bring competitive pressure to a sector which was often characterised by national markets dominated by incumbents. Integrated markets allow Member States to benefit from the security of access to each others networks and more diverse sources of energy. Integrated markets give the depth needed to allow the integration of new renewable energy sources at least cost.

Experience in the liberalisation and integration of energy markets, and electricity markets in particular, has demonstrated the importance of the liquid European traded wholesale markets. The development of power exchanges (or other organised markets) and broker facilitated markets in standardised over-the-counter (OTC) contracts has created liquidity for market participants. This is a positive and beneficial outcome of over a decade of successive European energy liberalization packages. Although liquidity in traded gas markets still lags behind electricity, it is catching up steadily.

Beyond generators and suppliers, wholesale energy markets now attract a wide range of actors including utilities, pure traders, financial institutions and other trade facilitators. These players have an important role in the price formation process and creating liquidity. Important derivative markets have arisen around markets in the underlying energy products. This means that energy wholesale markets have become increasingly hybrid physical and financial ones.

Prices established at the level of traded wholesale markets not only affect market participants, they also serve as the benchmark for retail prices for household consumers and industrial users. Equally importantly, by showing where energy prices are high and where they are low these markets send important signals for future investments in energy infrastructure. For this reason it is crucial that citizens, business and national authorities can have confidence in the integrity of such markets.

The 3<sup>rd</sup> Energy Market Liberalisation Package establishes a new institutional framework for the gas and electricity sectors, ensuring non-discriminatory access to networks, and establishing new European bodies to plan and oversee the development of transmission systems. During the preparatory phase for this legislation the Commission recognised potential gaps and inconsistencies in the regulatory oversight framework governing wholesale markets. There have been claims that price increases on energy markets have not reflected fundamentals. However, without a clear oversight regime it is difficult to assess whether such claims are well founded. This undermines public trust in the integrity of the market, and risks allowing market abuse to go undetected, imposing real costs on consumers. Ensuring market integrity in this sector supports economic competitiveness and facilitates meeting the climate challenge. It is therefore a key concern for the Commission.

After the Commission published the Third Energy Liberalisation Package proposals in September 2007, in December the Directorate General for Energy and Transport and the Directorate General for Internal Market and Services issued a joint mandate to the Committee of European Securities Regulators (CESR) and the European Regulators' Group for Electricity and Gas (ERGEG), seeking advice on issues concerning record keeping and transparency of

transactions in electricity and gas supply contracts and derivatives. This was intended as a first step towards addressing concerns relating to market integrity.

Since then, and in particular since the final report from CESR/ERGEG in January 2009 and the adoption of the Third Package in July 2009, the Commission has worked closely with stakeholders with the aim of developing a proposal for an efficient, effective and coherent oversight regime specifically designed for energy markets to ensure market integrity and transparency. Such a regime should lead to clear benefits, including:

- § Increased probability of the detection of market misconduct,
- § Reduced incidence of misconduct as a result of effective oversight,
- § Reduced risk premia,
- § Higher liquidity levels as a result of greater market confidence,
- § Reduced bid-offer spreads as a result of greater market confidence.

This public consultation is designed to ensure that all interested parties are able to contribute to this important debate. This includes energy companies, companies in the financial sector and companies covered by the Emissions Trading Scheme as well as consumer organisations, representatives of small and medium enterprises, and representatives of regional bodies and organisations who are affected by the development of the internal market in energy are encouraged to respond to this consultation.

## 2. ANALYSIS OF THE CURRENT LEGAL SITUATION AND EXPECTED DEVELOPMENTS

To be effective in closing regulatory gaps and supporting the internal energy market, an oversight regime for energy markets must take a number of ongoing developments into account. Firstly, there is a general debate regarding financial market regulatory reform. Secondly, the Third Energy Liberalisation Package is currently being implemented, which will lead to significant reforms in the area of cross border trade in electricity and gas. Finally the revised EU Emissions Trading Scheme (EU ETS) will see further increases in size and importance of the carbon market.

These are set out in more detail below:

- **3<sup>rd</sup> Energy Liberalisation Package**<sup>1</sup> This legislation implements a broad range of disclosure obligations for fundamental data codified in the Package. The scope of these requirements can be expanded through the comitology procedure.

However, the Third Energy Liberalisation package only addresses traded markets to a limited extent. Supply undertakings are required to keep records on all trading transactions for 5 years. These can be accessed by competent authorities. However, the definition of supply undertakings is quite limited and MiFID-regulated entities are specifically not covered by this provision.

There is also a wholesale market monitoring duty for national energy regulators (*"monitoring the level of transparency, including of wholesale prices, and ensuring compliance of electricity undertakings with transparency obligations"*, (Art 37, 1 (i) of

---

<sup>1</sup> [http://ec.europa.eu/energy/gas\\_electricity/third\\_legislative\\_package\\_en.htm](http://ec.europa.eu/energy/gas_electricity/third_legislative_package_en.htm)

electricity Directive, with equivalent provisions in the gas directive). However this is not particularly strong, and does not extend to a clear obligation to ensure the integrity of the energy market.

The newly established Agency for the Cooperation of Energy Regulators (ACER) is given a general obligation to monitor the internal market for electricity and gas, again this does not extend to a clear obligation to ensure the integrity of the energy market.

- The **Market Abuse Directive (MAD)**<sup>2</sup> 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 (together referred to as "market abuse"). MAD is designed for financial markets. It applies almost exclusively to financial instruments admitted to trading on a regulated market. Commodity products (e.g. physically settled spot market products) are not covered and commodity derivatives markets products are covered only if they are admitted to trading on a regulated market.

Thus, the present scope of MAD market abuse regulations (insider trading, market manipulation) generally does not apply to any over-the-counter (OTC) trades (i.e. not transacted through a regulated market) including standard OTC (spot and forward) transactions that make up the bulk of traded electricity and gas markets.

It should be noted however that the ongoing MAD review is addressing, inter alia, specific shortcomings in relation to its treatment of commodity derivatives. This concerns for example, the commodity derivative specific definition of insider information in MAD which may be difficult for securities regulators to apply, 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, including regulatory practices regarding the publication of price sensitive data held by public bodies.

- The **Markets in Financial Instruments Directive (MiFID)**<sup>3</sup> is of particular relevance. One of its key objectives is investor protection and market oversight over investment service activities carried out by investment firms, including trading in commodity derivatives. Another is to provide for free competition and a level playing field in terms of the regulatory supervision of trading venues (notably regulated markets and multi-lateral trading facilities (MTFs)) established in different Member States. Equally importantly, the Directive provides for requirements to ensure fair and orderly trading and appropriate transparency of trading venues for shares admitted for trading on a regulated market.

---

<sup>2</sup> Directive 2003/6/EC on insider dealing and market manipulation (market abuse); see [http://europa.eu/legislation\\_summaries/internal\\_market/single\\_market\\_services/financial\\_services\\_transactions\\_in\\_securities/l24035\\_en.htm](http://europa.eu/legislation_summaries/internal_market/single_market_services/financial_services_transactions_in_securities/l24035_en.htm)

The Commission also launched a call for evidence on review of Market Abuse Directive; see [http://ec.europa.eu/internal\\_market/securities/abuse/index\\_en.htm](http://ec.europa.eu/internal_market/securities/abuse/index_en.htm)

<sup>3</sup> Directive 2004/39/EC on Markets in Financial Instruments; see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0039:EN:NOT>.

However these pre- and post-trade transparency obligations do not apply to commodity derivatives. Hence there are only relatively high level transparency obligations with regard to exchanges listing commodity derivatives as part of their basic organizational requirements to ensure fair and orderly trading. Overall, the definition of financial instruments in the Directive does not cover the spot market in commodities and physically settled OTC transactions which are non-standardized.

MiFID's basic objective of ensuring "financial stability and investor protection" is sometimes argued to be less relevant for energy products since energy derivatives are primarily used as hedging instruments for mitigating price risks of professional market participants (e.g. some utilities) and not as investment products<sup>4</sup>. A potential breakdown of such markets, in this view, would not pose a systemic risk to financial stability or to the interests of investors. Specialist commodity derivative market participants can currently avail themselves of two exemptions from MiFID (and a further exemption from the Capital Requirements Directive) in specific cases. These exemptions will be addressed as part of the review of MiFID in 2010.

- In 2010, the Commission will adopt legislative proposals requiring eligible **derivatives to be cleared through central counterparties** (CCPs) and over the counter (OTC) derivatives trades to be recorded in trade repositories. The legislation will also impose strict organisational and governance requirements on both CCPs and trade repositories in order to ensure their safety. These measures will improve overall stability, reduce counterparty risk between market participants, promote greater standardisation, and improve the capacity of regulators to oversee market developments and emerging risks. Towards the end of 2010, the Commission will also propose amending the Capital Requirements Directive in line with internationally agreed principles. The changes will further promote central clearing and ensure better pricing of the risks associated with the use of derivatives by requiring adequate collateralisation of trades which remain outside CCPs.
- A high-level group of experts chaired by J. de Larosière recommended that the framework of EU financial supervision be strengthened to reduce the risk and severity of future financial crises.<sup>5</sup> Following these recommendations legislation is being developed to create three European Supervisory Authorities and a European Systemic Risk Council. The integrity and oversight of commodity derivative markets will thus be strengthened, in line with recommendations from the G20 and IOSCO (International Organisation of Securities Commissions). An agreement on the creation of The European Securities Market Authority (ESMA), which will be responsible for derivatives markets, was reached in Council on 2 December 2009.
- The revised **Emissions Trading Directive**<sup>6</sup> contains provisions of relevance to trading in carbon. Under Article 12(1a) of the Directive, the Commission shall examine whether the market for emission allowances is sufficiently protected from

---

<sup>4</sup> See e.g. advice by the European Securities Markets Expert Group on commodity derivatives business, p.59ff [http://ec.europa.eu/internal\\_market/securities/docs/esme/commodity\\_derivatives\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/esme/commodity_derivatives_en.pdf)

<sup>5</sup> The High-Level Group on Financial Supervision in the EU report, chaired by Jacques de Larosière, see: [http://ec.europa.eu/internal\\_market/finances/docs/de\\_larosiere\\_report\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf)

<sup>6</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:140:0063:01:EN:HTML>

insider dealing and market manipulation. The Commission 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 particular in the light of legislative proposals to be prepared in the fields of energy markets and financial markets during 2010. Issues relating to market abuse in the primary carbon market are dealt with in the draft Commission Regulation on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances under Article 10(4) of the Directive<sup>7</sup>, which was published on 6 April 2010. The draft Auctioning Regulation provides for a level of protection of the auctioning of spot emission allowances equivalent to that offered by MiFID and MAD to derivatives traded on regulated markets.

## QUESTION

- 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?**

### 3. DESCRIPTION OF PROBLEM

In the CESR/ERGEG report the two groups of specialist regulators concluded that it was appropriate to develop a tailor made approach to the regulation of electricity and gas markets.

The joint CERS/ERGEG analysis provided a solid basis for the ongoing work in the Commission to ensure an effective and consistent EU regulatory framework for traded electricity and gas markets. The challenges of ensuring effective market oversight result from changes in the energy sector combined with the increasing integration of national electricity and gas markets. Oversight practice has been both country and sector specific. Depending on the overall market framework and regulatory situation, this may result in trading activities being subject to multiple jurisdictions with oversight by several different authorities, possibly located in different countries. This results in a lack of clarity as to who has ultimate responsibility, and even to a situation where there is no oversight at all.

It has also become clear that behaviour which undermines the integrity of the energy market, for example insider trading, is not clearly prohibited on some of the most important marketplaces for energy. This is explained in more detail in the next section, but broadly, futures contracts and brokered OTC contracts are not generally subject to clear rules governing market abuse.

Experience in the United States has been that market abuse related to electricity and gas markets has encompassed different product types, for example physical trading of gas for delivery at points in the US gas network, and derivative trading on organised exchanges in New York. In the United States the Commodities Futures Trading Commission has always

---

<sup>7</sup> [http://ec.europa.eu/environment/climat/emission/pdf/proposed\\_auctioning\\_reg.pdf](http://ec.europa.eu/environment/climat/emission/pdf/proposed_auctioning_reg.pdf)

considered attempts to manipulate derivatives markets though actions on the market spot market for the underlying commodity (or indeed on related markets).

As described in section one, the European gas and electricity markets are increasingly characterised by the overlap of physical and financial markets and by cross-border trade. At present it is unclear who would be responsible in Europe for policing equivalent behaviour to that detected in the United States. This suggests that a carefully crafted and sufficiently integrated/coordinated (financial and physical) regulatory framework with an effective European institutional set-up is needed. Such an integrated/coordinated approach would allow regulators to observe the interactions between the physical and financial markets, and to observe the interactions between different national markets.

During 2009, the Commission organised a number of workshops to analyse these issues. These workshops drew significant stakeholder involvement, with strong support for the CESR/ERGEG recommendations. The Commission also outlined the development of its view in a non-paper presented at the Florence Forum<sup>8</sup> in December 2009 and requested the view of stakeholders.<sup>9</sup> The views of stakeholders are that the integrity of traded energy markets can be best ensured if a) wholesale energy transactions are subject to an effective and comprehensive regulatory surveillance with a coherent EU level approach to deliver a regulatory framework in which the energy regulator(s) has/have a responsibility and capability to assess price formation on those markets and to identify malpractices such as insider dealing and market manipulation and b) data which influence energy market fundamentals (i.e. data related to supply, demand and transport) are made transparent (taking into account legitimate competition concerns, e.g. the potential for collusive behaviour). Stakeholders are also concerned that an effective market oversight framework should also foster further development, and integration of the energy market. In particular, the regulatory framework must not push trading in energy products to the national level, undermining the real benefits that the internal energy market brings.

## QUESTIONS

- 2. Do you agree that the current Regulatory Framework should be updated to include clear rules governing energy market oversight? Please justify your reply.**
- 3. Do you agree that this update should ensure integrated/coordinated oversight between financial and commodity markets and across borders.**
- 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?**

---

<sup>8</sup>The Florence Forum was established in 1998 and meets bi-annually to discuss the creation of a true internal electricity market. Participants include national regulatory authorities, Member State governments, the European Commission, TSOs, electricity traders, consumers, network users, and power exchanges.

<sup>9</sup> [http://ec.europa.eu/energy/gas\\_electricity/forum\\_electricity\\_florence\\_en.htm](http://ec.europa.eu/energy/gas_electricity/forum_electricity_florence_en.htm) .

## **4. OPTIONS TO ENSURE EFFECTIVE OVERSIGHT**

An effective regulatory framework should ensure that all stakeholders can have confidence in the price formation process on energy markets. To this end it is important that transactions which are equivalent from an economic point of view should be subject to the same standard of market oversight. As set out above, traded energy markets have a number of dimensions (spot vs. forward, financial vs. physical, OTC vs. exchanges, standardised vs. non-standardised, brokered vs. non-brokered). Questions as to "what" should be monitored, by "whom" and "how" need to be considered carefully.

Relevant questions include:

- What are the appropriate market rules?
- Who monitors markets? Who enforces the rules?
- Which markets are covered?
- How are transactions reported?
  - Who collects data?
  - Who has access to the data?
  - Who publishes the data (if relevant)?

### **4.1. What are the appropriate market rules?**

Ensuring effective oversight requires that issues such as insider dealing and other forms of market misconduct cover traded wholesale markets in electricity and gas (and possibly beyond, e.g. for the carbon market see Sections 4.3 and 4.4 below). These should be consistent across Europe to prevent situations from arising where the same market conduct would be deemed as in line with rules on the one market but would be found as infringing the rules in another. Because important venues for energy trading are already covered by MAD, definitions relating to market misconduct specifically covering the physical energy markets should, as far as possible, be equivalent to those in MAD.

However, it should also be possible to take account of the specific characteristics of energy markets, in particular, the susceptibility of energy markets to significant changes in price as a result of economic or physical withholding of generation capacities. Similarly, the impact of network congestion on prices in several national markets brings about particular issues, which do not arise in global financial securities markets or indeed in other global commodity markets.

In order not to undermine MAD or the energy market integrity framework in general, such specificities should be taken account of through guidance from an oversight body as to how general market rules should be applied within the context of the energy markets, rather than set out directly in legislation.



## QUESTIONS

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

### 4.2. Oversight models - Who monitors markets? Who enforces the rules?

There are two basic design options for market oversight.

One is an oversight framework which is built on the competence of Member States' regulatory authorities (energy and securities regulators). In this model new legislation would focus on improving cooperation across sectors and borders.

The competences of energy regulators would need to be extended to include responsibility for oversight of wholesale gas and electricity markets, with a right to access information in relation to markets primarily overseen by securities regulators and vice-versa. This right to access information would also have to be extended to third country regulators. It would also be necessary to require Member States to establish clear procedures for assigning responsibility for enforcement.

Although market misconduct rules (market manipulation, insider trading) could be defined on EU-level, market oversight would be at the Member State levels. Securities regulators and energy regulators in each Member State would have to be empowered to examine the impact of actions taking place within their jurisdiction on other Member States. In this case national level bodies would have the obligation to co-operate amongst themselves, and define who is best placed to ensure effective oversight. Such inter-agency cooperation would need to be governed through what would inevitably be a complicated set of rules to ensure operational efficiency and effectiveness across many competent bodies.

A significant disadvantage of such an approach is that it would result in the continuation of multiple regimes and it would not give any single body clear responsibility for oversight of trades with a cross border impact. The alternative to this is the development of a European level oversight regime. Since energy commodities and derivatives are often traded in parallel in different Member States via different trading channels, any misconduct involving a combination of different commodity transactions and/or platforms may only be effectively detected if monitoring is organised centrally. For this reason our preference is for a European level regime.

In considering how an EU level regime can ensure effective market oversight, it is useful to consider two aspects of market oversight separately – monitoring and enforcement.

Monitoring involves the collection of market data and information and the analysis of this information. Based on its analysis, the oversight body can then form a judgement as to whether market outcomes are in line with what would be expected under effective

competition and whether it considers that market participants have complied with the appropriate rules governing those markets.

Enforcement is the step of actually taking steps to force market participants to comply with rules, and sanctioning market participants who do not comply with the relevant rules. While this will generally follow from monitoring action, it does not have to be the same body which carries out monitoring and enforcement action.

A European level monitoring body would require access to all transactions in spot and derivative electricity and gas products on all European trading venues (see section 3. and section 4 below). This European level monitoring body could either be a newly establish entity, or the result of strengthening the general monitoring obligations of ACER mentioned at section 2. The expertise and understanding of the energy markets, and the role of national energy regulators in ACER's Board of Regulators, mean this option would offer efficiency and coherence in the oversight of energy markets. In line with the IOSCO and G20 aims the information and analysis from this monitoring which the European level monitoring body would have access to should be shared with securities regulators on a formalised basis.

In relation to enforcement action in case of identified cases of market misconduct it is important to recall that due to the cross-border nature of likely misconduct scenarios, it will not always be obvious who should take action (e.g. in which Member State, energy regulator or securities regulator). In order to ensure that EU level rules designed to support the internal market are effectively applied it would be appropriate that the monitoring body have a coordinating role with regard to national enforcement action relating to transactions on electricity and gas markets. This coordination role would of course be without prejudice to enforcement responsibilities of national financial regulators arising from the provisions of EU level financial market legislation.

#### QUESTION

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

### 4.3. Which markets are covered?

Ensuring appropriate commodity coverage is crucial to the effectiveness of any legislative initiative on market integrity. The impetus for action arises because of the recognition of particular issues in the electricity and gas markets. Limiting the scope to these two commodities brings practical advantages. For example the existing legal and institutional framework applicable to the electricity and gas markets can more easily be adapted to address issues relating to market integrity.

However, electricity and gas markets are clearly interlinked with other commodity markets, in particular with markets for primary energy products. In the case of oil and coal these markets are to a significant degree global. This means that designing a regime which encompasses oversight of such markets would require a strategy for international regulatory cooperation to provide real benefits to Europe. There is not yet an international consensus about the appropriate regulatory regime for such markets. It is not appropriate to delay steps to ensure the integrity of wholesale electricity and gas markets until such consensus is reached on how to cover these markets. If necessary a specific EU regime covering oil and coal can be developed in the future.

However the strong cross-commodity inter-linkages suggest that carbon market should be taken into account when assessing market misconduct on markets within the framework of a market integrity regime for electricity and gas markets. The power sector is the largest single user of allowances within the EU Emissions Trading System (EU ETS), although it is not the only user with industrial companies who are customers of the power sector making up the remainder. Although the aim is to see the EU ETS linked up with compatible emission trading systems in other parts of the world, notably in the USA, the EU ETS is currently limited to the European Economic Area. Consequently, price formation on the energy market is driven by the actions of EU ETS actors based in Europe.

By and large the carbon market is an exchange based market with the bulk of transactions in carbon allowances taking place either on power exchanges or on dedicated carbon exchanges that are either regulated markets or multilateral trading facilities within the meaning of MiFID. As such they are either regulated by the market abuse rules provided for in MAD or these rules are applied by the carbon or power exchange to the participants in the exchange on a contractual basis under their market conduct rules.

Any EU monitoring body should be able to actively monitor all EUA transactions, to assess their impact on energy markets.

It is also very important that unnecessary burdens should not be placed on companies who participate in gas and electricity markets on a small scale. Therefore, our initial view is that any reporting obligations should be equivalent across all commodities and, in particular, that equivalent exemptions and *de minimis* levels should apply.

## QUESTIONS

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

### 4.4. How are data reported?

#### *Transactional data*

An effective monitoring regime requires consistent access to market data. The record keeping obligations codified under the 3<sup>rd</sup> Package will give regulators the power to access the transactional data kept by supply undertakings<sup>10</sup>. The Commission can adopt binding guidelines in this area to ensure the uniform application of these record keeping obligations. The guidelines can also be extended to include energy derivatives contracts with wholesale customers in this area.

While these provisions can be useful, there are shortcomings when it comes to ensuring the effective oversight of energy markets. In particular, there are no provisions for systematic access to data from MiFID regulated entities and companies who are neither supply undertakings nor wholesale electricity or gas customers. Without systematic access to such data it is difficult to develop a holistic view of energy markets.

This means that a streamlined mechanism for accessing data is required. In relation to energy markets currently not covered by MiFID, there should be a responsibility on parties to report those transactions to a body responsible for oversight of energy markets. The actual reporting could be performed by those who operate organised markets, or who provide brokerage services<sup>11</sup>.

---

<sup>10</sup> These record keeping obligations are set out in Article 40 of Directive 2009/72/EC concerning common rules for the internal market in electricity and Article 44 of Directive 2009/73/EC concerning common rules for the internal market in natural gas.

<sup>11</sup> For market participants who execute standardised transactions on a purely bilateral basis a *de minimis* exemption from reporting combined with different reporting timelines (e.g. yearly rather than daily) may be appropriate. This serves to recognise that these transactions make up only a relatively small portion of the overall traded market.

Transactions in energy products or derivatives subject to financial regulation should ideally also be available to the central market monitor. This data pool could also be open to national securities regulators and ESMA, but also to the responsible body or bodies for oversight of energy markets more generally.

Centrally collected and managed transactional data would facilitate energy regulators and securities authorities in carrying out their role effectively. It should also reduce their costs of collecting and sharing data. It is also likely to lower compliance costs for market participants.

In the absence of a comprehensive EU-level market integrity and supervisory framework national lawmakers have already introduced national measures including transactional data collection, regulatory monitoring and reporting (e.g. CRE the French energy regulator). Similar initiatives are likely in other Member States unless EU action is taken. In its extreme, this would result in 27 MS developing different market conduct rules, transaction reporting schemes and oversight practices.

#### *Fundamental data*

In relation to data on physical production, transmission and consumption of gas and electricity the third package allows for the adoption of legally binding guidelines. Therefore it is not necessary to address fundamental data disclosure obligations in relation to electricity and gas in any proposals designed to ensure the integrity of wholesale markets. Any specific proposals in this regard will follow the procedure for developing network codes set out in the third package,.

This would not be the case if the regulatory initiative on market integrity were to capture commodities beyond electricity and gas, in particular the carbon market. The revised EU ETS provides for clear rules for the publication of fundamental data regarding the annual cap on allowances issued, the number of allowances to be allocated for free, the annual volume of auctioned allowances, the results of individual auctions as well as the volume of verified emissions from an installation during the preceding calendar year. It should be possible for an authority responsible for the oversight of the energy market to access data relating to the amount of credits held, the volume of emissions and all other fundamental data.

In the context of the forthcoming review of the level of protection of the carbon market from market abuse as well as the review of the auctions foreseen under the Auctioning Regulation, the Commission will consider whether a greater level of transparency (e.g. publication) is appropriate or desirable for market predictability.

### **QUESTIONS**

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

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

## List of Questions

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?
2. Do you agree that the current Regulatory Framework should be updated to include clear rules governing energy market oversight? Please justify your reply.
3. Do you agree that this update should ensure integrated/coordinated oversight between financial and commodity markets and across borders.
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?
5. Do you agree that definitions of market misconduct for gas and electricity markets should be consistent across EU? If not, why not?
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?
8. Do you agree that regular market monitoring is an essential function to detect market misconduct?
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?

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?**
- 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?**
- 17. Do you agree that it is appropriate to apply exemptions and *de minimis* levels? If not, why not?**
- 18. Do you agree that market data relating energy market transactions should be reported centrally? If not, why not?**
- 19. Do you agree the body with an oversight role requires full access to fundamental data relating to carbon?**

### **Submission of response**

Please, submit your response to this public consultation **by 23 July 2010** at the latest to the following e-mail address: [ENER-MARKET-INTEGRITY@ec.europa.eu](mailto:ENER-MARKET-INTEGRITY@ec.europa.eu). The Commission may want to make the responses it receives public. If you do not want your submission to be made public, please indicate it accordingly in your submission.