

Response to the consultation of CESR and ERGEG in July – August 2008: Market Abuse regime for the European power and gas sectors and related transparency issues

This EFET paper is in response to the CESR/ERGEG consultation paper, published in July 2008, on the CESR and ERGEG advice to the European Commission in the context of the Third Energy Package (Draft Response to Question F.20 – Market Abuse)¹, expressing views jointly held by the members of EFET.

Established in 1999, the European Federation of Energy Traders (EFET) is an industry association representing over 90 trading companies operating in more than 23 countries. The EFET mission involves improving conditions for energy trading in Europe and fostering the development of an open, liquid and transparent European wholesale energy market. More information about EFET views and activities is available on www.efet.org.

¹ Hereinafter referred to as „CESR/ERGEG consultation paper“.

Executive Summary:

EFET welcomes the ongoing consultation of energy market participants and other interested parties by the European Commission, financial regulators and energy regulators, and is pleased to make a contribution to this CESR/ERGEG consultation.

- CESR/ERGEG and the European Commission have not demonstrated, based on the evidence provided so far, that there is a compelling need for market abuse rules applying specifically to the wholesale trading level of the European power and gas sectors.
- EFET believes that a tighter and more focused enforcement of existing anti-trust legislation and single European energy market legislation in the power and gas markets, predominantly by national authorities, but also by the European Commission and through ACER (in the future), would suffice to deal with most foreseeable abuses.
- Nonetheless, EFET agrees with the assessment of CESR/ERGEG that there is a strong case for clearer, harmonised and legally binding rules, obliging owners and operators of infrastructure in the power and gas sectors to publish detailed information about the availability and utilisation of that infrastructure.
- If regulators do perceive a need in parallel for new measures to introduce a tailor-made market abuse regime applying to gas and power trading, EFET will support and provide further advice on the development of such a regime, provided it is proportionate to the potential mischief addressed and fully harmonised across Europe.
- There will be a need to consider whether it is necessary and/or practicable to extend any regime to other commodity or product markets that impact significantly on power and gas price formation specifically inside Europe (e.g. emissions allowances, fuel oil) and to consider the compatibility of a European regime with any globally organised supervision of energy commodity markets (e.g. those in coal and oil) tackled through international cooperation in the future.
- EFET will continue to discourage regulators from including any requirements in their plans for regular reporting of individual wholesale energy transactions; we see such reporting ideas as *a priori* disproportionate to any possible abuses that will need to be addressed in the power and gas sectors during the current liberalisation phase.
- EFET urges that any special market abuse regime for power and gas wholesale transactions be based on a clear, binding, EU-wide measure, e.g. a new EU Regulation. Any such measure could comprehend a consolidated catalogue of requirements for disclosure and publication of data about availability and use of infrastructure in one text. It must comply with “Better Regulation” principles.²
- Thus CESR/ERGEG and the European Commission would need to undertake a full impact assessment and a cost-benefit analysis in respect of such a new market abuse regime, before any concrete draft proposal for EU legislation is brought forward.

We would be happy to discuss any of our comments further and/ or receive your views on our response. To arrange this please contact either Peter Styles (for electricity and emissions) at peter.styles@efet.org; Dr. Colin Lyle (for gas) at colin.lyle@efet.org; or Dr. Karl-Peter Horstmann (Co-Chair, Task Force Financial Regulation, EFET) at karl-peter.horstmann@rwe.com.

² Reference is made to the Response to Question 6, see under para. 6 b.

EFET answers to the six questions to market participants

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

a) Introductory Comments

CESR and ERGEG have identified in their consultation paper (para. 26 to 42) two types of alleged market failure, i.e. asymmetric information and/or market power. And it has proposed significant new requirements to resolve the perceived regulatory gap – i.e. market abuse requirements in the physical gas and electricity market and new transparency requirements.

However, before any new requirements (which have the potential to significantly impact the market) are introduced it must be demonstrated that:

- They are based on a justified need (i.e. there is evidence of failure in the specific areas of the market identified, which is not already properly addressed by existing law or regulation);
- The regulatory response is proportional to the problems identified;
- The appropriate regulatory tools are being used to tackle any problems;
- There is no duplication, inconsistency or overlap with other existing legislation, which would lead to additional risks and uncertainty.

The evidence presented in the CESR ERGEG paper is not convincing in this respect and some of the conclusions reached are erroneous. However, EFET recognises that there is a perception of a regulatory gap in the application of market abuse requirements in commodities. If regulators decide that this supposed gap must be filled, then EFET agrees that the wholesale application of the existing MAD to commodities would not be appropriate. However, it is clear that a number of crucial issues need to be resolved to ensure that a sector specific regime does not lead to a significant distortion in the development and structure of the market. This EFET response sets out our thinking on these issues and how they may be overcome.

We also strongly urge that a full and thorough Impact Assessment must be undertaken before any new regulatory requirements are brought forward.

b) Comments on analysis of Sector Inquiry by CESR-ERGEG

The CESR/ERGEG consultation paper makes use of the outcome of the EU Commission Sector Inquiry (Ref: SEC (2006) 1724)³ to justify findings about the existence of market failure, which in turn are used to ground potential legislative proposals.

In this context, EFET raises the following issues, in the belief that some conclusions of the EU Commission Sector Inquiry have been misinterpreted misapplied by CESR-ERGEG:

The conclusions in the Sector Inquiry's analysis might be outdated to some extent, as the electricity and gas markets have subsequently undergone significant development. A few specific anti-trust investigations were launched in its wake. Additionally, further changes,

³ Hereinafter referred to „Sector Inquiry“

driven by the 3rd Energy Package should address some of the problems identified by the Sector Inquiry.

The wholesale tier specifically has advanced in recent years – for example traded volumes and liquidity are generally rising across all commodity markets, indicating that firms (1) are confident to trade and (2) judge risks as being manageable.⁴ This advance would not have occurred, if wholesale traded markets were characterised by significant incidences of market failure or a perception of a high risk of failure. As such, the absence of a market abuse regime specific to the commodity sector does not appear to be hindering the significant development in traded activity.

In addition, recent reviews of the commodity sector by regulators have not identified significant problems of market failure that need to be addressed through new regulatory mechanisms.⁵

Turning to some more detailed observations made in the CESR/ERGEG text, EFET does not agree (based on the conclusions from the Sector Inquiry), that dysfunctions quoted constitute real evidence of market failure:

The first main dysfunction highlighted in the consultation paper concerns the partial continuation from pre-liberalisation days of vertical integration, market power and dominant position. It is argued this may result in information asymmetry or withholding of asset capacity. The main causes of these potential problems are indeed inherent in the legacy structure in many countries of the power and gas sectors themselves. We suggest they should, in the first instance, be tackled through existing antitrust and internal market legislation already in place at both national and EU levels. Competent EU and national authorities should ensure effective and equal enforcement of, and compliance with, such legislation in all EU countries before the Commission or governments would propose new legally binding requirements.

To the extent incumbent producers and suppliers in each member state adhere to all relevant antitrust, transparency, unbundling and non-discrimination obligations, a more level playing field will be established. That in turn would ensure that the risk of information asymmetry, leading to potentially dysfunctional markets, will be minimised.

The Sector Inquiry did not identify any market failure resulting from a lack of information transparency concerning transactions on the wholesale energy markets and the wholesale derivatives markets. The Sector Inquiry concluded rather that increased transparency of data relating to the use of key infrastructure would be desirable (e.g. availability and use of interconnectors, availability and output of generation plants, state of storage facilities, balancing and reserve arrangements, and load) was necessary to increase the efficiency of the electricity and gas markets. We are pleased to see that ERGEG and CESR have recognised this fundamental distinction.

⁴ See for increase in commodity trading: FSA Study Growth in commodity investment, pages 5 et seq.

⁵ Such as (1) UK discussion paper on the Commission's review of the financial regulatory framework for commodity and exotic derivatives" (hereinafter "HMT/FSA Discussion Paper"), see under: http://www.hm-treasury.gov.uk/consultations_and_legislation/commodities_report/consult_commodities_report.cfm; (2) FSA Markets Infrastructure Department, "Growth in commodity investment: risks and challenges for commodity market participants", March 2007 (hereinafter: "FSA Study Growth in commodity investment"), see under: <http://www.fsa.gov.uk/pages/Library/Communication/PR/2007/039.shtml>.

We agree that transparency of data on the availability and use of assets and infrastructure is crucial. A high degree of such transparency is needed to assist market participants in making commercial decisions. In this context, it must be noted that already today there exist extensive transparency obligations in this respect under EU directives and regulations (and modest improvements are envisaged by the proposed third IEM package), as well as regulatory guidelines at the ERGEG, ERI and national levels. Taking these measures together, there is therefore the potential for a high level of transparency regarding physical infrastructure, as long as they are implemented and enforced fully across the EU. If they prove not to be so implemented and enforced, or indeed to be practically unenforceable in their current form, EFET supports the evaluation of new legislative measures. (We already went so far on the power side as to draft amendments to Regulation 1228/2003 for this purpose, in the context of the debate about the proposed third IEM legislative package.)

The second main type of dysfunction identified in the consultation paper relates to firms abusing the market in the sense of MAD. This means the existence, or threat, of substantial insider dealing and market manipulation, which would have significant consequences for the efficient operation of the market. EFET does not believe there is evidence of such behaviour in the physical power and gas markets. Indeed, the Nordpool example provided in the consultation paper is not appropriate, as this alleged misbehaviour took place in the “power futures market”⁶. The suspect behaviour related to “financial instruments” and not to physical spot or OTC markets. In addition, any effects of such on-exchange manipulation in the OTC market would be ancillary and be covered by the investigation of the manipulation in the futures market, under already applicable financial regulation in Norway.

EFET supports the analysis and findings of the ESME Report⁷ (pages 80 to 86) in respect of the Sector Inquiry: The Sector Inquiry did not identify any market failure resulting from a lack of public information about transactions on the wholesale energy markets, nor those on related derivatives markets. Consequently, the Sector Inquiry does not support the conclusion that there are market failures on the traded energy wholesale markets.

Turning specifically to the gas paragraphs of the consultation paper (22-25): The quoted findings from the Sector Inquiry indicate the problems identified have more to do with market immaturity than market failure. We are moreover concerned that the discussions of gas trading in paragraph 24 and of hubs in paragraph 25 are both out of date (particularly for Germany).

c) Comments on information asymmetry and manipulation of markets (para. 27 to 31):

Information asymmetries can exist for a number of reasons - the key is whether they are unfair and if so whether they lead to market distortion. Owners of physical assets could have access to better information on their assets than other market participants. Similarly, banks or hedge funds will have access to information on customer positions or speculative interest that is not accessible to other market participants (i.e. demand side information). Information on both can impact price formation – and as such transparency may be needed on both sides to fully understand price developments.

⁶ European Power Daily, VOLUME 10 / ISSUE 82 / APRIL 28, 2008, „Sweden's Alfa Kraft fined for manipulation“.

⁷ ESME Report on commodity derivatives (hereinafter: “ESME Report”), see under: http://ec.europa.eu/internal_market/securities/docs/esme/commodity_derivatives_en.pdf

We note the remarks in this context in a recent UK Treasury/FSA Discussion Paper, which states in paragraph 4.21, “Evidence suggests that significant market failures due to information asymmetries between market participants in commodity derivative markets are limited”, and in paragraph 4.27, “There is limited evidence to date of a lack of transparency in the commodity derivatives markets”.

The interaction between any additional transparency requirements under energy sector legislation and regulation on the one hand, and any market abuse requirements stemming from financial sector legislation must still be considered carefully. For example, just because data is subject to a publication requirement, use of it by the originator must not automatically be defined as inside information under existing financial sector market abuse arrangements.

The specifics of the power and gas sector must be taken into account in defining inside information. The development of clear guidance and/or exemptions will be needed to provide clarity to market participants about how they can use information. In this respect, EFET points out that existing MAD requirements already recognise the concept of ‘deferred publication thresholds and delays’ in *Annex II of Commission Regulation (EC) No 1287/2006 of 10 August 2006, implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading and defining terms for the purposes of that Directive*.

The CESR/ERGEG consultation paper states in paragraph 31 that, “With regard to these concerns it has to be noted that generation outages constitute a change in the market fundamentals as they affect generation availability. Such changes do normally result in certain price movements (e.g. rising price in case of scarcity), thus changes in prices in such situations are a normal development.”

This general assumption does not reflect the commercial reality of the power markets. In general, the availability of a particular plant will not usually have a significant effect in the market and on market prices.

In competitive energy markets, it is clearly important to protect the commercial confidentiality of market participants and, as a general rule, market participants should be free to arrange their individual production and purchasing decisions, without having to reveal their individual strategies or commercially confidential data to the market. At the same time, though, competition in power markets can be facilitated by increases in cross-border trade, and/or greater information release.

The need to protect commercial confidentiality suggests that plant or company specific outage plans should not be released to the market in advance and that generators are entitled to retain the right to use such information. One particular concern is that the release of ex ante generation information would unfairly compromise a market participant’s ability to buy in the market following an outage before the outage information is released so that they are not disadvantaged by higher market prices or “squeezed” by other market participants.

In developing legislative and regulatory policy toward information release, a balance must therefore be struck between protecting the commercial confidentiality of individual market participants and the benefits of releasing information to the wider market.

EFET thus envisages, given the current divergent complexity of power and gas industry structures and markets across Europe, that there should be guidelines on use and publication of information before and during an outage (and possibly other key areas), to be laid down in an EU instrument. The overall thrust of the EU principles should be to ensure that no undue impediment is faced by wholesale market participants, whether operating generation assets in the affected geographic market or not. The guidelines will need to include details on how and when information can be used and the circumstances and timing of any release to the market.

EFET stands ready to facilitate further consultation on this aspect of transparency and market supervision. In this context, EFET would like to comment also on para. 28 and 29 at a later stage during further consultation by CESR-ERGEG and/or EU Commission.

Neither on the basis of assumed information asymmetries, nor on the basis of the risk of producers squeezing non-producers in the wholesale market, does EFET see any need to introduce additional transaction reporting requirements, in respect of individual wholesale transactions in energy.

d) Comments in respect of market power

Market power can arise in any market – the role of regulators and policy makers is to ensure that it does not lead to abusive behaviour and that access to the market by all market players including new and small market entrants is possible without overcoming significant barriers.

In this context, EFET does not agree with the general statement in paragraph 32 of the CESR/ERGEG consultation paper that, “Market power is a market failure which arises where there is a lack of competition in a market. Those with power may exploit their influence on the price of the traded instrument.”

The development of market power is an economic process that cannot be deemed a “market failure” as such. Market power and the enjoyment of dominance as such, is neither prohibited nor sanctioned under competition legislation. Only if dominant undertakings abuse their market power, to the detriment of other undertakings or their customers, are such abuses prohibited under European and national competition law. Both sets of law give the European Commission, and the national competition authorities, adequate means to prohibit and sanction abusive or collusive behaviour respectively. (Adequate will or resources to investigate the circumstances or events, and then to enforce the rules, may be a different matter.)

A proposed market abuse regime is designed in a way that also captures competition issues that would result in an undue level of double regulation and therefore interaction (and overlap) between the two must be looked at carefully. Therefore EFET supports the statement of paragraph 113 of the CESR/ERGEG consultation paper that the sector specific should be coherent with existing securities and antitrust legislation – but would welcome clarification that firms should not be exposed to double regulation.

Also the statements in para. 34 and 38 are of importance for a number of EFET member companies. EFET would like to comment at a later stage on assumptions behind the statements, in the context of further consultation by CESR-ERGEG and/or the EU Commission.

The single historical reference in paragraph 36 to possible market manipulation at Nord Pool certainly forms an insufficient basis to support the assumption of general market failure of the energy wholesale trading markets.

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

In general, we agree with the analysis of CESR/EREG in that respect and we recognise there is a perception of a regulatory gap in the current application of the MAD regime in the power and gas sector in the areas identified. In this context we refer to and endorse the detailed analysis of the MAD-regime for commodities in the ESME Report.⁸

Disclosure Obligations

We agree that the scope of the MAD does not cover physical markets in electricity and gas, nor does it cover trade in electricity and gas derivatives not conducted in regulated exchanges. We also agree that the MAD is not designed for the specificities of electricity and gas markets. Therefore, with regard to information disclosure we agree with a sector-specific pan-European approach.

Transparency arrangements must be differentiated from monitoring arrangements. There is a fundamental difference between what transparency information is released to the market for the purpose of understanding price formation (transparency), and what information is provided for regulators for the purpose of assessing market behaviour (monitoring). While market transparency is aimed at increasing trust, the issuance of commercially sensitive information to other market participants would not be appropriate and would raise concerns in relation to EC Competition Law.

Where regulators want to release this information, the onus should be on them to demonstrate that such a release is necessary and proportionate. Such a demonstration should be effect-based (and not object or hypothesis-based) and should be backed up by an impact assessment.

⁸ See ESME Response, pages 96 to 123.

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

While EFET agrees with this conclusion we disagree with the premise of this question: it implies that greater pre and post trade transparency is necessary, and should either be introduced alone or with other measures. EFET does not consider that the case for greater pre and post trade transparency, by way of disclosing of transactions and/or positions (as commonly understood by regulators) is sufficiently proven at present.

In detail:

a) Differentiation between transparency of fundamental data and transparency relating to wholesale energy markets transactions

It is essential to distinguish between different forms of information transparency to determine whether each is either necessary or sufficient. In this regard EFET refers to and endorses the detailed analysis of the transparency issues for commodity markets contained in the ESME Report.⁹ Basically, there are two types of transparency relevant to the wholesale energy traded markets: On the one hand (1) transparency about the availability and use of key infrastructure and linked physical assets (through publication of relevant data), and on the other (2) transparency relating to wholesale energy market transactions (through so-called pre- and post trade disclosures by participants, brokers or exchanges).

Well-functioning wholesale power and gas markets need rather a high degree of transparency (disclosure of data by owners or operators) about availability and use of physical infrastructures. Such disclosure reduces risk, provides confidence and allows efficiency, liquidity and security of supply to improve. This assessment was reinforced by the findings of the Sector Inquiry. New legally binding requirements must be based naturally on a justified need, e.g. by reference to non-observance of already existing Guidelines for Good Practice or existing or draft legislation; the regulatory response must be proportional to the problems identified, e.g. in regard to the costs, the right regulatory tools should be used to tackle any problems; and there should be no duplication, inconsistency or overlap with existing legislation on transparency¹⁰ which would lead to additional risks and uncertainty. Hence, EFET believes transparency on the use and availability of infrastructure should be addressed by EU-specific legislation so that a single harmonised regime would be applicable in all EU Member States for the commodities concerned. **And importantly, we advocate that it is the owner or operator of the relevant infrastructure who must bear the primary disclosure obligation, not some third party, even if a third party provides a platform for publication.** (More on our recommendations for this crucial “physical transparency” can be found in our answers to question 4 below, as well as in annexes 1 and 2.)

On the other hand, the case for pre and post-trade transparency (publication or disclosure to regulators of transaction data by market participants) for electricity and gas derivatives and spot market transactions (comparable with those of MiFID) has not been made.¹¹ EFET believes that the rationale that led the European legislator to impose pre-trade transparency on equity markets cannot be transposed to the wholesale energy markets and, apart from the unreasonable burden it would impose, it would not deliver additional information that the market (or regulators) need.

⁹ See ESME Response, pages 86 to 90.

¹⁰ See ESME Response, Annex 5

¹¹ See for a detailed analysis, ESME Response, pages 87 to 89.

As EFET has commented previously, routine disclosure of company specific information on individual transactions is likely to form a barrier to entry particular for small players. Market participants can already make use of available information about the market in respect of transactions (brokers, power exchanges, other information providers – such as Platts and Heren) which meet their specific needs. Access to this information eventually can be made easier and more cost effective.

This view about pre and post-trade transparency is shared by other financial market regulators.¹²

b) Differentiation between design and purposes of transparency on one side and reporting obligations on the other side

Also, in this context a clear distinction has to be made between the design and purposes of transparency on one side and reporting obligations on the other side to guarantee a “better regulation” approach. In this context EFET refers to and endorses the detailed analysis of the transparency and reporting issues for commodities in the ESME Report.¹³

The objectives of financial and energy regulators, when dealing with transaction reporting obligations of market participants (as under MiFID), is not to provide transparency in the market, but to have information on transactions in order to monitor the market and assess market participants’ behaviour for the sake of investors’ or customers’ protection and of market integrity (market manipulation and insider dealing). However, transaction / position reporting obligations of market participants are not appropriate: for the underlying reasons of this statement we refer to the ESME Report.¹⁴ In a nutshell, EFET agrees with the assumption of the UK Treasury/ FSA Discussion Paper, which states in paragraph 5.20, “*HM Treasury and FSA do not believe that the benefits of applying the transaction-reporting framework to commodity derivatives outweigh the costs. In particular, transaction reports have little material benefit ...*”. Also, the Sector Inquiry does not provide any evidence regarding the need for further transparency of this type and fails to make any claim in this regard.¹⁵

Our main concerns are that such increased obligations will discourage new entrants and small players by imposing significant administrative and systems burdens on them. A regulatory impact assessment should be conducted.

In particular, EFET cannot support a national obligation for transaction reporting, such as that in the recent initiative of the CRE.¹⁶ Such special national regimes create even more serious barriers to entry and burdensome compliance regimes to market participants and potential entrants and, they also contravene the idea of a harmonised EU framework for wholesale energy trading.

Regarding the needs for market monitoring, of the type justified by regulators’ existing statutory responsibilities, they can in future make use of their powers under the record keeping obligation provisions of the 3rd EU IEM Legislative Package. EFET has already

¹² See HMT/FSA Discussion Paper, paragraph 6.34.

¹³ See ESME Response, pages 70 to 79 and 89 to 90.

¹⁴ See ESME Report, pages 117 to 121.

¹⁵ See ESME Report, pages 82 to 86.

¹⁶ See CRE’s public consultation on transaction monitoring terms for the French wholesale electricity and gas markets; see under: http://www.cre.fr/en/documents/consultations_publicques

suggested other sources of data to the CRE, suitable for a productive and accurate market monitoring regime.

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

a) EFET agrees with the analysis on the importance of the transparency/disclosure of fundamental data:

To compete effectively in the wholesale electricity market, all wholesale market participants – traders, generators and retailers - need to be able to assess the likely evolution of supply and demand fundamentals and the ability to move electricity around the transmission system. Participants base these predictions on analysis of expected levels of future demand, transmission capacity and generation capacity, but also by detailed analysis of actual events in the past and the observed impact on prices. The release of demand, transmission and generation data – before and after the date of delivery - is therefore crucial to market participants’ ability to analyse likely market developments and to participate in forward electricity markets.

b) EFET considers it useful to set up at the European level a harmonised list of fundamental data required to be published:

On the basis of our experience there has been a lack of real progress on transparency in several of the electricity regional initiatives. EFET considers it is essential to have not just a harmonised list of data, but a very detailed / exhaustive list and very specific obligations falling on specific owners and operators of the infrastructure to publish such data, as an EU proposal for the directive or regulation. EFET considers that it should be an EU Regulation because an EU Directive would leave space for interpretation at member state level.

In the case of electricity, regarding exactly which data should be published and who should be obliged to release it, see the EFET recommendations set in Appendix 1.

In the case of gas, the EFET view of the “fundamental data” that should be published (in addition to requirements in ERGEG guidelines for good practice – see below) is set out in Annex 2.

The CESR/ERGEG consultation paper mentions in this context also the “Guidelines of Good Practice on Information Management and Transparency” (GGPIMT), the “Guidelines for Good TPA Practice for Storage System Operators (GGPSSO)” and the “Guidelines for Good Third Party Access Practice for LNG System Operators (GGPLNG)”. It is to be noted that most EFET recommendations for publication obligations on the part of asset owners/operators are consistent with these guidelines.

c) EFET considers that an exhaustive list is conceivable and it will not normally be necessary to require additional data to be published on an ad hoc basis – this would also create the risk of inconsistent arrangements across Member States

In this context, EFET recommends to address the question of the legislative framework as follows:

The infrastructure information disclosure regime shall be based on a clear and binding EU wide measure, i.e. one single new EU Directive or EU Regulation¹⁷. The changes proposed by CESR/ERGEG and in this EFET paper to infrastructure information disclosure may prove difficult to achieve just through clarification of the current and the 3rd Package IEM Directives and Regulations, or under comitology procedures. The intended transparency regime for fundamental data goes beyond the scope of EU legislation as currently drafted, in our opinion. (It was for this reason that EFET proposed detailed amendments, for example, to Regulation 1228/2003, which so far have not been taken up in the Parliament, or in the Council.)

For the sake of clarity of regulation (better regulation approach) it may be advisable to transfer specific transparency obligations under the current and the 3rd Package Directives and Regulations into one single Directive or Regulation (instead of scattering these through different instruments and/or guidelines reached through comitology). This new legal instrument could be integrated into the suggested tailor-made market abuse regime (see answers under question 6 below) to ensure consistency and avoid contradictions between the two areas of regulation.

We believe a single set of new measures stipulating “physical” transparency and market abuse criteria for the power and gas sectors could help ensure a harmonised, EU-wide level playing field for wholesale energy trading. EFET is supportive of an ambitious timetable to achieve these improvements and is willing to participate actively in the process.

Also for that aim, a so-called “one-shop Regulation” (comparable to the principles of MiFID) could be considered. The principle of the so-called “Home Regulator” seems more appropriate than the exposure of market operators to the regulation by various Regulators and national regimes (implementing the EU regime). That would mean the market participant would only be subject to the harmonised regulation of its Home Regulator (where he is established) and its requirements, instead of being exposed to 27 (or 54?) different regulators in the EU and their national regimes. An alternative on the ERGEG side of the regulatory responsibilities might be to give ACER a new role.

It is also important that there will be a common application and interpretation among regulators and other stakeholders (TSOs, generators, storage operators etc.) of the new information publication requirements, to facilitate compliance with such a transparency regime and to avoid the creation of new regulatory barriers. It should be avoided that different regulators practically impose different information obligations, or that the data is not published in a uniform format.

To reach that aim, a maximum harmonisation, possibly inside a new primary EU Regulation itself – in line with the transparency obligations as determined by the GGPIMT, GGSSO, GGPLNG and NRE Transparency Report – is essential: Therefore, the new European legal instrument should not only be descriptive, but rather consist of exhaustive and very detailed lists and impose specific obligations on specific owners and operators of infrastructure.

An open-ended transparency obligation to publish additional data on an ad hoc basis if it is considered to be price sensitive would be too vague and raise serious regulatory concerns and potentially inconsistent arrangements across Member States. Market participants would be exposed to an important regulatory uncertainty, with unintended consequences.

¹⁷ EFET considers that it should be an EU Regulation because an EU Directive would leave space for interpretation at member state level.

However, it is recognised that some market participants may go beyond minimum requirements and it is important to ensure that the framework for making data available does not prevent those companies from going further than the minimum. EFET by no means criticises voluntary initiatives, to improve transparency regarding generation for example, recently put in place, as far as they go. However, they remain incomplete and largely not harmonised across national boundaries.

It is also important to consider how enforcement or sanctions should take effect; whether civil or criminal proceedings would result etc.

Furthermore, EFET calls for clarity regarding any (temporarily) permitted exemptions from duty to disclose data: This is e.g. of uppermost importance both for operators of power plants and for other affected electricity market participants, if an unplanned outage occurs. The EFET Electricity Committee will be further evaluating our recommendations with regard to a level European playing field, as to the use of information during outages.

d) Impact Assessment and Cost-Benefit Analysis is necessary

EFET agrees that the increased costs of compliance, and of costs incurred by regulators, should be repaid by the increased confidence in the market, resulting from better publication of data about the availability and use of energy infrastructure. Nonetheless it would be prudent to prepare a regulatory impact assessment, describing and estimating the costs and benefits underlying the recommendations.

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

For electricity generators unplanned outages are the most sensitive area of information release. See also annex 1 and section 4.3 of the “Report on Transparency” issued by the regulators working on the ERI “Northern Regional Electricity Market”.

In the case of gas, planned and unplanned outages of transportation capacity, interruptions, balancing decisions (e.g. where a TSO takes action to restore system balance, either by acting on a balancing market or by drawing on prearranged flexibility), and simple contractual changes in capacity availability may each be sensitive.

Nonetheless our overall view remains, that TSOs and other asset owners should explain to the market publicly all the reasons behind the event or circumstance, and the extent of any corrective or compensating measures.

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

a) Introductory EFET Comments

EFET agrees with the development of transparency (disclosure) obligations for owners and operators of infrastructure and of a basic, tailor-made market abuse framework (to cover insider trading and market manipulation) within power and gas sector legislation (hereinafter “EU Market Abuse Regime”). Nevertheless, EFET believes that CESR/ERGEG and the European Commission have not demonstrated, based on the evidence provided so far, that there is a compelling need for market abuse rules applying specifically to the wholesale trading level of the European power and gas sectors; that a tighter and more focused enforcement of existing anti-trust legislation and single European energy market legislation in the power and gas markets, predominantly by national authorities, but also by the European Commission and through ACER (in the future), would suffice to deal with most foreseeable abuses.

EFET agrees with the assessment of CESR/ERGEG that there is a strong case for clearer, harmonised and legally binding rules, obliging owners and operators of infrastructure in the power and gas sectors to publish detailed information about the availability and utilisation of that infrastructure

If regulators do perceive a need in parallel for new measures to introduce a tailor-made market abuse regime applying to gas and power trading, EFET will support and provide further advice on the development of such a regime, provided it is proportionate to the potential mischief addressed and fully harmonised across Europe.

As explained above, EFET agrees that the option to keep the current legal framework in the three different areas separate is not a realistic one and that an amendment and/or extension of MAD is not an appropriate solution. EFET also questions, whilst recognising the practical difficulties, whether there is a need for any transparency obligations and possible MAD regime to be extended to all commodities that have a significant impact on price formation in power and gas (primary oil and coal, where contract formats and prices have converged globally, as well as emissions) in order to ensure effective, overarching arrangements. Market abuse prevention measures relating to global commodity markets could later be the subject of talks within international forums, dealing with regulatory convergence.

Any steps taken specifically in Europe must focus on improving the trust participants have in the power, gas and emissions markets and their price building mechanisms. Robust markets will attract new participants and increase in liquidity. Consequently, we are in favour of a market design following the principles of “better regulation” – giving market participants a framework that will attract competition and liquidity rather than repel new entrants.

b) Respect of Better Regulation Principles

Such a new EU Market Abuse Regime should respect in each of its three above-mentioned areas the principles of better regulation, in particular as follows:¹⁸

¹⁸ Therefore, the Principle of Better Regulation, in particular the herein-mentioned Principles do apply to all of the following sections.

- As explained above in the EFET response under question 1, CESR-ERGEG and the European Commission still have not presented a sufficient, substantive basis to demonstrate market failures in EU wholesale energy traded markets. Therefore, further careful research to prove a “business case” for an EU market abuse regime still needs to be provided.
- In this context, an impact assessment and a cost-benefit analysis in respect of both extra transparency obligations and the special market abuse rules should be performed, before any concrete draft proposals for new legislation are tabled.
- EFET firmly believes that the development of a still emerging market for energy at the wholesale level and newly joining participants should not be hampered by a non-appropriate regulatory burden. Therefore, the proposed new obligations must not increase market entry barriers and the cost of participating in the relevant markets, otherwise they could:
 - Unnecessarily require participants to introduce new systems, controls and business structures, e.g. to buy expensive software tools for reporting / publication reasons, and to hire additional personnel to run this software;
 - Impose organisational requirements of a type particularly burdensome for small/mid-sized companies;
 - Unduly impact companies’ decisions regarding their business models or the structure of the market; and
 - Increase compliance costs through the introduction of e.g. additional checks and controls.

Thus EFET urges that a new EU market abuse regime is really tailor-made to the specifics of energy wholesale trading and not a “copy-paste” exercise, based on the current MAD regime or previous national energy market proposals. In particular, it must entail maximum harmonisation, by appearing in the form of a single EU instrument, possibly an EU Regulation (see above under question 4). This European legal instrument should not only be descriptive, but rather exhaustive and very detailed as well as very specific (see above under question 4 also), to avoid uncertainty and ambiguity. Also for that aim, a so-called “one-shop Regulation” in combination with the so-called “Home Regulator” seems more appropriate than the exposure of market participants to regulation by 27 different regulators in the EU and their national regimes.

c) In the light of the above-mentioned principles EFET comments on the three different areas of regulation in more detail as follows:

(1) Transparency / disclosure obligations

EFET agrees with the conclusion set forth in Option 3 i.e. that energy sector specific legislation should be introduced to ensure that price sensitive information is made available to the market. The detailed categories of data that EFET believes should be made compulsorily available by law are outlined in annex 1 and contain plant data as well as grid data in order to enable the user of this data to obtain past, current and future information on the supply and demand situation of the electricity system.

EFET also agrees that the obligation to disclose the required information should primarily lie with the entity responsible for the relevant activity i.e. the TSO for grid, reserve, balancing and load data and the generator for plant-related data. EFET expects that some of those entities may outsource the implementation of their disclosure obligation to one or more platform operators (for example a generator might decide to release its information through the exchange or through the TSO) or that some of those entities will envisage using a common platform for reasons of cost efficiency.

EFET considers it important that grid and plant data should not only be made available to market participants but also to exchanges and to commercial information providers.

EFET does not believe that a single European-wide website is the most effective way to release all of the above mentioned information. A lot of grid and plant data is best made available to data users by means of an open data standard that can be implemented across multiple systems. In addition to the display of the data on one or more websites, an open data standard would make the data available to other computer systems in a cost effective way.

EFET envisages that TSOs and generators would use the open data standard for system-to-system integration and to build a more intelligent grid. The same open data standard could be used by market analysts and researchers for the automated download of grid and plant data. Finally, commercial information providers would use the open data standard to repackage grid and plant data in innovative and proprietary ways and as such provide premium information services to market participants.

Only unexpected plant and grid outages (sometimes referred to as Urgent Market Messages) are best released on a single platform (like for example the website of the spot exchange)

In terms of trade and price transparency, EFET points out that such information is already readily available today without the need for recourse to additional transaction reporting requirements imposed on market participants. In this context EFET refers to the detailed analysis and recommendation of ESME¹⁹.

More specifically, EFET believes that the implementation of information requirements concerning electricity and gas wholesale physical and derivatives transactions should be driven by market developments and carried out in accordance with better regulation principles with a view to minimising the additional obligations that would result for the market participants.

Should lawmakers nevertheless decide to impose transaction reporting, EFET believes that also here the obligation should primarily lie with the relevant entities i.e. exchanges and operators of MTFs (brokers) as well as clearing houses. In effect, exchanges and MTFs are best suited to make available data of transactions concluded on their platform, and clearing houses are best suited to report on OTC transactions cleared through them.

¹⁹ See ESME Report, pages 80 to 95.

(2) Insider Trading

EFET agrees with the conclusion that a tailor-made insider dealing framework for products not covered by MAD, if proven necessary, should be introduced through specific energy sector legislation.

EFET agrees that an amendment and/or extension of MAD in this respect is not an appropriate solution. EFET does not support an extension of the MAD regime to OTC markets and spot markets and to Multilateral Trading Platforms in respect of commodities, commodity derivatives and exotic/hybrid derivatives.²⁰

- In respect of the tailor-made insider trading framework:

We note that CESR/ERGEG has looked favourably at the Nordic model as a template for pan-Europe transparency requirements. Whilst there are commendable features of the Nordic model it is by no means the only solution. Features, specifically suited to the Scandinavian electricity industry structure and generation profile are not necessarily applicable to all power and gas industry structures in the wider European market. There are substantial differences in market design and the market situation between areas. Market monitoring models other than Nord Pool should be taken into account: Light touch, risk based and principles-based regulation for example, which is currently in place in the UK, which, when combined with appropriate disclosure requirements, provides a solid framework for markets to operate effectively. The work done by consultants at the behest of USAID in South-East Europe, to bring key data into the public domain about the use of electricity infrastructure and opportunities to trade across that infrastructure, could also be examined.

- In respect of the Insider Information definition

EFET agrees that, if proven necessary, a new EU market abuse regime for power and gas would create, through the transparency / disclosure requirements mentioned in the CESR/ERGEG consultation paper, a better link to Article 4 of directive 2004/72/EC.

However, the concerns raised in the ESME Report against the current definition of Insider Information are still valid.²¹ EFET recommends a better adapted Insider Information definition for power and gas (and other commodities), which must take account of the issues raised in our foregoing answers.

²⁰ EFET refers insofar to the ESME Report; see ESME Report, pages 111 to 115.

²¹ EFET refers insofar to the ESME Report; see ESME Report, pages 102 to 110.

d) Market Abuse

EFET agrees with the conclusion that, if proven necessary, a tailor-made insider dealing framework, for products and dealing platforms not yet covered by MAD, would be better achieved under specific energy sector legislation, in the case of power, gas and emissions allowances.

EFET agrees that an amendment and/or extension of MAD in this respect would not be an appropriate solution. EFET does not support an extension of the MAD regime to OTC markets and spot markets and to Multilateral Trading Platforms in respect of commodities, commodity derivatives and exotic/hybrid derivatives.²²

²² EFET refers insofar to the ESME Report; see ESME Report, pages 111 to 115.

Annex 1

As mentioned in the answer to question 4 and 5, the release of generation data – both before and after the date of production, and data relating to balancing, transmission, and demand is vital for wholesale electricity market participants.

Below are the detailed categories of data which EFET recommends should be compulsorily published by law:

I. Generation

- *Ex post* generation data on a plant-by-plant basis at H+1 or +2;
- Weekly aggregate *ex post* reservoir levels by hub;
- *Ex ante* estimates of available generation capacity broken down by fuel type across price zones, in such a manner that the breakdown could indicate in different time periods likely variations in production of marginal price setting plant;
- Information on unplanned outages (however, exemption from or delay of disclosure obligation is to be considered; see main text of paper).

Although EFET has recognized the validity of arguments against publication *ex ante* of generation data plant by plant, it is become increasingly clear in the last few years that generators should be releasing such *ex ante* data to European TSOs. International TSOs need to be obliged to disclose the plant by plant data they receive to TSOs responsible for neighboring control zones in order to help them truly maximize NTC and ATC. Beyond the boundaries of the EU, the Swiss system and the Swiss market should be included if possible in such disclosure arrangements. While the benefit of disclosure of this information to TSOs has become clear, there is less evidence that disclosure of *ex ante* plant by plant information to the market is justified.

The need to develop efficient, liquid wholesale markets is at the heart of European electricity market liberalisation. Efficient wholesale markets underwrite competition between generators and retailers and allow them to manage electricity market risks cheaply and efficiently. Market transparency is crucial to the successful development of an efficient wholesale market and the progress with EU electricity liberalisation.

In competitive markets, it is clearly important to protect the commercial confidentiality of market participants and, as a general rule, market participants should be free to arrange their individual production and purchasing decisions without having to reveal their individual strategies or commercially confidential data to the market. In highly concentrated markets, while aggregation may be insufficient to protect individual players' commercial interests (i.e. because they have such a high percentage of the generation/supply), regulators may nevertheless decide that the release of information is essential to allow further competition to develop and to mitigate the effects of that market power.

In developing regulatory policy toward information release, a balance must therefore be struck between protecting the commercial confidentiality of individual market participants and the benefits of releasing information to the wider market. This balance should be achieved with clear definitions of inside information, clear rules for information release, and clear rules for any exemption from, or delays for disclosure obligations.

II. Balancing Services and Reserve

- Transparent calculation and publication of balancing costs. Where a balancing market exists, the calculation of balancing prices shall be explicit. In the absence of a balancing market, the level of the imbalance tariff and clear definitions of the applied rules for their derivation should be published. The income from these tariffs shall be auditable by the regulator or competition authority to ensure cost reflectivity;
- Details of constraint points on the transmission network inside borders as soon as they have been identified and the reasons for the constraint.

III. Transmission:

- Net Transfer Capacity (NTC) and Actual Transfer Capacity (ATC). NTC and ATC shall be defined and agreed;
- TSOs shall implement NTC and ATC definitions in the management of flows, publication of data and co-ordination of cross-border flows;
- TSOs shall publish the thermal rating of the interconnectors between regions and the methodology for calculating the safety margin (TRM);
- Using the agreed definitions of ATC and NTC, TSOs should publish aggregate contracted cross-border capacity bookings ex-ante up to a year forward;
- Aggregate levels of nominated hourly import and export per unique border on a day-ahead basis, and ongoing during the intra day trading period the Transmission Capability Matrix ;
- In publishing availability of cross-border capacity, TSOs shall specify the capacity already reserved for long-term contracts and how long these contracts are in existence for;
- For long term cross border contracts, with daily options embedded within them, the aggregated maximum value that can be requested under them shall be published in the annual forecast;
- Ex-post levels of hourly aggregate physical cross-border flows per unique border between neighbouring TSOs as soon as practicable but by D+1 at the latest.

IV. Demand

- Regular forecast demand data by market hub including a day-ahead forecast;
- Actual demand data in real-time or the following day at the latest;
- Historical demand data for at least the last three years.

Annex 2

As mentioned in the answer to question 4 and 5, the release of data by gas TSOs – relating to flows, balancing, transmission, and demand - is vital for wholesale gas market participants.

Below are the detailed categories of data which EFET recommends should be compulsorily published by law:

For the services provided, each transmission system operator shall make public on an ex ante daily basis, and in real time, if changes occur, information on a numerical basis for each relevant entry and exit points, for:

- (a) maximum technically available capacity
- (b) commercially available and booked (or contracted) capacity
- (c) maintenance schedules and planned outages

Each transmission system operator shall make public information on a numerical basis for each relevant entry and exit point:

- (a) the daily gas flows, including interruptions to those flows, on an ex post basis, no later than one day after the end of the relevant gas day
- (b) the historic daily gas flows, including interruptions to those flows, for the past [ten years] on a rolling basis
- (c) notify each relevant shipper, daily allocation information, on an ex post basis, not later than one day after the end of the relevant gas day.

Each transmission system operator shall make public information on a numerical basis for each interconnection point:

- (a) daily aggregate upstream gas flows, on an ex post basis, no later than one day after the end of the relevant gas
- (b) daily historic aggregate upstream gas flows, for the past [ten years] on a rolling basis
- (c) daily aggregate demand forecasts for each relevant balancing zone, on an ex ante basis, no later than the beginning of the preceding relevant gas day
- (d) each transmission operator shall make public, in real time, the imbalance charge for each relevant balancing period.

Each transmission system operator shall provide each relevant shipper, in each balancing period, preliminary imbalance and cost data, at least one month after the end of the balancing period, with final data provided within three months, but no later than one year after the end of the balancing period.

Each transmission system operator shall make public, on an ex post basis no later than one day after the end of the relevant gas day, daily aggregate line-pack information (including historic information for the last 10 years).

Each transmission system operator shall make public, on an ex ante basis, daily aggregate line-pack forecasts for the end of each relevant gas day.

Each transmission system operator shall make public the calculation method for imbalance quantity and charges. Updates shall be provided promptly by each transmission system operator where there are any changes to the relevant information.

Each transmission system operator shall make public information relating to the basis upon which a supply emergency is declared including the procedures for doing so. Updates shall be provided promptly by each transmission system operator where there are any changes to the relevant information.

Each transmission system operator shall make public a full specification of the gas quality parameters applicable to the system and the procedures and rules (including any associated costs) for the treatment of any gas that is not within the specified parameters. Updates shall be provided promptly by each transmission system operator where there are any changes to the relevant information.

Each transmission system operator shall make public information on the daily actual measured values of key gas quality parameters, on an ex post basis, no later than three days after the end of the relevant gas day.

Each transmission system operator shall make public any Operational Balancing Agreements and Interconnection Agreements (or other equivalent agreements) that set out provisions in relation to gas flow allocations (including methods used) and related information. Updates shall be provided promptly by each transmission system operator where there are any changes to the relevant information.

Each transmission system operator shall provide a secure web-based capacity booking and nomination system for network users.

The requirements outlined in this annex shall be provided at no additional charge, on an internet-based, user friendly and transparent basis, accessible to all network users (including potential network users).