

Response of EFET to Public Consultation by the Directorate General for Energy on measures to ensure transparency and integrity of wholesale markets in electricity and gas, 31st May 2010

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Introduction

We support the objective of DG Energy to create a proportionate EU market transparency and integrity regime which takes into account the specifics of the energy wholesale trading markets and fosters further market development. We are of the opinion that on balance a specific regime of DG Energy to ensure the market integrity and transparency of at least physical power and gas markets is likely to be a sufficient and appropriate policy measure to address any proven regulatory gaps and concerns with the existing framework. Nevertheless, there are also arguments in favour of using amendments to the Market Abuse Directive (MAD) as a means of delivering a practical solution to the supervision of energy markets as long as it takes the specifics of the energy sector into account.

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

We agree with the description of the current and expected developments. In this context, we would like to stress the significant differences between wholesale energy firms / businesses and the traditional financial firms / businesses and demonstrate that wholesale energy trading firms do not give rise to issues of investor protection and financial stability. Consequently, we question any simple like-for-like application of financial markets regulation to the wholesale energy trading markets, because this would contravene the aims of the energy market liberalisation and ignore the specifics of the energy wholesale trading markets. It is crucial therefore that the EU Commission effectively coordinates the various current initiatives that could impact on energy markets.

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

Yes, we recommend that if DG Energy is to create a tailor-made market transparency and integrity regime it should be based on the following general principles and reasons explained in Section I. below.

In this case, we advocate the content of the market transparency and integrity regime, which is explained in Section II. below.

Additionally, we support such a regime to avoid the shortcomings of the current regulatory situation as explained in Section III. below:

I. General Principles for EU market transparency and integrity regime for the underlying physical energy wholesale trading markets

1. The EU market transparency and integrity regime should be an **EU-wide binding Regime within the internal energy market sector legislation** (hereafter the “**EU TIR**”). This ensures a harmonized and EU-wide level playing field.¹
2. This EU TIR shall comprise a **transparency and market integrity regime for physical energy wholesale trading markets**. The market integrity regime comprises the insider dealing and market manipulation provisions as well as transaction reporting obligations. The transparency regime provides for transparency of fundamental data and trade data.²
3. **In an ideal world scenario this EU TIR should be comprehensive enough to cover the whole energy trading markets and to create a single EU-wide harmonized regime for this market:** A participant should be enabled to act on the underlying physical energy (gas, power, CO2) and energy derivatives markets without being exposed to several sets

¹ A voluntary regime would not ensure harmonized obligation and application and hinders in practice a level-playing field across the EU, because different voluntary regimes would be created in the different Member States.

² Please see our response to Question 2, Section II for more detailed explanation of the content of a market integrity and transparency regime.

of regulation of market integrity and transparency, so that the EU TIR should cover both the physical energy and the energy derivatives markets.

4. Recent EU developments indicate that **EU TIR would probably cover the underlying physical power and gas markets (spot and forward) and the Market Abuse Directive would probably be extended to the energy/commodity derivatives products traded on Regulated Markets (Exchanges) and Multilateral Trading Platforms (“MTFs”) and to certain OTC derivatives.**³ In addition, regulatory initiatives exist to entrust EU and national financial regulators under the MAD with the mission of monitoring, supervising and enforcing an EU market integrity and transparency regime for CO2. Consequently, there should be a clear line between the regulatory framework applying to financial products and that for physically traded products. In this respect we urge the EU Commission to take account of US proposals in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 that clarifies that the definition of a swap should not include:
 - o “(i) any contract of sale of a commodity for future delivery (or option on such a contract), ...”; and
 - o “(ii) any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled;...”.⁴

This regulation shows that physically settled transactions are usually not categorized as financial products.

5. **We champion an integrated/coordinated European level oversight regime:**⁵ EU wholesale energy markets are become increasingly integrated (both across class of products and regions). Therefore, ACER (Agency for Cooperation of Energy Regulators) could fulfil a coordinating and harmonising role to ensure harmonized and effective application of the EU TIR across the EU. For this reason ACER and national energy regulators on one side and ESMA and national financial regulators on the other side need to exchange information, cooperate and coordinate their actions. The question of how to best organize the responsibilities for the monitoring of these markets (i.e. nationally or/and at an EU level) will have to take into account on one hand the need to ensure a

³ Please see public consultation of DG Internal Market on a revision of the Market Abuse Directive (MAD), 25.06.2010, pages 3-4 and 6 – 7; see under: http://ec.europa.eu/internal_market/securities/abuse/index_en.htm; please see our response to Questions 9 to 12 for further explanation. .

⁴ Please see Title VII - Wall Street Transparency and Accountability -; Subtitle A - Regulation of Over-the-Counter Swap Markets; Part II - Regulation of Swap Markets -; sect. 721 (a).

⁵ Please see response to Questions 9 – 12 below.

consistent approach across all markets from an EU perspective, and on the other hand the detailed knowledge of local markets that national regulators have developed. It is equally crucial to avoid any unnecessary overlapping of responsibility and to prevent opportunities for regulatory arbitrage as this will only serve to undermine regulatory certainty and integrity in markets. There is also a need to consider how the oversight regime will work across the financial and physical markets – including the coordination of roles and responsibilities between energy and financial regulators at both a national and EU level (i.e between ACER and ESMA). We have attached a graphical description of a possible integrated/coordinated European level oversight regime (see attachment).

6. In this regulatory oversight system, it needs to be made sure that there is **no overlap, duplication and/or contradiction** between both sets of energy and financial market regulation and proper coordination between energy and financial market regulators.⁶
7. This EU TIR shall be created with the aim of reaching a maximum harmonisation. **To reach a maximum harmonisation, possibly an EU Regulation is necessary** to address the danger of Member States' legislators adopting super-equivalent and/or different measures regulating energy markets and transactions, once a new EU TIR is in place.⁷
8. **We propose to the EU Commission the following multi-level approach to define the EU TIR:**⁸ On the first level, the EU Commission should set out the EU-wide fundamental framework principles in an EU Regulation. At the second level, the relevant implementing binding guidelines shall be adopted on EU level: These should be binding guidelines to define the details of e.g. trade and fundamental data transparency, insider information and market manipulation etc.⁹ The advantage of this approach is e.g. that the guidelines can take into account the specifics of the energy wholesale trading markets, ensure coordination and harmonization and the flexibility of the regime.

⁶ See for more detailed response to Question 9 – 12.

⁷ Also, the European legal instrument should not only be descriptive, but rather exhaustive, detailed and specific, because an open-ended regime would be too vague and raise serious regulatory concerns and offer Member States possibilities to implement different rules. This could be realized through the adoption of Level 1 and 2 measures.

⁸ Please see our response to Question 6 – 7 below.

⁹ For example please see our response to Question 2, Section II. 1. below in respect of fundamental data transparency

9. **The main objectives of the EU TIR are clearly stated and respected in the later legislative process:** These objectives are market transparency and market integrity to foster further market development. The measures should aim to further improve the reliability of open and competitive energy trading wholesale markets. It should improve the trust participants have in the market and its price building mechanisms. This is the best way to give this still not fully mature market (in some Member States even emerging market) a positive brand and facilitates the entrance of new market participants: A brand of transparent and fair energy trading/ wholesale markets would attract market participants and most likely increase liquidity. Therefore, the proposals are supposed to secure the quality of the power/gas/emissions trading markets places in terms of fairness, efficiency, transparency and liquidity of the markets as well as regulatory oversight and avoidance of insider dealing and market manipulation / abuse. In doing so more confidence in price formation is intended as well as an increase in competition ensuring power/gas prices for consumers at competitive levels.

10. **This EU TIR is adapted to the specifics of the energy wholesale trading markets, its products, participants and market places.¹⁰**

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

12. **This EU TIR respects the principles of better regulation, in particular it is appropriate and proportionate in the light of its aims.** Hence, a right balance between the interest of market transparency / market integrity on the one hand and the legitimate interest of market participants of a still emerging EU energy wholesale trading market on the other hand needs to be respected. Also, we urge the EU Commission to perform a full Cost-Benefit-Analysis and Impact Assessment of the EU TIR.

¹⁰ This EU TIR should take into account the specifics of the energy markets, and should not be a „copy-paste-exercise“ on the basis of the existing Market Abuse Directive („MAD“).

13. The EU TIR should not lead to regulatory arbitrage¹¹ and to a competitive disadvantage of the EU and EU based energy trading firms. Any kind of regulatory arbitrage could put European players and markets places into a competitive disadvantage vis-à-vis other non EU-jurisdictions and as result put European regulatory authorities into an even less comfortable situation. Therefore, the EU TIR will create only an attractive EU market place, which can compete with other international market places.

II. Content of EU TIR

We propose the following contents of an EU TIR:

1. EU Transparency Regime

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

a. Transparency of fundamental data:

The EU TIR should guarantee the transparency of fundamental data. Fundamental data is the information, which has an effect on the price formation process for power, CO2 and gas products. Transparency of fundamental data means the disclosure of such relevant information to the public domain. We are of the opinion that such relevant fundamental data should be published as close to a real time basis as practicable.

The EU Commission states that this fundamental data regime can be realized through appropriate amendments of the EU Cross-Border Regulations for Power and Gas of the 3rd Energy Package¹² and adoption of according transparency guidelines under these EU Regulations. In this context we think that it is necessary that these guidelines define, in an explicit and inclusive way, the relevant fundamental data and the manner of the publication as

¹¹ Regulatory arbitrage (under these proposals) is actually possible in a number of different ways, e.g. market participants (energy firms, banks, etc.) and/or operators of market places (exchanges, platforms) could envisage to move their activities/operations to less onerous regulatory environments, e.g. to non EU-jurisdictions.

¹² Regulation of the European Parliament and of the Council on conditions for access to the natural gas transmission networks and repealing regulation (EC) NO 1775 / 2005 and Regulation of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges in electricity and repealing regulation (EC) NO 1228 / 2003.

such (timing, aggregation, etc.) to guarantee clarity of the fundamental data regime and certainty for market participants.

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

A basic requirement of this regime shall be the definition of which fundamental data should be disclosed to the public and which information represents insider information before public release. In this context it is necessary to define explicitly and in a comprehensive way the relevant fundamental *data*; *who* has the duty of publication; the *manner*, (i.e. aggregate VS individual basis); and the *timing* (i.e. close to real time VS other deadlines) of publication to ensure consistency with the timeframe for commercial and operational decisions. This should allow all market participants to have the relevant information about when to buy, when to sell, at what price and in what volume. Hence we highlight the need for transparency on fundamental data both to create a level playing field for market participants and to let market mechanisms function in the most efficient way. However, the level of transparency must be seen as a balance between market needs on the one side for transparency, better utilisation of assets and equal, fair trading and on the other side the need for giving investors sufficient incentive for assets to be built and protecting contractual arrangements used to underpin investments. This is recognised as important, given the extent of investment that will be required over the coming years in order to be able to continue to meet European energy requirements.

b. Post-trade transparency of trade data and reporting

The EU TIR should guarantee the transparency of post-trade data. Post-trade transparency refers to the publication of trade information on executed trade transactions in respect of power and gas products on a real/near real-time basis (“*Post Trade Transparency*”). Trade transaction means standardized transactions on Regulated Markets, MTFs and OTC-Markets. The post-trade transparency should not be limited to the underlying physical power and gas markets (spot and forward), but extend to all energy derivatives products. However, overlap and duplication of trade publication by firms, in particular for MiFID-firms, should be avoided, e.g. by data exchange between the different trade repositories. All post-trade data should be published in an anonymous format, so as to protect the commercial confidentiality of firms. Regulators should have access to full details on transactions through the proposed trade repository (see below) – but there is a need to define the access rights of regulators to such information – for example the circumstances under which regulators can access information that is not directly related to the market they monitor.

Transaction reporting is a necessary tool for the detection of market abuse by the competent regulator (i.e. insider dealing and market manipulation).¹³ In this context it is necessary that the EU TIR defines in an explicit and inclusive way the relevant transaction data and the manner of the publication as such (timing, frequency, etc.) to guarantee clarity and certainty for market participants.

The reporting of trades transacted through Regulated Markets, MTFs, broker platforms or central counterparty clearing shall be made by the operators of these facilities to the competent regulator or, if applicable, to a central trade repository. For pure bilateral OTC trades, a cost effective and practicable solution has to be found. We believe that an obligation on all counterparties to report transactions concluded would be inefficient, multiplying structures and costs. An obligation on trading facilities would instead preclude redundancy and mismatching and ensure harmonisation in the most efficient way. If a central trade repository is installed it could report the collected transaction data to the competent regulator. For pure bilateral standardised trades we agree with the EU Commission’s proposal that these should be reported on a less frequent basis (i.e. monthly/quarterly/annually).

¹³ Please see also our response to Question 18.

In addition, we want to give a specific mention to national transaction reporting requirements that are increasing throughout Europe and also for this reason we urge to replace these requirements at EU level as soon as possible by the above-mentioned transaction reporting regime.

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

Market Integrity Regime consists of an Insider Dealing Regime and a Market Manipulation Regime for the underlying physical power and gas markets (spot and forward).

a. Insider Dealing Regime

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

b. Market Manipulation Regime

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

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

III. Shortcomings of the current regulatory situation

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

Therefore the current regulatory framework should be updated – as described in section I and II above) – to

- *close existing regulatory gaps in respect of the wholesale energy trading markets (see no. 1 below); and*
- *avoid shortcomings of the current regulatory oversight over the wholesale energy trading markets¹⁴ (see no. 2 below).*

In detail:

(1) The current regulatory framework should be updated on a proportionate basis to close the following important regulatory gaps in the oversight of energy wholesale markets (power, gas, CO2), which have been identified by CESR-ERGEG in their advice of October 2008 on Market Abuse (Ref: CESR/08-739 – “CESR-ERGEG Advice on Market Abuse”)¹⁵ and of December 2008 on Transparency (Ref: CESR/08-998 – “CESR-ERGEG Advice on Transparency”)¹⁶:

¹⁴ “Energy wholesale trading markets” means wholesale markets in power, gas and CO2.

¹⁵ Please see CESR and ERGEG advice to the European Commission in the context of the Third Energy Package Response to Question F.20 – Market Abuse – of October 2008 (Ref: CESR/08-739 – “CESR-ERGEG Advice on Market Abuse”); see under: <http://www.cesr-eu.org/popup2.php?id=5270>.

¹⁶ Please see CESR and ERGEG advice to the European Commission in the context of the Third Energy Package, Questions D.4 to D.6 – record-keeping, Questions E.11, E.18 and E.19 – transparency, Questions D.7 to D.10 – exchange of information, of December 2008 (Ref: CESR/08-998 – “CESR-ERGEG Advice on Transparency”); see under: <http://www.cesr-eu.org/popup2.php?id=5478>.

- There is no comprehensive EU regime for the transparency of fundamental data.¹⁷
- There are no pre- or post-trade transparency obligations for firms with respect to energy and energy derivatives.¹⁸
- There is only transaction reporting under the MiFID for MiFID firms.¹⁹
- There is no transaction reporting for non-MiFID firms, only a record keeping obligation under the 3rd Energy Package which obliges energy firms (i.e. only non-MiFID firms) to keep records of their transactions and to deliver that data only upon request to regulators.
- The insider dealing and market manipulation prohibitions of MAD do not apply to the physical spot and OTC markets.²⁰
- The 3rd Energy Package does not comprise clear obligations to ensure the integrity of the energy wholesale markets: the 3rd energy package does not specifically address energy wholesale trading markets, in particular it does not contain at all market integrity rules for energy wholesale trading markets. Also the transparency provisions of it have not been conceived specifically for those markets and their needs.

(2) An updated EU Regime is necessary to avoid a scattered regulatory landscape.

In many Member States, such as Germany, there are energy and financial regulators as well as a competition authorities, which already have competencies within their national regulatory regime for the oversight of wholesale energy markets; these competencies will be supplemented by the future implementation of the 3rd package (e.g. record keeping) and the future financial market regulation of OTC derivatives (e.g. trade repositories). In addition, the regulatory regime of these authorities does differ in each of the Member States. Furthermore, currently DG Competition and in the future ACER (under the 3rd package for e.g. the record keeping) and ESMA (under the forthcoming EU Securities Market Regulator) respectively, will have regulatory competencies in respect of those markets. It is obvious that such a multitude of regulatory bodies and their regimes are not an optimal regulatory design as this could lead to overlapping and contradictory regulatory oversight and decisions and hence legal uncertainty for market participants. Also the costs of such a multitude of regimes leads to market entry barriers and could also cause the exit of existing market participants, because

¹⁷ See CESR-ERGEG Advice on Market Abuse, ref. 59 et seq.

¹⁸ See CESR-ERGEG Advice on Transparency, ref. 100.

¹⁹ See CESR-ERGEG Advice on Transparency, ref. 68.

²⁰ See CESR-ERGEG Advice on Market Abuse, ref. 53

market participants and new entrants have to handle these national and EU authorities and their regimes. Therefore, a right borderline and coordination between the different regulations and regulators should be created.

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

Please see our response to Question 2 under Section I. 5. above and Questions 9 – 12 below.

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

We agree that - based on the above-mentioned regulatory gaps and shortcomings²¹ - a sub-optimal oversight of energy wholesale markets exists, which hinders further market development. The current regulatory situation does, in particular, not take into account the factual situation that energy wholesale markets are increasingly characterized by a wide range of actors (including utilities, pure traders, financial institutions and other wholesale trading market participants and platforms), cross-border trade, important derivatives markets around markets in the underlying energy products and increasing liquidity in energy wholesale trading activities. Various different national regimes and authorities do not fit to such an EU-wide wholesale trading market.

An integrated/coordinated EU level oversight regime²² between all markets is necessary because only a corresponding EU-wide regime can create a harmonized regulatory situation and an EU level playing field; this is also necessary to guarantee further market development:

²¹ Please see response to Question 2, Section III above.

²² Please see our response to Question 2, Section I. 5. above and Questions 9 – 12 below.

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

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

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

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

A market integrity regime consists of definition and prohibition of market abuse, i.e. insider dealing and market manipulation. It needs to be considered that the different participants in the energy trading markets, the different products and markets places should be subject to a consistent market integrity regime to create a level playing field for the EU-wide energy market and avoid a burdensome compliance. Otherwise the same market participant would have to comply with substantially different sets of regulations (i.e. with an EU TIR, a MAD-regime and maybe also with a specific CO2 market integrity regime, dependent on the market place and kind of products he trades). Therefore, we champion an integrated/coordinated European level oversight regime.²³

However, the current definition of market abuse under MAD cannot be applied 1:1 to the energy wholesale trading markets without further clarification, because it was originally drafted specifically for the traditional financial markets and its instruments and market

²³ Please see for more explanation our response to Questions 9 to 12.

participants. Therefore, it cannot be applied directly to wholesale energy trading markets. Therefore, further work will be necessary to ensure that specific energy requirements are appropriately covered if this route is chosen.

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

We recommend to the EU Commission to include provisions on market abuse directly into the EU TIR Regulation instead of leaving this to non-binding guidance from an EU oversight body. Therefore, we propose to the EU Commission the following multi-level approach to define a tailor-made market integrity regime, which guarantees a better regulation approach: The EU Commission could set out the EU-wide fundamental framework principles on a first level, which could consist of an EU Regulation. At the second level, ACER could, in its coordinating and harmonising role, adopt guidelines, which could be made binding through comitology procedures by the EU Commission, if it is necessary to ensure a level-playing field and harmonized application of the EU TIR across all Member States.

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

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

However, the EU TIR should comprise additional regulatory features to guarantee market integrity and transparency and enable competent regulators to monitor, supervise and enforce this regime. Therefore, the EU Commission should define at first the contents of an EU TIR in more detail.²⁴

²⁴ We advocate that the above-mentioned items are part of the EU TIR; please see our response to Question 2, Section II above.

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?

Please see our response under Question 2, Section I. 5. above.

The EU Commission should take into account that possibly there will be three regulatory regimes in the future for the energy wholesale trading markets in power, gas and CO2 as follows:

- DG Energy's EU TIR for the underlying physical power and gas markets (spot and forward);
- the MAD for energy derivatives products traded on Regulated Markets and MTFs (and certain OTC derivatives);²⁵ and
- a future DG Environment's EU market integrity and transparency regime for CO2.²⁶

This highlights that it will be crucial for the EC to coordinate its proposals under the various initiatives that will impact on EU energy markets.

²⁵ Please see public consultation of DG Internal Market on a revision of the Market Abuse Directive (MAD), 25.06.2010, pages 3-4 and 6 – 7; see under: http://ec.europa.eu/internal_market/securities/abuse/index_en.htm.

²⁶ Please see Regulation on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances under the Emissions Trading Directive 2003/87/EC, please see under:

http://ec.europa.eu/environment/climat/emission/pdf/proposed_auctioning_reg.pdf; please see also the so-called Prada-Report: The regulation of CO2 markets, Assignment report by Michel Prada, April 2010; see under: <http://www.economie.gouv.fr/services/rap10/100419rap-prada.pdf>.

To ensure an effective European level oversight regime across these three sector regulation, then the EU Commission needs

- to install a “one-stop-shop Regulation”, respectively, a “Home Regulator”. Market participants should not be obliged to handle 27 national regulators for each of the above-mentioned 3 regimes. For the supervision and enforcement one competent energy and financial market regulator should be installed;
- to define clearly the institutional framework for the oversight and monitoring of these wholesale energy markets. It has to be defined which regulator is competent for which market segment, e.g. energy markets regulators for the underlying physical power and gas markets (spot and forward) and financial market regulators for energy derivatives products traded on Regulated Markets and MTFs.
- to guarantee a common application, interpretation, monitoring, supervision and enforcement among all national and EU regulators and market participants (traders, TSOs, SSOs, etc.). This facilitates the compliance with such a regime, avoids the creation of new regulatory barriers and creates a level-playing field.²⁷ The harmonization, cooperation and coordination of these regulatory networks should be led by ACER and ESMA (European Securities Market Authority). These aims could be reached by ACER and ESMA through adopting binding guidelines;²⁸
- to define interaction and relationship between / among national and EU energy and financial regulators. It is important for regulators to exchange information between themselves,²⁹ to observe the interactions between the underlying physical and financial markets as well as between different national markets and to supervise / monitor cross border cases; and
- to draw an appropriate borderline and to create coordination between the different regulation, i.e. energy market and financial market and anti-trust regulation, to avoid duplication and overlap of regulation:
 - For example, the new EU TIR should not contradict and overlap with other relevant EU legislation such as the MAD, the forthcoming CO2 market integrity regime and antitrust law and the competencies of the respective regulators.

²⁷ It should be avoided that different regulators impose different obligations, or, e.g. that different market participants (Traders, TSOs, SSOs) publish data in ways that are not useful or cannot be compared between network operators etc.

²⁸ Please see response to Questions 6 and 7 above.

²⁹ Please see CESR-ERGEG Advice on Transparency, ref. 251 et seq.

Duplication/Contradiction of regulation will create uncertainty as to which legal framework should apply including the appropriate authority to pursue any cases.

- The interaction between energy, anti-trust and financial regulators will be crucial to making any regime work effectively. Clear obligations and responsibilities must be outlined in any legislation.

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?

The EU Commission (DG Environment) has proposed in its CO2 Auctioning Regulation that the MAD shall apply to the primary auction of CO2-certificates and will carry out a major study during 2011 to evaluate the level of protection of the EU ETS carbon market. The Prada-Report³⁰ recommends the creation of a regulation framework adapted to the specifics of the CO2 market, which should cover the entire range of transactions (spot or derivatives, on trading platforms or OTC) under the supervision of the EU system of financial regulators, in close cooperation with the EU system of energy regulators. In addition, most of transactions are either traded via Regulated Markets (exchanges), MTFs (brokers) or centrally cleared. In this context, it is considered to entrust the primary responsibility for monitoring, supervising and enforcing an EU market integrity regime for CO2 to financial regulators.³¹ The national financial market regulators and ESMA would also need access to trade data and fundamental data to be able to fulfil these missions. If such an approach were to be adopted, we propose that this regime should be an integrated/coordinated European level oversight regime similar to the one for the EU TIR.³²

However, we think that CO2-markets are strictly correlated to physical energy markets in Europe and that those markets closely interact with each other. Energy and CO2-products are

³⁰ Please see the so-called Prada-Report: The regulation of CO2 markets, Assignment report by Michel Prada, April 2010; see under: <http://www.economie.gouv.fr/services/rap10/100419rap-prada.pdf>.

³¹ Please see the so-called Prada-Report: The regulation of CO2 markets, Assignment report by Michel Prada, April 2010; see under: <http://www.economie.gouv.fr/services/rap10/100419rap-prada.pdf>.

³² Please see our response to Questions 2 and 9 – 12 for a description of an integrated/coordinated European level oversight regime.

usually traded by the same market participants and there are strong links in the price formation and interaction between markets. Additionally many trading venues are available both for trading energy and CO₂. Consequently, it would also be justified that the EU TIR covers the market integrity and transparency of physically CO₂ markets (spot and forward). In any case, we urge that ESMA and national financial regulators act at least in close cooperation with ACER and national energy regulators as described above in our response to Questions 9 – 12. Also, ACER should have access to all relevant transaction and fundamental data and get the support from ESMA to analyse fundamentals.

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?

Coal and oil influence the price formation process of energy markets. Nevertheless we understand that these are more global markets and the definition of a proper oversight regime would go beyond EU boundaries and imply a different timeframe by which results might be available. However we suggest that it is important to work also in this direction, most likely with a different priority and timescale

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

We do not believe that the general application of exemptions (either to firms, products traded or types of transactions) or *de minimis* levels is consistent with the objective of ensuring that the new regime is comprehensive and closes the perceived regulatory gaps. They could undermine confidence in the new regime and lead to the possibility of regulatory arbitrage if different approaches are taken across Member States.

If any exemptions are provided they should

- be as limited as possible – both in terms of scope and time;
- be fully justified and approved by the EU Commission following consultation with market participants; and
- demonstrate that a full application of the new regime would materially damage the future development of an efficient and integrated market.

The only area where we see that the application of *de minimis* levels is required, is on the publication of fundamental data – where for example EFET has identified a threshold of 100 MW for an individual power plant below which transparency requirements should not apply. Any *de minimis* levels for transparency should be applied on a consistent basis across the EU and should be monitored by ACER.

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

We are strongly advocating that all energy market transactions should be reported centrally to an EU-wide trade repository. In the event that a ‘trade repository’ is created for the collection of trade data its scope will need to be defined clearly and we champion that the EU Commission should consider that ACER could call upon and supervise a trade repository (in coordination with ESMA). Access rules and arrangements and any disclosure requirements (ensuring the commercial confidentiality of counterparties) for such trade repository will need to be outlined in the EU TIR. Again, primary responsibility for reporting transaction data to a trade repository should reside with the market operator (i.e. regulated exchange, broker, MTF etc) where the trade was concluded. As suggested in the consultation paper, transactions in standard products concluded on a purely bilateral basis (and not cleared) should be reported in a proportionate and cost effective way (i.e. monthly/quarterly/yearly). Information fed into a repository must only be mandated by electronic means and based on standardized formats and EFET electronic data exchange standards could be adopted to facilitate peer to peer or centralised communication of data. This approach would reduce the burden of providing transactional data, because there will be one set of data, one format, one reporting delay and

frequency across the EU instead of potentially 27 different reporting regimes.³³ ACER could then transmit to national regulators (energy and financial regulators) and ESMA the trade data either upon request from those regulators or on an automated basis through a so-called Transaction Reporting Exchange Mechanism (TREM).³⁴

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

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

Contact Person: Dr. Karl-Peter Horstmann (karl-peter.horstmann@rwe.com)

³³ Please see for possible formats etc. CESR-ERGEG Advice on Transparency, ref. 69 et seq.

³⁴ Please see for exchange of information between regulators CESR-ERGEG Advice on Transparency, ref. 251 et seq.