

**General Principles and Content of a
Transparency and Market Integrity Regime for Energy Trading**

A. General Principles

- I. EU-wide binding Regime within the internal energy market sector legislation (hereafter the “EU Regime”). This ensures a harmonized and EU-wide level playing field.¹
- II. This EU Regime shall comprise a transparency and market integrity regime for energy wholesale trading markets. “Energy wholesale trading markets” means wholesale markets in power, gas and CO₂.
- III. This EU Regime is created by a new Directive or Regulation with the aim to reach a maximum harmonisation. To reach a maximum harmonisation, possibly an EU Regulation is necessary, to address the need to prevent Member States legislators adopting super-equivalent measures regulating energy markets and transactions, once a new EU regime is in place.²
- IV. The main aims of the EU Regime are clearly stated and respected in the further legislative process: These 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 shall improve the trust participants have in the market and its price building mechanisms. This is the best way to give this still 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 as much market participants as possible and will increase liquidity. Therefore, the proposals are supposed to secure the quality of the power/gas 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.
- V. This EU Regime is tailor-made to the energy wholesale trading markets, its products, participants and market places.³
- VI. This EU Regime is comprehensive: It covers energy wholesale trading markets, i.e. power, gas and CO₂, as well as all market participants and places. It is useful to define in details the products covered by the new EU Regime. This product scope of the EU Regime should cover all (standardized) products traded and all markets places of the energy trading markets⁴ to cover the whole energy trading markets and to create a single EU-wide harmonized regime for this market.

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 Also, the European legal instrument shall not be only 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 do implement different rules. This could be realized through the adoption of Level 1 and 2 measures.

³ This EU Regime should take into account the specifics of the energy markets, and shall not be a „copy-past-exercise“ on the basis of the existing Market Abuse Directive („MAD“).

⁴ This would encompass all standardized products traded on regulated markets, MTFs and OTC-markets and all standardized products which are physically and financially settled, so that no regulatory gap exists.

- VII. The 3rd energy package does not specially address energy wholesale trading markets, in particular it does not contain at all market integrity rules for energy wholesale trading markets. Also the transparency provision of it have not been conceived specially for those markets and their needs. In addition, the EU Regime would go beyond the borders of the existing provisions of the 3rd package and result in major changes / obligations so that a primary new legislation is necessary. Therefore, a new regulatory framework needs to be created as a simple elaboration in comitology of guidelines under the 3rd energy package can not achieve the intended aims.
- VIII. However, a right borderline and coordination between the different regulation, i.e. energy market and financial market and anti-trust regulation, needs to be drawn.⁵
- IX. A participant should be enabled to act on the energy (gas, power, CO2) and energy derivatives markets without being exposed to several sets of regulation of market integrity, which differ substantially, so that the EU Regime should cover both the energy and the energy derivatives markets. It needs to be considered that the different participants in the energy trading markets and the different products and markets places on the energy market should be subject to a comparable set of regulation and of regulators to create a level playing field for the EU-wide energy market and avoid a burdensome compliance.⁶ For example, the definition of what constitutes insider information and market manipulation should be identically as far as possible.
- X. There will be a need to define clearly the institutional framework for monitoring wholesale energy markets and in particular the interaction and relationship between energy and financial regulators. There is a need to consider whether there is a requirement for any EU Monitoring Agency responsible for all EU wholesale energy markets and if so its responsibilities and powers which will need to be included in the EU regime.⁷
- XI. Transfer of all relevant market integrity and transparency obligations into this EU Regime. 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.⁸
- XII. A Directive / Regulation defines the fundamental framework principles, whereas the technical implementing measures are defined in (an) implementing Directive(s) / Regulation(s). For the creation / adoption of this EU Regime a stepwise approach could be

⁵ A right borderline and coordination between the different areas of regulation and the EU Regime needs to be drawn:

1. The new EU Regime shall not contradict and overlap with other relevant EU legislation, such as the MAD and antitrust law and the competencies of the respective regulators. Duplication/Contradiction of regulation will create uncertainty as to which legal framework should apply including the appropriate authority to pursue any cases.
2. 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.

⁶ Otherwise the same market participant would have to comply with two substantially different set of regulations (a MAD-regime and the EU Regime dependent on the market place and kind of products he trades).

⁷ See for more details on this subject matter under III. 2. below.

⁸ 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 Regime.

used, whereas ACER and market participants should be involved on all levels. This offers various advantages and guarantees a better regulation approach⁹

- XIII. A common application, interpretation, supervision and enforcement among national regulators and market participants (Traders, TSOs, SSOs, etc.) of this EU Regime are necessary. This facilitates the compliance with such a regime and avoids the creation of new regulatory barriers.¹⁰ In this context, a “one-stop-shop Regulation”, respectively, a “Home Regulator” is necessary.
- XIV. Therefore, market surveillance and enforcement powers as well as information sharing between any EU Monitoring Agency and national regulators (as well as between regulators /competent authorities) are to be regulated by the EU Regime.¹¹
- XV. In this context of an EU harmonization and EU-wide level playing field it should be considered to introduce a so-called “data repository”, which would be the central point of collection of fundamental and trade data in the EU and ensure that this information is made transparent to the market and accessible to national regulators in an appropriate manner which safeguards the interest of all involved parties.¹²
- XVI. This EU Regime 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 and on the other hand of a still emerging EU energy wholesale trading market needs to be respected. The potential burden of regulation on small and medium-sized market participants could be addressed by “de-minimis rules” or similar regulatory mechanisms (based on specific thresholds).
- XVII. The EU Regime should not lead to regulatory arbitrage¹³ 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

⁹ The first level will consist of a Directive or Regulations, proposed by the Commission following consultation with all interested parties and adopted under the "co-decision" procedure by the Council and the European Parliament, in accordance with the EC Treaty. In such legislative act the nature and extent of detailed technical implementing measures has to be decided at a second level. At this second level, the relevant implementing measures will be adopted. Such measures will be used to ensure that the EU Regime is flexible, technical provisions can be kept up-to-date with market developments and differences in markets and market maturity across products and geographic areas can be taken into account.

¹⁰ 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.

¹¹ Please see for details under B III. 2. below.

¹² For details of the competence and role of such EU-wide data repository see under B III. 2. below.

¹³ Regulatory arbitrage (under these proposals) is actually possible in a number of different ways of which the following appear to be relevant in particular:

1. Not all players active in the European Market place are affected in the same way as requirements for market participants can not be extended to players active from abroad. Not all market places are regulated in the same way (with EEX and Nord Pool being market places with a fully fledged exchange surveillance environment) and trading of products can not be restricted so that other market places outside of EU-regulation might start to become the most prominent places to trade power and gas for marketplaces in Europe.
2. 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.

vis-à-vis other non EU-jurisdiction and as result put European regulatory authorities into an even less comfortable situation. Therefore, the EU Regime will create only an attractive (financial) EU market place, which can compete with other international (financial) market places.

B. Content of tailor-made Transparency and Market Integrity Regime for Energy Trading in Europe

I. EU Transparency Regime

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

1. Transparency of fundamental data:

Fundamental data is the information on data, which have an effect on the price formation process for power, CO₂ and gas products, such as information on generation, transmission, storage and consumption.

Transparency of fundamental data is the disclosure of such information to the public domain by the operator of the infrastructure (“EU Fundamental Data Regime”).

It is necessary to define in an explicit and inclusive way the relevant fundamental data and the manner of the publication as such (timing, aggregation, etc.) to guarantee clarity of the EU Fundamental Data Regime and certainty for market participants.

The EU Fundamental Data Regime could include already existing information infrastructures and procedures.

2. Transparency of trade data

Post-trade transparency refers to the publication of trade information on executed transaction in respect of power, CO₂ and gas products on a real/near real-time basis (“*Post Trade Transparency*”).

Trade Transaction means standardized transaction on Regulated Markets, Regulated Multilateral Trading Platforms (MTFs) and OTC-Markets (broker platforms).

Disclosure to the public shall be made by the operators of Regulated Markets, MTFs and broker platforms.

It is necessary to define explicit and inclusive the relevant data and the manner of the publication as such (timing, aggregation, etc.) to guarantee clarity of the EU Post Trade Transparency Regime and certainty for market participants.

In the event a ‘trade repository’ is created for the collation of post trade data its scope will need to be defined clearly. It should be the EU Monitoring Agency, whereas access rules and arrangements and any disclosure requirements (ensuring the commercial confidentiality of counterparties) for the trade repository will need to be outlined in the EU Regime. 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. Information fed into a repository must only be mandated by electronic means and electronic data exchange standards could be adopted to facilitate peer to peer or centralised communication of data.

II. Tailor-made Market Integrity Regime for power and gas markets

Market Integrity Regime consists of an Insider Dealing Regime and a Market Manipulation Regime.

1. Insider Dealing Regime

The insider dealing regime forbids any person who possesses inside information

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

The definition of inside information needs to be tailor-made: It is necessary to define exactly what constitutes inside information based on the above-mentioned definition of fundamental data.¹⁴

2. Market Manipulation Regime

The prohibition of market manipulation (Art. 5 MAD) forbids any person

- to disseminate Information which gives or is likely to give, false or misleading signals to the price of financial instruments;
- to execute transactions or give orders to trade, which give or are likely to give, false or misleading signals to the price of financial instruments, and
- to manipulate the price of financial instruments via other forms of deception.

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 inefficiency in the operation of energy infrastructure (power plants, gas production facilities, LNG, storage etc).

¹⁴ Such definition should be explicit and inclusive.

III. Regulatory Supervision: Information for regulators, powers of regulators, competent regulator, information exchange between regulators

Regulatory supervision is needed to guarantee, check and enforce the compliance by market participants of the above-mentioned EU Regime.

The regulatory supervision consist of different set of rules in relation to information for regulators, powers of regulators, competent regulator, information exchange between regulators.

1. Competent regulator

The competent national regulator has to be nominated, whereas the preference lies on the national energy market supervisory body. In this context the principles of “one-stop-shop Regulation” and of the “home state regulator” are to be addressed. There could be a new EU Monitoring Agency and if so it should take an important role in ensuring equal implementation and application of the EU regime (see below under no. 2).

2. The powers of the competent national regulators and EU Monitoring Agency and their interaction

It is crucial to define the powers of the competent national regulators and the EU Monitoring Agency:

The national regulators should continue to have their powers under the respective EU sector regulation, in particular their prohibition and enforcement powers vis-à-vis the market participants.

The EU Monitoring Agency should focus on the tasks, which are EU-wide issues and more efficiently handled on an EU-wide level:

- It could operate (or regulate) an EU-wide “data repository” for transaction data. This would guarantee that firms active on the energy wholesale trading markets should deliver this data only once under a single format and regime instead of reporting this data to the numerous national regulators across the EU under their different regimes and formats.
- It could publish the reported transaction data in an aggregated, anonymous manner, so that confidentiality of commercial sensitive data is guaranteed.
- It could organise access to transaction data by national regulators.
- It could provide guidance to national regulatory authorities on implementation of the EU regime and coordinate cross-border investigation.
- It could harmonize and define regulatory EU-wide binding rules under the primary EU Market Integrity and Transparency Regime in the form of implementing measures.

The institutional relationship, interaction and information sharing between the national regulators (energy market regulators, financial market regulators and competition authorities) themselves and between the national regulators and the EU Monitoring Agency need to be defined. Also, the relationship between any EU monitoring agency for wholesale energy markets and the recently proposed European Securities Market Authority will also need to be specified clearly.

If an EU wide monitoring agency is established it will also be necessary to consider whether this is a new institution or whether ACER [Agency for the Cooperation of Energy Regulators ("ACER") established by Regulation (EC) No 713/ 2009 of the European Parliament and of the Council ("ACER-Regulation")] should take this responsibility, whereas the latter is would be preferable.

Finally, the EU Monitoring Agency needs to be regulated (like other EU Agencies) by a dedicated EU Regime, e.g. like the ACER-Regulation, which addresses all of the above-mentioned relevant issues.

3. Information for competent regulator (monitoring the market)

The EU regime shall enable the national regulators and the EU Monitoring Agency to monitor the power and gas markets. For this purpose the competent national regulator and the EU Monitoring Agency needs information about the market in terms of fundamental data and transaction data.

Currently, the record-keeping obligation of the 3rd package contains elements of an information obligation of market participants to national regulators.

4. Record Keeping

A fundamental decision needs to be made whether or not the new record keeping obligation of the 3rd package (see Art. 40 Power Directive; Art. 44 Gas Directive) should be integrated in the EU Regime. This is recommended as this provision comprises already many of the above-mentioned elements of regulatory supervision which have to be included in the EU Regime anyway.

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