



SÄCHSISCHES  
STAATSMINISTERIUM  
FÜR WIRTSCHAFT  
UND ARBEIT

SÄCHSISCHES STAATSMINISTERIUM FÜR WIRTSCHAFT UND ARBEIT  
Postfach 10 03 29 • 01073 Dresden

CESR Secretary General  
11-13 Avenue de Friedland  
F - 75008 Paris

CEER and ERGEG Secretariat  
Rue le Titien 28  
B - 1000 Brussels

By Electronic Mail  
mailto: [fis@ergge.org](mailto:fis@ergge.org) and [www.cesr.eu](http://www.cesr.eu)

**BÖRSENAUFSICHT**

Dresden, 17.3.2008  
Telefon: (03 51) 5 64-8565  
Bearb.: Volker Zuleger  
E-Mail: [Volker.Zuleger@smwa.sachsen.de](mailto:Volker.Zuleger@smwa.sachsen.de)  
Aktenzeichen: 56-4203.55  
(Bitte bei Antwort angeben)

**CESR/ERGEG Call for Evidence on Record Keeping, Transparency, Supply  
Contracts and Derivatives for Electricity and Gas (Ref: CESR/08-140)**  
Comments from the Saxonian Exchange Supervisory Authority

Dear Sir or Madam,

We welcome CESR's and ERGEG's efforts to evaluate the aforementioned subject and the opportunity to respond to the consultation.

The Saxonian Exchange Supervisory Authority in the Saxonian State Ministry for Economic Affairs and Labour is responsible, under the German Exchange Act, for monitoring the European Energy Exchange in Leipzig, a regulated market under EU law. In view of CESR's and ERGEG's own contributions, the attached comments are limited to some general remarks related to our experiences with the supervision of an energy exchange under the current EU and national legal framework.

We hope the attached annotations are helpful in your call for evidence. If you have any questions with regard to our comments, please do not hesitate to contact us.

Yours faithfully,

Reinhard Flaskamp  
Ministerialrat

**Enclosure**

**Comments from the Saxonian Exchange Supervisory Authority on the CESR/ERGEG Call for Evidence on Record Keeping, Transparency, Supply Contracts and Derivatives for Electricity and Gas (Ref: CESR/08-140)**

**I. General remarks**

1. We welcome the opportunity to respond to CESR's and ERGEG's joint consultation on record keeping, transparency, supply contracts and derivatives for electricity and gas. We expect this consultation extremely useful and important to further develop and harmonize the rules on supervising wholesale energy markets both under EU financial market rules and EU energy market rules.
2. Such rules are particularly necessary for the supervision of exchanges and MTFs that are limited to spot markets and therefore fall outside the scope of EU financial market rules as no financial instruments are traded. But also the fact that a significant share of the wholesale energy market is traded over-the-counter and therefore beyond exchanges hampers the facility of national authorities to obtain a full market oversight and hence the possibility to detect market abuse.
3. The on-going process of cooperation and mergers between European energy exchanges is another reason to call on reviewed common rules for the supervision of wholesale energy markets.

**II. Review of the EU financial market rules**

1. The current EU legislative framework to protect market integrity requires a fine adjustment as regards the rules on commodity derivative markets. Particularly the MiFID regime and the market abuse directive (hereafter: MAD) could be reviewed as to the obligations to report transactions and the rules on insider dealing and market abuse with regard to commodity derivatives.
2. As to the obligation to report transactions in any financial instrument admitted to trading on a regulated market, it should be recalled that, pursuant to Article 25(3) of MiFID, such obligations are limited to investment firms. Pursuant to Article 2(1)(i) to (l) of MiFID, certain persons are excluded from the scope of MiFID and not considered as an investment firm in the meaning of MiFID. However, in commodity derivative markets, often only a minority of market participants consists of investment firms in the meaning of MiFID, whilst the majority consists of persons dealing on own account or persons providing investment services in commodity derivatives as an ancillary activity to their main business pursuant to Article 2(1)(i) of MiFID. As therefore a large group of economic actors on such markets is excluded from the obligation to report transactions, the competent authority does not receive all information necessary for an overall market oversight. This is why, if the exemptions of Article 2 of MiFID remain unchanged, at least the obligation to report transactions on financial instruments to the competent authority should be extended to a larger group if not all market participants pursuant to 25(3) of MiFID.
3. Furthermore, the MAD regime and its provisions on insider dealing and market manipulation should be reviewed in order to further increase the integrity of commodity derivative markets and investor confidence in those markets. Article 4 of Commission Directive 2004/72/EC and its aim to increase legal certainty for market participants on what constitutes inside information on derivative markets

the underlying of which is not a financial instrument but a commodity points in the right direction, but seems to require further legislative fine-tuning, e.g. as regards the definition of an inside information and the definition of an issuer on commodity derivative markets as well as regards any potential interdependency between insider dealing on commodity derivative markets and/or on the underlying commodity market. In addition, it should be assessed whether the rules on market abuse, at least the rules on market manipulation, of the MAD regime could be extended to commodities underlying financial instruments as stipulated in points C(6) and (7) of Annex I to MiFID (see § 20a(4) of the German Securities Trading Act).

### **III. Review of the EU energy market rules**

1. We appreciate the Commission's efforts to stipulate, in the context of the so-called 3<sup>rd</sup> energy package, common rules for the European wholesale power and gas markets. In response to DG Internal Market's call for evidence on the review of commodity and exotic derivatives business launched on 8 December 2006, we have previously called for an extension of the MiFID- and MAD-regimes to commodity markets. However, due to the recent developments of up-coming cooperations and mergers between EU energy exchanges leading to a potential intense competition between markets falling under the MiFID rules on the one hand and exchanges and MTFs limited to spot markets and therefore outside the scope of EU financial market rules on the other hand, we would now propose to rather extend the competences of the national energy regulators and to define common energy market rules for the supervision of the EU wholesale energy market, regardless whether the market place fulfils the definition of a regulated market under MiFID or not. Such rules may comprise market abuse rules similar to the MAD regime, but also obligations to report transactions to enable the competent authorities to detect market abuse.

The current proposal of the 3<sup>rd</sup> energy package to introduce obligations on record keeping is indeed a good starting point and will significantly improve the market monitoring of regulators. But in practice this will only be of any use if there already is a certain suspect of an offence and hence only improves the ex-post control. A full market oversight of regulators, however, requires constant information on market transactions. In order to prevent any unjustified administrative burden, such reporting obligations may actually be limited to oblige exchanges, MTFs and clearing houses to report daily transactions in energy commodities to the competent authority in an aggregated form. As a significant share of transactions is conducted over-the-counter, in addition also traders trading a significant volume of energy commodities over-the-counter should be obliged, as of a certain threshold, to report their transactions. Combined with the requirement of record keeping as intended in the 3<sup>rd</sup> energy package, this would enable the competent authority to receive the necessary market oversight to detect any market abuse the earliest possible. One can argue, that market abuse in energy markets is less important from the view of the market participants than in securities markets because energy traders can be assumed as well informed and as acting professionally. But it should be clear, that the advantages a reference price like the EEX-Phelix has for the hole power market should be accompanied by proper market rules.

2. Furthermore, the transparency in the wholesale energy market could be increased by defining legally binding rules for publishing power plant information. Spot traders, in particular, need to be fully informed of any changes to the available capacity figures. Any misinformation may have an impact on the market. Lately,

several honourable transparency initiatives of a voluntary nature intended to increase the level of information. However, voluntarily published data often lacks the necessary completeness or reliability and may be unsatisfactory to serve market needs; in an extreme case, such misinformation may even have distortionary effects on the wholesale market. This is why legally binding rules for the publication of such data, possibly under the supervision of national energy regulators, are needed to create a level playing field for all spot traders in the wholesale energy market. As regards the information that should be published, when this should be done and how, it is referred to a study commissioned by our ministry on the information necessary to increase transparency in wholesale electricity markets. It is available under:

[http://www.smwa.sachsen.de/de/Markt\\_Aufsicht/Wettbewerbsschutz/Boersenaufsicht/19079.html](http://www.smwa.sachsen.de/de/Markt_Aufsicht/Wettbewerbsschutz/Boersenaufsicht/19079.html)

3. It should finally be noted that extending the competences of the energy regulators on energy commodities would not harm the competences of the financial regulators on energy derivatives or vice versa. In contrary, such competences would complement each other and enable a complete market oversight of both energy derivatives and there underlying commodities. In a way, such regulatory framework of shared competences finds its role model in the US with the Securities and Exchange Commission (SEC) and the Federal Energy Regulatory Commission (FERC), the latter also having *inter alia* competences to issue rules to bar market manipulation in wholesale power and gas markets.