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(Bitte bei Antwort angeben)

**CESR and ERGEG advice to the European Commission in the context of the
Third Energy Package (Ref: CESR/08-509)**

Comments from the Saxonian Exchange Supervisory Authority

Dear Sir or Madam,

We welcome your draft advice to the European Commission and the opportunity to respond to the consultation. The draft advice clearly reveals the existing loopholes in the current market abuse legislation. It proposes a streamlined solution to overcome these loopholes by calling on a tailor-made market abuse framework within the energy sector legislation for all electricity and gas products not covered by the market abuse directive, particularly in the physical market. From our perspective, such Community rules become even more important in view of the ongoing consolidation process of European energy exchanges. For more details, please refer to our comments made by letter of 17.3.2008 on your call for evidence on record keeping, transparency, supply contracts and derivatives for electricity and gas (Ref. CESR/08-140). We fully agree with the analysis made and the solutions proposed. As regards disclosure obligations and public dissemination mentioned in point 108 of the draft advice, we would, however, propose to better distinguish between public dissemination and information for regulators in order to avoid a paradoxical effect that results from collusion of market incumbents.

We would nevertheless like to highlight that any such Community rules should respect the different market designs of energy exchanges in Europe, with pool-oriented models, on the one hand, and exchanges competing with OTC trading, on

the other hand. As an example for market rules stipulated for the latter market design, we would like to refer to the recently adopted EEX Code of Conduct.¹

Any new legislation should take into account the existing national regulatory frameworks.

For the time being, the legal basis of the proposed tailor-made market abuse framework is left open. We assume an insertion in the third energy package may run against the ongoing legislative procedure. The draft regulations and directives do not foresee any empowerment for the Commission to introduce a second level legislation in the field at stake. Article 8(3)(e) of the Commission Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity² indicates that the Commission intends to introduce such rules in the form of guidelines. However, as such guidelines are normally considered as “soft law” that is not legally binding and does not provide for sanction mechanisms in respect of relevant EC regulations³, from our perspective, a secondary legislation similar to the Lamfalussy process in the financial markets field would be preferable to ensure legal certainty and predictability for both regulators and market participants. Maybe your draft advice could briefly explore the legal quality of such market abuse framework.

We hope these remarks 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,

signed

Reinhard Flaskamp
Ministerialrat

¹ See http://www.eex.com/de/document/34471/EEX_code_of_conduct_e.pdf.

² COM (2007) 531 final.

³ See e.g. ECJ, C-288/96, Germany vs. Commission, ECR 2000, I-8237, para 62; C-310/99, Italy vs. Commission, ECR 2002, I-2289, para 45/52.