European Energy Regulators' response to the European Commission's public consultation on "Review of the Markets in Financial Instruments Directive (MiFID)"

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1 General comments

European Energy Regulators welcome the possibility to comment on the planned revision of the Markets in Financial Instruments Directive (MiFID). We would like to focus on issues related to commodity derivatives as electricity and gas trading may be affected by such a revision.

European energy regulators have already previously been engaged in the discussions on how to secure market integrity in energy trading. In December 2007, ERGEG together with CESR was mandated by the Commission to provide an advice on market abuse issues related to the energy sector. Energy and financial regulators noticed in their advice that the Market Abuse Directive only partly covers energy markets as it is designed for the financial markets. It applies almost exclusively to financial instruments admitted to trading on a regulated market. Physical products (e.g. spot market products) are not covered and derivatives markets products are covered only if they are admitted to trading on a regulated market. Thus, energy and financial regulators recommended in their advice a sector specific regime for electricity and gas trading.

The importance of a sector-specific regime for the energy sector has to be seen in the context of a rapidly growing energy market. Energy trading including emission allowances, coal and oil markets, will gain further importance in the near future, since wholesale market volumes are increasing. Trading provides good opportunities for hedging which is crucial for numerous market participants in order to ensure price predictability. This is especially true for the rapidly increasing amount of small and medium sized companies, as e.g. municipal energy suppliers, entering into energy trading in order to gain competitive advantages. In the course of the EU attempt to increase the production of electricity from renewable sources, on the promotion of the use of energy from renewable sources, the amount of renewable energy traded on the energy market will also increase significantly. This will lead to higher trade

volumes, more traders and most likely a higher volatility of energy prices. In addition to its supply function the electricity and gas market – as most commodity markets – have become more and more "financialised". Thus, the integrity of the markets will become more important than ever.

Additionally, energy regulators would like to point out that transparency of price sensitive information (so called fundamental data) is also a crucial and effective measure to avoid market abuse in energy markets. This is in particular true for the electricity markets where storability is almost not possible and therefore production and consumption have to match constantly. The publication of all relevant fundamental data before trading takes place (such as load, outages, foreseen amount of electricity from renewable sources, cross-border congestions, etc.) gives traders a good view of the current supply and demand situation. This is also an important measure for the reduction of systemic risks, since with a better knowledge of the current market situation traders may refrain from building up dangerous positions and exaggerated risk taking. Moreover: reasonable transparency on what the market is about is the best way to avoid "speculative hypes" and contributes to fair prices charged to end customers which represent true economic values.

European Energy Regulators thus welcome the Commission proposal for a Regulation on "Energy market integrity and transparency" from 8 December 2010 (hereafter referred to as "REMIT"),[1] which foresees a sector-specific market abuse and market monitoring regime for the energy wholesale market including reporting obligations for market participants to ACER. The revised rules of the financial markets should be coherent with the REMIT rules (and vice versa).

European Energy Regulators welcome the Commissions commitment of establishing a single rulebook for EU financial markets to improve supervision and enforcement, reduce costs for market participants, and improve conditions of access and competition across the EU.

[1] Commission Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on energy market integrity and transparency from 8.12.2010, COM(2010) 726 final.

Extending the proposed measures to electricity and gas products – where there will be an efficient sector-specific regime with rules and requirements tailored to the needs of the market and the supervision - does **not** seem to serve these objectives and the consultation document does not explain how these steps are related to the above-mentioned objectives of MiFID.

It is important to take into account that electricity and gas trading is very different from trading other commodities or financial products. First of all, electricity is not storable (at least not in economic terms). Secondly, energy trading depends to a great degree on the availability of transport facilities. Thus, there are certain risks of market specificities that exist uniquely in the energy sector. Thirdly, there is a need for tailor-made products as standardised products traded and cleared at exchanges do not sufficiently address the needs of the market participants. Market participants demand tailor-made products at least for physical delivery. Additionally, TSOs are involved in energy trading as they may demand derivative contracts (e.g. options and futures) for deliveries to maintain system integrity in their networks.

Furthermore, European Energy Regulators would like to recall previous advice from CESR and CEBS to the Commission in 2008 which concluded that the application of the CRD's large exposures regime to commodity firms appeared to be disproportionate. Instead, they advocated a more bespoke prudential regime for commodity firms that takes into account the lower systemic risk that commodity firms generally pose in the market. Higher capital and collateral requirements would eventually push away small market players, like e.g. municipalities, and makes trading and esp. hedging more expensive, if not impossible. The amount of additional capital which is under discussion could also pose problems for big European electricity and gas companies which are engaged in the trading sector. As a consequence, participation of commercial traders to energy markets most likely will reduce in favour of trading from non-commercial participants, which evidently is not a desired outcome. Thus, the market would be left to financial investors and investment banks due to their financial power. Due to the envisaged increase of central clearing in the financial legislation, a few banks could be the dominating players in energy trading.

Since it would be very difficult to address within the (revised) financial legislation all issues relevant for ensuring market integrity in energy trading (e.g. physical trading), European energy regulators favour sector-specific measures to ensure transparency and integrity of wholesale markets in electricity and gas. Thus, European energy regulators believe that REMIT could provide an appropriate answer to the specificities of the energy sector (data collection; nature of inside information / market manipulation) related to fundamentals. Increasing the scope of MIFID to energy derivatives and other products related to the energy sector may eventually appear contradictory with the admitted fact that the energy sector requires specific regulation. **European energy regulators would thus recommend that MiFID requirements applying to commodity derivatives and commodity firms do only apply to those commodities and firms where there is no sector-specific regime in place. Information needed about these commodity markets should be provided by the relevant regulators (e.g. ACER) to the financial regulators.**

In view of competences for commodity derivatives for European Energy Regulators under REMIT and European Financial Regulators under MiFID and MAD, the review of MiFID and MAD should in any case foresee a close cooperation and information exchange between European financial and energy regulators and explicitly provide a role for ACER as another competent authority at EU level for the monitoring of energy trading activities at EU level under REMIT.

We would like to point to the ERGEG comments to the consultation of the MAD review in summer 2010. In autumn 2010, the chairman of the European energy regulators' Financial Services Working Group, Mr Johannes Kindler, participated in the hearing on the MiFID review organised by DG MARKT in Brussels. These comments are also valid for the review of the MiFID.

2 Procedural comments

European Energy Regulators would favour if MAD and MiFID are jointly reviewed and to possibly even integrate EMIR into the review of MiFID and MAD. Due to its complexity, the spreading of EU financial market rules in several different legal acts (MiFID, MAD and EMIR) may make it increasingly difficult for "honest" market participants to respect the rules, whilst risking opening new loopholes for dishonest market participants. European Energy Regulators are aware of the international dimension of financial market regulation, but for the sake of legal certainty and clarity would prefer a consistent legal framework for commodity derivatives rather than risking having fragmented rules and regulations stipulated in four different European legal acts.

Any such reconsideration would allow the Commission to rearrange the scope and regulatory content of MiFID, MAD and EMIR and hence make the legal framework more consistent. For instance, the provisions on transaction reporting currently stipulated under MiFID mainly serve the monitoring of the market abuse regime under MAD and would therefore better be stipulated in MAD rather than in MiFID. However, if stipulated in MAD, there would be no reason why the reporting obligations should be linked to the licensing as an investment firm and to products traded at regulated markets. The transaction reporting to financial regulators could thus be extended to other market participants and OTC derivatives and streamlined as regards the data format. If the transaction reporting to financial regulators were extended to OTC derivatives and contained all relevant data, there would be no need to introduce a position reporting for OTC derivatives under EMIR. Already this example shows how important a holistic look at the three pieces of legislation would be to achieve a consistent and coherent market oversight regime for financial instruments.

3 Concrete comments on the review of the MiFID

The intended update of MiFID to provide a more suitable, clear, and robust regulatory coverage of all different types of trading facilities, technological applications, and methods of execution which exist today or may emerge in the foreseeable future, as regards measures specific to commodity derivatives markets, transaction reporting and derivatives, the reinforcement of supervising powers in key areas, including commodity derivatives, also concern energy wholesale markets and their oversight. This is why European Energy Regulators would like to note the following as regards the questions posted by the Commission in the MiFID consultation:

1. Developments in Market Structure

> **(1) What is your opinion on the suggested definition of admission to trading? Please explain the reasons for your views.**

European Energy Regulators would welcome a definition of admission to trading in order to clarify that trading venues are no issuers as defined in the Market Abuse Directive and therefore no possessors of inside information when they admit financial instruments to trading. Such a clarification would help to improve the applicability of the provisions of Market Abuse Directive to wholesale electricity and gas markets. As similar definitions of insider information apply under REMIT, any clarification would also benefit any application of REMIT.

> **(2) What is your opinion on the introduction of, and suggested requirements for, a broad category of organised trading facility to apply to all organised trading functionalities outside the current range of trading venues recognised by MiFID? Please explain the reasons for your opinion.**

Introducing a new category of organised trading facilities would be one option to clarify the oversight of brokers, but it should be ensured that this is not against the wish to further align organisational requirements for organised markets as envisaged in questions 23 and 24 of the consultation at stake. In view of the latter consideration, it could be another option to merge the definitions of regulated markets and MTFs for reasons of simplification.

(8) What is your opinion of the introduction of a requirement that all clearing eligible and sufficiently liquid derivatives should trade exclusively on regulated markets, MTFs, or organised trading facilities satisfying the conditions above? Please explain the reasons for your views.

Generally, European Energy Regulators would welcome any increase in transparency and stability of financial markets. European Energy Regulators understand the Commission services' consideration to require that all clearing eligible and sufficiently liquid derivatives should trade exclusively on regulated markets, MTFs or organised trading facilities. However, European Energy Regulators are afraid that such mandatory requirements would have a negative impact on competition and liquidity in the energy sector as this would not take into account the specificities of derivatives with physical delivery.

Trading exclusively at exchanges requires standardised products. The participants in the electricity and gas market, however, require tailor-made products. **The requirement that all clearing eligible and sufficiently liquid derivatives should trade exclusively on regulated markets, MTFs, or organised trading facilities thus does not correspond to the market needs and has a negative effect on European industry competitiveness.**

It can represent an additional barrier to market entry and lead to a decrease in the number of market participants since small and medium sized traders would have difficulties fulfilling these requirements without posing any significant risk to the market environment. Any negative impact on competition would risk to ultimately resulting in an unreasonable level of end-user prices. However, if any such requirements are introduced, any such decision should be consulted in advance with other competent authorities, i.e. ACER in case the wholesale energy products would be affected, and with the public.

(23) What is your opinion of the suggestions to further align organisational requirements for regulated markets and MTFs? Please explain the reasons for your views.

(24) What is your opinion of the suggestion to require regulated markets, MTFs and organised trading facilities trading the same financial instruments to cooperate in an immediate manner on market surveillance, including informing one another on trade disruptions, suspensions and conduct involving market abuse?

European energy regulators share the concerns expressed in the MiFID consultation paper in relation to a lack of alignment of the organisational requirements and also the market surveillance requirements for regulated markets and MTFs. European energy regulators have noted similar differences between the existing trading venues in energy wholesale markets, which they are currently assessing in an ERGEG advice on the regulatory oversight of energy exchanges. In this draft advice, European Energy Regulators express that in view of an increasing trading of energy wholesale products across Europe, a close cooperation between market surveillances of trading venues should be a matter of course. To this end these entities should be entitled – or even be obliged - to closely cooperate and exchange information between them.

2. Measures specific to commodity derivatives markets

2.1. Specific requirements for commodity derivative exchanges

(60) What is your opinion about requiring organised trading venues which admit commodity derivatives to trading to make available to regulators (in detail) and the public (in aggregate) harmonised position information by type of regulated entity? Please explain the reasons for your views.

(61) What is your opinion about the categorisation of traders by type of regulated entity? Could the different categories of traders be defined in another way (e.g. by trading activity based on the definition of hedge accounting under international accounting standards, other)? Please explain the reasons for your views.

(62) What is your opinion about extending the disclosure of harmonised position information by type of regulated entity to all OTC commodity derivatives? Please explain the reasons for your views.

(63) What is your opinion about requiring organised commodity derivative trading venues to design contracts in a way that ensures convergence between futures and spot prices? What is your opinion about other possible requirements for such venues, including introducing limits to how much prices can vary in given timeframe? Please explain the reasons for your views.

European Energy Regulators would welcome the suggested specific requirements for commodity derivative exchanges, but would also like to highlight the following:
The Commission is considering that a further specification to the MiFID implementing regulation could be added requiring regulated markets, MTFs and organised trading facilities to design commodity derivatives contracts which they admit to trade and which can be physically settled in a way that ensures convergence between futures and spot prices. This would, in any case, require reliable and monitored spot prices at commodity spot trading venues.

ERGEG is currently assessing the regulatory oversight of energy exchanges, will soon publish the above-mentioned document for public consultation and will provide the Commission with the outcome of the consultation. European energy regulators would however like to express the preliminary views here.
A preliminary result is that the supervision of spot energy venues, as of any other commodity spot trading venue, largely differs across Europe. There are no rules at European level obliging Member States to require *inter alia* a monitoring of compliance with self-regulated rules of the market place or similar legal obligations. Thus, the regulation of spot markets across Europe still differs largely. Regulators stress the interrelation between physical and financial markets, which have been taken into due account during the elaboration of these recommendations. There are several exchanges operating in more than one national market, e.g. Nord Pool Spot and EPEX Spot, and the importance of cross-border exchange of electricity is increasing.
Taking the above mentioned considerations into account, European energy regulators are of the preliminary view that there should be a proper European regulatory framework for power exchanges. The design of such a framework and the cooperation between Transmission System Operators and Power Exchanges will be provided by Governance Guidelines, which are currently being elaborated. These guidelines shall establish clear roles and responsibilities for the exchanges participating in market coupling.
National Energy regulators are competent for the overall market design (e.g. market rules) of energy markets. As it is considered beneficial if supervision of the market is in one hand, energy regulators should be responsible for supervising all energy exchanges. If not included in the governance guidelines, REMIT could be enlarged to include clear rules for energy exchanges. Furthermore, information about trading of energy derivatives exchanges should be made available to energy regulators by the financial regulators.

2.2. MiFID exemptions for commodity firms

(64) What is your opinion on the three suggested modifications to the exemptions? Please explain the reasons for your views.

(111) What is your opinion on modifying the exemption regime in order to clarify that firms dealing on own account with clients are fully subject to MiFID requirements? Please explain the reasons for your views.

European Energy Regulators would like to recall that the MiFID exemptions for commodity firms were based on the assumption that commercial and specialist commodity firms neither pose the same systemic risk as their financial counterparts nor interact with private investors. This is why commodity firms currently benefit from the MiFID exemptions in Art. 2 (1) b, d, i and l.

	MiFID general rule	Parents' or Subsidiaries' exemption (Art. 2(1)(b) MiFID)	Own account exemption (Art. 2(1)(d) MiFID)	Activity ancillary to main business (Art. 2(1)(i) MiFID)	Hedging and locals exemption (Art. 2(1)(l) MiFID)
Spot/Physical					
Physically settled non-standardized derivative					
Physically settled standardized derivative					
Cash settled derivative					

The Commission proposes to narrow the MiFID exemption stipulated in Article 2(1)(d) and (i) MiFID and to delete the MiFID exemptions stipulated in Article 2(1)(k) MiFID. This would significantly limit the scope of the MiFID exemptions for commodity firms and therefore oblige more commodity firms, including energy firms, to become licensed as an investment firm by financial regulators. Commodity firms would then only be exempted for hedging activities stipulated in Article 2(1)(l) MiFID. This is why it would be important to precise this notion in order to increase legal certainty and clarity for commodity firms and particularly energy firms wishing to apply this provision. Moreover, from a practical point of view, it might prove difficult to clearly distinguish between hedging physical production or consumption and other trading activities for instance. A vague provision and distinction causes confusion in practical application.

European Energy Regulators would like to recall previous advice from ESME to the Commission in 2007 which concluded that the fundamental premises for imposing authorisation requirements - to protect clients or to mitigate systemic risks - do not present themselves in commodity markets to the same degree (if at all) as in financial markets, in particular because of the wholesale nature of the markets and the lack of the interconnections with payment systems and other mechanisms that magnify the effect of individual shocks in financial markets. This is why ESME believed that it would be inappropriate to extend regulation to cover this group of market participants in the absence of a compelling demonstration of the risks that they present. However, ESME also stated that there is scope for rationalisation and simplification of the current MiFID exemptions, in order to create an EU-wide regime governing specialist commodity firms which only deal on own account with other wholesale market participants. Thus, it is considered preferable to exempt energy firms to a large extent from MiFID requirements and instead to cover all energy companies in a sector-specific regime.

Should the Commission stick to its proposed amendments of the MiFID exemptions for commodity firms, European Energy Regulators consider it indispensable that the Commission demonstrates a detailed cost / benefit analysis on these issues. Energy market participants and in particular large utilities, whose core business is arguably asset optimization, are concerned that proposals under MIFID, or EMIR, would imply large associated costs (clearing fees or capital). This is particularly caused by the current automatism that MiFID firms have to fulfil the capital requirements of the Capital

Requirements Directive (CRD). In this context, European Energy Regulators would like to recall previous advice from CESR and CEBS to the Commission in 2008 which concluded that the application of the CRD's large exposures regime to commodity firms appeared to be disproportionate and advocated a more bespoke prudential regime for commodity firms that takes into account the lower systemic risk that commodity firms generally pose in the market.

Finally, European Energy Regulators would like to put into question the need to narrow the MiFID exemptions for commodity firms if anyway EMIR will enable financial regulators to carry out a full-fledged position reporting and if the Commission furthermore considers in the context of the MIFID review to introduce reporting obligations for all commodity derivative transactions. If the latter is introduced and all transactions of commodity firms will in future be present to energy and financial regulators, there is no reason why the MiFID exemptions should be narrowed for commodity firms. European Energy Regulators strongly believe that commodity firms and particularly energy firms should not be treated the same way then investment firms.

2.3. Definition of other derivative financial instrument

(65) What is your opinion about removing the criterion of whether the contract is cleared by CCP or subject to margining from the definition of other derivative financial instrument in the framework directive and implementing regulation? Please explain the reasons for your views.

This consideration would directly affect physically settled OTC contracts which are very common in European energy wholesale markets. European Energy Regulators are therefore concerned that such amendment would have a negative impact on competition and liquidity in the energy sector as this would not take into account the specificities of energy derivatives with physical delivery. It can represent an additional barrier to market entry and lead to a decrease in the number of market participants since small and medium sized traders would have difficulties fulfilling these requirements without posing any significant risk to the market environment.

In general, since the MiFID review also aims at taking into account international developments, it should take into account the swap definition under the US-American Dodd-Frank-Act, where “contracts for sale of commodities for future delivery“ and “the sale of a

non-financial commodity for deferred delivery, so long as the transaction is intended to be physically settled" are excluded from the scope of application. In order to ensure an enhanced and consistent international supervisory framework, this could be taken into account when refining the definition of financial instrument under MiFID and thus such contracts be excluded from the scope of application of MiFID, at least for electricity and gas contracts which would then solely fall under the scope of REMIT.

(66) What is your opinion on whether to classify emission allowances as financial instruments? Please explain the reasons for your views.

EU emission allowances (hereafter referred to as "EUA") are neither covered by the Draft REMIT nor by the MiFID. Only EUA derivatives are covered by MiFID. The Auctioning Regulation[2] sets rules for the oversight of the auctioning of EUA and the Communication from the Commission to the European Parliament and the Council towards an enhanced market oversight framework for the EU Emission Trading Scheme announces that the Commission will launch an in depth study and initiate a stakeholder consultation examining in greater detail the structure of the carbon market and the current level of market oversight. The Commission will then consider implications for the carbon market of the revision of financial legislation and the establishment of energy market legislation. It should however be kept in mind that financial regulators and energy regulators can have an interest / bring useful insight to these markets. In France, the recommendations of the Prada report[3] have passed into law in October 2010. At the European level, the primary market is dealt with by the Auctioning Regulation, but there is still no comprehensive framework covering the secondary market. It would be important that such a framework gives the possibility for the financial and the energy regulators to get access to information on EUA if necessary.

Classifying EUA as financial instruments would of course immediately solve any supervisory issue as they then would be covered both by the MiFID and by the MAD regime in the same way as any other financial instrument. However, European Energy Regulators believe that this would not respect the specificities of the carbon market as described in the above-

[2] Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and the Council establishing a scheme for greenhouse gas emission allowances trading within the Community, OJ L 302, 18.11.2010, p. 1.

mentioned Prada report. As the Prada report stated:

“A unique feature of this market is that the supply is set in advance by public authorities. This market is then an instrument of economic optimization: the possibility to trade allowances ensures that emission reductions are achieved where they are cheapest, i.e. in installations with the lowest marginal abatement cost. It thus enables to reach the emission reduction target at the lowest social cost. The dual nature of the market results in two types of regulation issues: the environmental regulation, which corresponds to the rules governing the supply of allowances (the cap) and the regulation of allowance trading, which is the focus of this report.”

This is why European Energy Regulators share the view expressed in the Prada report and support the creation of a regulatory framework adapted to the specificities of the CO2 market as already expressed in the Prada report:

“This option is considered as more adequate than the extension of financial regulation. Applying existing financial regulation to the parts of the market currently not regulated would be the simplest option. The extension could consist in the inclusion of all transactions on allowances and credits within the remit of financial directives, e.g. MiFID and MAD. Nevertheless, financial regulation, designed originally for classical markets of financial instruments, is not always adapted or relevant for the CO2 market. A good example of this is the fact that the notion of issuer of a financial instrument, which is core to MAD, is not relevant on the CO2 market.”

From the European Energy Regulators’ point of view, the CO2 market is closely linked with the gas and electricity markets. They share in common several fundamentals such as the level of electricity demand, coal and gas prices, economic activity, etc. CO2 and wholesale energy prices are interdependent and thus the CO2 prices have an impact on the energy prices. In addition, a significant share of participants to carbon markets participates in the wholesale energy markets, in particular, electricity utilities.

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[3] La régulation des marchés du CO2 - Rapport de la mission confiée à Michel PRADA, Inspecteur général des Finances honoraire, published under http://www.economie.gouv.fr/services/rap10/100419rap-prada.pdf.

As a consequence, a sector specific regulatory regime for the CO2 market should involve the energy regulators, who can bring their expertise of the fundamentals of the energy and carbon sectors and their knowledge of wholesale energy market and its participants.

3. Transaction Reporting

(70) What is your opinion on the extension of the transaction reporting regime to transactions in all commodity derivatives? Please explain the reasons for your views.

The Commission services describe the reason for enlarging the scope of transaction reporting requirements for commodity derivatives with their considerations to extend the MAD to market manipulation of commodities derivatives markets. The Commission services believe that commodity derivatives may be used to manipulate markets in the underlying commodity. Since this is currently not covered by MAD, any such extension of the MAD would therefore need to be followed in MiFID by extending the transaction reporting obligation to all commodity derivatives, including those which are only traded OTC.

European Energy Regulators appreciate the efforts of the Commission services to improve the oversight regime over commodity derivatives. The approach outlined in the MiFID review seems similar to the approach chosen under REMIT, only that REMIT is a sector-specific market abuse regime instead of a horizontal regime aimed at under MAD and MiFID.

As regards energy derivatives, European Energy Regulators would welcome any clear-cut reporting channels and distribution of tasks under REMIT and MiFID/MAD/EMIR. As outlined in the CESR / ERGEG advice to the Commission in 2008, they would favour a sector-specific market abuse regime for the whole energy wholesale market. Not only for energy regulators, but also for market participants, **the favoured solution should be a common reporting for all products – including spot and derivative contracts - to ACER and access for all relevant regulatory authorities (financial and energy) to the relevant information**.

The CFTC experience has shown that transaction reporting can be an efficient tool to detect many forms of abuse.

Only in case this cannot be achieved, European Energy Regulators could agree on an oversight regime pursuant to which all energy derivatives are reported to financial regulatory authorities, whilst all spot data is reported to ACER under REMIT. However, if such a regime applies, it has to be ensured that financial and energy regulatory authorities cooperate closely and energy regulators have the full picture of all trades in energy derivatives as in the spot market without any loopholes for market participants or product classes.

(73) What is your opinion on the introduction of an obligation to store order data? Please explain the reasons of your views.
(74) What is your opinion on requiring greater harmonisation of the storage of order data? Please explain the reasons for your views.

Since the definition of attempted market manipulation is envisaged under the review of the market abuse directive, orders will even become more relevant for the assessment of market manipulation. Since a reporting of all orders to regulators would be probably too cumbersome and overwhelming, also as regards the data volume, any introduction of an obligation to store order data for organised markets would be welcomed. This is foreseen under REMIT as well. The preliminary results of the current ERGEG pilot project Energy Trade Data Reporting Scheme indicate similar proposals for the storage of orders of energy trade data.

(80) What is your opinion on the possibility of transaction reporting directly to a reporting mechanism at EU level? Please explain the reasons for your views.

The reporting channels under MiFID gain importance for European Energy Regulators due to REMIT. The REMIT proposal currently foresees that any reporting obligation is waived if market participants are obliged to report trade data on energy wholesale products to financial regulators under MiFID or to trade repositories under EMIR. However, REMIT furthermore stipulates that financial regulators and trade repositories have to forward the trade data on energy wholesale products received by market participants to ACER. It is therefore crucial that ACER will receive the trade data in a standardized format – irrespective from whom.

In view of the problems with the current transaction reporting regime under MiFID described in point 6.2. of the consultation paper by the Commission services, there are sufficient grounds to favour the introduction of a transaction reporting directly to a reporting mechanism at EU level as foreseen in REMIT for energy products. In general, similar information channels should apply under MiFID and REMIT, in order to facilitate any further cooperation and data exchange between financial and energy regulators. For energy products this would mean, that ACER should serve as a central data storage for the energy markets – i.e. as a kind of trade repository also for the financial regulators. MiFID should thus include a provision that information on energy derivatives could also be reported to ACER.

(82) What is your opinion on waiving the MiFID reporting obligation on an investment firm which has already reported an OTC contract to a trade repository or competent authority under EMIR? Please explain the reasons for your views.

(83) What is your opinion on requiring trade repositories under EMIR to be approved as an ARM under MiFID? Please explain the reasons for your views.

As regards EMIR, similar problems of double reporting apply under MiFID and REMIT. The transaction reporting under MiFID and REMIT both serve the oversight of market abuse, whilst the position reporting under EMIR mainly serves the control of systemic risks. It is therefore assumed that the data format of trade data reported under EMIR may most likely not allow for a surveillance of market abuse under MAD and/or REMIT. This is why European Energy Regulators would prefer to either accept a double reporting (of the same data by central counterparties and exchanges, not market participants) under both MiFID and EMIR as well as under REMIT and EMIR to ensure an effective oversight of market abuse. Another option would be to stipulate a waiver in EMIR pursuant to which no transactions have to reported if already reported in a transaction reporting under MiFID or REMIT if it can be assured that all information necessary for a position reporting is included in the transaction reporting. This would then avoid any double reporting. Stipulating a waiver in MiFID would not be a useful option as it is presumed to hinder a consistent market abuse oversight.

4. Reinforcement of supervisory powers in key areas

(142) What is your opinion on the possibility to ban products, practices or operations that raise significant investor protection concerns, generate market disorder or create serious systemic risk? Please explain the reasons for your views.

(143) For example, could trading in OTC derivatives which competent authorities determine should be cleared on systemic risk grounds, but which no CCP offers to clear, be banned pending a CCP offering clearing in the instrument? Please explain the reasons for your views.

(144) Are there other specific products which could face greater regulatory scrutiny? Please explain the reasons for your views.

(145) If regulators are given harmonised and effective powers to intervene during the life of any derivative contract in the MiFID framework directive do you consider that they could be given the powers to adopt hard position limits for some type or all types of derivative contracts whether they are traded on exchange or OTC? Please explain the reasons for your views.

(146) What is your opinion of using position limits as an efficient tool for some or all types of derivative contracts in view of any or all of the following objectives: (i) to combat market manipulation; (ii) to reduce systemic risk; (iii) to prevent disorderly markets and developments detrimental to investors; (iv) to safeguard the stability and delivery and settlement arrangements of physical commodity markets. Please explain the reasons for your views.

(147) Are there some types of derivatives or market conditions which are more prone to market manipulation and/or disorderly markets? If yes, please justify and provide evidence to support your argument.

(148) How could the above position limits be applied by regulators:

(a) To certain categories of market participants (e.g. some or all types of financial participants or investment vehicles)?

(b) To some types of activities (e.g. hedging versus non-hedging)?

(c) To the aggregate open interest/notional amount of a market?

European Energy Regulators are fully aware that supervisory powers of financial regulators have to be reinforced in key areas in view of the worst financial crisis in decades. However, European Energy Regulators believe that the energy wholesale market does not pose similar concerns of systemic risk than the financial market. They therefore consider that the reinforcement of supervisory powers in key areas should not, or if so only in a limited way, affect the energy wholesale market and its market participants. However, if the energy wholesale market should be affected by the issues described above, European Energy Regulators would see an urgent requirement for a close coordination and cooperation between energy and financial regulators on any specific regulatory decision intended to be taken under the reinforced supervisory powers by financial regulators and / or ESMA.