



CESR and ERGEG Expected to Recommend a Bespoke EU Market Abuse Framework for the Energy Markets

The EU public consultation on a proposed market abuse framework for EU energy markets is shortly due to close for comments from market participants on 29th August 2008.

The consultation was launched on 21st July 2008 by the Committee of European Securities Regulators (CESR) and the European Regulators' Group for Electricity and Gas (ERGEG) acting jointly pursuant to a European Commission mandate of 21st December 2007 which requested technical advice on market abuse issues relating to energy markets in the context of the "Third Energy Package."¹

Specifically, the Commission has asked CESR and ERGEG to evaluate whether the scope of Directive 2003/6/EC on insider dealing and market manipulation ("Market Abuse Directive—MAD") already addresses market integrity issues in the EU electricity and gas markets properly, with a view to considering whether a bespoke market abuse framework should be adopted, or whether MAD should be adapted, for the energy sector.

In light of the growing interconnection between the energy and financial markets, proper regulatory oversight of the market abuse risks and greater transparency and disclosure of information were deemed necessary to promote market integrity and confidence in these markets.

The consultation paper² is based on an in-depth study of the relevant topics by a Joint Group of securities and energy regulators formed by CESR and ERGEG and sets out their proposed "draft responses" as well as analyses, on which market participants have been invited to submit their comments.

Inadequacy of existing EU securities legislation

CESR and ERGEG have concluded that the existing EU securities legislation, including MAD in particular, does not properly address the market integrity issues in the electricity and gas markets.

¹ The third package of legislative measures adopted by the European Commission on 19th September 2007 to complete a single energy market in the EU. For further information, see "Energising Europe: A real market with secure supply," http://ec.europa.eu/energy/electricity/package_2007/index_en.htm.

² "CESR and ERGEG advice to the European Commission in the context of the Third Energy Package | Draft Response to Question F.20 – Market Abuse | Consultation Paper" (July 2008), <http://www.cesr.eu/popup2.php?id=5071>.

MAD is designed primarily for financial markets and its scope is limited almost exclusively to financial instruments which are admitted to trading on a regulated market. Physical energy products (e.g., spot market products) therefore fall outside its scope, and energy derivatives are only covered to the extent that an issuer may be subject to the disclosure obligations under MAD if it has issued listed securities which are linked to the performance of energy products. Thus, MAD does not properly address market integrity issues relevant to trading energy contracts and derivatives.

Regulatory proposal for a tailor-made EU market abuse framework for the energy markets

To mitigate these shortcomings, CESR and ERGEG would be inclined to recommend that a tailor-made EU market abuse framework be implemented as part of the energy markets legislation.

They concluded that the other alternative - extension of the scope of MAD provisions (e.g., insider trading, market manipulation) to physical products - would not reflect the special attributes of the electricity and gas markets and could even lead to inappropriate application of MAD or complications in other commodities markets.

The consultation paper also calls for legally binding disclosure obligations for price-sensitive, 'fundamental data' (e.g., generation, transmission, transportation, storage and capacity levels), including sanction mechanisms, in order to enhance the transparency of trades in energy products and to complement existing provisions of MAD (e.g., insider trading in commodities derivatives).

Conclusion

It remains to be seen what feedback is submitted by market participants and how their contributions may determine or alter the details of the final advice which CESR and ERGEG are expected to provide to the Commission by late September/early October 2008, but it looks likely that new EU legislation of some description will follow.

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