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*Committee on Economic and Monetary Affairs*

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**2010/0363(COD)**

17.3.2011

## **DRAFT OPINION**

of the Committee on Economic and Monetary Affairs

for the Committee on Industry, Research and Energy

on the proposal for a regulation of the European Parliament and of the Council  
on energy market integrity and transparency  
(COM(2010)0726 – C7-0407/2010 – 2010/0363(COD))

Rapporteur: Robert Goebbels

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## SHORT JUSTIFICATION

The proposal for a regulation on energy market integrity and transparency is necessary.

It has become clear, a decade after the gradual liberalisation of the electricity and gas markets, that the power exchanges which have developed and the over-the-counter (OTC) contracts which have flourished virtually everywhere have never been impervious to attempts at market manipulation and insider dealing. There is no other explanation for certain electricity and gas price fluctuations, given that the depth and liquidity of the transnational energy markets were supposed to have a stabilising effect and to make prices more predictable.

At the time, energy market liberalisation was vaunted by the Commission as a necessary step that would cut the cost of electricity and gas for consumers. In fact, the trend has been towards soaring prices, and the concept of 'energy poverty' has become associated with the move to liberalisation.

Ensuring that the energy markets become more transparent, that they are better monitored and that anyone abusing them is traced and punished is thus more important than ever.

In proposing specific regulatory provision for the energy markets, the Commission is acknowledging the specificity of those markets while, at the same time, advocating that they be governed by the same the rules on market abuse and insider dealing which apply on the financial markets.

The Commission proposal draws chiefly on Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (the Market Abuse Directive). However, the proposal also includes certain provisions designed to reinforce that directive, which take their inspiration from amendments that the Commission intends to propose as part of a scheduled review of it. A problem thus arises for the co-legislators, as they are being asked, in the current proposal, to approve provisions which go further than the specific legislation currently in force. Confusion and conflict could potentially result if the co-legislators were, by chance, to accept the Commission's proposals in relation to the energy market regulation and then reject all or part of an identical set of proposals for revision of the Market Abuse Directive. While the risk may be theoretical, it is not fantastical.

The Commission proposes that the task of monitoring compliance be given to the newly operational Agency for the Cooperation of Energy Regulators (ACER) in Ljubljana. While it is logical for ACER to take on this new role, it will have to be given the necessary equipment and staff.

It is also of paramount importance that cooperation not only between the national regulatory authorities and ACER but also between the national financial market regulators and the European Securities and Markets Authority (ESMA) should be as close as possible so that the wholesale energy market can be monitored effectively.

It must also be ensured that market operators who break the rules are punished. The penalties to be set by the national authorities must serve as a deterrent to fraud, which means they must outweigh would-be perpetrators' anticipated gains.

In a recent communication on the need for tougher penalties in the financial services sector (COM(2010)716), the Commission states: 'Important divergences exist as to the minimum and maximum level of pecuniary sanctions provided for in national legislations and sometimes the maximum level is so low that the sanctions are unlikely to be sufficiently dissuasive.'

It continues: 'To ensure that a fine has a sufficiently deterrent effect on a rational market operator, the possibility that an infringement will remain undetected must be offset by imposing fines which are significantly higher than the potential benefit deriving from a breach of the financial services legislation. In the financial sector, where a large number of potential offenders are cross-border financial institutions with very considerable turnovers, sanctions of a few thousand euros cannot be considered sufficiently dissuasive.'

What holds good for combating financial market abuses must necessarily apply in the same way on the energy markets.

The rapporteur supports the Commission proposal: the regulation is needed and it should come into force as soon as possible.

## AMENDMENTS

The Committee on Economic and Monetary Affairs calls on the Committee on Industry, Research and Energy, as the committee responsible, to incorporate the following amendments in its report:

### Amendment 1

#### Proposal for a regulation

##### Recital 7

###### *Text proposed by the Commission*

(7) Derivative trading and commodity trading are used together on wholesale energy markets. It is therefore important that the definitions of market abuse, which consists of insider trading and market manipulation, are compatible between derivatives and commodity markets.

###### *Amendment*

(7) Derivative trading and commodity trading are used together on wholesale energy markets. It is therefore important that the definitions of market abuse, which consists of insider trading and market manipulation, are compatible between derivatives and commodity markets. ***The rules will apply to all transactions concluded, whether directly or through intermediaries, on regulated markets, on***

***multilateral trading facilities or over the counter.***

Or. fr

*Justification*

*It is essential that the rules should apply to all operators and to all transactions by major operators using all possible types of instrument.*

**Amendment 2**

**Proposal for a regulation**

**Recital 11**

*Text proposed by the Commission*

(11) Specification of the definitions of inside information and market manipulation is necessary to account for the specificities of wholesale energy markets, which are dynamic and subject to change. The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty in respect to such detailed rules.

*Amendment*

(11) Specification of the definitions of inside information and market manipulation is necessary to account for the specificities of wholesale energy markets, which are dynamic and subject to change. The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty in respect to such detailed rules. ***Before adopting a delegated act, the Commission should request comments from energy market operators and consult the energy sector authorities as well as the European supervisory authority (European Securities and Markets Authority). The European Parliament and the Council should be informed of the outcome of these consultations.***

Or. fr

*Justification*

*The process of preparing a delegated act must entail cooperation and the requisite level of transparency.*

## Amendment 3

### Proposal for a regulation Recital 15

#### *Text proposed by the Commission*

(15) In order to ensure the necessary flexibility in collecting information on transactions in wholesale energy products, the Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty setting out the timing, form and content of the information which market participant are required to provide. Reporting obligations should not create **unnecessary** costs for market participants. Persons reporting transactions to a competent authority in accordance with the provisions of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, and to trade repositories and competent authorities in accordance with the provisions of Regulation ... of the European Parliament and the Council on OTC derivatives, central counterparties and trade repositories should therefore not be subject to additional reporting obligations under this Regulation.

#### *Amendment*

(15) In order to ensure the necessary flexibility in collecting information on transactions in wholesale energy products, the Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty setting out the timing, form and content of the information which market participant are required to provide. Reporting obligations should not create **avoidable** costs for market participants. Persons reporting transactions to a competent authority in accordance with the provisions of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, and to trade repositories and competent authorities in accordance with the provisions of Regulation ... of the European Parliament and the Council on OTC derivatives, central counterparties and trade repositories should therefore not be subject to additional reporting obligations under this Regulation.

Or. fr

#### *Justification*

*The term ‘avoidable costs’ is preferable to ‘unnecessary costs’. All regulatory arrangements generate costs, which nonetheless need to be kept as low as possible, notably by setting a ‘de minimis’ threshold.*

## Amendment 4

### Proposal for a regulation Recital 19

*Text proposed by the Commission*

(19) National regulatory authorities should ***be responsible for ensuring that*** this Regulation ***is enforced*** in the Member States. To this end they should have the necessary investigatory powers to allow them to carry out this task efficiently.

*Amendment*

(19) National regulatory authorities should ***have a duty to enforce*** this Regulation in the Member States. To this end they should have the necessary investigatory powers to allow them to carry out this task efficiently.

Or. fr

*Justification*

*It must be ensured that all the national authorities participate in combating abuses.*

## Amendment 5

### Proposal for a regulation Article 1 – paragraph 2 a (new)

*Text proposed by the Commission*

*Amendment*

***This regulation shall apply to all participants in the markets concerned irrespective of whether they are from the EU or from third countries. The rules shall apply to all sales, purchases, production, supply, transportation and delivery of wholesale energy products.***

Or. fr

*Justification*

*It is useful to specify that the regulation will also apply to non-EU operators who participate in the energy markets, whatever the type of service they provide.*

## Amendment 6

### Proposal for a regulation

#### Article 2 – point 1 – paragraph 2

##### *Text proposed by the Commission*

For the purposes of applying the first subparagraph, information a reasonable market participant would be likely to use as part of the basis of his decision to enter into a transaction relating to a wholesale energy product is information which, if it were made public, would be likely to have a significant effect on the prices of such wholesale energy products. Such information includes information related to the capacity of facilities for production, storage, consumption or transmission of electricity or natural gas, as well as information which is required to be disclosed in accordance with legal or regulatory provisions at Union or national level, market rules, and contracts or customs on the relevant wholesale energy market.

##### *Amendment*

For the purposes of applying the first subparagraph, information a reasonable market participant would be likely to use as part of the basis of his decision to enter into a transaction relating to a wholesale energy product is information which, if it were made public, would be likely to have a significant effect on the prices of such wholesale energy products. Such information includes information related to the capacity – ***including capacity reductions following accidents and maintenance operations*** – of facilities for production, storage, consumption or transmission of electricity or natural gas, as well as information which is required to be disclosed in accordance with legal or regulatory provisions at Union or national level, market rules, and contracts or customs on the relevant wholesale energy market.

Or. fr

##### *Justification*

*Reductions in capacity can have a significant influence on the markets and are potential sources of manipulation.*

## Amendment 7

### Proposal for a regulation

#### Article 2 – point 2 – paragraph 2

##### *Text proposed by the Commission*

***By way of example***, making it appear that the availability of electricity generation capacity or gas availability, or the availability of transmission capacity is

##### *Amendment*

Making it appear that the availability of electricity generation capacity or gas availability, or the availability of transmission capacity is other *than* the



other *that* the capacity which is actually physically available constitutes market manipulation.

capacity which is actually physically available – ***inter alia by booking infrastructure for energy transport operators, which the operator in question does not intend to use*** – constitutes market manipulation.

Or. fr

#### *Justification*

*The important thing is not to give ‘examples’ of market manipulation but clearly to prohibit such manipulation, including the overbooking of capacity.*

### **Amendment 8**

#### **Proposal for a regulation**

#### **Article 3 – paragraph 4 – subparagraph 1**

##### *Text proposed by the Commission*

Market participants shall publicly disclose inside information in respect of business or facilities which the participant concerned owns or controls or for which the participant is responsible for operational matters, either in whole or in part. Such information shall include information relevant to the capacity of facilities for production, storage, consumption or transmission of electricity or natural gas.

##### *Amendment*

Market participants shall publicly, ***and in a timely manner***, disclose inside information in respect of business or facilities which the participant concerned owns or controls or for which the participant is responsible for operational matters, either in whole or in part. Such information shall include information relevant to the capacity – ***including capacity reductions following accidents and maintenance operations*** – of facilities for production, storage, consumption or transmission of electricity or natural gas.

Or. fr

#### *Justification*

*Reductions in capacity can have a significant influence on the markets and are potential sources of manipulation.*

## Amendment 9

### Proposal for a regulation

#### Article 3 – paragraph 4 – subparagraph 1 a (new)

*Text proposed by the Commission*

*Amendment*

***The term ‘undertaking’ shall also cover related companies as defined by Articles 1 and 2 of Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts<sup>1</sup>.***

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<sup>1</sup> ***OJ L 193, 18.7.1983, p. 1.***

Or. fr

#### *Justification*

*The concept of an undertaking must be understood in its logical sense as including all the subsidiaries and companies in which the undertaking has a substantial share.*

## Amendment 10

### Proposal for a regulation

#### Article 5 – paragraph 1

*Text proposed by the Commission*

*Amendment*

In order to take account of future developments on wholesale energy markets, the Commission shall adopt delegated acts in accordance with Article 15 and subject to conditions of Articles 16 and 17, specifying the definitions set out at Article 2(1) to (5).

In order to take account of future developments on wholesale energy markets ***and to ensure consistency with changing EU legislation on financial and energy services***, the Commission shall adopt delegated acts in accordance with Article 15 and subject to conditions of Articles 16 and 17, specifying the definitions set out at Article 2(1) to (5).

Or. fr

#### *Justification*

*It must be ensured that all the relevant legal texts are consistent.*

## Amendment 11

### Proposal for a regulation Article 6 – paragraph 1

#### *Text proposed by the Commission*

The Agency shall monitor trading activity in wholesale energy products to detect and prevent trading based on inside information and market manipulation. It shall collect the data for assessing and monitoring wholesale energy markets as provided for in Article 7.

#### *Amendment*

The Agency shall monitor trading activity in wholesale energy products, **including OTC transactions inter alia with major end users of energy**, to detect and prevent trading based on inside information and market manipulation. It shall collect the data for assessing and monitoring wholesale energy markets as provided for in Article 7.

Or. fr

#### *Justification*

*The regulators must have a comprehensive overview of the market.*

## Amendment 12

### Proposal for a regulation Article 7 – paragraph 1

#### *Text proposed by the Commission*

1. The Agency shall be provided with a record of wholesale energy market transactions, including orders to trade. The Commission shall adopt delegated acts in accordance with Article 15 and subject to conditions of Articles 16 and 17, laying down the timing, form and content in which this information is reported and, **where appropriate**, defining thresholds for the reporting of transactions as well as specifying types of contracts for which transactions shall be reported.

#### *Amendment*

The Agency shall be provided with a record of wholesale energy market transactions, including orders to trade. The Commission shall adopt delegated acts in accordance with Article 15 and subject to conditions of Articles 16 and 17, laying down the timing, form and content in which this information is reported and defining thresholds for the reporting of transactions as well as specifying types of contracts for which transactions shall be reported.

Or. fr

## Amendment 13

### Proposal for a regulation

#### Article 7 – paragraph 1 – subparagraph 1 a (new)

*Text proposed by the Commission*

*Amendment*

***A ‘de minimis’ threshold shall be established to exempt from the reporting requirements operators which, by virtue of their size, are unlikely to influence the energy markets.***

Or. fr

*Justification*

*A ‘de minimis’ rule needs to be established in order to keep down the costs borne by SMEs.*

## Amendment 14

### Proposal for a regulation

#### Article 7 – paragraph 4 – subparagraph 1

*Text proposed by the Commission*

*Amendment*

4. Market participants shall provide the Agency and national regulatory authorities with information related to the capacity of facilities for production, storage, consumption or transmission of electricity or natural gas for the purpose of monitoring trading in wholesale energy markets.

Market participants shall provide the Agency and national regulatory authorities with information related to the capacity – ***including capacity reductions following accidents and maintenance operations*** – of facilities for production, storage, consumption or transmission of electricity or natural gas for the purpose of monitoring trading in wholesale energy markets.

Or. fr

*Justification*

*Reductions in capacity can have a significant influence on the markets and are potential sources of manipulation.*

## Amendment 15

### Proposal for a regulation

#### Article 9 – paragraph 1 – subparagraph 2

##### *Text proposed by the Commission*

**Where relevant**, the Agency will comply with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

##### *Amendment*

The Agency will comply with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

Or. fr

## Amendment 16

### Proposal for a regulation

#### Article 10 – paragraph 1 – subparagraph 1

##### *Text proposed by the Commission*

1. National regulatory authorities shall ensure that the prohibitions set out in Articles 3 and 4 are applied.

##### *Amendment*

1. National regulatory authorities shall **have a duty to** ensure that the prohibitions set out in Articles 3 and 4 are applied.

Or. fr

##### *Justification*

*A duty must be imposed on all the national authorities to cooperate in combating market abuse and insider dealing.*

## Amendment 17

### Proposal for a regulation

#### Article 10 – paragraph 1 – subparagraph 2 – introductory part

##### *Text proposed by the Commission*

Each Member State shall ensure that national regulatory authorities have the

##### *Amendment*

Each Member State shall ensure that national regulatory authorities have the

investigatory powers necessary for the exercise of this function. These powers shall be exercised in a proportionate manner. These powers may be exercised:

investigatory powers necessary for the ***immediate*** exercise of this function. These powers shall be exercised in a proportionate manner. These powers may be exercised:

Or. fr

## Amendment 18

### Proposal for a regulation

#### Article 10 – paragraph 2 – point d

##### *Text proposed by the Commission*

d) require existing telephone and existing data traffic records;

##### *Amendment*

d) require existing telephone and existing data traffic records, ***notably those kept electronically in any form***;

Or. fr

## Amendment 19

### Proposal for a regulation

#### Article 12 – paragraph 2 – point c

##### *Text proposed by the Commission*

c) persons working or who have worked for the national regulatory authorities;

##### *Amendment*

c) persons working or who have worked for the national regulatory authorities ***or other national authorities to which cases may be referred***;

Or. fr

##### *Justification*

*The requirement of professional secrecy must apply to all the authorities involved.*

## Amendment 20

### Proposal for a regulation Article 13

#### *Text proposed by the Commission*

The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by... at the latest and shall notify it without delay of any subsequent amendment affecting them.

#### *Amendment*

The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. ***They must reflect the gravity of the infringements and must considerably exceed the real or potential gains from illegal operations.*** The Member States shall notify those provisions to the Commission by... at the latest and shall notify it without delay of any subsequent amendment affecting them.

Or. fr

#### *Justification*

*The penalties must outweigh the potential gains.*

## Amendment 21

### Proposal for a regulation Article 15 – paragraph 1 a (new)

#### *Text proposed by the Commission*

#### *Amendment*

***1a. Before adopting a delegated act, the Commission must request comments from energy market operators and consult the energy sector authorities as well as the European supervisory authority (European Securities and Markets Authority). The European Parliament and the Council shall be informed of the outcome of these consultations.***

*Justification*

*The process of preparing a delegated act must entail cooperation and the requisite level of transparency.*

**Amendment 22**

**Proposal for a regulation**  
**Article 17 a (new)**

*Text proposed by the Commission*

*Amendment*

***Article 17 a***

***Agency staffing and resources***

***By 15 September 2011 at the latest, the Agency shall assess the staffing and resources needs arising from the assumption of its powers and duties in accordance with this Regulation and submit a report to the European Parliament, the Council and the Commission.***