



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

On 1 October 2008, the Committee of European Securities Regulators (CESR) and the European Regulators' Group for Electricity and Gas (ERGEG) published their final advice to the European Commission on market abuse issues relating to electricity and gas markets in the European Union (EU).¹

The advice followed their recent public consultation with market participants from 21 July to 29 August 2008, pursuant to the European Commission's mandate of 21 December 2007, which requested their joint technical advice in the context of the "Third Energy Package."²

Specifically, and as could be expected in light of the approach indicated in their consultation paper, the CESR and ERGEG experts recommend that the European Commission adopt (i) a bespoke EU *market abuse* framework for all electricity and gas products that are not covered by the Market Abuse Directive (MAD) and (ii) legally binding *disclosure* obligations as part of energy sector regulations, to be supported by sanction mechanisms.

A Bespoke EU Market Abuse Framework for all Electricity and Gas Products not Covered by MAD

MAD provisions (e.g., insider trading, market manipulation) were designed for the financial markets and apply almost exclusively to financial instruments that are admitted to trading on a regulated market. They do not cover physical (e.g., spot) electricity or gas supply contracts, nor most energy derivatives, which are mainly traded on unregulated markets and over-the-counter.

Furthermore, the energy sector demands considerations that are different from those relevant to the financial sector. For example, the structure of the national energy markets tends to be highly concentrated and consequently poses a greater risk of dominant firms potentially abusing their market power, in a manner connected to market manipulation. There may also be other public interest considerations that are uniquely relevant to the supply of energy.

¹. CESR and ERGEG final advice to the European Commission in the context of the Third Energy Package, Response to Question F.20 - Market Abuse, <http://www.cesr.eu/popup2.php?id=5270>. See also CESR and ERGEG advice to the European Commission in the context of the Third Energy Package, Response to Question F.20 - Market Abuse Feedback Statement: Evaluation of Comments, <http://www.cesr.eu/popup2.php?id=5271>.

². Our client alert dated 25 August 2008, "CESR and ERGEG Expected to Recommend a Bespoke EU Market Abuse Framework for the Energy Markets," http://www.mofo.com/news/updates/files/Client_Alert_CESR_and_ERGEG_expected_to_recommend.pdf, reported on the joint public consultation by CESR and ERGEG and its background.

Accordingly, CESR and ERGEG advise that the European Commission develop a “tailor-made EU market abuse framework” for all electricity and gas products not already covered by MAD, rather than attempting to adapt the existing provisions of MAD, which could lead to inappropriate application of MAD or complications in other commodities markets.

Legally Binding Disclosure Obligations as Part of Energy Sector Regulations, Including Sanction Mechanisms

CESR and ERGEG recommend the implementation of legally binding disclosure obligations comparable to Article 6 of MAD, enforced by sanction mechanisms, as part of the energy sector regulations.

That is, the new disclosure regime should not only be designed to enhance the transparency (both pre- and post-trade) for energy products (both physical and derivative) but also be tailored to the specific characteristics and needs of the energy markets.

The new disclosure regime will require relevant entities (e.g., generators, suppliers, transmission system operators (TSOs)) to make a timely public disclosure of price-sensitive “fundamental data” (e.g., generation, transmission, transportation, storage, and capacity levels) on a single platform, under threat of regulatory sanctions.

Other Recommendations

CESR and the ERGEG also advise the European Commission to take into account the “substantial interdependencies” between electricity and gas markets and other energy markets (e.g., emission allowances, coal and oil markets). For example, they have identified that the same market participants tend to trade the products in these markets and that there are “linkages” between these markets in the price formation processes.

In addition to market abuse, the European Commission’s mandate of 21 December 2007 also asked CESR and ERGEG to advise on transparency, recordkeeping, and information exchange among the securities and energy regulators. Accordingly, CESR and ERGEG intend to launch another consultation in October 2008, with a view to delivering their final advice on the remaining issues by the end of December 2008.

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