CEER final advice on the regulatory oversight of energy exchanges

A CEER Conclusions Paper

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INFORMATION PAGE

Abstract

On 18 May 211, European energy regulators launched a public consultation on the "ERGEG draft advice on the regulatory oversight of energy exchanges" (C10-WMS-13-03). Following the public consultation CEER elaborated the current conclusions document (C10-WMS-13-03b) incorporating stakeholders' responses.

In their advice European Energy Regulators investigate the organisation and the regulatory oversight of energy exchanges (i.e. the supervision of energy exchanges and the monitoring of trading activities of market participants by the competent authorities) and describe the CEER findings from best practice examples. The advice may thus serve as a background paper, which may be utilised in parallel to the further discussions on the implementation of REMIT.

This conclusions document is accompanied by the Evaluation of Responses (C10-WMS-13-03b).

Target Audience

Energy exchanges, suppliers, traders, gas/electricity customers, gas/electricity industry, consumer representative groups, network operators, Member States, academics and other interested parties.

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Related documents

CEER/ERGEG documents

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EXECUTIVE SUMMARY

Whilst regulatory oversight of energy derivatives exchanges is harmonised through minimum standard requirements through MiFID at European level, regulatory oversight of energy spot exchanges currently differs in the EU Member States due to a lack of European minimum standards and different national legislative requirements. Competencies and responsibilities at national level are often divided between different exchange supervisory authorities, if any (for example ministries, the financial market regulator, the energy regulator or others), and may overlap in some cases. To overcome the current unsatisfactory situation European Energy Regulators decided to elaborate best practices of supervision of energy exchanges. This serves the interest of proper and adequate supervision and supports also greater EU market integration and market integrity.

In their advice European Energy Regulators investigate the organisation and the regulatory oversight of energy exchanges (i.e. the supervision of energy exchanges and the monitoring of trading activities of market participants by the competent authorities) and describe the CEER findings from best practice examples. The advice may thus serve as a background paper, which may be utilised in parallel to the further discussions on the implementation of REMIT.

As European Energy Regulators already formulated and submitted their position to the European Commission (Commission) in the context of the consultation of the MiFID review (e.g. as regards market makers)[1], these recommendations mainly focus on the regulatory oversight of energy spot exchanges if not stated differently.

CEER recommends that:

- Supervision and Governance: Minimum standards for a supervisory framework for energy spot exchanges should be set and harmonised at European level and each energy spot exchange should be subject to appropriate and effective exchange supervision by a competent exchange supervisory authority to increase market integrity.

- Transparency: Pre- and post-trade requirements should be defined for energy exchanges and the publication of additional fundamental data information by energy spot exchanges should be encouraged.

- Market Surveillance: Each energy exchange should have a clear framework for conducting market surveillance, compliance and enforcement activities and there should be oversight of these activities by an exchange supervisory authority.

[1] CEER response to the Commission's public consultation on the MiFID review, Ref: C11-FIS-23-04, 2 February 2011, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Cross-Sectoral/2011/C11-FIS-23-04_MiFID_02-Feb-2011.pdf

- Monitoring: Market monitoring should be based on existing experiences of energy regulators and surveillance departments of energy exchanges and national regulatory authorities (NRAs) should closely cooperate in the monitoring of wholesale energy markets.

- Cooperation: Competent exchange supervisory authorities, regulatory authorities and other relevant authorities should cooperate with each other, at national, regional and European level, as appropriate, in promoting market integrity and effective and efficient supervision of energy exchanges.

1. Introduction

1.1. Background and purpose of this paper

Following a request of the European Commission (Commission) the European Regulators' Group for Electricity and Gas (ERGEG) has committed itself in 2009[2] to examine the supervision of energy exchanges and gas hubs and to elaborate best practices as an effort to align these arrangements in the interest of greater EU market integration. The Monitoring Report on the regulatory oversight of natural gas hubs was already presented in October 2010[3], the findings on the regulatory oversight of energy exchanges are presented hereby.

ERGEG started working on this issue in 2009 and has presented preliminary findings at the Florence School of Regulation workshop on "The regulation of energy exchanges" on 5 March 2010. Due to ERGEG´s abolishment with 1 July 2011, CEER finalised the advice following the public consultation.

The purpose of this paper is to:

- Assess the status quo of regulatory oversight of energy exchanges;
- Describe best practice examples of current regulatory oversight of energy exchanges by national energy regulators;
- Identify the need for improvement of regulatory practices and / or modification of existing provisions of the regulatory oversight of energy exchanges.

CEER defines its best practices and recommendations in this advice for all models of energy exchanges, without aiming at harmonising the existing models or influencing the ownership structure of energy exchanges. The sole focus of this paper is the regulatory oversight of energy exchanges.

1.2. Recap of the public consultation

The public consultation on the draft advice on the regulatory oversight of energy exchanges[4] recognised the important role of energy exchanges in a liberalised energy market, but highlighted the differences in the regulatory oversight of energy exchanges due to different

[2] European Energy Regulators Work Programme 2009, Ref: C08-WPDC-16-03, 10 December 2008, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/Work_Programmes/Tab/C08-WPDC-16-03_publicWP2009_10-Dec-08.pdf

[3] ERGEG Monitoring Report 2010 on the regulatory oversight of natural gas hubs, Ref. E10-GMM-11-03, 10 October 2010, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Gas/2010/E10-GMM-11-03%20Gas%20Hub%20Monitoring%20Report%202010_final.pdf

[4] ERGEG draft advice on the regulatory oversight of energy exchanges. An ERGEG public consultation document, Ref: C10-WMS-13-03, 5 April 2011, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_CONSULT/CLOSED%20PUBLIC%20CONSULTATIONS/CROSS_SECTORAL/Oversight%20of%20PXs/CD/C10-WMS-13-03_EnergyExchangeOversight_v7%20for%20PC.pdf

national requirements and competent authorities. Therefore European Energy Regulators decided to elaborate best practices of supervision of energy exchanges, in order to align these arrangements in the interest of proper and adequate supervision and to support greater EU market integration. For the purposes of the analysis, to identify best practices of supervision and to investigate the main regulatory oversight aspects of energy exchanges, an internal survey was undertaken gathering input from national regulatory authorities (NRAs). Information gathered in this document relies on input provided by 14 European energy regulators, and cover electricity or gas exchanges.

CEER considered the organisation of energy exchanges, especially with regard to the role of internal and external governance bodies in the initial establishment of market rules and market surveillance, the diversity of prerequisites to trade at European exchanges and the structure of fees as well as their approval procedure, the appointment of market makers, the information published by exchanges and misbehaviour treatment and recommended the following:

- Energy spot exchanges, who´s regulation is currently not harmonised at EU level, should in future be covered by the energy market integrity regime. In view of market coupling, energy regulators should be competent for the regulation of the market design of energy spot markets. This does not necessarily mean that energy regulators should regulate energy (spot) exchanges. This may be the case, but at least there should be a close cooperation between energy regulators, financial regulators, market surveillance departments of energy exchanges and possibly competition authorities.

- There should be an obligation for energy exchanges to install and maintain a market surveillance department, regardless whether the exchange is a regulated market, an Multilateral Trading Facility (MTF) or a currently unregulated market under the Markets in Financial Instruments Directive (MiFID). Such a market surveillance department should be sufficiently staffed to continuously monitor and analyse the daily exchange trading, the compliance with market rules and other legal provisions. Any such market surveillance department of an energy exchange should cooperate with national energy regulators. The proper functioning of the market surveillance department should be supervised by a national regulator. In view of market coupling, there should also be an obligation for a close cooperation and exchange of trade data and information between market surveillance departments of different energy exchanges.

- Given the differing energy exchange rules, it should be considered if a harmonisation of legal and operational frameworks could enhance cooperation between European energy exchanges, and facilitate trading. The involvement of market participants is regarded positively by energy regulators.

- Regarding the publication of additional information, principal regulatory requirements should be set to make sure that the energy exchanges establish satisfactory routines.

- The experiences and competences of national energy regulators already monitoring energy wholesale markets could be an archetype for the future monitoring of energy wholesale markets across Europe.

CEER stated that these ideas did not represent CEER's definite position on the subject but rather sought to act as a first step in engaging with stakeholders.

1.3. Responses received to the public consultation

CEER had a very positive response to the public consultation, receiving 32 responses (three being confidential).

Broadly, 3 respondents represent the interests of energy exchanges, 7 the interests of energy trading companies, 4 the interests of energy industry, 3 the interests of local energy companies, 5 the interests of network owners, 4 representing consumer interests and 2 representing national authorities. Other respondents include London Energy Broker Association. Of the 32 respondents, 6 are from European or international organisations; the rest are from national level. Annex 4 lists the publically available responses by category and country of respondent.

In general, respondents welcomed European Energy Regulators' initiative aimed at enhancing the regulatory oversight of energy exchanges, particularly their recognition of the importance of ensuring that any duplication between financial regulation (e.g. MiFID) and the proposed energy regulatory framework is avoided.

Of the responses received, the key messages from a significant number of respondents are that:

- An adequate degree of harmonisation in the regulatory oversight of energy exchanges can be suitable for the integration of the European electricity and gas markets and for the competition between energy exchanges if European level minimum standards are set;
- The growing number of coupled markets result in a tight interconnection of the physical capacities, leading to an equivalent growing demand for common standards at European level both for market practices and for the supervision regime, even though all or part of this supervision is delegated to the national level;
- There must be an obligation for energy trading venues to establish and run a market monitoring department, independently from their status (regulated market, MTF or none).
- Generally, national regulatory authorities should play an important role in the supervision of energy exchanges.

However, some respondents also emphasised that:

- The scope of the paper and important definitions should be further clarified;
- The draft advice did not sufficiently identify a regulatory gap or evidence of market misconduct and pled for the implementation of existing and

forthcoming legislation like REMIT, MAD, MiFID and EMIR[5] before considering further measures.

1.4. Recent developments

There are some recent developments that are relevant to the issues raised in the public consultation document.

In July 2011, the European Commission, the European Parliament and the Council found a political compromise on the proposal for a Regulation for energy market integrity and transparency (REMIT). REMIT will introduce a definition of market abuse in wholesale energy markets and an EU-wide monitoring of wholesale energy markets by the Agency for the Cooperation of Energy Regulators (ACER) and national regulatory authorities (NRAs), in coherence with the EU financial legislation and taking into account the interactions with CO_2 markets.

When referring to REMIT the signed Council version of 25 October 2011 is used as the general reference throughout this document[6].

This paper also takes into account further developments relating to the review of the Markets in Financial Instruments Directive (MiFID).

The finalisation of this advice coincides with the publication of a relevant report on the commodity futures markets by the International Organization of Securities Commissions (IOSCO)[7]. The IOSCO Task Force on Commodity Futures Markets has repeatedly recommended to improve the transparency of both market fundamentals (supply, demand, inventories, transport capacities, etc.) and physical commodity market transaction[8]. The overall intention of the IOSCO recommendations was to gain a more comprehensive understanding of the interaction between financial and non-financial participation in commodity derivatives and related physical commodity markets that affect price formation[9]. In European Energy Regulators' view, improving the regulatory oversight of energy exchanges would make a significant contribution to this objective. This paper may therefore also contribute to these discussions.

[5] Proposal for a Regulation on Energy Market Integrity and Transparency (REMIT), Directive 2003/6/EC on insider dealing and market manipulation (market abuse) (MAD), Directive 2004/39/EC on markets in financial instruments (MiFID), Commission proposal for a Regulation on OTC derivatives, central counterparties and trade repositories (EMIR).

[6] Regulation of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency, http://register.consilium.europa.eu/pdf/en/11/pe00/pe00034-re02.en11.pdf

[7] See, IOSCO Report of the Technical Committee: Principles for the Regulation and Supervision of Commodity Derivatives Markets, September 2011, http://www.iosco.org/library/pubdocs/pdf/IOSCOPD358.pdf

[8] Ibid., p. 7.

[9] Ibid., p. 8.

1.5. Review of the advice in view of responses received and of recent developments

In view of the responses received and the recent developments, the draft advice has been reviewed and partly restructured. In particular the following amendments were made:

- The scope of the paper, important definitions and wording issues were further clarified (see in particular points 3.1, 3.2, 4.1, 4.2 and 4.3);
- The difference between monitoring and supervision of energy exchanges was explained more into detail (see in particular point 4.1);
- A comparative assessment with CEER findings from best practice examples was added, in particular to better distinguish between derivatives and spot energy exchanges and also to demonstrate current shortcomings (see point 5).

2. A short history of energy exchanges

With energy market liberalisation, energy exchanges were founded incrementally all over Europe. There are respective origins of establishing an energy exchange due to different legal frameworks. In the initial phase, information about the historic development and its consequential characteristics of the energy exchanges were inquired to outline the different historic backgrounds of existing exchanges.

In 1993, the first European energy exchange, Nord Pool was founded in Norway[10]. Only six years later, at the very beginning of the energy market liberalisation in continental Europe, APX was established to operate as electricity exchange for the Netherlands. In the following years, electricity exchanges started their operation step by step mostly all over Europe. The development of gas exchanges started a few years after the establishment of electricity exchanges.

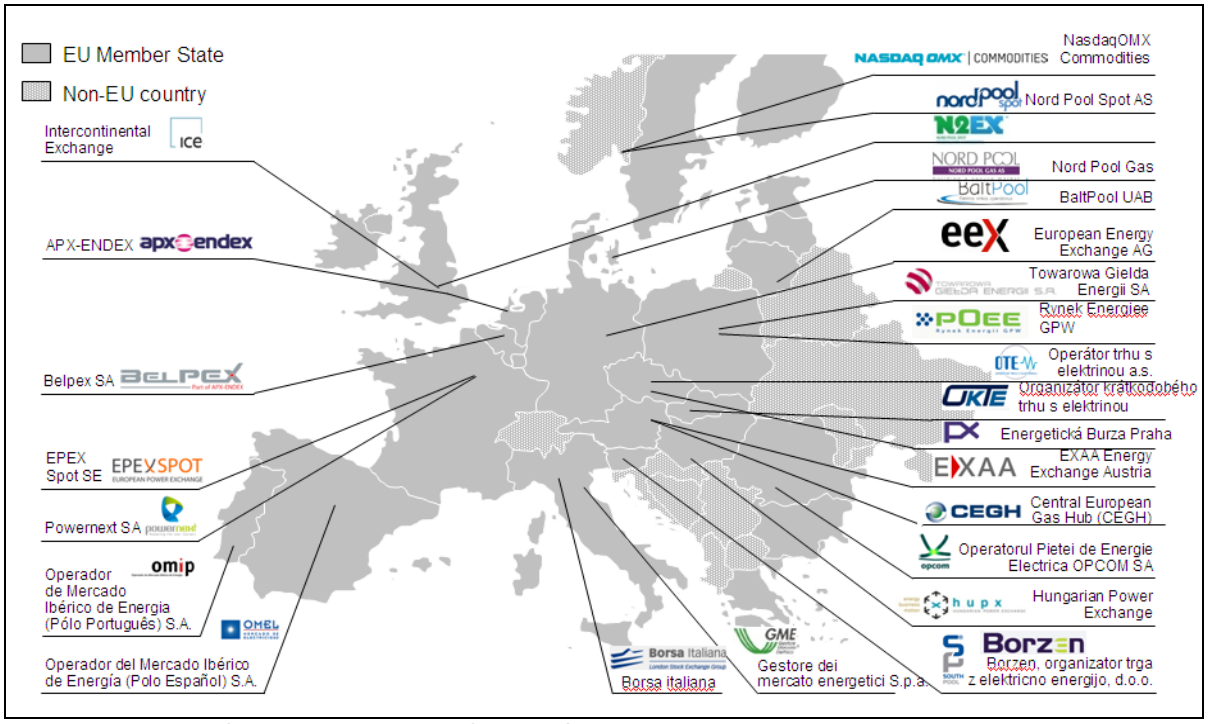

Figure 1 – Energy exchanges in Europe 2011. Source: EEX, CEER

In the majority of cases, the prevalent initial trigger for the establishment of energy exchanges in Europe was commercial interest. This means that the company running the exchange established it without any legal obligations and considered it profitable to operate the business by charging fees to trading participants for providing the exchange services. There are, however, exceptions from this general rule. The Spanish electricity exchange OMEL[11] (involved since July 2007 in the market splitting with Portugal), the Portuguese

[10] The history of the Nordic electricity exchange (Nord Pool Spot) can be referred back to 1971, when it was owned by an organisation of Norwegian producers.

[11] According to the International Agreement for the constitution of an Iberian electricity market between the Spanish Kingdom and the Portuguese Republic, done in Santiago de Compostela on 1 October 2004, and

exchange OMIP and the Romanian exchange OPCOM were established due to legal enforcement by the government. The Hungarian Power Exchange (HUPX) was established by MAVIR's subsidy (Hungarian TSO) based on legal enforcement and it is functioning since summer 2010.

There are only some European exchanges which were developed with the involvement of the respective energy regulator. The Norwegian energy regulator granted a license for the electricity exchange for physical power and was involved when the electricity exchange was established. The Portuguese regulator was involved through discussions in the MIBEL Council of Regulators, and Romania's energy regulator granted the license for the power exchange, gradually issued and approved the market rules and established the market monitoring system. The Netherlands Competition Authority (NMa) advised the Ministry on the regulation of APX. Most other NRAs were not or not formally involved in the development of energy exchanges.

The development of liquidity differs strongly between exchanges and depends on market maturity, market size and the products traded. Spot electricity products represent between 7 and 72% of annual national consumption, whereas futures electricity products stand for 17 to 189% of annual national consumption. This is due to the fact that volumes for futures products can be much higher than those for spot products, since they are traded for a longer time period in advance. As for gas liquidity, a couple of spot exchanges have recently been launched, and their liquidity is still low.

Figure 2 shows the year-on-year development in electricity trading volumes in Scandinavia, the Netherlands, France and Germany from 2001 to 2009.

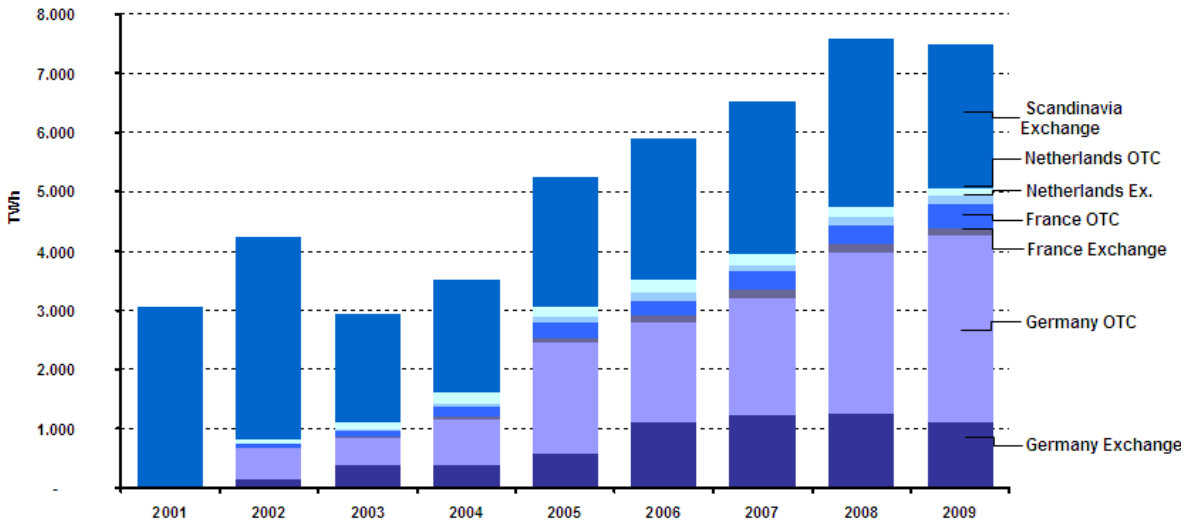

Figure 2 – Liquidity of European Power Derivatives Markets.
Source: RWE Facts and Figures, August 2010

which regulates the Iberian electricity market ("MIBEL"), on 1 July 2011 the OMEL corporate splitting process was finalised. Therefore, the activity branch for the operation of the spot (day-ahead) power market, so far carried out by OMEL, is taken over by OMI-POLO ESPAÑOL, S.A.U. (OMIE).

Efficient capacity allocation through market coupling arrangements should facilitate price convergence throughout Europe. In terms of responsibility, coordinated order matching is for the exchanges what the coordinated capacity calculation is for the TSOs. Market integration can progress quickly through multi-regional price coupling, building on existing infrastructure and regulatory frameworks, albeit with some degree of harmonisation when technically needed. Developments ahead will however be challenging for energy exchanges, TSOs and energy regulators.

The role of energy exchanges and the services they offer is expected to increase both in derivatives and spot markets, the latter not at least with the increasingly important role in market coupling, where energy spot exchanges allow implicit border capacity auctions.

3. Organisation of energy exchanges

3.1. Introduction

Energy exchanges trade an array of products, both physical and derivative. For the purposes of this paper, an energy exchange is a multilateral system for the trading of wholesale electricity and/or natural gas spot and/or derivatives products operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in wholesale natural gas and/or electricity spot and/or derivatives products – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the wholesale energy product admitted to trading under its rules or systems. The model of energy exchanges in Europe depends on the overall market design chosen at national level.

Depending on the model chosen, some of the energy exchange's activities may be of a monopolistic nature (either by their nature or because a legal monopoly can be created by Member States), whilst others are carried out in competitive markets. These two facts affect heavily the way in which each energy exchange is organised and regulated at European and national level.

3.2. Prominent role and different models of energy exchanges

As described in the short history of energy exchanges, most of them are licensed either by the government or the competent Ministry (e.g. Germany, Austria), the competent national financial (e.g. derivatives exchanges in Austria, France) or the competent national energy regulatory authority (e.g. spot exchanges in Norway, Romania) and are supervised by an exchange supervisory authority, which is often the same authority as the one granting the license.

This licensing requirement indicates the prominent role of energy exchanges. Energy exchanges have emerged in many countries over the last years as a result of the increasing liberalisation of the energy sectors. Their creation is a quasi-necessary step in markets where different types of market participants have the option to decide their level of production and demand as well as their transaction counterparties. Energy exchanges allow participants to trade physical spot products and derivatives products. Unlike bilateral trading or brokered trading, energy exchanges have strict exchange rules which contribute to secure transactions for the participants. They offer participants to deal standardised products, in

terms of maturity and structure and also offer clearing services which limit the counterparty failure risks.

Energy exchanges help creating an efficient and liquid energy wholesale market as called for by the European Commission. As they are open to any participant, set price signals for standardised products, and offer anonymous transactions, they play an important role in creating more transparency and competitive prices, which foster competitiveness within the internal market. They also help establishing adequate price signals for detecting potential security of supply or particularly generation adequacy problems.

The prominent role of energy exchanges therefore lies in the facilitation of the trading of standardised products and the promotion of market information, competition, and liquidity. Energy exchanges (ideally) also provide other benefits, such as a neutral marketplace, a neutral price reference, easy access, low transaction costs, a safe counterpart, and clearing and settlement services. For instance, spot market prices are an important reference both for over-the-counter (bilateral) trading, and for the trading of forward, future and option contracts.

The model of energy exchanges in Europe depends on the overall market design chosen at national level. Therefore trading conditions may differ in wholesale electricity and gas and in spot and derivatives markets, which may also affect the design of energy exchanges in these markets.

Energy exchanges have to be distinguished from energy brokers, i.e. an individual or firm who or which acts as an intermediary between a buyer and seller, usually charging a commission. However, unlike brokers, energy exchanges are multilateral systems for the trading of wholesale electricity spot and/or derivatives products operated and/or managed by a market operator, which bring together or facilitate the bringing together of multiple third-party buying and selling interests in wholesale electricity spot and/or derivatives products in the system and in accordance with their non-discretionary rules.

In the wholesale electricity market, most European countries have adopted an exchange model with bilateral contracts and a voluntary electricity exchange. However, Spain and Portugal, like many countries outside Europe, have decided for a pool model, where the entire electricity trading has to be transacted via the pool and long-term contracts are usually traded as purely financial products.

In the wholesale gas market, gas exchanges coincide with gas hubs, which can be defined as a point – physical (local) or virtual (notional) – on the gas system. However, unlike gas hubs, gas exchanges are multilateral systems for the trading of wholesale natural gas spot and/or derivatives products operated and/or managed by a market operator, which bring together or facilitate the bringing together of multiple third-party buying and selling interests in wholesale natural gas spot and/or derivatives products.

As compared to electricity markets, most natural gas markets in Continental Europe are still in an early stage of development. Particularly in trading hubs where liquidity has developed, energy exchanges are faced with competition from the OTC market, i.e. brokers, gas hubs and competition from other energy exchanges in some cases. The majority of European gas exchanges are thus still at the stage of developing liquidity by acquiring new members and attracting volumes in a highly competitive environment.

Finally, spot and derivatives energy exchanges have to be distinguished. Spot energy exchanges provide for day-ahead and intraday – or within-day – trading of electricity and/or gas products, whilst derivatives energy exchanges provide for the trading of futures and options relating to electricity and/or natural gas products as regulated markets or Multilateral Trading Facilities (MTFs) according to MiFID.

CEER defines its best practices and recommendations in this advice for all models of energy exchanges mentioned-above, without aiming at harmonising the existing models or influencing the ownership structure of energy exchanges. The sole focus of this advice is the regulatory oversight of energy exchanges.

3.3. Organisational structure of energy exchanges

The organisational structure of energy exchanges normally distinct the exchange management, the market monitoring and, to a greater or lesser extent, the involvement of market participants on a formal or informal basis. Depending on the level of self-regulation of the exchange, the organisational structure may also foresee exchange sanctions by a specific committee (e.g. Nasdaq OMX Commodities; EEX) or by the exchange management (e.g. Nord Pool Spot) for the sanctioning of breaches of exchange rules. The monitoring role of energy exchanges may be conducted by a designated market surveillance department at the exchange.

The following examples may elucidate the different organisation structures of European energy exchanges:

- At Nord Pool Spot (NPS), the market surveillance department monitors market participants' orders and trades. Furthermore, it may also request information about physical OTC-trades of market participants at NPS' markets. Further, the Norwegian energy regulator and the Norwegian Competition Authority are monitoring the Norwegian generators bidding at NPS. Similar rules apply to the derivatives market.

- At EEX, an independent market surveillance department collects and analyses all exchange and clearing data (including cleared OTC trades) and reports to the exchange supervisory authority and to the exchange council, which is the representative body of the market participants of EEX, inter alia responsible for the adoption of the exchange rules and their amendments.

- At EPEX Spot, the Management Board of elaborates the relevant rules and regulations amongst the relevant agreements with the exchange members through an exchange council. A market surveillance officer collects and analyses the exchange data.

- At APX-Endex, the supervisory board and the company management fulfil the obligation of a general market oversight and elaborate rules.

- At the Italian IPEX, market rules are prepared by the market operator (GME S.p.A) and approved by the Minister of Economic Development, after having heard the opinion of the Italian energy regulator (AEEG). Moreover, in accordance with AEEG's decisions, both GME and the TSO have already established a markets surveillance unit and set up electronic data warehouses that can be used through business

intelligence tools by AEEG as well. The aforementioned data warehouses contain fundamental and trading data regarding IPEX and over-the-counter physically settled contracts, as well as large market participants' over-the-counter cash-settled contracts.

- At the Austrian CEGH Gas Exchange of Wiener Boerse, an assigned Compliance Officer reports to the competent authorities.

3.4. The definition of exchange rules

Basically, energy exchanges distinguish between three types of rules: exchange / trading rules, clearing / settlement rules and IT requirements. The conditions contain very different specifications for the trading at the respective energy exchange. For example, trading rules mostly describe financial issues including collaterals, payment procedures and bank accounts. Concerning settlement rules, the trader must appoint an appropriate clearing bank. Some energy exchanges provide a trading platform and demand a special IT software or infrastructure (e.g. data transmission) from the trader.

The energy exchanges considered in this advice have an internal body which elaborates new market rules. Exchange supervisory authorities are often involved at the end of the development process by an approval act.

In most of the indicated energy exchanges, market participants are involved in the elaboration of new rules whilst national energy regulators or other external entities are not involved in such elaboration procedures. Dependent on the respective energy exchange, the participants develop new rules in different ways. At the CEGH Gas Exchange of Wiener Boerse, EFET and customers discuss new rules through workshops. At the German EEX, it is established by law that the exchange management proposes and the exchange council (i.e. the elected representation of market participants) approves the market rules. The energy exchanges in Belgium, France, Norway and the Netherlands established a separate internal body with market participants for that purpose. A so called "Market Agent Committee" enables the market participants in Portugal to take part in the elaboration of the national energy exchange rules (OMIP). In Romania, new rules have to be agreed in a public consultation. In Italy GME S.p.A. may propose amendments to market rules and notify them to all parties concerned (the Italian Ministry of Economy and Finance is the single shareholder of GSE S.p.A., which entirely owns GME S.p.A.). Subsequently GME submits its amendments for the approval of the Minister of Economic Development who decides after having heard the opinion of the Italian energy regulator AEEG. This procedure is not applied to urgent amendments aiming at safeguarding the proper functioning of the Italian market. Five energy exchanges do not foresee the possibility for market participants to influence or to initiate the elaboration process.

Except for Slovenia, all answers to the internal survey pointed out that different government bodies (such as the Ministry for Economic Affairs, the exchange supervisory authority or the national financial regulator) are authorised to approve the rules. In Romania and Norway the national energy regulator is competent to approve new market rules. In general, other government bodies are not designated for further activities within the procedure of setting the rules. Furthermore, the answers indicate a strict binding character of these rules. However, their relevance exceeds the scope of this paper.

3.5. Prerequisites to be fulfilled by market parties for trading at the exchange

Market parties have to fulfil different prerequisites to trade at the exchanges, which are listed below.

Conclusion of a contract
Based on the available information, the conclusion of a contract is a prerequisite for trading at most energy exchanges, both physical and derivative markets.

Entrance fees
In addition to a contract, an entrance fee or an annual fee has to be paid as a prerequisite for trading in most cases. In the Netherlands the annual fee has to be paid on a monthly basis.

Credit assessment
Other prerequisites are collaterals or bank guarantees and credit assessment. In most exchanges, a credit assessment as well as an annual fee is prerequisite for trading at the exchange.

Additional requirements
When entering a contract in order to become a participant at the energy exchange, the participant usually also accepts to be bound by the regulations at the exchange, e.g. disclosure requirements, rules regarding insider trading and market manipulation. In some cases, the participants are required to submit a declaration provided by the relevant Ministry (i.e. EPEX Spot France).

3.6. Market makers

Market makers exist at most exchanges, not only at energy exchanges. It is their task to place bids on the buy and sell side in order to guarantee the liquidity of the market. MiFID defines “market maker” as a person who holds himself out on the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against his proprietary capital at prices defined by him (Art. 4(1) No 8 MiFID).

At some exchanges (e.g. EPEX Spot, Nord Pool Spot and at the Italian IPEX), there are no market makers since they are normally only relevant for continuous trading at derivatives exchanges. At other exchanges market makers have been active since the beginning of the trading activity. Most of the market makers at European energy exchanges are not officially appointed, but established a bilateral agreement between the energy exchange concerned and a market participant (under private law). Members who sign these agreements typically benefit from a reduction of their trading fees when they trade (depending on the volume traded and the length of the bid/ask spread quoted).

CEER considers that market making is linked to liquidity and not needed as such in liquid markets. Therefore CEER is of the view that proportionate rules and controls must be in place to regulate market makers’ role, where needed.

CEER considers that harmonised transparent market rules applying to appointments of

market makers are needed at European level, so that individual market participants and Member States which share a balancing area/hub are not disadvantaged from attracting market makers as a result of differing treatment and rules. Such harmonised rules are of special importance in futures markets. These rules may be set on a voluntary basis, as currently there is no legal basis for such rules. However, REMIT foresees that ACER shall evaluate the operation and transparency of the different market places, assess whether minimum requirements for organised markets are likely to improve market transparency[12], and report to the European Commission on this issue.

It is useful to distinguish reasons for market intervention, rather than distinguishing spot or future markets. The reasons for market intervention include:

- trading on own account to optimise physical assets or a sourcing portfolio;
- trading on own account to capture arbitration revenues;
- trading for third parties.

Market makers may be trading in parallel for all of these different reasons. In CEER's view information collected for the first reason (e.g. physical state of the assets) and for the third reason (e.g. client needs) must be properly treated, otherwise it can lead to conflict of interests.

Generally, information collected under different trading reasons may be inside information in the sense of REMIT, and persons who possess inside information can neither buy nor sell a wholesale energy product to which this information relates, or distribute this information outside of their normal professional exercise or recommend or induce someone to buy or sell a wholesale energy product to which this information relates, on the basis of this information[13]. Market participants will have to publish effectively and in a timely manner any inside information which they hold in respect of their business[14]. A market participant may delay, in exceptional circumstances, the publication of inside information to protect its legitimate interests if it can ensure its confidentiality that no decision to trade wholesale energy products is taken on the basis of this information and this is not likely to mislead the public. This information and the reasons for the delay shall be communicated immediately to ACER and the relevant NRA[15].

CEER considers appropriate that NRAs regularly control whether voluntary and appointed market players have put in place internal procedures (Chinese walls) in order to prevent insider dealing and in particular:

- how inside information is detected;
- how the process for publication of inside information is organised;
- how the confidentiality of inside information is ensured, when its publication has been delayed;

[12] Article 7(3) of REMIT.
[13] Article 3(1) of REMIT.
[14] Article 4(1) of REMIT.
[15] Article 4(2) of REMIT.

- how it is ensured that no decision to trade is made on the basis of inside information.

CEER believes that where market makers are necessary, the aforementioned internal procedures should be defined in such a way to lessen potential conflicts of interests, but, at the same time, to preserve market makers' convenience to provide liquidity.

3.7. Transparency and published information

The transparency obligations listed in this chapter should not be considered as exhaustive.

3.7.1. Pre- and post-trade transparency and information published by the exchange

Most energy exchanges are publishing data on traded volumes, price signals, membership fee, contact details and product/service list. In the electricity markets, traded volumes are in general published daily as MWh.

Moreover, most energy exchanges publish the number of members, but less than half of them publish number of *active* members. Other information published by some exchanges is e.g. number of trades.

The exchanges for electricity derivatives publish settlement prices, highest price traded, lowest price traded and/or bid and ask prices. The spot exchanges for electricity publish hourly spot market prices daily. Exchanges also publish differentiated data between sell and buy activities (e.g. bidding curves or bid-offer spread information), and types of standard energy exchange contracts.

Since Italy has a zonal market system depending on the grid situation, the Italian IPEX publishes the following types of information: zones characterising the spot electricity market; admissible hourly electricity transmission capacity limits between geographical zones and regarding zones interconnected with neighbouring countries; estimated hourly electricity demand in each geographical zone; data of offers/bids submitted into the spot electricity market and data of offers/bids accepted in the forward electricity market.

If relevant/applicable, the price formation mechanism of the electricity exchange for day-ahead auctions is publicly available for most of the investigated exchanges. The price formation mechanism of the electricity exchange for day-ahead continuous prices is publicly available only for some exchanges when relevant.

3.7.2. Additional transparency information published by the exchange

A few exchanges publish additional information for example data on electricity generation and information from TSOs on trading capacity. Published data on electricity generation includes e.g. installed capacity, information on planned and unplanned outages, filling rate of water reservoirs and ex-post data on actual generation. Further, ex-ante information on scheduled unavailability of significant consumption units and ex-post information on unplanned unavailability of significant consumption units should be published. Current publication practices are based on either legal requirements (e.g. Congestion Management

Guidelines), on existing exchange rules or on voluntary initiatives.

3.7.3. Assessing the liquidity of the exchanges

Based on the received responses, market liquidity is assessed from one or more of the following indicators: churn rate, the Herfindahl-Hirschman Index, the variety of market actors and traded volumes.

Moreover, according to NRAs, publishing of traded volume is sufficient to assess the market liquidity.

3.8. The treatment of misbehaviour

The issue how to define misbehaviour and what kind of actions are to be considered misbehaviour differs currently substantially across Europe, also due to different exchange rules, regulations and national legislations applying.

Firstly, all practices in breach of exchange rules and regulations are seen as misbehaviour.

- At the EEX, misbehaviour is understood as fictitious orders, misleading trading transactions, insider dealing, and non-compliance with transparency obligations. The rules are defined in the EEX Code of Conduct, which are harmonised with the Code of Conduct of EPEX Spot.

- EPEX Spot (electricity, France) has also a clear list of cases which are considered misbehaviour, stipulated in a Code of Conduct. These are dissemination of false information, deceitful acts intended to mislead the market, deceitful acts intended to reduce market liquidity, and orders with no economic justification.

- The Austrian CEGH Gas Exchange of Wiener Boerse defines misbehaviour in the context of possible offenders as market manipulation by market makers, largest traders, and by suppliers.

- At the Italian IPEX, misbehaviour includes late payment or redemption of financial guarantees; late payment to the market operator; failure to pay the market operator; negligence, imprudence and unskillfulness in the use of the systems of communication and submission of bids/offers; disclosure to third parties of confidential information related to market participants; anticompetitive conduct.

- At Nord Pool Spot, market manipulation is defined in the Rulebook, and is understood as transactions or orders to trade which give, or are likely to give, false or misleading signals as to the supply of/demand for or price of a listed product, securing the price at an abnormal or artificial level by acting in collaboration, transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance, and dissemination of information which gives, or is likely to give, false or misleading signals.

Secondly, misbehaviour may include breaches of superior national rules and regulations.

The Romanian energy exchange for example considers any behaviour which does not comply with ANRE (Romanian Energy Regulatory Authority) regulations and related procedures and could have a negative effect on market efficiency or system security as misbehaviour. Furthermore, any action that has negative influence on the competition is seen as misbehaviour.

The Spanish/Portuguese OMEL and OMIP have also a very broad definition of misbehaviour.

There are different sanctions that apply in case of misbehaviour of a market party. Several NRAs stated that misbehaviour of market participants can lead to an exclusion from the market. Furthermore, in several countries national authorities are to be informed in case of misbehaviour. Most respondents to the internal survey stated that in case of misbehaviour the financial supervisory authority or the competition authority is to be informed. Furthermore, there are several energy exchanges that can impose sanctions in case of misbehaviour.

The results of the internal survey showed that there is no common definition on what is to be seen as misbehaviour due to different exchange rules and regulations and national legislation nor is there a common approach on how to deal with misbehaviour of market participants.

REMIT will at least harmonise the market abuse definition to be applied in Europe and will also be relevant for energy exchanges and their definition of misbehaviour.

3.9. Exchange fees

Usually there are fees to be paid for trading at energy exchanges. In most cases the energy exchanges decide on the level and structure of the fees.

Generally there are different kinds of fees like transaction fees, fees per quantity unit and fees per period of time such as annual fixed fees, one time entry fees or variable trading fees. Most energy exchanges have a fee per quantity. Often, there is also an additional fee per period of time. There are very few energy exchanges which have a fee per period of time but no fee per quantity unit. Furthermore, there are several energy exchanges that charge other kind of fees, for example entrance fee at the Austrian Electricity exchange EXAA, at EPEX Spot in France, and at the Dutch APX-Endex.

Most European energy exchanges can decide on the level of their fees without the approval of a public authority. At the Portuguese OMIP the regulatory authority has to approve the fees. At OMEL, the fees are set by law and in Romania the NRA is in charge for setting the fees. At Nord Pool Spot the level of the fees are not regulated directly, but the revenue from the organisation and operation of the market place shall cover the costs and provide a reasonable profit through efficient operations.

Furthermore, information about these fees is publicly available all exchanges considered in this advice. At most energy exchanges the publication of the fees is required by law.

3.10. A new role for energy exchanges due to market coupling

An important new feature – currently only for electricity exchanges – is the coupling with neighbouring electricity exchanges like the Central-West Europe (CWE) Market Coupling of BELPEX, APX-ENDEX, EPEX Spot FR and EPEX Spot DE or the Interim Tight Volume Coupling (ITVC) between the Nordic market (Nord Pool Spot) and CWE via the auction office EMCC or the Italian-Slovenian Market Coupling (ITA-SI MC) between Italian and Slovenian electricity exchanges. These market coupling projects can be considered an ancillary service of electricity spot exchanges.

Market coupling is a method for integrating electricity markets in different areas. With market coupling the daily cross-border transmission capacity between the various areas is not explicitly auctioned among the market parties, but is implicitly made available via energy transactions on the electricity exchanges on either side of the border (hence the term implicit auction).

This means that the buyers and sellers on an electricity exchange benefit automatically from cross-border exchanges without the need to explicitly acquire the corresponding transmission capacity. The system of market coupling has been in use since 2006 (trilateral market coupling between the Netherlands, Belgium and France) and has proven very successful.

The main purpose of this mechanism is to maximise the total economic surplus of all participants: cheaper electricity generation in one country can meet demand and reduce prices in another country. Prices will equalise across adjacent countries where there is sufficient transmission capacity. Market coupling leads to a more efficient use of the daily capacity of the interconnections between the networks of involved national Transmission System Operators.

Market coupling is currently designed to enable different electricity exchanges to be coupled in a manner that requires them to make minimal changes to their market rules. For the members of the individual electricity exchanges, bidding methodologies remain practically unchanged. The involved electricity exchanges continue to exist as legally separate markets, with their own clearing and settlement arrangements.

A by-effect of this mechanism is that it results in additional volumes and thus additional revenues for electricity spot exchanges. The opportunity to implement market coupling reinforces therefore the position of electricity spot exchanges significantly. By linking transmission allocation to the trade on the day-ahead market, more market participants must use the national electricity spot exchange. In addition, the exclusive use of capacity by a central coupling algorithm makes this algorithm a de-facto monopoly function with respect to the allocation of cross-border capacity. Thus, with market coupling, the access to interconnector capacity may be discriminatory in the sense that it is offered exclusively to the coupled electricity spot exchanges. Market coupling may therefore create a de-facto monopoly for this ancillary service of electricity spot exchanges. Therefore, the design of the system should ensure low transaction costs and low barriers to entry for newcomers. Monopoly power and excessive direct or indirect transaction costs can cause market failure. Energy regulators could play an influential role in harmonising and reviewing respective fees.

The final report "From Regional Markets to a Single European Market"[16] elaborated by Commission´s consultants, highlights that the ways of cooperating between electricity spot exchanges in market coupling will depend on a purely voluntary basis for the time being, since the 3rd Energy Package is not addressing the issue of this cooperation.

Nevertheless, the Framework Guideline on Capacity Allocation and Congestion Managements[17] foresees the introduction of a Europe-wide market coupling. On the basis of this Framework Guideline ENTSO-E drafts network codes which are foreseen to be subject to a comitology procedure. After the comitology process the respective network code (and consequently the introduction of Market Coupling) will have legal character and will thus be legally binding.

There is however an additional issue mentioned in the aforementioned report affecting the future of electricity exchanges: their current regulatory status varies significantly, and some electricity exchanges are not subject to electricity sector regulation. Therefore the report concludes: *"If organised electricity markets become the platform on which congestion is managed in an efficient way through implicit allocation mechanisms, a consistent regulatory framework should be established for these markets. Currently, EU legislation does not currently provide for this outcome."* This coincides with the European Energy Regulators' point of view. In some Member States, where financial market rules are also applied to electricity spot markets, national exchange acts may even create barriers for the implementation of a Europe-wide market coupling and may require legal amendments[18].

Accordingly, in European Energy Regulators' view, these issues underline the need for a coordinated institutional and legal framework for the regulatory oversight of energy exchanges as a prerequisite for an effective Europe-wide market coupling.

[16] Everis/Mercados, Final Report: From Regional Markets to a Single European Market, 28.4.2010, p. 126.

[17] ACER Framework Guidelines on Capacity Allocation and Congestion Management for Electricity, Ref: FG-2011-E-002, 29 July 2011, http://www.acer.europa.eu/portal/page/portal/ACER_HOME/Public_Docs/Acts%20of%20the%20Agency/Framework%20Guideline/Framework_Guidelines_on_Capacity_Allocation_and_Congestion_M/FG-2011-E-002%20(Final).pdf

[18] See, e.g., the study "Legal Opinion on Establishing an Auction Office within the Framework of OMC" commissioned by the German Study Group on Congestion Management at Bundesnetzagentur, recommending inter alia a modification of the German exchange before implementation of market coupling in Germany (see page 24 et seq. of the study). The study is published in German and English language under http://www.bundesnetzagentur.de/cln_1931/EN/Areas/ElectricityGasRegulation/SpecialTopics/OpenMarketCoupling/openmarketcoupling_node.html

4. Areas of regulatory oversight of energy exchanges

4.1. Introduction

The areas of regulatory oversight examined are on the one hand the supervision of the energy exchange itself and its orderly functioning and on the other hand the monitoring of trading activities of market participants at the exchange and beyond.

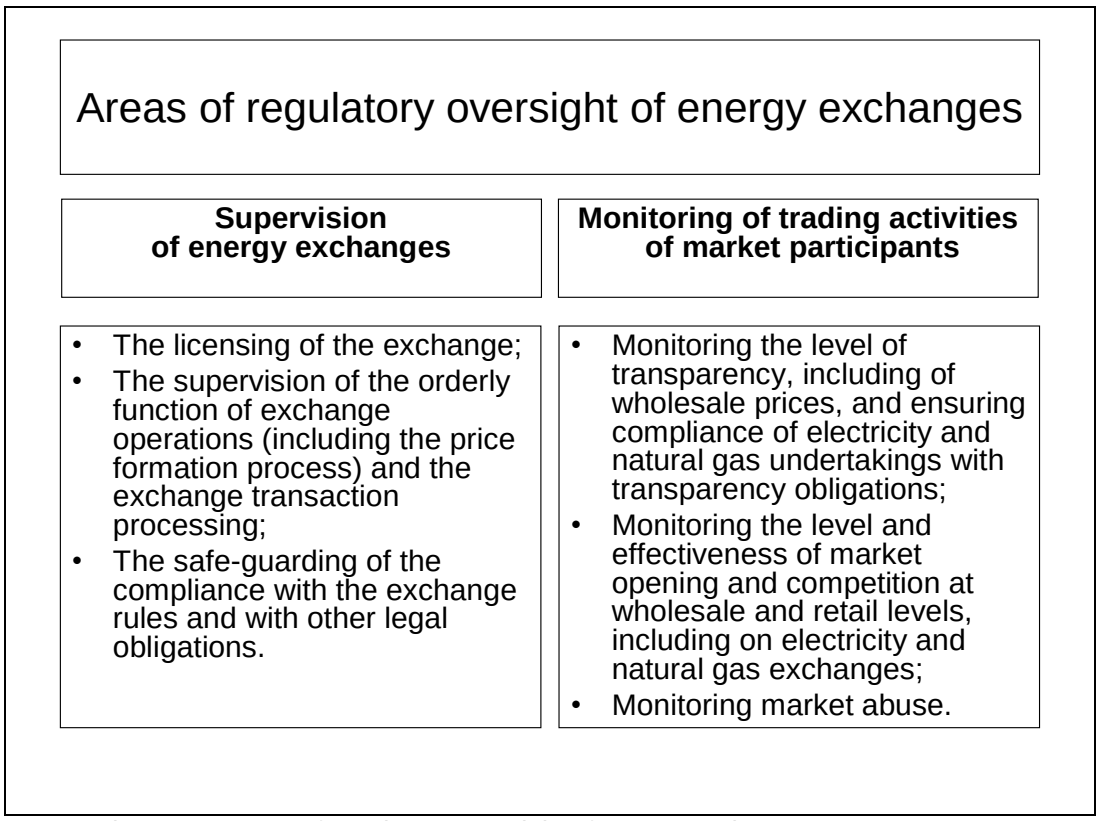

Figure 3 – Areas of regulatory oversight of energy exchanges. Source: CEER

Box 1: MiFID and MAD

In EU financial market legislation, it is common practice to distinguish between the supervision of organised markets (MTFs and regulated markets), mainly stipulated in Titles II and III of MiFID, and the monitoring of market abuse, mainly stipulated in the Directive on insider dealing and market manipulation (market abuse, MAD).

In particular, according to Article 4(1) No 14 of MiFID, 'Regulated market' means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules

and/or systems, and which is authorised and functions regularly and in accordance with the provisions of Title III of MiFID.

Title III of MiFID stipulates rules on the following issues:

- Authorisation of regulated markets and applicable law;
- Requirements for the management of the regulated market;
- Requirements relating to persons exercising significant influence over the management of the regulated market;
- Organisational requirements for the regulated market;
- Admission of financial instruments to trading;
- Suspension and removal of instruments from trading;
- Access to the regulated market;
- Monitoring of compliance with the rules of the regulated market and with other legal obligations;
- Pre- and post-trade transparency obligations;
- Provisions regarding central counterparty and clearing and settlement arrangements.

Furthermore, Member States are obliged to draw up a list of regulated markets for which it is the home Member State and to forward that list to the other Member States and the Commission. The Commission publishes a list of all regulated markets in the Official Journal of the European Union and updates it at least once a year.

According to Article 50(2) of MiFID, competences of competent national authorities concerning regulated markets comprise inter alia:

(a) access to any document in any form whatsoever and to receive a copy of it;
(b) demand information from any person and if necessary to summon and question a person with a view to obtaining information;
(c) carry out on-site inspections;
(d) require existing telephone and existing data traffic records;
(e) require the cessation of any practice that is contrary to the provisions adopted in the implementation of MiFID;
(f) request the freezing and/or the sequestration of assets;
(g) request temporary prohibition of professional activity;
(h) require authorised investment firms and regulated markets' auditors to provide information;
(i) adopt any type of measure to ensure that regulated markets continue to comply with legal requirements;
(j) require the suspension of trading in a financial instrument;
(k) require the removal of a financial instrument from trading, whether on a regulated market or under other trading arrangements.

Whilst Title III of MiFID stipulates competences for the supervision of regulated markets, MAD stipulates the prohibition of market abuse in financial markets and competences for national financial regulators to monitor market participants to ensure that the provisions adopted pursuant to MAD are applied.

4.2. Supervision of energy exchanges

The supervision of energy exchanges, as understood in this advice, complies mutatis mutandis with the meaning of supervision of regulated markets in Title III of MiFID:

- The licensing (or right of closure) of the exchange;
- The supervision of the orderly function of exchange operations (including the price formation process) and the exchange transaction processing;
- The safeguarding of the compliance with the exchange rules and with other legal obligations.

Energy exchanges are normally supervised by an exchange supervisory authority, i.e. government, ministry, national energy regulator and/or national financial regulator. The energy exchanges of Spain and Portugal (OMEL and OMIP) are jointly supervised by the MIBEL council of regulators. The German EEX is supervised by the Exchange Supervisory Authority, the Nord Pool Spot AS by the Norwegian energy regulator and the Nordic derivatives market Nord Pool ASA by the Financial Supervisory Authority of Norway. Whilst the supervision of energy derivatives markets is harmonised at European level by MiFID, the supervision of energy spot markets differs from Member State to Member State.

4.2.1. Supervision of energy derivatives exchanges

In the absence of an EU sector-specific regulation, MiFID is currently the only legal framework for the supervision of energy derivatives exchanges at EU level. Under MiFID, organised markets are distinguished as regulated markets or multilateral trading facilities (MTFs) defined in Article 4 of MiFID. The definition applies to financial instruments in the form of commodity derivatives traded at regulated markets and MTFs, hence also to energy exchanges.

Pursuant to Article 4(1) No 14 of MiFID, 'regulated market' means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of Title III of MiFID. The list of regulated markets is published on a yearly basis in the Official Journal of the EU[19].

Pursuant to Article 4(1) No 15 of MiFID, 'Multilateral Trading Facility (MTF)' means a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with the provisions of Title II of MiFID.

[19] See, e.g., OJ C 348 of 21.12.2010, p. 9.

MiFID deals with energy derivatives instruments such as:

- futures products and options traded on regulated markets and MTFs;
- forward products traded OTC that are cash-settled;
- forward products traded OTC that are physically settled if standardised.

The fundamental difference between a regulated market and an MTF from a regulatory point of view concerns the organisational requirements for monitoring the compliance with the rules of the organised market and with other legal requirements. At regulated markets, this task is normally carried out by a sufficiently staffed market surveillance department supervised by the competent exchange supervisory authority.

Box 2: Differences between MTFs and regulated markets in MiFID

Article 26 MiFID
Monitoring of compliance with the rules of the MTF and with other legal obligations

1. Member States shall require that investment firms and market operators operating an MTF establish and maintain effective arrangements and procedures, relevant to the MTF, for the regular monitoring of the compliance by its users with its rules. Investment firms and market operators operating an MTF shall monitor the transactions undertaken by their users under their systems in order to identify breaches of those rules, disorderly trading conditions or conduct that may involve market abuse.

2. Member States shall require investment firms and market operators operating an MTF to report significant breaches of its rules or disorderly trading conditions or conduct that may involve market abuse to the competent authority. Member States shall also require investment firms and market operators operating an MTF to supply the relevant information without delay to the authority competent for the investigation and prosecution of market abuse and to provide full assistance to the latter in investigating and prosecuting market abuse occurring on or through its systems.

Article 39 MiFID
Organisational requirements

Member States shall require the regulated market:
(a) to have arrangements to identify clearly and manage the potential adverse consequences, for the operation of the regulated market or for its participants, of any conflict of interest between the interest of the regulated market, its owners or its operator and the sound functioning of the regulated market, and in particular where such conflicts of interest might prove prejudicial to the accomplishment of any functions delegated to the regulated market by the competent authority;
(b) to be adequately equipped to manage the risks to which it is exposed, to implement appropriate arrangements and systems to identify all significant risks to its operation, and to put in place effective measures to mitigate those risks;
(c) to have arrangements for the sound management of the technical operations of the system, including the establishment of effective contingency arrangements to cope with risks of systems disruptions;

(d) to have transparent and non-discretionary rules and procedures that provide for fair and orderly trading and establish objective criteria for the efficient execution of orders;
(e) to have effective arrangements to facilitate the efficient and timely finalisation of the transactions executed under its systems;
(f) to have available, at the time of authorisation and on an ongoing basis, sufficient financial resources to facilitate its orderly functioning, having regard to the nature and extent of the transactions concluded on the market and the range and degree of the risks to which it is exposed.

Article 43 MiFID
Monitoring of compliance with the rules of the regulated market and with other legal obligations

1. Member States shall require that regulated markets establish and maintain effective arrangements and procedures for the regular monitoring of the compliance by their members or participants with their rules. Regulated markets shall monitor the transactions undertaken by their members or participants under their systems in order to identify breaches of those rules, disorderly trading conditions or conduct that may involve market abuse.

2. Member States shall require the operators of the regulated markets to report significant breaches of their rules or disorderly trading conditions or conduct that may involve market abuse to the competent authority of the regulated market. Member States shall also require the operator of the regulated market to supply the relevant information without delay to the authority competent for the investigation and prosecution of market abuse on the regulated market and to provide full assistance to the latter in investigating and prosecuting market abuse occurring on or through the systems of the regulated market.

Regulation within the MiFID regime depends on the traded products and only covers financial instruments. Therefore, derivative markets at energy exchanges or energy derivatives exchanges as such are normally supervised by national financial regulators.

4.2.2. Supervision of energy spot exchanges

As spot energy trading venues are not covered by MiFID, there are no rules at European level obliging Member States to require *inter alia* a supervision of compliance with self-regulated rules of the market place or with other legal obligations. As long as spot energy markets are not an annex to a regulated market or MTF, such markets are considered as unregulated markets under MiFID. This is why some Member States, under their national rules, apply the MiFID rules particularly applicable for regulated markets mutatis mutandis also to spot markets. However, since these spot markets are not covered by MiFID, they cannot benefit from the MiFID passport-function for operations in other Member States.

For most energy exchanges, the question of separate supervision for spot and financial products is not applicable as no differentiation in the supervision between physical and financial markets exists in their domestic legislation. This is for instance the case for EEX and Powernext. The supervisory authority for both EEX's derivatives and spot markets is the Saxon State Ministry for Economic Affairs and Labour as exchange supervisory authority, and the exchange supervisory authority of Powernext is the French financial market regulator AMF.

There are, however, several energy exchanges where the competent exchange supervisory authorities for their spot markets are different from those for their derivatives markets. Nord Pool Spot is regulated by licences issued pursuant to the Norwegian Energy Act, and the electricity exchange shall contribute to the fulfilment of the purpose of the act which is to ensure socio-economic efficient trade. The Austrian CEGH Gas Exchange of Wiener Boerse (spot market) and EXAA are supervised by the Austrian Federal Ministry for Economic Affairs and Labour, while the derivatives market is supervised by the Austrian financial market regulator FMA).

In addition, in some cases, the supervision of financially-settled energy products is shared between energy and financial authorities. In Italy, for instance, AEEG, which supervises physically-settled IPEX products, shares monitoring functions with the Italian Financial Services Authority (CONSOB) as regards financial electricity products traded in the Italian Derivatives Energy Exchange (IDEX).

None of the indicated exchanges is exempted from supervision by an external entity except EPEX Spot which is only subject to monitoring by the French energy regulator, CRE. CRE does not have any explicit supervision duties related to exchanges services. The supervision framework of Nord Pool Spot in Norway is stipulated in the energy regulation. The supervision framework of EEX in Germany is stipulated in the German exchange act and applies mutatis mutandis the MiFID rules to spot exchanges, which is similar in Austria, with the exemption that different authorities are competent for the spot and the derivatives market supervision.

These examples indicate a patchwork of supervisory frameworks and of competent authorities for the supervision of energy spot exchanges. This is true for both electricity and gas spot exchanges, the latter being in competition with gas hubs[20].

4.3. Monitoring by national energy regulators

According to Article 37(1) (i) and (j) of Directive 2009/72/EC and Article 41(1) (i) and (j) of Directive 2009/73/EC, national energy regulators shall inter alia have the following duties:

(i) monitoring the level of transparency, including of wholesale prices, and ensuring compliance of electricity and natural gas undertakings with transparency obligations;
(ii) monitoring the level and effectiveness of market opening and competition at wholesale and retail levels, including on electricity and natural gas exchanges, (…).

However, the actual monitoring activities of national energy regulators (NRAs) in particular concerning energy exchanges vary from one country to another. There is a more general monitoring of the energy exchanges in Germany, Austria, Spain and Portugal. In particular, price formation and market abuse are part of their monitoring activities.

[20] Concerning the regulatory oversight of gas hubs, please refer to the ERGEG Monitoring Report 2010 on the regulatory oversight of natural gas hubs (Ref: E10-GMM-11-03) of 10 October 2010, which includes recommendations for the regulatory oversight of gas hubs, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Gas/2010/E10-GMM-11-03%20Gas%20Hub%20Monitoring%20Report%202010_final.pdf

The French energy regulator (CRE) supervises the proper functioning of electricity and natural gas markets. For that purpose, CRE monitors electricity and natural gas transactions between suppliers, traders and producers, transactions carried out on organised markets and cross-border trades. CRE ensures that proposals made by suppliers, traders and producers are compliant with economical and technical constraints.

The Romanian energy regulator and the electricity exchange of Romania collect data in order to determine market trends, structure and performance indicators and publishes the relevant market data/indicators.

Monitoring activities carried out by the Italian NRA are mainly aimed at verifying whether market participants unilaterally or collectively exercise significant market power. In this respect, the national energy regulator has standardised specific analyses (e.g. analysis of economic and physical withholding, what-if analysis, concentration indicators), which are implemented with the TSO and GME S.p.A.'s support.

The future Regulation of the European Parliament and of the Council on Energy Market Integrity and Transparency (REMIT)[21] will introduce an EU-wide monitoring of wholesale energy markets by the Agency for the Cooperation of Energy Regulators (ACER) and national regulatory authorities, in coherence with the EU financial regulation and taking into account the interactions with CO_2 markets.

[21] COM(2010) 726/3 from 8 December 2010.

5. Comparative assessment: CEER findings from best practice examples

5.1. Introduction

This section outlines practices, identified during the review, of successful regulatory oversight practices at national or regional level, on the basis of the current European legal framework.

The section distinguishes between the regulatory oversight of energy derivatives exchanges and energy spot exchanges.

Whilst the practices outlined have been identified as useful in the countries or regions concerned, the benefits from implementing them across Europe will depend on local conditions. Therefore this set of Best Practices may be seen as a practical "toolbox" that could potentially be adapted and/or adopted in other countries or regions depending on national- or regional-specific factors, but may also indicate the need for harmonisation at EU level.

5.2. Regulatory oversight of energy derivatives exchanges

The regulatory oversight of energy derivatives exchanges in Europe is subject to MiFID and the relevant national law implementing MiFID. Energy derivatives exchanges are therefore either regulated markets or multilateral trading facilities, so-called MTFs.

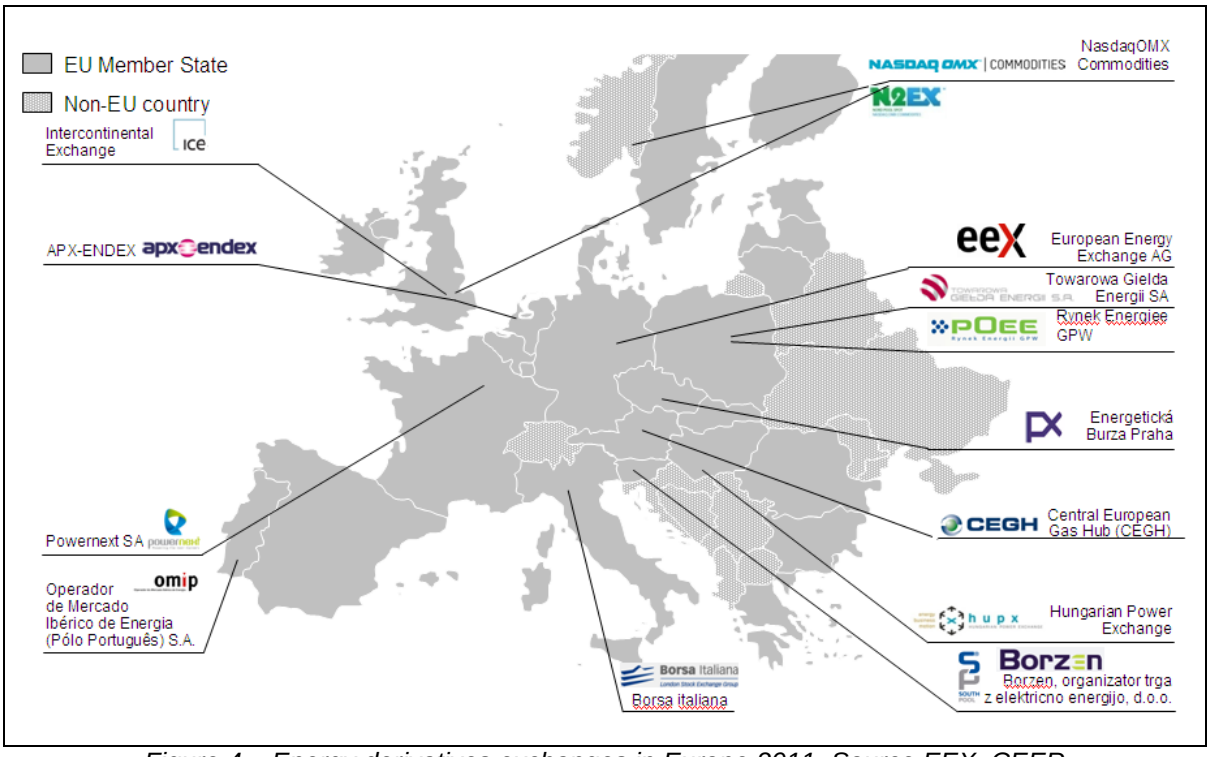

Figure 4 – Energy derivatives exchanges in Europe 2011. Source EEX, CEER

5.2.1. Supervision, governance and role of market surveillance departments of energy derivatives exchanges

According to MiFID, Member States shall require that regulated markets and MTFs establish and maintain effective arrangements and procedures for the regular monitoring of the compliance by their members or participants with their rules. They shall monitor the transactions undertaken by their members or participants under their systems in order to identify breaches of those rules, disorderly trading conditions or conduct that may involve market abuse. In addition, Member States shall require the operators of the regulated markets or MTFs to report significant breaches of their rules or disorderly trading conditions or conduct that may involve market abuse to the competent authorities. Member States shall also require them to supply the relevant information without delay to the authority competent for the investigation and prosecution of market abuse and to provide full assistance to the latter in investigating and prosecuting market abuse occurring on or through the systems of the regulated market or MTF. In several national jurisdictions, this led to the obligation for operators of organised markets to establish a market surveillance department which continuously monitors all trading activities on a daily basis and conducts investigations of possible breaches of laws and regulations. The role of market surveillance departments may however vary, in particular depending on the status of an energy exchange as an MTF or a regulated market. Best practice examples are usually the market surveillance departments of regulated markets, e.g. EEX.

Box 3: Regulatory oversight of EEX

The European Energy Exchange (EEX) in Leipzig, Germany, is a public-law institution operated by the private law companies EEX AG and EPD GmbH licensed and supervised by the Saxon State Ministry of Economic Affairs, Labour and Transport (SMWA) as exchange supervisory authority under the German Exchange Act. EEX is a regulated market pursuant to MiFID. The German Exchange Act applies the MiFID rules on regulated markets *mutatis mutandis* also for commodity spot markets. EEX is governed by its bodies, the exchange council as representative body of the market participants, the exchange management, the market surveillance and the exchange sanction committee.

The EEX bodies

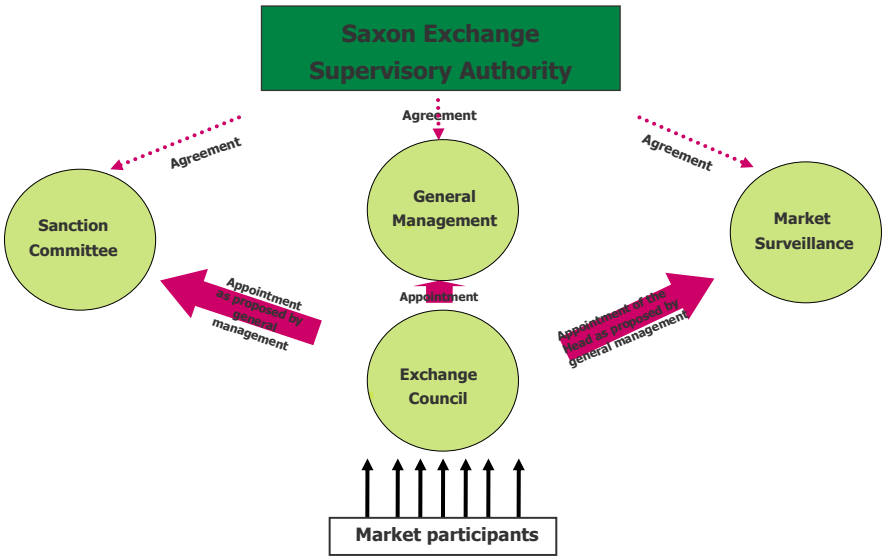

Figure 5 - Organisational set-up of EEX
Source: Exchange Supervisory Authority of EEX

In Germany, the areas of regulatory oversight are distinguished between the monitoring of market activities and the regulation of the exchanges in two different acts, the Securities Trading Act and the Exchange Act:

Firstly, there is a monitoring of all market activities (exchange and OTC trades) and of market abuse: According to the German Securities Trading Act, the financial regulatory authority BaFin located in Frankfurt/Main is responsible for the monitoring of all trading activities, regardless whether carried out through an exchange or OTC, and the detection of market abuse. However, the monitoring practically does not cover commodities markets as the majority of market participants are either exempt by the MiFID exemptions or active solely in energy spot markets. But the provisions on market abuse go beyond the provisions of the Market Abuse Directive (MAD, Directive 2003/6/EC) and apply *mutatis mutandis* to commodities which are traded at an exchange.

Secondly, there is the regulation of the exchange: According to the Exchange Act, the State exchange supervisory authorities (ESAs) are competent for the regulation of the German exchanges situated at seven different sites depending on the exchanges' registered office. The competent ESA, located at the exchange's site or close by, is responsible for the licensing of the relevant exchange operator, the supervision of the exchange and its bodies, including used trading and settlement systems, and the monitoring of the exchange trading activities through the market surveillance department. It stipulates *inter alia* the rules for the election of the exchange council and for the sanction committee, participates in the meetings, supervises the independency of the market surveillance department and its adequate staffing and resources, approves *inter alia* the exchange rules and their amendments or the admission of new products to trading and supervises the used trading and settlement system.

Thirdly, there is the constant monitoring of the exchange trading activities: The market surveillance departments ("Handelsüberwachungsstelle") of the exchanges are responsible for the monitoring of the exchange trading activities pursuant to the Exchange Act and the exchange rules. This requires a systematic and complete surveillance and analysis of data of the exchange trading and clearing activities and the execution of the necessary investigations in case of a suspected breach of exchange rules or other legal provisions by market participants. The market surveillance department is located in the premises of the relevant exchange and is legally an exchange body.

This is why under the German Exchange Act, EEX was required by law to establish a compulsory Market Surveillance department. The market surveillance department has been set up and operates independently from the exchange management according to the requirements of the exchange supervisory authority, the Saxon State Ministry of Economic Affairs, Labour and Transport (SMWA). The SMWA can assign special investigations to the market surveillance department, but it can also take over investigations from it.

The market surveillance department of EEX continuously monitors all trading activities in the spot and derivatives markets on a daily basis and conducts investigations of possible breaches of laws and regulations. This monitoring is carried out under the systems of the exchange and covers all trading data of the exchange, i.e. matched trades and unmatched orders, but also OTC-transactions cleared by the Clearinghouse ECC AG. It thus ensures the correctness of pricing mechanisms, the transparency of price relevant information and the integrity of the market. Its findings may not only concern breaches of exchange rules, but also disorderly trading conditions which may become a reason for amendments of the exchange / trading rules. Conduct that may involve market abuse has to be immediately reported to the competent regulatory authority. In order to fulfil its task, the market surveillance department is allowed to record and analyse all trading data and to conduct investigations if necessary. Moreover, the market surveillance department can request the disclosure of information form market participants and, if necessary, information about the identities of their customers.

The main tasks of the market surveillance department are to ensure that all trading is conducted according to the rules and that the market results at the exchange are not manipulated.

The market surveillance department is not authorised to enact sanctions. Nevertheless, in case the market surveillance department suspects any irregularities regarding compliance with exchange rules it has to inform immediately the Exchange Management and the SMWA.

It is up to them to decide independently from each other whether the case should be filed to the exchange sanction committee which can impose administrative sanctions up to 250,000 EUR. In case of suspected market manipulation, it has to inform immediately the financial regulatory authority BaFin which would then carry out its own investigations.

According to Section 6 of the German Securities Trading Act, BaFin, the Federal Cartel Office, the exchange supervisory authorities, the market surveillance departments, the Federal Network Agency (Bundesnetzagentur) as German energy regulatory authority and other domestic authorities shall communicate to each other any observations and findings, including personal data, which may be necessary for the performance of their functions.

5.2.2. Transparency provided by energy derivatives exchanges

MiFID stipulates for pre- and post-trade requirements for regulated markets (Articles 44 and 45), but mainly linked to shares admitted to trading at regulated markets. Similar rules apply to MTFs. As the Commission describes in its consultation paper on the MiFID review[22], the key rationale for transparency is to provide investors with access to information about current trading opportunities, to facilitate price formation and assist firms to provide best execution to their clients. It is also intended to address the potential adverse effect of fragmentation of markets and liquidity by providing information that enables users to compare trading opportunities and results across trading venues. Post trade transparency is also used for portfolio valuation purposes. Transparency is crucial for market participants to be able to identify a more accurate market price and to make trading decisions about when and where to trade.

Pre- and post-trade transparency serves to address these issues. However, the Commission's consultation paper on the MiFID review also emphasises that the MiFID transparency regime only applies to shares admitted to trading on regulated markets (including when those shares are traded on an MTF or over the counter). This transparency regime was designed to harmonise the available information, mitigate the potential effects of fragmentation of market liquidity, integrate EU equity markets in the eyes of issuers and investors, increase the potential number of active market participants in a financial instrument, and thus increase liquidity.

The Commission considers that improvements could therefore help the market deal with inherent information asymmetries, support fair and orderly pricing, and improve overall market efficiency and resilience. The Commission stated that the principles of the existing MiFID transparency regime for shares could be adapted, but the detailed requirements should be suitably tailored to the specificities of the different non-equity asset classes. However, in order to support the consolidation of trade data, publication of post-trade transparency data would, as far as possible, follow the same channels as for equities[23].

Therefore, the Commission considers that the MiFID framework Directive could be amended to require pre- and post-trade transparency for all trades in specific non-equity products, whether executed on regulated markets, MTFs, organised trading facilities or OTC. These

[22] See chapter 3, and in particular point 3.4, of the Commission's public consultation on the MiFID review of 8.12.2010, http://ec.europa.eu/internal_market/consultations/docs/2010/mifid/consultation_paper_en.pdf

[23] See chapter 4 of the Commission's consultation paper on the MiFID review.

new requirements would be differentiated by asset class. The new transparency regime would be achieved through the setting up of new obligations for investment firms, whether trading OTC or within organised trading facilities, as well as for MTFs and regulated markets.

This requirement would apply to all derivatives eligible for central clearing according to Article 4 and all derivatives reported to trade repositories according to Article 6(1) of the Commission proposal on OTC derivatives, central counterparties and trade repositories (EMIR), hence also to energy derivatives and to pre- and post-trade data published by energy derivatives exchanges.

European Energy Regulators would welcome the advancement of pre- and post-trade transparency of energy derivatives exchanges and are prepared to contribute to the further discussions on this issue in the MiFID review. Given the market structure of the wholesale energy derivatives market, regulators favour the publication of pre- and post-trade transparency information by the relevant energy derivatives exchange or, as considered by the Commission in the MiFID review consultation document (option C under point 4.3), i.e. MiFID would prescribe the conditions that must be met for the provision of a consolidated tape and allow competing commercial providers to provide the consolidated tape if they meet those conditions. Within a defined timeframe these providers would need to be approved by competent authorities and start to operate.

Relevant pre-trade data for wholesale energy markets include information on fundamental data, which was considered additional transparency information above. A best practice example for such additional transparency information published by an energy derivatives exchange is the transparency platform from EEX.

Box 4: EEX Transparency Platform

In 2009, EEX and German TSOs created a new Transparency Platform for the electricity market covering German and Austrian data. On the EEX transparency platform market-relevant generation and consumption data is published at a central and neutral site, close to the market, in order to increase transparency on the wholesale market. The platform was established by the four German TSOs, Amprion GmbH, EnBW Transportnetze AG, transpower stromübertragungs gmbh and 50Hertz Transmission GmbH, which are legally obliged to publish power plant and consumption data, together with the European Energy Exchange AG (EEX). Since mid-2011, the Austrian TSO Austrian Power Grid joined the platform for the publication of Austrian data. The platform is operated by EEX and it replaces the previous EEX transparency platform, where information was published on a voluntary basis.

The German and Austrian energy regulators are responsible for examining whether the publication requirements are implementation properly. In this context, they have to examine in particular whether a company providing data has made the data available on time and to the required extent. Usually, the TSOs provide this information to the competent energy regulator upon request. The energy regulators do not have a permanent right of access to the data platform.

The operator of the platform, EEX, undertakes, in particular, the following tasks in processing the data:

- Plausibility checks;
- Anonymisation and aggregation;
- Publication.

The generation and consumption data intended for publication is divided into two categories:

1. Statutory publication requirements of Transmission System Operators:

These publications are based on the "Congestion Management Guidelines" (CM Guidelines, Annex to the Regulation (EC) No. 714/2009)[24] and section 4.3 of the "Report on Transparency"[25] which is interpreting the binding requirements of the CM Guidelines and was prepared under the aegis of the German energy regulator for the Northern European region. These publication requirements are available at the website of the German energy regulator.

2. Voluntary commitment of the market participants:

This data was also published on the previous EEX transparency platform for generation.

5.2.3. Monitoring by energy regulators

Box 5: French monitoring by CRE

The French energy regulator CRE has been entrusted with the task of monitoring the French wholesale electricity and natural gas markets since 7 December 2006. The law allows CRE to effectively fulfil this monitoring duty by providing the authority with wide-ranging rights of access to information and sanctions in the event access is refused, and of referral to the Competition Council in the event an anti-competitive practice is detected.

This market monitoring covers operations that take place on the French market involving a producer, trader or energy supplier regardless of the nationality of the counterparts. CRE is entitled to monitor the transactions effectively entered into by a producer, trader or supplier, the proposals made by these wholesale market players, and the technical and economic constraints affecting these players and their proposals and transactions.

[24] Guidelines on the management and allocation of available transfer capacity of interconnections between national systems, Annex I to the Regulation (EC) No 714/2009 on conditions for access to the network for cross-border exchanges in electricity.

[25] Legal Opinion on Establishing an Auction Office within the Framework of OMC, study commissioned by the German Study Group on Congestion Management at Bundesnetzagentur, http://www.bundesnetzagentur.de/cln_1931/EN/Areas/ElectricityGasRegulation/SpecialTopics/OpenMarketCoupling/openmarketcoupling_node.html

CRE's remit applies to all transactions carried out on the French market regardless of the mode of negotiation, whether they are bilateral transactions with or without an intermediary, or transactions on organised markets.

It applies both to transactions for physical delivery and for financial settlement when one of the two parties involved in the transaction (purchase or sale) makes a physical delivery on the French market or a financial settlement in connection with the French wholesale price. Cross-border transactions, a single part of which takes place on the French market, are covered by CRE's monitoring.

In order to limit the burden on market participants, CRE designed a process of transaction data collection where brokers and exchanges are in charge of transaction transmission. Monthly, they deliver data on spot and derivatives electricity and gas matched transactions. TSO's are also obliged to provide monthly information on nominative cross-borders flows. In addition, the main producers are required to transmit detailed generation data to the energy regulator.

5.2.4. Cooperation between competent authorities at domestic level

Competent authorities for the exchange supervision under national law implementing MiFID are normally national ministries or financial market regulators.

Directives 2009/72/EC and 2009/73/EC state that energy regulators and financial market regulators need to cooperate in order to enable each other to have an overview over the markets concerned.[26]. This is why at national level, more and more energy and financial market regulators cooperate with each other also in the supervision of energy exchanges.

Box 6: Regulatory oversight of the Austrian CEGH Gas Exchange of Wiener Boerse

The Austrian CEGH Gas Exchange of Wiener Boerse started trading of gas spot contracts on 11 December 2009, and one year later (on 10 December 2010) also gas derivatives contracts. The gas exchange is executed through the system of the Viennese stock exchange Wiener Boerse AG – a regulated market under MiFID –, as a cooperation project of CEGH AG, Wiener Boerse AG and ECC AG as clearing house. In Austria, the CEGH Gas Exchange of Wiener Boerse – as any other commodity exchange – is supervised by the Federal Ministry of Economy, Family and Youth, whilst the derivatives market is supervised by the Austrian Financial Market Authority (FMA).

The Austrian energy regulatory authority, E-Control, is competent for the market monitoring and, with the implementation of the 3rd Energy Package, will be competent for monitoring the level of transparency, including of wholesale prices, and ensuring compliance of natural gas undertakings with transparency obligations, and for monitoring the level and effectiveness of market opening and competition at wholesale and retail levels, including on natural gas exchanges.

[26] Recital 39 of Directive 2009/72/EC and Recital 36 of Directive 2009/73/EC.

In the context of administrative cooperation, E-Control assisted the aforementioned authorities on the basis of its professional knowledge and practical experience in the licensing procedure for the gas exchange. With the implementation of the 3rd Energy Package into national law, a closer cooperation between financial market authority and energy regulatory authority is envisaged.

Box 7: Oversight of the Italian Derivatives Energy Exchange (IDEX)

The Italian Derivatives Energy Exchange (IDEX) was established in 2008 as the segment of Italian Derivatives Exchange Market (IDEM) dedicated to trading of energy and commodity derivatives.

IDEX currently offers futures on Italian power with monthly, quarterly and yearly delivery periods. The contracts are cash settled against the Single National Price (PUN) and an option for physical delivery is also available for GME members. All contracts traded on IDEX are guaranteed by CC&G, the Italian clearing house.

In the Italian Derivatives Energy Exchange (IDEX), monitoring functions are shared between the Italian Financial Services Authority (CONSOB) and the Italian energy authority (AEEG).

In general, CONSOB is responsible for supervising financial markets, but, as far as regulated markets of electricity and gas derivatives (cash-settled contracts) are concerned, the Consolidated Law on Finance provides that CONSOB implements some regulatory and monitoring measures in cooperation with AEEG.

In some cases it is necessary that AEEG agrees with CONSOB (e.g. authorisation to activate regulated markets), whereas in other cases the latter receives a non-binding opinion from the former (e.g. in case of request for suspension of financial instruments and market participants). At any rate, in carrying out its duties, AEEG pursues stability, efficiency and competition of the energy markets and security and efficiency of the energy networks.

According to the aforementioned Law, CONSOB and AEEG established an Agreement in 2008, in order to coordinate their actions.

5.2.5. Cooperation of competent authorities at regional and European level

Over the last decade, especially in the electricity derivatives trading, transnational electricity derivatives exchanges became increasingly common, i.e. one electricity derivatives exchange for several Member States, as the following figure elucidates.

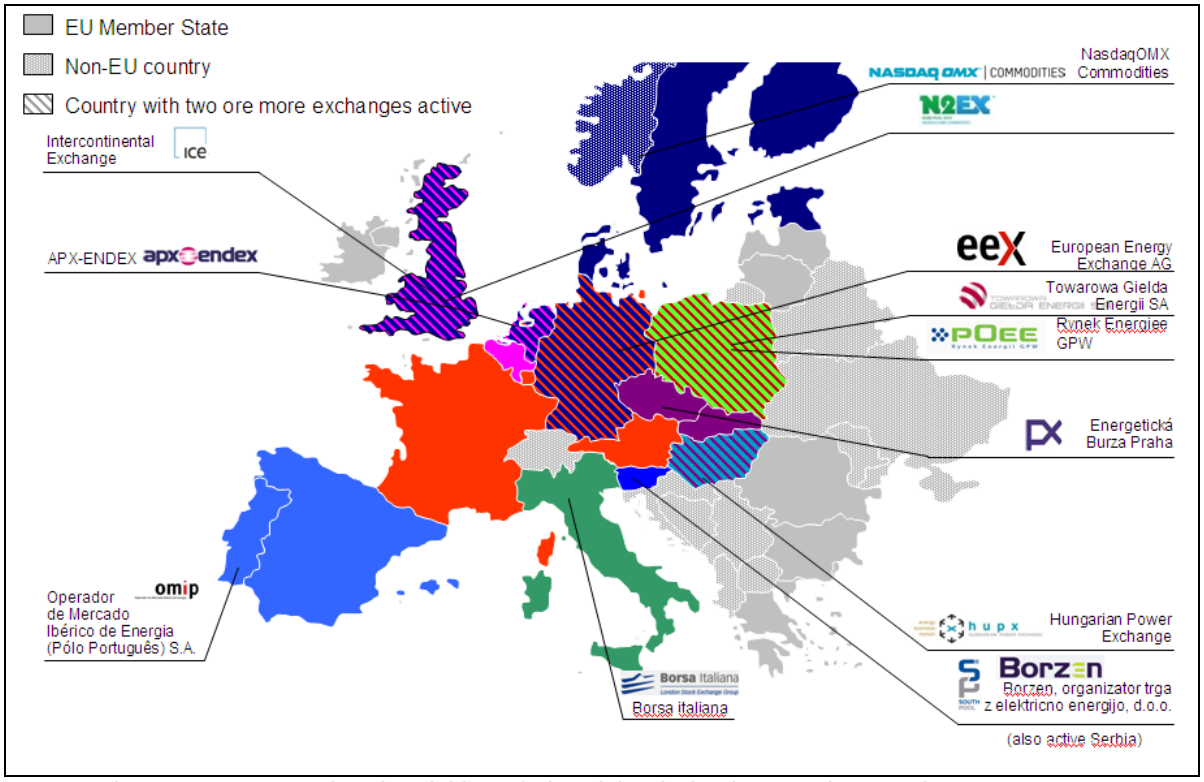

Figure 6 – Transnational activities of electricity derivatives exchanges in Europe 2011. Source: EEX, CEER

MiFID stipulates the ways of cooperation in such cases. Whilst the prior EU financial market legislation, e.g. the Investment Services Directive (ISD)[27], featured a 'minimum harmonisation and mutual recognition' concept[28], MiFID places more emphasis on home state supervision and distinguishes between the Home Member State (in case of a regulated market, the country in which the regulated market is registered or, if under the law of that country it has no registered office, the Member State in which the head office of the regulated market is situated) and the Host Member State (in case of a regulated market, the country in which it provides appropriate arrangements so as to facilitate access to trading on its system by remote members or participants established in that same country). MiFID does not permit countries to be 'super equivalent' or to 'gold-plate' EU requirements.

Regulated markets covered by MiFID will be authorised and regulated in their "home state". Once it has been authorised, it will be entitled to use the MiFID passport to provide services to customers in other EU Member States. These services will be regulated by the Member

[27] Directive 93/22/EEC.

[28] See, e.g., Article 16 of Directive 93/22/EEC.

States in their "home state" (whereas previously under ISD, a service was regulated by the Member State in which the service took place). Accordingly, Article 36(4) MiFID stipulates, without prejudice to any relevant provision of Directive 2003/6/EC that the public law governing the trading conducted under the system of the regulated market shall be that of the home Member State of the regulated market. According to Article 47 MiFID, each Member State shall draw up a list of regulated markets for which it is the home Member State and shall forward that list to the other Member States and the Commission. A similar communication shall be effected in respect of each change to that list. The Commission shall publish a list of all regulated markets in the Official Journal of the European Union and update it at least once a year. The Commission shall also publish and update the list at its website, each time Member States communicate changes to their lists. Similar rules apply to third country regulated markets. According to MiFID, a third country market shall be considered equivalent to a regulated market if it complies with equivalent requirements to those established under Title III of MiFID. The Commission shall publish a list of those markets that are to be considered equivalent. This list shall be updated periodically.

According to Article 56 et seq. MiFID, competent authorities of different Member States shall cooperate with each other whenever necessary for the purpose of carrying out their duties under MiFID, making use of their powers whether set out in this Directive or in national law. Competent authorities shall render assistance to competent authorities of the other Member States. In particular, they shall exchange information and cooperate in any investigation or supervisory activity. In order to facilitate and accelerate cooperation, and more particularly exchange of information, Member States shall designate one single competent authority as a contact point for the purposes of MiFID. Member States shall communicate to the Commission and to the other Member States the names of the authorities which are designated to receive requests for exchange of information or cooperation.

A competent authority of one Member State may request the cooperation of the competent authority of another Member State in a supervisory activity or for an on-the-spot verification or in an investigation. In the case of investment firms that are remote members of a regulated market, the competent authority of the regulated market may choose to address them directly, in which case it shall inform the competent authority of the home Member State of the remote member accordingly.

Where the competent authority of the host Member State of a regulated market or an MTF has clear and demonstrable grounds for believing that such regulated market or MTF is in breach of the obligations arising from the provisions adopted pursuant to MiFID, it shall refer those findings to the competent authority of the home Member State of the regulated market or the MTF. If, despite the measures taken by the competent authority of the home Member State or because such measures prove inadequate, the said regulated market or the MTF persists in acting in a manner that is clearly prejudicial to the interests of host Member State investors or the orderly functioning of markets, the competent authority of the host Member State, after informing the competent authority of the home Member State, shall take all appropriate measures needed in order to protect investors and proper functioning of the markets. This shall include the possibility of preventing the said regulated market or MTF from making their arrangements. When, taking into account the situation of the securities markets in the host Member State, the operations of a regulated market that has established arrangements in a host Member State have become of substantial importance for the functioning of the securities markets and the protection of the investors in that host Member State, the home and host competent authorities of the regulated market shall establish proportionate cooperation arrangements.

MiFID therefore stipulates and requires close cooperation for the supervision of transnational exchanges between competent authorities of the Member States concerned, which is also the case for energy derivatives exchanges, regardless whether electricity or gas derivatives are concerned. At the best, the national law is even involving both financial market regulators and energy regulators at European level.

Box 8: Regulatory oversight of MIBEL

The Iberian power futures market (also known as the MIBEL derivatives market), which operates in Portugal, began its activity on 3 July 3. The market is managed by OMIP and OMIClear acts as clearing house. In addition to trading in the continuous market, trading members can register OTC trades in order to be cleared and settled by OMIClear.

The Agreement between the Republic of Portugal and the Kingdom of Spain for the creation of the Iberian Electricity Market (the so-called "MIBEL"), signed in Santiago de Compostela on 1 October 2004, established that the supervision of the electricity markets within the MIBEL scope will be undertaken by the supervisory entities of the country where the market is constituted, according to the national legislation. It establishes the coordinated supervision through the creation of the MIBEL Regulatory Council, composed of the national energy regulators (NRAs) and the national financial services authorities (FSAs) of Portugal and Spain. On 25 March 2011, the MIBEL Regulatory Council inaugurated its website: http://www.mibelcr.com.

MIBEL is under the supervision of the Portuguese Financial Services Authority (Comissão do Mercado de Valores Mobiliários, CMVM), coordinated with the rest of the members of the MIBEL Regulatory Council. CMVM supervises the futures market and shares – on a daily basis through encrypted files – with the rest of the members of the MIBEL Regulatory Council all the information with transaction details provided by OMIP (i.e. transaction reporting).

The Spanish [and Portuguese] over-the-counter (OTC) market is a non-organised bilateral market, in which traders, usually through a broker, trade forward contracts with cash settlement (i.e. financial instruments). Therefore it is under the supervision of the Spanish [and the Portuguese] Financial Services Authority (Comisión Nacional del Mercado de Valores, CNMV, and Comissão do Mercado de Valores Mobiliários, CMVM). On 17 May 2011, the entities of the MIBEL Regulatory Council have signed a Memorandum of Understanding (MoU) for cooperation in the MIBEL supervision, permitting their coordinated OTC market oversight.

The MIBEL Regulatory Council publishes a monthly bulletin with main MIBEL statistics, with one section devoted to the futures market. This bulletin also indicates the results of the regulated forward contracting mechanisms in Spain and Portugal.

5.3. Regulatory oversight of energy spot exchanges

The regulatory oversight of energy spot exchanges currently lacks European harmonisation. However, at national level, several jurisdictions often stipulate a supervisory framework also

for energy spot exchanges. On the basis of several national jurisdictions[29], the definition of an energy spot exchange should be aligned with the definition of a regulated market pursuant to MiFID, but for wholesale energy spot products. Accordingly, an energy spot exchange could be defined as a multilateral system for the trading of wholesale electricity and/or natural gas spot products operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in wholesale natural gas and/or electricity spot products – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the wholesale energy product admitted to trading under its rules or systems *and which respects the governance rules similar to the ones for regulated markets*.

The following best practice examples demonstrate how competent authorities and energy spot exchanges and their operators developed practices to overcome the current shortcomings of the missing supervisory framework at EU level, but also indicate the need for further legal action at EU level. Where necessary, it is distinguished between electricity spot and gas spot exchanges.

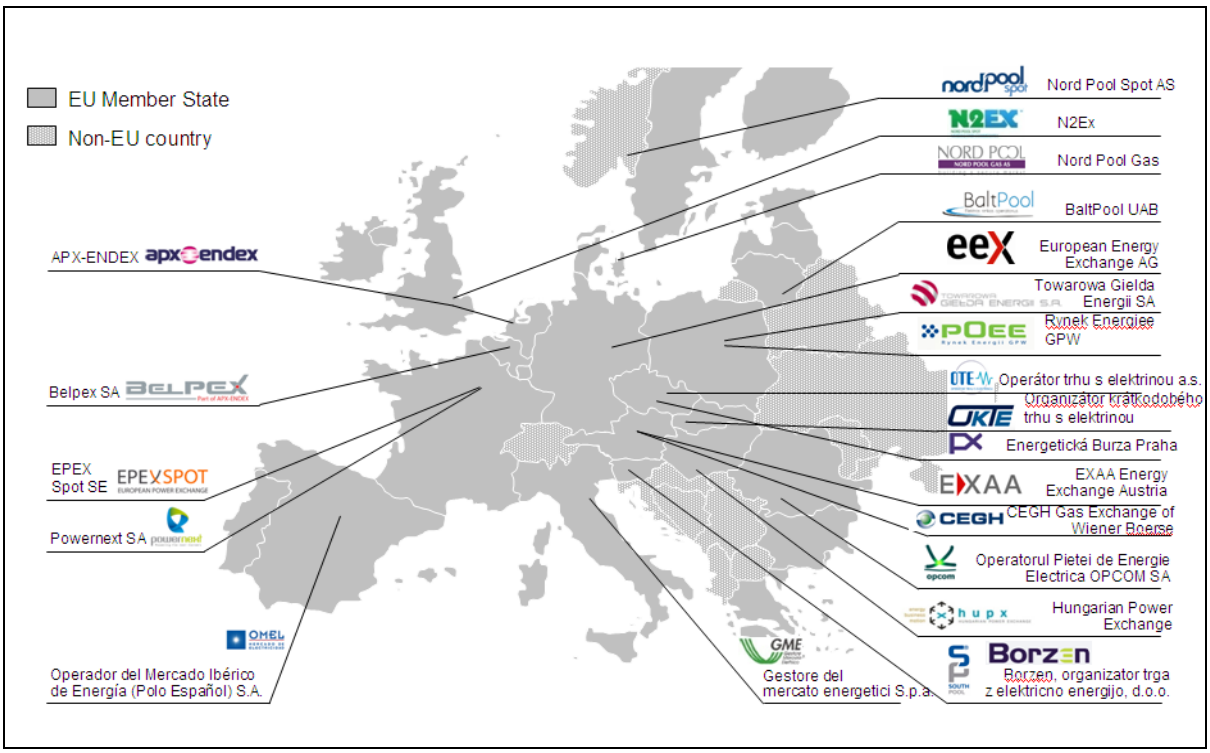

Figure 7 – Energy spot exchanges in Europe 2011. Source: EEX, CEER

5.3.1. Supervision, governance and role of market surveillance departments of energy spot exchanges

As described above, for most energy spot exchanges, the question of separate supervision for spot and financial products is not applicable as no differentiation in the supervision between physical and financial markets exists in their domestic legislation. This is for

[29] E.g. Germany, Austria.

instance the case for EEX and Powernext. The supervisory authority both for EEX's derivatives and spot markets is the Saxon State Ministry for Economic Affairs and Labour as exchange supervisory authority while the exchange supervisory authority of Powernext is the French financial market regulator AMF.

There are, however, several energy exchanges where the competent exchange supervisory authorities are different for their spot markets from those for their derivatives markets. Nord Pool Spot is regulated by licences issued pursuant to the Norwegian Energy Act, and the electricity exchange shall contribute to the fulfilment of the purpose of the act which is to ensure socio-economic efficient trade.

In addition, in several jurisdictions, the role, tasks and competences of market surveillance departments at energy derivatives exchanges foreseen in MiFID were conferred to market surveillance departments at energy spot exchanges, as already described above for EEX and as foreseen for Nord Pool Spot.

Box 9: Regulatory oversight of Nord Pool Spot AS

Nord Pool Spot AS (NPS) runs the Nordic market place for physical power, offering both day-ahead and intraday markets to its participants. In the preparatory work for the Norwegian Energy Act, the Ministry stated that the marketplace should have two main functions:

- Administration of the market place for physical power by facilitating daily bidding and price determination;
- Clearing of all contracts entered on the marketplace, i.e. enter as the central counterparty in all trades, guaranteeing settlement for trade and anonymity for participants.

NPS is owned by the Nordic Transmission System Operators.

NPS is regulated by the Norwegian Energy regulator, the Norwegian Water Resources and Energy Directorate (NVE). Since 1 February 2002 the regulation of NPS provides guidelines on Nordic cooperation. With these guidelines NVE wanted to facilitate a closer collaboration with the regulators in Denmark, Finland and Sweden. The guidelines are not legally binding, but considered as a memorandum of understanding. NPS operates within the framework set by both the market place licence issued by NVE and the licence for cross-border electricity exchange issued by the Ministry of Petroleum and Energy. Both licences are issued pursuant to the Norwegian Energy Act of 1990.

The market place licence states that the concessionaire shall:
- Contribute to efficient price formation and appropriate energy flows;
- Act in a neutral and non-discriminatory manner, e.g. ensuring all parties neutral and efficient access to information that is of importance to determining prices;
- Design a suitable infrastructure, regulations for trade and for contracts between parties, as well as systems for security and settlement that ensure confidence and predictability for the parties;
- Establish appropriate procedures to monitor the behaviour of parties in the organised market place (market monitoring);
- Have an advisory board with broad representation of market participants;
- Inform NVE of changes to its organisation, ownership situation, or activities, about amendments to contracts with market parties or associated regulations and any changes the

concessionaire is going to undertake that have or may have an influence on price formation. Material changes to the concessionaire's organisation, ownership situation, and activities or material changes that have or may have an influence on price formation must be approved by NVE before the changes are put into effect. The assessments of the advisory board and any comments from market parties must be presented to NVE.

Further, the market place licence regulates the concessionaire's economic situation:

- The concessionaire's revenue from the organisation and operation of the market place shall cover the costs and provide a reasonable profit through efficient operations;
- The concessionaire shall have adequate liable capital in relation to the activities being operated.

The market monitoring shall contribute to ensuring that the parties behave in accordance with the objectives of the Energy Act and regulations issued pursuant to this act. Further, the Financial Supervisory Authority of Norway requires the establishment of an internal market surveillance body by Nord Pool ASA, and NPS' Market Surveillance cooperates with Nord Pool ASA's Market Surveillance in a joint function.
In order to become a participant at NPS, the market actor has to sign a participant agreement, and thereby accept to be bound by the NPS Rulebook. According to the Rulebook, the participants shall not engage in market manipulation as defined in the Rulebook. Further, also regulations laid down in the Norwegian Competition Act regarding misuse of dominant position applies.
The main task for the market surveillance department is to monitor the market participants' orders, trades and reporting of non-exchange trades in the financial market, as well as bidding in the physical market. The Market Surveillance NPS might ask for access to physical OTC contracts traded by participants at NPS' markets. The market surveillance also monitors possible abuse of the interaction between the two markets. Further, the market surveillance is in close and continuous dialogue with the Nordic Transmission System Operators with respect to their role in the information of trading capacities within the Nordic electricity exchange area.

However, different models exist at national level for an indirect involvement of energy regulators in the supervision of energy spot exchanges.

Box 10: Regulatory oversight of the electricity spot sub-segment of APX-Endex

The Dutch Electricity and Gas Acts authorise the appointment of power and gas exchanges by the minister of Economic Affairs of the Netherlands. APX BV has been appointed as an electricity exchange operator in 2006. In the appointment process the minister has assessed and approved the request of APX BV and its Rules and Regulations on the basis of the criteria independency, impartiality, security of supply, financial solidity, confidentiality and feasibility. This was a once and for all appointment. Later also the gas spot and gas derivatives exchanges were appointed. The Electricity and Gas Acts at that time contained no provisions which would enable the Netherlands Competition Authority (NMa; comprising the Dutch Office for Energy Regulation), to supervise the activities of the APX while in operation.

A few years ago possibilities have been created to add conditions and restrictions to the appointment as an outcome of the approval procedure. These would enable NMa to start supervising the activities of APX as a power exchange, if deemed necessary. That would however also require new appointment procedures.

Nevertheless, NMa currently supervises APX-Endex activities in the day-ahead electricity market indirectly since it has approved the power grid code which defines amongst others the obligations for APX-Endex with regard to the matching functions it has to perform in the process of market coupling within the Central-West European region (which consists of the Netherlands, France, Belgium, Germany and Luxemburg) that has been launched in November 2010.

5.3.2. Transparency provided by energy spot exchanges

As described above, energy spot exchanges normally publish hourly spot market prices daily. Exchanges also publish differentiated data between sell and buy activities (e.g. bidding curves or bid-offer spread information), and types of standard energy exchange contracts. In addition, if relevant/applicable, the price formation mechanism of the electricity exchange for day-ahead auctions is publicly available for most of the concerned exchanges. The price formation mechanism of the electricity exchange for day-ahead continuous prices is publicly available only for some exchanges when relevant.

As a general principle, NRAs share the view that exchanges should be required to publish such kind of post-trade data. To achieve fair market conditions and reduce information asymmetries, all market participants should have access to all relevant information. Traded volumes and prices on all products should be published and a set of minimum standards would be regarded beneficial for market transparency.

Relevant pre-trade data for wholesale energy markets include information on fundamental data, which was considered additional transparency information above. Best practice examples for publication of such additional transparency information by energy exchanges are the publications from Nord Pool Spot.

Box 11: Urgent Market Messages at Nord Pool Spot

In the Nordic Market relevant information is disclosed electronically using the internet-based application Urgent Market Messages (UMM) at Nord Pool ASA[30]/Nord Pool Spot AS. The information shall be disclosed immediately, and no later than 60 minutes after the occurrence of the event which leads to the relevant information.

The contractual basis for UMMs at Nord Pool Spot AS is the following:

1. Disclosure of UMM information and power system fundamentals by TSOs

[30] Change of name to NASDAQ OMX Oslo ASA from 1 January 2010.

There is a Data Publication Agreement between Nord Pool Spot (NPS) AS and TSOs within Nordel concerning continuous disclosure by TSOs and subsequent publication by NPS of primarily "price sensitive information" as further detailed in the Agreement.

In general terms it primarily covers UMM reporting of planned outages, unplanned outages (failures) and special information linked to, primarily, the main transmission grid as well as continuous reporting of hourly power system data such as for example overall production, consumption, cross-border flows and Regulating Power Market data.

2. Disclosure of UMM information by market participants

Participants in Nord Pool Spot's Physical Markets as well as participants in Nord Pool ASA's financial market are obliged to disclose via the UMM system "price sensitive information" regarding, primarily, production and consumption facilities as further explained in the respective rulebooks for trading.

As regards inside information, it is important to establish disclosure requirements. In the Nordic Market, the term "inside information" is defined as "any information of a precise nature which has not been made public relating directly or indirectly, to one or more Instruments, and which participants and clearing customers would expect to receive in accordance with accepted market practice."

According to the disclosure requirements, participants should disclose any information relating to the participant's own business or facilities (for production, consumption or transmission of electricity) that has not yet been made public and is likely to have a significant effect on the prices of the products traded at the electricity exchange if made public. The disclosure requirements should cover for example:

- Any planned outage, limitation, expansion or dismantling of capacity in the next 6-weeks period of more than 100 MW for one generator, consumption or transmission facility, or more than 200 MW for one production station, including changes of such plans;
- Any planned outage, limitation, expansion or dismantling of capacity of more than 400 MW for one production station, consumption or transmission facility for the current calendar year and three calendar years forward, including changes of such plans;
- Any unplanned outage or failure relating to more than 100 MW for one generator, consumption or transmission facility, and more than 200 MW for one production station, including updates on such outages or failures;
- Any other information that is likely to have a significant effect on the prices of one or more instruments if made public.

5.3.3. Monitoring by energy regulators

Box 12: Energy market monitoring in Italy

The monitoring structure of wholesale electricity and gas markets in Italy varies on the basis of market characteristics. It is consequently necessary to provide some details on the Italian electricity and gas markets. At the moment two electricity exchanges are active, i.e. the Italian Electricity exchange (IPEX) and the Italian Derivatives Energy Exchange (IDEX).

IPEX, which enables producers, wholesalers and final customers to enter into physically-settled contracts different from bilateral contracts, is managed by the Energy Market Operator (GME) and consists of the Spot Electricity Market (MPE); including the Day-Ahead Market (MGP), the Intra-Day Markets (MIs), the Ancillary Services Market (MSD) and the Forward Electricity Market with delivery and withdrawal obligation (MTE), where operators may sell/purchase future power. IDEX, which is a segment of the Italian Derivatives Markets (IDEM) managed by Borsa Italiana S.p.A., is dedicated to trading of cash-settled contracts (base-load futures). Bilateral contracts are over-the-counter contracts, but, in some circumstances, they are relevant for exchange results. In fact, if electricity bilateral contracts are physically-settled, their volumes are taken into account to define the system marginal price of the day-ahead market.

With reference to the Italian wholesale gas market, the gas exchange (M-Gas), managed by GME, is operative since 2010, but most contracts are bilateral.

In case of IPEX and physically-settled bilateral contracts, monitoring functions are shared among the Ministry of Economic Development, the Italian Energy Authority (AEEG) and the Energy Market Operator. After having heard AEEG's opinion, the Ministry of Economic Development approves the electricity market rules prepared by GME, which verifies market participants' compliance with electricity market rules.

The typical actions classified as misbehaviour in the electricity market rules are the following: late payment or redemption of financial guarantees; late payment to GME and failure to pay GME; negligence, imprudence and unskillfulness in the use of the systems of communication and submission of bids/offers; disclosure to third parties of confidential information related to market participants.

According to the Law n. 481/1995, which instituted AEEG, the Italian Energy Authority promotes competition and efficiency in electricity and gas markets, in accordance with EU legislation and general policies laid down by the Government. Moreover, according to the Ministerial Decree of 19 December 2003, AEEG defines and manages a mechanism to monitor prices and market power abuses in IPEX.

Therefore, monitoring activities carried out by AEEG are mainly aimed at verifying whether market participants unilaterally or collectively exercise significant market power. In this respect, the national energy regulator has standardised specific analyses (e.g. analysis of economic and physical withholding, what-if analysis, concentration indicators), which are implemented with the TSO's and GME's support.

In particular, in accordance with AEEG's decisions, both the TSO and GME have already instituted a market surveillance unit and created electronic data warehouses that can be used through business intelligence tools by AEEG as well. These data warehouses contain fundamental and trading data regarding IPEX and over-the-counter physically settled contracts, as well as large market participants' over-the-counter cash-settled contracts. These data, which are extremely detailed, are potentially suitable for satisfying a wide range of analytical needs.

In addition, AEEG must be informed by operators active in the Gas Virtual Trading Hub (Punto di Scambio Virtuale) on bilateral contracts stipulated in the hub and by the gas TSO on transport capacity utilisation and gas and capacity transactions.

The aforementioned tasks assigned to AEEG in the monitoring field imply that in the Italian legal framework the definition of misbehaviour also includes anticompetitive conducts in the form of unilateral or collective exercise of significant market power.

5.3.4. Cooperation between competent authorities at domestic level

Whilst the competent authority for the exchange supervision is clearly defined by the national legislation implementing MiFID, the competent authority for the supervision of energy spot exchanges differs largely. In some Member States, the same authority is competent as under MiFID, in other Member States the competent authority is a ministry while in a few Member States it is the energy regulator.

Similar to the supervision of energy derivatives exchanges, it is considered a best practice if national competent authorities cooperate in the supervision of energy spot exchanges.

Box 13: Cooperation between competent authorities in Italy

The Italian Energy regulator (AEEG) and the Italian Antitrust Authority (AGCM) have established an effective cooperation in the supervision of the Italian Electricity Exchange (IPEX). As far as IPEX is concerned, AEEG monitors prices and the conduct of market operators to detect potential misbehaviours, mainly related to the exercise of market power. AEEG shares the results of its monitoring activities with the Italian Antitrust Authority (AGCM) which can further investigate the case and apply administrative sanctions and impose remedies to market participants.

In addition, on the basis of its analyses, AEEG can propose measures to the Government to improve competition in energy markets.

Box 14: Cooperation between competent authorities in Norway

In Norway, the Norwegian Energy regulator, NVE and the Norwegian Competition Authority is monitoring the Norwegian generators bidding at NPS. They have developed a model for monitoring competition in the market where the actual market price is compared to an

expected price calculated by a model that simulates an efficient utilisation of reservoir-water (estimation of water values). Differences that cannot be explained as price-taker behaviour should be investigated by looking at the different participants bidding on the market place. As a part of this process, NVE has the full mandate to collect information about the bidding from NPS. Within the Norwegian energy act and the market place licence the possibility of asking for data both for the Norwegian authorities and also for the authorities in the other Nordic countries are quite extensive.

While NVE is looking into the bidding of Norwegian generators only, the Market Surveillance at NPS is looking at the bids from all market participants at the Nordic market place.

5.3.5. Cooperation of competent authorities at regional and European level

In the same way as energy derivatives exchanges, also energy spot exchanges are more and more characterised by transnational exchanges and mergers or joint ventures across countries, which is especially currently the case for electricity spot exchanges.

In most European transmission systems there is only one electricity spot exchange operating for delivery. Information from NRAs indicated a de-facto monopoly (despite market platforms such as broker screens) at least as regards market coupling services (see above point 3.10). However, in several countries such as Germany, Austria, Hungary and the Czech Republic there are more than one electricity spot exchanges in the same transmission zone.

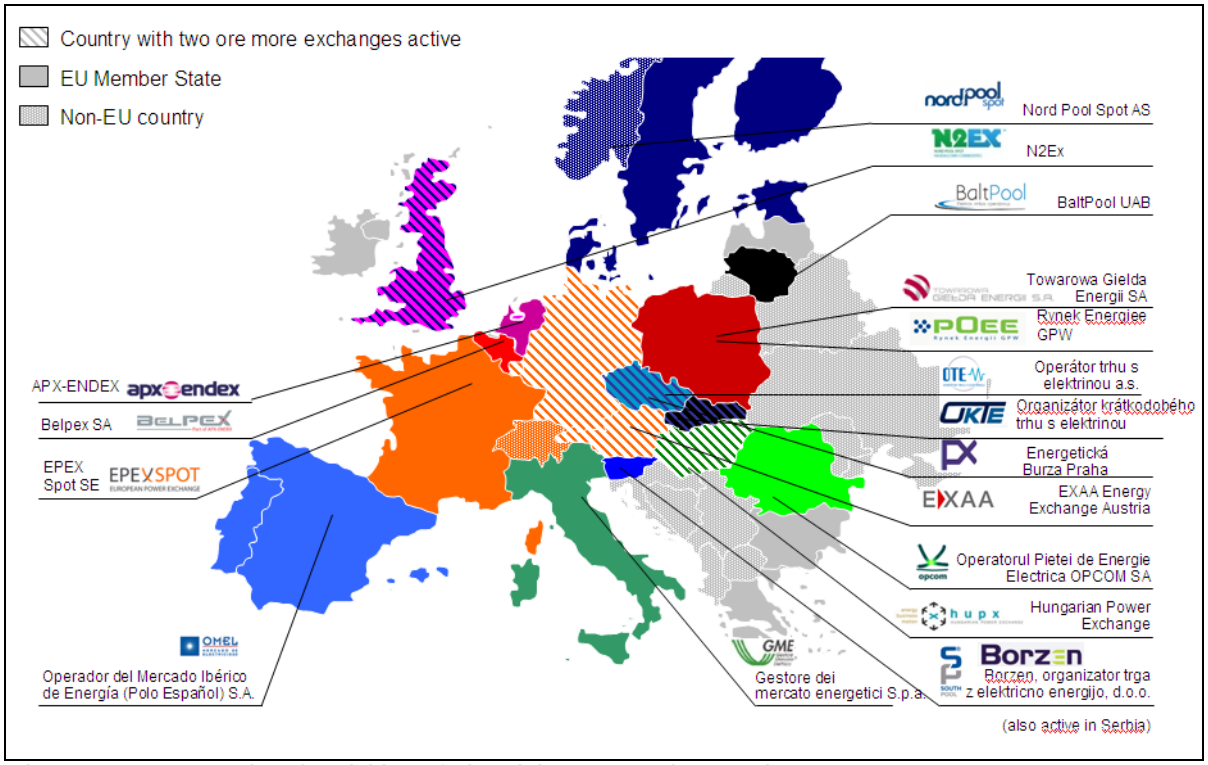

Figure 8 – Transnational activities of electricity spot exchanges in Europe 2011. Source: EEX, CEER

This situation requires close cooperation between competent authorities across national borders. However, with different national competent authorities and different national jurisdictions and without any European harmonisation in this respect, an international cooperation of competent authorities is made very complicated, if not impossible. With an increasing cooperation of national energy spot exchanges, like in the context of market coupling, and increasing transnational activity of energy spot exchanges and mergers, a purely national approach may hamper an efficient enhancement and competition between energy spot exchanges.

This can be demonstrated with the cooperation of EEX and Powernext and the merger of their electricity derivatives and electricity spot markets in 2009. Whilst the legal framework for the transnational merger and cooperation between competent authorities following the merger was stipulated in MiFID and the relevant national law, no such rules existed for the merger of the electricity spot markets in the joint venture EPEX Spot.

Box 15: Best-of-both example EPEX Spot

In 2009, the electricity spot markets of EEX (German/Austrian and Swiss market areas), a regulated market pursuant to MiFID and supervised under the German exchange act by the competent Saxon State Ministry for Economic Affairs, Labour and Transport, and Powernext (French market area), an MTF pursuant to MiFID and, supervised by the French financial market regulator AMF and monitored by the French energy regulator CRE, were merged to the common electricity spot exchange in Paris, EPEX Spot. In exchange, the French electricity derivatives market was transferred to EEX as a sub-market operated by Power Derivatives GmbH, which manages the French and German derivatives markets ever since.

EPEX Spot, being a genuine spot-only exchange, did receive neither the status of an MTF nor of a regulated market under MiFID since no financial instruments were admitted to trading at the exchange. In the absence of a common European legal supervisory framework, the prerequisites of the architectures of EEX and Powernext were partly transferred to EPEX Spot in a best-of-both-approach regarding transparency and surveillance, particularly the presence of an Exchange Council and a Market Surveillance Office:

The Exchange Council

- Consists of 16 members;
- Decides on the Rules and Regulations and on general decisions related to EPEX Spot;
- Approves new trading systems, new contracts or market areas;
- In the beginning members of the Exchange Council were nominated by EPEX Spot, then the Council is elected every three years by the members of the exchange.

The Market Surveillance Office

- Monitors on a daily basis the EPEX Spot market and its members;
- Cooperates with the EEX market surveillance department;
- Reports on a regular basis as an independent body to competent authorities, EPEX Spot management and the Exchange Council.

Whilst the two exchanges, their operators and market participants therefore found a pragmatic and successful approach how to overcome the shortcomings of the missing EU legal framework for energy spot exchanges, the supervisory impact of the joint venture was less satisfactory.

As far as the supervision is concerned, AMF was initially in charge of the spot market of Powernext in France, and so was the competent ESA (SMWA) of EEX for the German Spot market. As EPEX Spot is an electricity spot-only exchange, the financial authority AMF was not anymore competent for the supervision of the electricity spot market after the merger. On the other hand, concerning the monitoring of EPEX Spot markets, CRE was and remains the surveillance authority for French products. However, the two authorities involved, CRE and ESA, may only cooperate informally with each other as formal cooperation is hindered by the fact that CRE may only formally cooperate with foreign authorities having the same competences; but its official counterpart, the German energy regulator (BNetzA), has currently no competences for monitoring energy wholesale markets, and the cooperation in exchange supervisory matters in Germany is centralised at the Federal Financial market regulatory authority BaFin, the single contact authority named by Germany according to MiFID. This was made possible by a close and official cooperation between the market surveillance department of EEX, supervised by the competent ESA, and the market surveillance Office of EPEX Spot, which exchange data and make common reports to ESA.

This is very different to the situation concerning the relocation of the French electricity derivatives market from Powernext to EEX, as the supervisory powers, cooperation channels and exchange of information between AMF, BaFin and the competent ESA are clearly defined by MiFID and the transposing national law.

A cooperation regime could either be designed like the cooperation regime under MiFID, i.e. with the principal competence of the home regulator and its obligation to cooperate closely with the “host regulators”, i.e. the regulators the transmission zones of which are delivered by an energy spot exchange. Alternatively, and maybe preferably, a cooperation regime like in the Iberian energy market may be an option, with a regulatory counsel or college of regulators for a transnational energy spot exchange. As the spot prices form the reference price for the countries concerned, as the place of the physical delivery of the transactions at the energy spot exchange will depend on the transmission zone concerned and may therefore be in a host country, as the product definition may depend on and be distinct from the competitive environment in every host country concerned, there may be very good reasons for a cooperation regime foreseeing regulatory counsels and colleges of regulators.

5.4. Key findings of best practices

European Energy Regulators consider an independent market surveillance department at an energy exchange, both at energy derivatives and energy spot exchanges (as indicated for EEX and Nord Pool Spot), as best practice. Furthermore, the reporting of or access to cleared OTC trades is an important additional information which enables market surveillance departments to get a broader picture of market activities. In addition, taking into consideration published fundamental transparency data (e.g. in the form of UMMs like at Nord Pool or from a transparency platform like from EEX) enables market surveillance departments to play a key role in the future monitoring of wholesale energy markets and provide advice to national regulatory authorities and ACER as they would bring in market knowledge and knowledge of customers, which will be crucial for an effective market monitoring under REMIT.

European Energy Regulators are of the view that minimum standards for pre- and post-trade transparency for energy exchanges beneficial for the further improvement of transparency in wholesale energy markets. As the examples of Nord Pool Spot and EEX demonstrate, energy exchanges may also play a key role in contributing to fundamental data transparency.

The monitoring of energy wholesale markets is already covered by the 3rd Energy Package and has to be implemented into national legislation. The experiences and competences of national energy regulators already monitoring energy wholesale are highly relevant for the further development of monitoring energy wholesale markets across Europe under REMIT. REMIT requests that, in case of reasonable suspicion of insider dealing, market manipulation or attempt to manipulate the market, trading venues shall inform the relevant NRA immediately[31]. REMIT gives a strong role to trading venues in the prevention and detection of market misconduct and close cooperation between NRAs and market surveillance departments will be crucial for sophisticated market monitoring.

European Energy Regulators furthermore consider close cooperation in the supervision of exchanges (as indicated above) as best practice examples for a Europe-wide cooperation of financial and energy regulatory authorities, both domestically and internationally.

This means that both a close cooperation at national level between national energy and financial regulators and at regional or European level between energy regulators and between financial regulators of several countries where energy exchanges are active is beneficial. Such cooperation should be based on a Memorandum of Understanding between the competent authorities to establishing ways of cooperation, exchange of information and regularity of meetings.

As regards cooperation between energy regulatory authorities, Article 38(2)(a) of Directive 2009/72/EC and Article 42(2)(a) of Directive 2009/73/EC concerning the regulatory regime for cross-border issues stipulate (emphasis added):

[31] Article 15 of REMIT.

> "*Regulatory authorities shall cooperate at least at a regional level to foster the creation of operational arrangements in order to enable an optimal management of the network,* ***promote joint electricity and natural gas exchanges*** *and the allocation of cross-border capacity, and to enable an adequate level of interconnection capacity, including through new interconnection, within the region and between regions to allow for development of effective competition and improvement of security of supply, without discriminating between supply undertakings in different Member States*".

However, the best practice examples for the cooperation of energy spot exchanges at regional level also demonstrate the current lack of harmonisation and the problems caused for energy exchanges, their operators and particularly for regulatory authorities. With a patchwork of different national competent authorities, different national jurisdictions and competences and without any European harmonisation in this respect, cooperation of competent authorities at European level is very complicated, if not impossible. With increasing transnational activities of energy spot exchanges, joint ventures and mergers and cooperation of energy spot exchanges, e.g. in the context of market coupling, a purely national approach may significantly hamper an efficient enhancement and competition between energy spot exchanges, supervision and hence market integrity.

6. Recommendations

Energy spot exchanges play a vital role in the market as they provide important price signals and the underlying of energy derivatives markets.

CEER assessed the potential role of energy regulators in the supervision of energy exchanges. The recommendations will particularly focus on aspects related to the regulatory oversight of trading short term physical products as these products are essentially important with regard to regulating network access. Furthermore, energy derivatives exchanges fall under the scope of MiFID and the remit of financial regulators. In most European transmission systems only one energy exchange operates for the trading of short term physical products. Most European exchanges were developed without being prescribed by national law. However, as liquidity of the existing exchanges increases, the entrance of new exchanges in these markets will be more and more difficult. The reason is that liquidity normally attracts more liquidity. Competition between energy exchanges is thus limited. Regulators stress the interrelation between physical and financial markets, which have been taken into due account during the elaboration of these recommendations.

As European Energy Regulators already formulated and submitted their position to the Commission in the context of the consultation of the MiFID review (e.g. as regards market makers)[32], these recommendations mainly focus on the regulatory oversight of energy spot exchanges, if not indicated differently.

6.1. Supervision, governance and role of market surveillance departments of energy spot exchanges

6.1.1. Supervision and Governance: Minimum standards for a supervisory framework for energy spot exchanges should be set and harmonised at European level and each energy spot exchange should be subject to appropriate and effective exchange supervision by a competent exchange supervisory authority to increase market integrity

Albeit REMIT will introduce a monitoring of European wholesale energy markets, including spot markets, there is currently no European supervisory framework for energy spot exchanges. They are not covered by MiFID or by any other European legislation.

European Energy Regulators consider such a framework necessary as several exchanges operate 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. However, when energy exchanges are active over national boundaries, disparities in the national supervisory framework could occur. The supervisory framework for these exchanges active under multiple national jurisdictions should be clarified.

[32] CEER response to the Commission's public consultation on the MiFID review, Ref: C11-FIS-23-04, 2 February 2011, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Cross-Sectoral/2011/C11-FIS-23-04_MiFID_02-Feb-2011.pdf

Experience and competences of national energy regulators already supervising energy exchanges and their cooperation models could be an archetype for a future supervisory scheme. This does not necessarily mean that energy regulators should be responsible for supervising all energy spot exchanges, although it is beneficial if supervision of the market is in one hand. However, other exchange supervisory authorities were appointed, there should be a close cooperation between energy regulators, financial regulators and competition authorities similarly to the cooperation foreseen in REMIT.

In line with several national jurisdictions[33] and with the provisions of the Auctioning Regulation for greenhouse gas emission allowances[34], energy spot exchanges should receive a status similar to regulated markets pursuant to MiFID. An energy spot exchange could therefore be defined as a multilateral system for the trading of wholesale electricity and/or natural gas spot products operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in wholesale natural gas and/or electricity spot products – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the wholesale energy product admitted to trading under its rules or systems and which respects the governance rules similar to the ones for regulated markets.

Minimum standards for a supervisory framework of energy spot exchanges could consist of:

- The licensing (or right of closure) of the exchange;
- The supervision of the orderly functioning of exchange operations (including the price formation process) and the exchange transaction processing, including the
    - Involvement of market participants in the definition of exchange and trading rules;
    - Approval[35] of exchange rules, i.e. the exchange's core rules on the exchange's line(s) of business, the organisation of the exchange, admission of market participants, type of trading (e.g. auctions or continuous trading), publication of prices and transactions, and further transparency rules by an exchange supervisory authority, if distinct from the energy regulator concerned following the consultation of the competent energy regulator and notification of further rules and their amendments;
    - Obligation for exchanges to define transparent market rules for market makers (if applicable);
    - Definition of market misbehaviour in case of breach of exchange or trading rules and exchange sanctions.
- The safeguarding of compliance with exchange rules and with other legal obligations.

[33] E.g. Germany, Austria.

[34] 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 of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community (OJ L 302, 18.11.2010, p. 1).

[35] Whether prior to their entry into force or retroactively should be left to the implementation at national level.

Licensing of energy spot exchanges should be an area for considerations. Most Member States provide for national rules for the licensing of spot exchanges, often as general commodity exchanges. Minimum standards could be set at European level for the authorisation of energy spot exchanges, similar to the minimum standards set in MiFID for regulated markets. The competent authority for licensing could be a national competent ministry, the regulator competent for the authorisation of regulated markets (or MTFs) under MiFID or the competent national energy regulatory authority.

Markets become more and more European and market participants are to a large extent active in more than one market and participate at more than one exchange. Thus it becomes increasingly important to foster the creation of a level playing field by harmonised exchange rules, including harmonised approach for the treatment of misbehaviour. The relevant rules and regulations of the exchanges are usually elaborated by an internal body, and usually approved by a governance entity. Exchange members may sometimes also be involved in the definition of those rules which rules usually specify the trading rules, clearing/settlement rules and IT requirements. They may contain very different specifications for the trading at the respective energy exchange, such as prerequisite to trade, which differ from one exchange to another. Given the differing energy exchange rules, it should be considered by all entities involved in legislation if harmonisation of legal and operational frameworks could enhance cooperation between European energy exchanges, and facilitate trading. The involvement of market/exchange participants is important. **To create a level-playing field the exchange rules should be approved by a regulatory authority taking into account the view of energy exchange participants.**

CEER is of the view that proportionate rules and controls must be in place to regulate market makers' role, when needed in non-liquid markets. CEER considers that transparent market rules applying to appointed market makers are needed in order not to be a place for competition between market places located in different Member States, but addressing the same balancing area/hub. They are of special importance in future markets. These rules may be set on a voluntary basis, as currently there is no legal basis for such rules. However, REMIT foresees that ACER shall evaluate the operations and transparency of the different categories of market places, assess whether minimum requirements for organised markets are likely to improve market transparency[36], and report to the European Commission on this issue. CEER considers appropriate that under REMIT, NRAs regularly control if voluntary and appointed market players have put in place internal procedures (like Chinese wall) in order to prevent insider dealing.

Exchanges play a vital role for the market as they provide important price signals and must therefore be protected from market misbehaviour. Most exchanges have rules concerning the treatment of misbehaviour, however, the definition of misbehaviour and what kind of actions are considered misbehaviour differs very much across Europe. Some energy exchanges define a wide range of different types of misbehaviour as abusive. The results of regulators' internal survey showed that there is no common definition or a common approach on how to deal with misbehaviour of market participants and the definition of misbehaviour beyond REMIT.

[36] Article 7(3) of REMIT.

Finally, minimum standards should be set for the safeguarding compliance with exchange rules and with other legal obligations, which could be achieved through a market surveillance framework.

These recommendations apply for both electricity and gas spot exchanges, the latter being in competition with gas hubs[37].

The issue of market coupling and potential consequences for regulation will be addressed in the future governance comitology guidelines being developed by the Commission and therefore have not been assessed in more detail in this paper. European Energy Regulators have been contributing their input to the development of these guidelines. However, European Energy Regulators believe that market coupling reinforces the plea for minimum harmonised standards for energy spot exchanges which can even be considered as a prerequisite for an effective Europe-wide market coupling in energy markets.

6.1.2. Market Surveillance: Each energy exchange should have a clear framework for conducting market surveillance, compliance and enforcement activities and there should be oversight of these activities by an exchange supervisory authority

In order to further improve market monitoring in energy markets, energy exchanges should be obliged to install and maintain a market surveillance department. Such an obligation should be valid for all energy exchanges including spot exchanges. Such a market surveillance department should be sufficiently staffed to continuously monitor and analyse the daily exchange trading, the compliance with market rules and with other legal provisions. Any such market surveillance department of an energy exchange should cooperate with energy regulatory authorities. As the proper functioning of the market surveillance department is important for ensuring market integrity, it should be supervised by a national regulator. In view of market coupling, there should also be an obligation for a close cooperation, for exchange of trade data and information between market surveillance departments of different energy exchanges and energy regulators.

REMIT will not change this need, but rather reinforce it. According to Article 15 of REMIT, any person professionally arranging transactions in wholesale energy products who reasonably suspects that a transaction might breach the market abuse rules of REMIT shall notify the national regulatory authority without further delay. In addition, persons professionally arranging transactions in wholesale energy products shall establish and maintain effective arrangements and procedures to identify breaches of REMIT's market abuse rules. Market surveillance departments will be crucial for market monitoring under REMIT since they could bring in their market knowledge and their knowledge of the exchange customers in the monitoring from ACER and NRAs.

[37] Concerning the regulatory oversight of gas hubs, please refer to the ERGEG Monitoring Report 2010 on the regulatory oversight of natural gas hubs (Ref: E10-GMM-11-03) of 10 October 2010, which includes recommendations for the regulatory oversight of gas hubs, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Gas/2010/E10-GMM-11-03%20Gas%20Hub%20Monitoring%20Report%202010_final.pdf

6.2. Transparency: Pre- and post-trade requirements should be defined for energy exchanges and the publication of additional fundamental data information by energy exchanges should be encouraged

As regards pre- and post-trade requirements, exchanges publish traded volumes and prices of all products. Furthermore, additional price relevant data such as electricity generation should also be published. This includes e.g. installed capacity, information on planned and unplanned outages, filling rate of water reservoirs and ex-post data on actual generation. Further, ex-ante information on scheduled unavailability of significant consumption units and ex-post information on unplanned unavailability of significant consumption units should be published. This is already foreseen within the ERGEG advice on Guidelines on Fundamental Electricity Data Transparency[38].

Exchanges provide important information about price signals in the market. Thus it is beneficial if price sensitive information is also published there.

Regarding the publication of additional transparency information (not required by MiFID but essential to achieve transparency in energy markets), regulatory requirements should be set to ensure that the energy exchanges establish satisfactory routines. Publications through exchanges or exchange platforms may have the advantage that market surveillance departments could immediately verify the correctness of the data provided from market participants and provide advice for a meaningful and understandable publication of data.

6.3. Monitoring: Market monitoring should be based on existing experiences of energy regulators and surveillance departments of energy exchanges and NRAs should closely cooperate in the monitoring of wholesale energy markets

The monitoring of energy wholesale markets is already covered by the 3rd Energy Package and has to be implemented into national legislation. The experience and competences of national energy regulators already monitoring energy wholesale are highly relevant for the further development of the monitoring of energy wholesale markets across Europe.

The role of market surveillance departments at energy exchanges is crucial for a sophisticated monitoring of trading activities. This is another reason why energy exchanges should be obliged to install and maintain a market surveillance department, regardless whether the exchange is a regulated market, an MTF or a currently unregulated market under MiFID. Indeed, REMIT requests that persons arranging transactions in the wholesale energy markets shall establish and maintain arrangements and procedures to identify insider dealing, market manipulation and attempts to manipulate the market[39].

CEER stresses that resources of energy trading venues for performing market surveillance activities should be proportionate. The procedures and organisation put in place need also to

[38] ERGEG final advice on Comitology Guidelines on Fundamental Electricity Data Transparency, Ref: E10-ENM-27-03, 7 December 2010, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_CONSULT/CLOSED%20PUBLIC%20CONSULTATIONS/ELECTRICITY/Comitology%20Guideline%20Electricity%20Transparency/CD/E10-ENM-27-03_FEDT_7-Dec-2010.pdf

[39] Article 15 of REMIT.

prevent potential conflict of interests. In particular, persons in charge of market surveillance at an energy exchange must not hesitate to report a potential breach to the relevant NRAs, fearing of losing a client. The best way to respect this obligation would be to install and maintain a market surveillance department. It should be even seen as an obligation for liquid trading venues, including spot exchanges. Such market surveillance departments should be sufficiently staffed to continuously monitor and analyse the daily exchange trading, the compliance with market rules and with other legal provisions. Indeed, the market surveillance function would not spontaneously emerge at every trading venue as the result of competition between them. If there are market participants looking for transparent and well supervised market places, there are also other market participants attracted by less transparent platforms. The emergence of dark pools in the financial markets could be seen as a proof.

REMIT requests that, in case of reasonable suspicion of insider dealing, market manipulations or attempts to manipulate the market, trading venues shall inform the relevant NRA immediately[40]. CEER understands REMIT as giving a strong role to trading venues in the prevention and detection of market misconducts.

As proposed in the CEER draft advice for public consultation, CEER agrees that written agreements about market surveillance could be signed between NRAs and energy exchanges. They could also be extended to data reporting. Indeed, CEER agrees that providing transaction data may be part of the market surveillance function. In the practical implementation of REMIT, as implementing acts may provide that reporting to ACER will be made via organised exchanges or trading systems[41], the way to inform market participants about how to report all their trades must be defined. CEER deems appropriate that ACER and/or relevant NRAs sign agreements with trading venues providing trading data, and publish the list of these trading venues on their websites. As REMIT requires that, if appropriate, NRA investigative powers may be exercised in collaboration with market places[42], such agreements should be extended to investigations. It will also be part of the monitoring function of ACER and NRAs under REMIT, to identify all trading venues and to verify that they perform their above-described market surveillance duty. Such agreements could be a way to perform the latter. CEER is of the view that NRAs and market surveillance bodies must keep their own well defined roles and such agreements can help them in doing so.

CEER considers that data publication is not a market surveillance issue – the publication obligation under REMIT only applies to market participants. However, market surveillance departments could verify that the energy trading venue publishes the required set of data.

During the public consultation, it was proposed that trading venues should be agreed by NRAs. However, this is not foreseen by any legislation in force or in preparation. This proposal should therefore be further investigated. CEER recalls that under REMIT, ACER shall evaluate the operations and transparency of the different categories of market places and assess whether minimum requirements for organised markets are likely to improve market transparency[43].

[40] Article 15 of REMIT.

[41] Article 8(2) of REMIT.

[42] Article 13(1) of REMIT.

[43] Article 7(3) of REMIT.

Practical cooperation of NRAs and market surveillance teams could take the form of exchange of information, bilateral meetings, or sharing best practices of detecting market misconduct, for example, through multilateral working groups. These cooperation schemes must however remain very flexible and be adapted to the circumstances and may be detailed in the above-mentioned agreements.

6.4. Cooperation: Competent exchange supervisory authorities, regulatory authorities and other relevant authorities should cooperate with each other at national, regional and European level, as appropriate, in promoting the market integrity and effective and efficient supervision of energy exchanges

European Energy Regulators consider a Europe-wide cooperation of financial and energy regulatory authorities at national, regional and European level a perquisite for market integrity and an effective and efficient supervision of energy exchanges.

Strong cooperation between NRAs and financial regulators is necessary, especially concerning trading venues which would fall under double regulation (even if it would have been preferable to avoid double regulation). REMIT includes joint monitoring competences for energy regulators (ACER and NRAs) and financial regulators, which could be extended to exchange supervision.

Cooperation means both a close cooperation at national level between national energy and financial regulators and at regional and/or European level between energy regulators and between financial regulators of several countries where energy exchanges are active.

Such cooperation should be based on a Memorandum of Understanding between the competent authorities in order to establish the ways of cooperation, exchange of information and regularity of meetings. It could probably best be established through regulatory councils or colleges of regulators involving the competent authorities of the countries concerned.

Finally, ACER could play a role in the supervision of energy exchanges active under multiple national jurisdictions or regarding cross-border issues, e.g. for coordinating cross national supervision of energy exchanges.

7. Conclusions and taking the work forward

European Energy Regulators conclude that minimum standards for the regulatory oversight of energy spot exchanges are needed, which could be covered by the energy market integrity regulation or by new Commission proposal or guidelines.

Concerning the supervision of energy derivatives exchanges, European Energy Regulators will continue to contribute their knowledge and views in the further process of the MiFID review.

Concerning energy spot exchanges, European Energy Regulators consider the definition of minimum standards for a supervisory framework for energy spot exchanges at European level essential for increasing market integrity and transparency in wholesale energy markets, but also a prerequisite for an effective Europe-wide market coupling. Each energy spot exchange should be subject to appropriate and effective exchange supervision by a competent exchange supervisory authority to increase market integrity through the supervision of e.g. the organisation of the exchange, admission of market participants, type of trading (e.g. auctions or continuous trading), publication of prices and transactions, overall governance and further transparency rules.

The issue of market coupling as such and potential consequences for regulation will be addressed in future governance comitology guidelines being developed by the Commission and therefore have not been assessed in more detail in this paper. European Energy Regulators have been contributing their input to the development of these guidelines.

The issue of oversight of energy exchanges will also be relevant for ACER under REMIT. According to Article 7(3) of REMIT, the Agency shall, in its annual reports, assess the operation and transparency of different categories of market places and ways of trading and may make recommendations to the Commission as regards market rules, standards, and procedures which could improve market integrity and the functioning of the internal market. It may also evaluate whether any minimum requirements for organised markets could contribute to enhance market transparency. This advice and its findings may therefore feed into the Agency's aforementioned assessment and evaluation.

In view of the MiFID review, it could be considered whether the newly created trading venue category of Organised Trading Facilities (OTF) should also be considered for spot trading venues in wholesale energy markets and a framework for the regulatory oversight of energy exchanges be extended to such new kind of trading venues.

Annex 1 – CEER

The Council of European Energy Regulators (CEER) is the voice of Europe's national regulators of electricity and gas at EU and international level. Through CEER, a not-for-profit association, the national regulators cooperate and exchange best practice. A key objective of CEER is to facilitate the creation of a single, competitive, efficient and sustainable EU internal energy market that works in the public interest.

CEER works closely with (and supports) the Agency for the Cooperation of Energy Regulators (ACER). The forerunner to ACER was the European Regulators' Group for Electricity and Gas (ERGEG). ERGEG was established by the European Commission in November 2003 (Decision 2003/796/EC), as its formal advisory group of energy regulators on Internal Energy Market issues. With ACER fully operational since March 2011, ERGEG was dissolved by the Commission, with effect from 1 July 2011 (Decision of 16 May 2011, repealing Decision 2003/796/EC). Some of ERGEG's works passes to ACER (e.g. the Regional Initiatives) and some (such as the work formally carried out by the ERGEG Electricity Quality of Supply and Smart Grids Task Force) to CEER.

ACER, which has its seat in Ljubljana, is an EU Agency with its own staff and resources. CEER, based in Brussels, deals with many complementary (and not overlapping) issues to ACER's work such as international issues, smart grids, sustainability and customer issues.

The work of CEER is structured according to a number of working groups and task forces, composed of staff members of the national energy regulatory authorities, and supported by the CEER Secretariat.

This report was prepared by the Wholesale Market Supervision Task Force (WMS TF) of the Financial Services Working Group (FIS WG).

Annex 2 – List of abbreviations

Term	Definition
ACER	Agency for the Cooperation of Energy Regulators
CEER	Council of European Energy Regulators
CESR	Committee of European Securities Regulators
EFET	European Federation of Energy Traders
ERGEG	European Regulators Group for Electricity and Gas
EU	European Union
FIS WG	Financial Services Working Group
MAD	Market Abuse Directive
MiFID	Markets in Financial Instruments Directive
MTF	Multilateral Trading Facility (as defined in MiFID)
NRA	National Regulatory Authority
OTC	Over the Counter
REMIT	Regulation for Energy Market Integrity and Transparency
TSO	Transmission System Operator
UMM	Urgent Market Messages (at Nord Pool)
WMS TF	Wholesale Market Supervision Task Force (of the FIS WG)