

BEUC POSITION ON PROPOSED REGULATION ON ENERGY MARKET INTEGRITY AND TRANSPARENCY

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1. What are our main concerns with respect to this Regulation?

The current proposal focuses on improving the transparency of energy trading conducted via organised exchanges and energy brokers. We therefore demand a broadening of the scope of the proposal to ensure that all aspects of energy trading are covered.

In some EU Member States we believe that the majority of power trading, including almost all forward trading, is actually carried out via direct bilateral contracts (i.e. structured off-market contracts). If these do not fall within the scope of the regulation, then there is a risk that it will not deliver on its aims to improve market transparency (because the bulk of the market will remain unreported) or to ensure market integrity (because the characteristics and consequences of 'off-market' trading will not be understood). In section 2 of this paper, we therefore propose some changes to the Regulation to enforce its stated objective of energy markets integrity and transparency.

In order to allow for the swift modification of certain provisions in the Regulation to keep pace with developments in the wholesale market, the Commission is empowered to make changes through delegated acts. To ensure that any such amendments are properly informed, fair and transparent, it is important that they are based on adequate consultation of the stakeholders, including consumer organisations. We elaborate this point in more detail in section 3.

Section 4 briefly addresses the shortcomings of this Regulation to establish a monitoring system that would cover all possible market failures.

2. How to enforce the objective of energy markets integrity and transparency?

In order to meet the stated objective of the Regulation we believe that amendments are required to:

- Expressly empower ACER (the Agency) to recommend which records related to bilateral, off-market contracts would enable it (and national regulatory authorities, as appropriate) to effectively monitor the wholesale market.
- Introduce the required transparency through the publication of data that will allow the proposal to meet its stated objective of providing confidence to citizens, businesses as well as authorities in the wholesale market.
- Clarify the definition of "wholesale energy markets" to more accurately cover the breadth of transactions included within it.

Market Monitoring

In determining which records are required to "effectively and efficiently monitor wholesale markets", the Agency should be expressly required to include bilateral contracts.

In addition, the Agency should be expressly empowered to develop a methodology for the amalgamation of data which sufficiently anonymises the trading parties but nevertheless allows an effective monitoring of this segment of the market.

Justification:

As it stands, the provisions only place an express requirement on the Agency to include “orders to trade” within the transactions to be monitored. As stated above, in some major markets (e.g. the UK, Germany, France), the majority of trades are direct bilateral contracts. The Regulation is therefore unlikely to meet its stated objective of improving the transparency and integrity of the wholesale market, unless these bilateral transactions are taken into account.

It is clear that certain data related to bilateral contracts will be deemed to be commercially confidential information. In recognition of this, the Agency should also be required to develop a methodology that achieves the appropriate balance between this right to confidentiality and its own obligation to protect the integrity of the market place.

Publication of data

The proposal to allow the Agency to make available to market participants and the wider public, non-commercially sensitive information (set out in recital 18) should be incorporated into the body of the Regulation.

In addition, the publication of this data has to be made mandatory, in a format to be determined by the Agency and the Commission (as set out in the amendment above).

Justification:

The proposal acknowledges “citizens (as well as) businesses and authorities must have confidence in the integrity of ... wholesale energy markets.” The Agency should therefore be obliged to put the relevant information into the public domain.

The Agency should have flexibility to choose how it reports (rather than whether it reports). A balance must be struck between ensuring commercial confidentiality and ensuring market participants have access to reasonably robust data. Furthermore, it is likely that the data will need to be ‘crunched’ into a more user friendly format in order for public reporting to be meaningful.

Definitions (wholesale market)

The definition of “wholesale energy markets” should be amended to include direct bilateral trading as well as trading conducted through organised exchanges and brokered over-the-counter (OTC) deals.

Justification:

As stated above, the Agency cannot effectively monitor and regulate the wholesale market if bilateral contracts are excluded.

3. Additional recommended amendments

Delegated acts

Throughout the proposal for Regulation, reference is being made to delegated acts. Delegated acts would allow the European Commission i.e. to detail the definitions of inside information and market manipulation or to lay down the timing, form and content in which collected data is reported.

To ensure that delegated acts do not lead to a watering down of the provisions of the Regulation, we call for a requirement for the European Commission to develop the delegated acts in close consultation with stakeholders including consumer organisations.

Justification:

The obligations of this Regulation should be reinforced and specified as much as possible. The possibility to adopt delegated acts should not lead to introducing exceptions at the implementation stage of this Regulation which would be counterproductive.

Union level cooperation

The principle of a coordinated market approach should be further endorsed by including reporting rights and obligations of the competent national and European competition authorities.

Justification:

It is essential that national authorities inform each other mutually about suspicion of abuses as early as possible. This Regulation should expressly endorse this obligation.

4. Missed opportunity of the Regulation

The objective of the Regulation is commendable but as it stands it will not address some of the key market failings, such as the opportunity for market abuse by dominant operators, or simply the “coordinated effects” (similar outcomes) resulting from the individual business decisions of the dominant market players. The Regulation does also not prevent operators from distorting pool prices by withholding generator capacity (running higher cost plants before lower cost ones). We therefore regret that the Regulation has missed an opportunity to give more direct guidance on what data should be collated by the Agency (and national regulators) to more strictly monitor the potential existence of these market failings.

Bolder steps would have been needed to facilitate the identification of practices that are leading to price distortions.

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