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NOTE

from: General Secretariat of the Council
to: Delegations

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Subject: Proposal for a Regulation of the European Parliament and of the Council
on energy market integrity and transparency

Delegations will find in Annex the text of the draft proposal, adapted in light of discussions in the Energy Working Party and written contributions.

Many delegations still maintain a scrutiny reservation; one maintains a reservation.

Changes compared to the Commission proposal are highlighted in **bold**, deletions by []; changes and deletions compared to the previous version of the text (including DS 1087/11) are highlighted in **bold underlined**.

Note: two proposals for a Regulation currently under negotiation are of some relevance to the present negotiations:

- proposal for a Regulation on Short Selling and certain aspects of Credit Default Swaps (2010/0251 (COD)); the current draft text is reflected in doc. 16676/10;
- proposal for a Regulation on OTC derivatives, central counterparties and trade repositories (2010/0250 (COD)); the current draft text is reflected in doc. 5059/11 ("European Market Infrastructure Regulation - EMIR").

Proposal for a**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL****on energy market integrity and transparency****(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 194(2) thereof,

Having regard to the proposal from the Commission¹,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee²,

Having regard to the opinion of the Committee of the Regions³,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) It is important to ensure that consumers can have confidence in the integrity of electricity and gas markets and that prices set on wholesale energy markets reflect a fair interplay between supply and demand.
- (2) The advice of the Committee of European Securities Regulators and the European Regulators Group for Electricity and Gas confirmed that the scope of existing legislation may not properly address market integrity issues on the electricity and gas markets and recommended the consideration of an appropriate legislative framework in the energy sector, preventing market abuse.
- (3) Energy markets are increasingly interlinked across the Union. Market abuse in one Member State affects wholesale prices for electricity and gas across national borders. Therefore the concern to ensure the integrity of markets cannot be a matter only for individual Member States.

¹ OJ C , , p. .

² OJ C , , p. .

³ OJ C , , p. .

- (4) Wholesale energy markets encompass both commodity markets and derivative markets, with price formation in both sectors interlinked. **They include *inter alia* regulated markets, multilateral trading facilities and Over The Counter (OTC) transactions, direct or through brokers.**
- (5) To date energy market monitoring practices have been Member State and sector specific. Depending on the overall market framework and regulatory situation, this can result in trading activities being subject to multiple jurisdictions with monitoring carried out by several different authorities, possibly located in different Member States. This can result in a lack of clarity as to where responsibility rests and even to a situation where no such monitoring exists.
- (6) Behaviour which undermines the integrity of the energy market is currently not clearly prohibited on some of the most important energy markets.
- (7) Derivative trading and commodity trading are used together on wholesale energy markets. It is therefore important that the definitions of market abuse, which consists of insider trading and market manipulation, are compatible between derivatives and commodity markets.
- (8) Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity⁴ and Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks⁵ recognise that equal access to information on the physical status and efficiency of the system is necessary to enable all market participants to assess the overall demand and supply situation and identify the reasons for **movements** [] in the wholesale price.

⁴ OJ L 211, 14.8.2009, p. 15.

⁵ OJ L 211, 14.8.2009, p. 36.

(9) It should be clearly prohibited to use or to attempt to use inside information to trade either on one's own account or on the account of a third party. Use of inside information can also consist in trading in wholesale energy products by persons who know, or ought to know, that the information they possess is inside information. **Information which is required to be made public in accordance with the provisions of Regulation (EC) No. 714/2009 or Regulation (EC) No. 715/2009, including guidelines and network codes adopted pursuant to those Regulations, may serve as the basis of market participants' decisions to enter into transactions in wholesale energy products and therefore constitute inside information until it has been made public.**

(10) Manipulation on wholesale energy markets involves artificially causing prices to be at a level not justified by the actual availability and costs of production, storage or transportation capacity and demand. **Forms of such market manipulation include: placing and withdrawal of false orders; spreading of false or misleading information or rumours including through the media; deliberately providing false information to undertakings which provide price assessments or market reports with the effect of misleading market participants acting on the basis of those price assessments or market reports []; deliberately making it appear that the availability of electricity generation capacity or gas availability, or the availability of transmission capacity is other than the capacity which is actually physically available.** Manipulation and its effects may occur across borders, [] between gas and electricity and across financial and commodity markets.

(10a) Examples of market manipulation and attempts to manipulate the market include conduct by a person or persons acting in collaboration, to secure a decisive position over the supply of or demand for a wholesale energy product which has the effect of fixing, directly or indirectly, prices or creating other unfair trading conditions; the offering, buying or selling of wholesale energy products to mislead market participants acting on the basis of reference prices⁶.

⁶ **Note: examples derived from "MAD 2003/6", Art. 1(2).**

- (11) Specification of the definitions of inside information and market manipulation is necessary to account for the specificities of wholesale energy markets **and to ensure coherence with other relevant EU legislation in the fields of financial services and energy**, which are all dynamic and subject to change. The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty in respect to such detailed rules. **It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. Expertise could be provided *inter alia* by experts from the Agency for the Cooperation of Energy Regulators, the Committee of European Securities Regulators, the European Networks of Transmission System Operators for Gas and for Electricity the, the European Securities and Markets Authority (ESMA), national regulatory authorities, competent financial authorities in the Member States and market participants. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and Council.** ⁷
- (12) Regulation (EC) No 713/2009 of the European Council and of the parliament establishing an Agency for the Cooperation of Energy Regulators⁸ furthers the objectives of Article 194 of the Treaty. Had this Article been in force when Regulation (EC) No 713 was adopted, it would have provided the legal basis for the establishment of the Agency for the Cooperation of Energy Regulators (the Agency).
- (13) Efficient market monitoring is vital to detecting and deterring market abuse on wholesale energy markets. The Agency is best placed to carry out such monitoring as it has both a Union wide view of electricity and gas markets, and the necessary expertise in the operation of electricity and gas markets and systems in the Union. National regulatory authorities having an important understanding of developments on energy markets in their Member State should have an important role in ensuring efficient market monitoring.
- (14) Efficient market monitoring requires regular access to records of transactions. For this reason market participants who trade wholesale energy products should be required to provide this information to the Agency.

⁷ **Note: new text copied from the draft Common Understanding on delegated acts of the 3 institutions, as agreed by Coreper I on 8.12.2010 (DS 1020/11).**

⁸ OJ L 211, 14.8.2009, p. 1.

- (15) In order to ensure the necessary flexibility in collecting information on transactions in wholesale energy products, the Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty setting out the timing, form and content of the information which market participant are required to provide. Reporting obligations should not create unnecessary costs **or administrative burdens** for market participants, **and should therefore undergo an ex ante cost benefit analysis** [1]. Persons reporting transactions to a competent authority in accordance with the provisions of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments⁹, and to trade repositories and competent authorities in accordance with the provisions of Regulation ... of the European Parliament and the Council on OTC derivatives, central counterparties and trade repositories should therefore not be subject to **double** reporting obligations [1]. **It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and Council.**
- (16) In order to facilitate efficient monitoring of all aspects of trading in wholesale energy products, the Agency should establish mechanisms to give access to the information which it receives on transactions on wholesale energy markets to other relevant authorities, in particular to the European Securities and Markets Authority [1] established by Regulation (EU) ---/--- of the European parliament and of the Council establishing a European Securities and Markets Authority [ESMA regulation – Commission proposal 2009/0144 (COD)] national regulatory authorities, competent financial authorities of the Member States, competition authorities of the Member States and other relevant authorities.
- (17) The Agency should ensure the operational security of the data which it receives, prevent unauthorised access to the information kept by the Agency, and establish procedures to ensure that the data it collects are not misused by persons with an authorised access to them. The Agency should also be assured that those authorities who have access to the data held by **the** Agency will be able to maintain an equally high level of security.

⁹ OJ L 145, 30.04.2004, P. 0001 - 0044

- (18) Where information is not **[]** sensitive **from a commercial or security viewpoint**, the Agency should be able to make that information available to market participants and the wider public. Such transparency can help build confidence in the market and help the development of knowledge about the functioning of wholesale energy markets.
- (19) National regulatory authorities should be responsible for ensuring that this Regulation is enforced in the Member States. To this end they should have the necessary investigatory powers to allow them to carry out this task efficiently.
- (20) The Agency should ensure that the application of this Regulation is done in a coordinated way across the Union, and is coherent with the application of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)¹⁰. Since market abuse on wholesale energy markets often affects more than one Member State, the Agency should have an important role in ensuring that investigations are carried out in an efficient and coherent way. To achieve this it should be able to coordinate the operation of investigatory groups comprised of representatives of the concerned national regulatory authorities, and where appropriate, other authorities.
- (21) National regulatory authorities and competent financial authorities should cooperate to ensure a coordinated approach to tackling market abuse on wholesale energy markets which encompasses both commodity markets and derivatives markets.
- (22) It is important that the obligation of professional secrecy applies to those who receive confidential information in accordance with the provisions of this Regulation.
- (23) It is important that the penalties for breaches of this Regulation are proportionate and dissuasive, and reflect the gravity of the infringements and the potential gains from trading on the basis of inside information and market manipulation. Recognising the interactions between trading in electricity and gas derivative products and trading in actual electricity and gas, the penalties for breaches of this Regulation should be in line with the penalties adopted by the Member States in implementing Directive 2003/6/EC.

¹⁰ OJ L 96, 12.4.2003, p. 16.

(24) Since the objective of this Regulation, namely the provision of a harmonised framework to ensure energy market transparency and integrity, cannot be sufficiently achieved by the Member States and can be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS REGULATION:

Article 1

Subject matter, scope and relationship with other Union legislation

This Regulation establishes rules prohibiting abusive practices on wholesale energy markets coherent with those applying in financial markets. It provides for the monitoring of wholesale energy markets by the Agency **for the Cooperation of Energy Regulators (the Agency)**.

This Regulation applies to trading in wholesale energy products. The provisions of Article 3 and Article 4 shall not apply to wholesale energy products which are financial instruments and to which the provisions of Article 9 of Directive 2003/6/EC apply. This Regulation is without prejudice to Directive 2003/6/EC and 2004/39/EC as well as to the application of the provisions of European competition law to the practices covered by this Regulation.

The Agency, national regulatory authorities and competent financial authorities shall cooperate to ensure that a coordinated approach is taken to the enforcement of the relevant rules where actions relate to one or more financial instruments to which the provisions of Article 9 of Directive 2003/6/EC apply and also to one or more wholesale energy products to which the provisions of Article 3 and Article 4 apply.

Article 2

Definitions

For the purposes of this Regulation the following definitions shall apply:

1. "inside information" means precise information which has not been made public, relating directly or indirectly to one or more wholesale energy products and which, if it were made public, **it would be likely to** significantly affect the prices of such wholesale energy products;

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

II

2. "Market manipulation" means:
 - (a) entering into transactions or the issuing of orders to trade in wholesale energy products, which:
 - i)** give, or are likely to give, false or misleading signals as to the supply of, demand for or price of wholesale energy products; or
 - ii)** secure or attempt to secure, by a person or by persons acting in collaboration, the price of one or several wholesale energy products at an abnormal or artificial level, unless the person who entered into the transactions or issued the orders to trade establishes that his reasons for doing so are legitimate and that these transactions or orders to trade conform to accepted market practices on the wholesale energy market concerned; or

- iii)** employ or attempt to employ fictitious devices or any other form of deception or contrivance;
 - (b) dissemination of information which gives, or is likely to give, false or misleading signals as to wholesale energy products, including the dissemination of rumours and false or misleading news, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading. In respect of journalists when they act in their professional capacity such dissemination of information is to be assessed taking into account the rules governing their profession, unless those persons derive, directly or indirectly, an advantage or profits from the dissemination of the information in question.

II

3. "Attempt to manipulate the market" means:

- (a) entering into a transaction, placing an order to trade or taking any other action relating to a wholesale energy product with the intention of:
 - i)** giving false or misleading signals as to the supply of, demand for or price of wholesale energy products;
 - ii)** securing the price of one or several wholesale energy products at an abnormal or artificial level; or
 - iii)** employing a fictitious device or any other form of deception or connivance relating to a wholesale energy product
- (b) disseminating information through the media, including the Internet, or any other means with the intention of giving false or misleading signals as to wholesale energy products.

4. "Wholesale energy products" means the following contracts and derivatives, irrespective of where and how they are traded:
- (a) contracts for the supply of natural gas or electricity **in the EU**;
 - (b) derivatives relating to natural gas or electricity **produced, transported, traded or delivered in the EU**;
 - (c) contracts relating to the transportation of natural gas or electricity **in the EU**;
 - (d) derivatives relating to the transportation of natural gas or electricity **in the EU**.

Contracts for the supply of natural gas or electricity for the use of final consumers **are not wholesale energy products; [] however, for the purposes of this Regulation, contracts for the supply of natural gas or electricity to final customers with a capacity of more than ["X" MW]¹¹ per year shall be treated as** wholesale energy products.

5. "Wholesale energy market" means any market [] within the Union on which wholesale energy products are traded;
- 5a. "Market participant" means any person who enters into transactions, including the placing of orders to trade, in one or more wholesale energy markets¹²;**
- 5b. "Person" means any natural or legal person;**
6. "Competent financial authority" means a competent authority designated in accordance with the procedure laid down in Article 11 of Directive 2003/6/EC;
7. "National regulatory authority" means a national regulatory authority designated in accordance with the Article 35(1) of Directive 2009/72/EC of the European Parliament and of the Council¹³ or Article 39(1) of Directive 2009/73/EC of the European Parliament and of the Council¹⁴;

¹¹ **Note: this threshold should be set, and suggestions are welcome. However, delegations should note already that the intention of this provision would be to cover *only the very largest final consumers*, i.e. those who by their capacity may influence prices.**

¹² **Note: the Commission specified that TSOs are included in this definition.**

¹³ OJ L 211, 14.8.2009, p. 55.

¹⁴ OJ L 211, 14.8.2009, p. 94.

8. "Transmission system operator" has the meaning set out in Article 2(4) of Directive 2009/72/EC and Article 2(4) of Directive 2009/73/EC.

Article 3

Prohibition of insider trading []

1. Persons who possess inside information in relation to a wholesale energy product shall be prohibited from:
 - (a) using that information by acquiring or disposing of, or by trying to acquire or dispose of, for their own account or for the account of a third party, either directly or indirectly, wholesale energy products to which that information relates;
 - (b) disclosing that information to any other person unless such disclosure is made in the normal course of the exercise of their employment, profession or duties. In this case they must make complete and efficient public disclosure of that information. Where disclosure is intentional the information shall be made available to all persons simultaneously. In the event of a non-intentional disclosure the information shall be made available to all persons as soon as possible following the non-intentional disclosure. This point shall not apply if the person receiving the information owes a duty of confidentiality, regardless of whether such duty is based on a law, on regulations, on articles of association or on a contract;
 - (c) recommending or inducing another person, on the basis of inside information, to acquire or dispose of wholesale energy products to which that information relates
2. The prohibition set out in paragraph 1 applies to the following persons who possess inside information in relation to a wholesale energy product:
 - (a) members of the administrative, management or supervisory bodies of an undertaking;
 - (b) persons with holdings in the capital of an undertaking;
 - (c) persons having access to the information through the exercise of their employment, profession or duties;
 - (d) persons who acquired such information through criminal activity;
 - (e) persons who know, or ought to know, that it is inside information.

- 3. Paragraphs 1 (a) and (c) shall not apply to transmission system operators when purchasing gas or electricity in order to ensure the safe and secure operation of the system in accordance with their obligation under Article 12(d) and (e) of Directive 2009/72/EC or Article 13(1)(a) and (c) of Directive 2009/73/EC.**

This Article shall not apply to transactions conducted in the discharge of an obligation that has become due to acquire or dispose of wholesale energy products where that obligation results from an agreement concluded before the person concerned possessed inside information.

Where the person who possesses inside information in relation to a wholesale energy product is a legal person, the prohibitions laid down in paragraph 1 shall also apply to the natural persons who take part in the decision to carry out the transaction for the account of the legal person concerned.

Article 3a

Obligation to publish inside information

- 1.** Market participants shall publicly, **|| effectively and in a timely manner** disclose inside information in respect of business or facilities which the participant concerned, **or parent undertaking or related undertaking**, owns or controls or for which the participant, **or its parent undertaking or related undertaking**¹⁵, is responsible for operational matters, either in whole or in part. Such information shall include information relevant to the capacity of facilities for production, storage, consumption or transmission of electricity or natural gas, **including planned or unplanned unavailability of these facilities.**
- 2.** A market participant may under his own responsibility delay the public disclosure of inside information such as not to prejudice his legitimate interests provided that such omission would not be likely to mislead the public and provided that the market participant is able to ensure the confidentiality of that information and does not make decisions relating to trading in wholesale energy products based upon this information. In this situation the market participant shall provide this information to the Agency and the relevant national regulatory authority having regard to the provisions of Article 7(4).

¹⁵ **Note: "parent undertaking" is defined in Art. 2(14) of the "EMIR" proposal (cf. cover page) as "a parent undertaking within the meaning of Articles 1 and 2 of Council Directive 83/349/EEC".**

- 3. Paragraphs 1 and 2** ¶ are without prejudice to the obligations of market participants under the provisions of Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 including guidelines and network codes adopted pursuant to those Directives and Regulations, in particular regarding the timing and method of publication of information.

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Article 4

Prohibition of market manipulation

It shall be prohibited to engage in, or attempt to engage in, market manipulation on wholesale energy markets.

Article 5

Specification of definitions of inside information and market manipulation

1. In order to take account of future developments on wholesale energy markets **and ensure coherence with other relevant EU legislation in the fields of financial services and energy**, the Commission shall, **where appropriate**, adopt delegated acts in accordance with Article 15 and subject to conditions of Articles 16 and 17, specifying the definitions set out at Article 2(1) to (5).
2. The delegated acts referred to in paragraph 1 shall take into account at least:
 - (a) the specific functioning of wholesale energy markets and the interaction between commodity markets and derivative markets;
 - (b) the potential impact on wholesale energy market prices of actual or planned production, consumption, use of transmission, or use of storage capacity;
 - (c) network codes and framework guidelines adopted in accordance with the provisions of Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009.

Article 6

Market monitoring

1. The Agency shall monitor trading activity in wholesale energy products to detect and prevent trading based on inside information and market manipulation. It shall collect the data for assessing and monitoring wholesale energy markets as provided for in Article 7.
2. National regulatory authorities shall cooperate with the Agency in carrying out the monitoring of wholesale energy markets referred to at paragraph 1. For this purpose national regulatory authorities shall have access to relevant information held by the Agency which it has collected in accordance with paragraph 1, subject to the provisions of Article 8(2).
3. The Agency shall at least on an annual basis submit a report to the Commission on its activities under this Regulation **and make this report public**. Such reports shall bring to the notice of the Commission flaws in market rules, standards, and procedures which could facilitate insider trading and market manipulation or undermine the internal market. Reports may be combined with the report referred to in Article 11(2) of Regulation (EC) No 713/2009.

The Agency may make recommendations **to the Commission** as to the records of transactions, including orders to trade, which it considers are necessary to effectively and efficiently monitor wholesale energy markets. Before making such recommendations the Agency shall consult with interested parties [], in particular [] with [] national regulatory authorities[], competent financial authorities in the Member States **and the European Securities and Markets Authority (ESMA)**.

Article 7

Data collection

1. **Market participants, or an entity listed in paragraph 3(b) to (e) on their behalf, shall provide the Agency with a record of wholesale energy market transactions, including orders to trade. []The reporting obligations on individual market participants shall be minimised by collecting the required information from a body listed in paragraph 3(ba) to (e) where possible.**

The Commission shall adopt delegated acts in accordance with Article 15 and subject to conditions of Articles 16 and 17. The delegated acts shall:

- (a) specify the contracts for which transactions shall be reported;**
- (b) specify the content of the information to be reported which shall at least include the precise identification of the wholesale energy products bought and sold, the price and quantity agreed, the dates and times of execution, the parties to the transaction and the beneficiaries of the transaction.**
- (c) lay down the timing and form [] in which this information shall be reported;**
- (d) define appropriate thresholds for the reporting of transactions.**

2. The delegated acts referred to in paragraph 1 shall ensure that persons referred to in paragraph 3 a), b), **(ba)** and c) who have reported transactions in accordance with Directive 2004/39/EC¹⁶ or Regulation (EC)---/---- of the European Parliament and of the Council on OTC Derivatives, central counterparties and trade repositories of the European Parliament and of the Council [European Market Infrastructure Regulation – 2010/0250(COD)] are not subject to **double** reporting obligations [].

Without prejudice to the first subparagraph, the delegated acts may establish a non-binding framework¹⁷ to allow organised markets and trade matching or trade reporting systems to provide the Agency with records of wholesale energy transactions.

3. For the purposes of paragraph 1, information shall be provided by:
- (a) the market participant;
 - (b) a third party acting on behalf of the market participant;
 - (ba) a trade reporting system;**
 - (c) an organised market, a trade-matching [] system **or other person professionally arranging transactions;**

¹⁶ OJ L 145, 30.4.2004, p. 1.

¹⁷ **Note: it was explained in the Energy Working Party meeting on 8.2.11 that delegated acts can never adopt non-binding frameworks; the deletion of "non-binding" or "establish a non-binding framework to" would solve this. However, the Commission entered a reservation on such a change, and a compromise is being developed.**

- (d) trade repositories registered or recognised under Regulation (EC)---/---- of the European Parliament and of the Council [European Market Infrastructure Regulation – 2010/0250(COD)]; **or**
 - (e) a competent authority which has received this information in accordance with the provisions of Article 25(3) Directive 2004/39/EC or Article 6(2) of Regulation (EC)---/- --- [European Market Infrastructure Regulation – 2010/0250(COD)].
4. Market participants shall provide the Agency and national regulatory authorities with information related to the capacity of facilities for production, storage, consumption or transmission of electricity or natural gas, **including planned or unplanned unavailability of these facilities**, for the purpose of monitoring trading in wholesale energy markets. **The reporting obligations on individual market participants shall be minimised by collecting the required information or parts thereof from existing sources where possible.**

The Commission shall adopt delegated acts in accordance with Article 15 and subject to conditions of Articles 16 and 17, laying down the timing, form and content of the information to be reported.

Article 8

Sharing of information between the Agency and other bodies

1. The Agency shall establish mechanisms to share information it receives in accordance with Article 6(1) and Article 7 with national regulatory authorities, the competent financial authorities of the Member States, competition authorities of the Member States, **ESMA** and other relevant authorities. The Agency shall only give access to the mechanisms referred to in paragraph 1 to bodies which have set up systems enabling the Agency to meet the requirements of Article 9(1).
2. Trade repositories registered or recognised under Regulation (EC)---/---- [European Market Infrastructure Regulation – 2010/0250(COD)] shall make **[] relevant** information regarding wholesale energy products collected by them available to the Agency.

Competent financial authorities shall transmit to the Agency reports of transactions in wholesale energy products received under article 25(3) of Directive 2004/39/EC to the Agency and Article 6(2) of Regulation (EC)---/--- [European Market Infrastructure Regulation – 2010/0250(COD)].

Article 8a

Data protection

[] This Regulation shall be without prejudice to the obligations of Member States relating to their processing of personal data under Directive 95/46/EC¹⁸ or the obligations of the Agency relating to its processing of personal data under Regulation (EC) No 45/2001¹⁹ when fulfilling its responsibilities²⁰.

Article 9

[] Operational reliability

1. The Agency shall ensure the confidentiality, integrity and protection of the information received under Article **3(4) and Article 7**. The Agency shall take steps to prevent any misuse of the information maintained in its systems.

National regulatory authorities, the competent financial authorities of the Member States, competition authorities of the Member States, ESMA and other relevant authorities shall ensure the confidentiality, integrity and protection of the information which they receive in accordance with the provisions of Article 6(2) or Article 8 and shall take steps to prevent any misuse of such information.

The Agency shall identify sources of operational risk and minimise them through the development of appropriate systems, controls and procedures.

2. **Subject to the provisions as set out in Article 12²¹**, the Agency may decide to make publicly available parts of the information which it holds provided that commercially sensitive information on individual market participants or individual transactions is not released.

¹⁸ **OJ L 281, 23.11.1995, p. 31**

¹⁹ OJ L 8 12.1.2001, p. 1.

²⁰ **Note: based on Art. 71 of "ESMA" Regulation (EU) No 1095/2010 (OJ L 331 of 15.12.2010, p. 84)**

²¹ **Note: cf. in particular Art. 12(3) as regards "in summary or aggregate form".**

Article 10

Implementation of prohibitions against market abuse

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

Each Member State shall ensure that national regulatory authorities **II** have the investigatory powers necessary for the exercise of this function. These powers shall be exercised in a proportionate manner. These powers may be exercised:

- (a) directly;
 - (b) in collaboration with other authorities or market undertakings;
 - (c) by application to the competent judicial authorities.
2. The investigatory powers referred to in paragraph 1 **shall be limited to the aim of the investigation, and shall** include the right to:
 - (a) have access to any relevant document in any form, and to receive a copy of it;
 - (b) demand information from any person, including those who are successively involved in the transmission of orders or conduct of the operations concerned, as well as their principals, and if necessary, to summon and hear any such person;
 - (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 this Regulation or its delegated acts;
 - (f) request a court to freeze or sequester assets;
 - (g) request **a court or any competent authority to impose a** temporary prohibition of professional activity.

3. Any person professionally arranging transactions in wholesale energy products who reasonably suspects that a transaction might breach the provisions of Articles 3 or 4 shall notify the national regulatory authority without further delay.

Persons professionally arranging transactions in wholesale energy products shall establish and maintain effective arrangements and procedures to identify breaches of the provisions of Articles 3 or 4.

Article 11

Union level cooperation

1. The Agency shall **aim to** ensure that national regulatory authorities carry out their tasks under this Regulation in a coordinated way.

National regulatory authorities shall cooperate with the Agency and with each other for the purpose of carrying out their duties in accordance with this Regulation.

2. National regulatory authorities shall inform the Agency in as specific a manner as possible where they have reasonable grounds to suspect that acts contrary to the provisions of this Regulation, are being, or have been, carried out either in that Member State or in another Member State.

Where a national regulatory authority suspects that acts which affect wholesale energy markets or the price of wholesale energy products in that Member State are being carried out in another Member State, it may request the Agency to take **II action** in accordance with paragraphs **3(b) and 4**.

3. In order to ensure a coordinated approach to market abuse on wholesale energy markets:
 - (a) national regulatory authorities shall inform the competent financial authority of their Member State and the Agency where they have reasonable grounds to suspect that acts, which constitute market abuse within the meaning of Directive 2003/6/EC, are being, or have been, carried out on wholesale energy markets and which affect financial instruments subject to the provisions of Article 9 that Directive;

- (b) the Agency shall inform ESMA and the appropriate competent financial authority where it has reasonable grounds to suspect that acts, which constitute market abuse within the meaning of Directive 2003/6/EC, are being, or have been, carried out on wholesale energy markets and which affect financial instruments subject to the provisions of Article 9 of that Directive;
 - (c) the competent financial authority of a Member State shall inform ESMA and the Agency where it has reasonable grounds to suspect that acts, which breach the provisions of Articles 3 and 4, are being, or have been, carried out on wholesale energy markets in another Member State
4. In order to carry out its functions under paragraph 1, where it suspects that there has been a breach of the provisions of this Regulation the Agency **may**:
- (a) request one or more national regulatory authorities to supply any information related to the suspected breach;
 - (b) request one or more national regulatory authorities to commence an investigation of the suspected breach, and take appropriate action to remedy any such breach;
 - (c) where it considers that the possible breach has, or has had, a cross-border impact, convene an investigatory group consisting of representatives of concerned national regulatory authorities to investigate if the provisions of this Regulation have been breached and in which Member State the breach took place; where appropriate, the Agency may also request the participation of representatives of the competent financial authority or other relevant authority of one or more Member States in the investigatory group.
5. National regulatory authorities shall comply with a request of the Agency made in accordance with the provisions of paragraph 4.

National regulatory authorities receiving a request for information in accordance with paragraph 4(a), or receiving a request to commence an investigation of a suspected breach in accordance with paragraph 4(b), shall immediately take the necessary measures in order to comply with that request. If a national regulatory authority is not able to supply the required information immediately, it shall without further delay notify the Agency of the reasons.

National regulatory authorities shall participate in an investigatory group convened in accordance with paragraph 4(c), rendering all necessary assistance. The investigatory group shall be subject to coordination by the Agency.

6. The last sentence of Article 15(1) of Regulation (EC) No 713/2009 shall not apply to the Agency when carrying out its tasks under this Regulation.

Article 12

Professional secrecy

1. Any confidential information received, exchanged or transmitted pursuant to this Regulation shall be subject to the conditions of professional secrecy laid down in paragraphs 2, 3 and 4.
2. The obligation of professional secrecy shall apply to:
 - (a) persons working or who have worked for the Agency;
 - (b) auditors and experts instructed by Agency;
 - (c) persons working or who have worked for the national regulatory authorities **or for other relevant authorities**;
 - (d) auditors and experts instructed by national regulatory authorities **or by other relevant authorities** who receive confidential information in accordance with the provisions of this Regulation.
3. Confidential information received by the persons referred to in paragraph 2 in the course of their duties may not be divulged to any other person or authority, except in summary or aggregate form such that an individual market participant or market place cannot be identified, without prejudice to cases covered by criminal law or the other provisions of this Regulation, or other relevant Union legislation.

4. Without prejudice to cases covered by criminal law, the Agency, national regulatory authorities, competent financial authorities, ESMA, bodies or natural or legal persons which receive confidential information pursuant to this Regulation may use it only in the performance of their duties and for the exercise of their functions., Other authorities, bodies, natural or legal persons may use this information for the purpose for which it was provided to them or in the context of administrative or judicial proceedings specifically related to the exercise of those functions. Where the Agency, national regulatory authorities, competent financial authorities, ESMA, bodies or natural or legal persons communicating information consents thereto, the authority receiving the information may use it for other purposes.

*Article 13*²²

Penalties

The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by²³ ... at the latest and shall notify it without delay of any subsequent amendment affecting them.

²² **Note: in view of the comments of some delegations about a possible (degree of) harmonisation in sanctions, it is recalled that a consultation is underway (until 19.2) on the Commission Communication "*Reinforcing sanctioning regimes in the financial services sector*" (COM (2010)716). Furthermore, see recitals 20 and 23.
Text on the harmonisation of penalties will be added in this Article, which may however undergo changes in light of the outcome of this consultation.**

²³ OJ insert date **[eighteen months]** after adoption of this regulation.

Article 14 ²⁴

International relations []

Without prejudice to the **respective** competences of the **Member States and the** Union institutions, including the European External Action Service, the Agency may **develop** contacts **and enter into administrative arrangements** with supervisory authorities, [] international organisations and the administrations of third countries. **Those arrangements shall not create legal obligations in respect of the Union and its Member States nor shall they prevent Member States and their competent authorities from concluding bilateral or multilateral arrangements with those third countries.**

Article 15 ²⁵

Exercise of the delegation

1. The powers to adopt the delegated acts referred to in Articles 5 and 7 shall be conferred on the Commission for an indeterminate period of time.
2. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
3. The powers to adopt delegated acts are conferred on the Commission subject to the conditions laid down in Articles 16 and 17.

²⁴ **Note: text aligned with Art. 33 of "ESMA" Regulation 1095/2010 (OJ L 331 of 15.12.2010, p. 84).**

²⁵ **Note: the text related to delegated acts in Art. 5 and 7, as well as Art. 15, 16 and 17 will be aligned with the final text of the draft Common Understanding on delegated acts of the 3 institutions (DS 1020/11) still under discussion. For Art. 15(1), a choice must be made between a fixed period or an indeterminate period for the delegation of power.**

Article 16

Revocation of the delegation

1. The delegation of powers referred to in Articles 5 and 7 may be revoked at any time by the European Parliament or by the Council.
2. The institution which has commenced an internal procedure for deciding whether to revoke the delegation of powers shall inform the other institution and the Commission within a reasonable time before the final decision is taken, indicating the delegated powers which could be subject to revocation and possible reasons for a revocation.
3. The decision of revocation shall put an end to the delegation of the powers specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the delegated acts already in force. It shall be published in the Official Journal of the European Union.

Article 17

Objections to delegated acts

1. The European Parliament and the Council may object to the delegated act within a period of two months from the date of notification. At the initiative of the European Parliament or the Council this period shall be extended by **two months**.
2. If, on expiry of that period, neither the European Parliament nor the Council has objected to the delegated act it shall be published in the *Official Journal of the European Union* and shall enter into force at the date stated therein. The delegated act may be published in the *Official Journal of the European Union* and enter into force before the expiry of that period if the European Parliament and the Council have both informed the Commission of their intention not to raise objections.
3. If the European Parliament or the Council objects to a delegated act, it shall not enter into force. The institution which objects shall state the reasons for objecting to the delegated act.

Article 18

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [...]

For the European Parliament

The President

For the Council

The President[...] [...]