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from: General Secretariat of the Council
to: Coreper / Council

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

Introduction

1. On 10 December 2010, the Commission submitted the above proposal, proposing as legislative basis Article 194(2) TFEU.
2. After a first presentation and exchanges of views in December, a weekly examination of the legislative text by the Council instances started in January 2011¹. The opinions of the European Economic and Social Committee and the Committee of the Regions have been requested. The European Parliament is expected to nominate a rapporteur around mid-February.
3. In light of the European Council conclusions of 4 February 2011, which stated "*Council and European Parliament are invited to work towards the early adoption of the Commission's proposal for a Regulation on energy markets integrity and transparency.*", the Presidency intends to progress as swiftly as possible with the examination of the proposal.

¹ Note: the latest draft text is reflected in document 5115/2/11 REV 2.

4. The EU internal energy market for electricity and gas is becoming more and more liberalised and interconnected. With it, the crossborder effects of gas and electricity production, transport, pricing and trading are increasing, as is the use of financial instruments related to the gas and electricity market. Thus, the potential for abuse and manipulation of this market is also growing.

Whereas market abuse and manipulation relating to financial instruments *in general* are covered by the Market Abuse Directive ("MAD", 2003/6/EC) and the Markets in Financial Instruments Directive ("MiFID", 2004/39/EC), the Commission considers that the particular nature of the market for gas and electricity warrants a separate instrument. Therefore, the proposed Regulation aims to set up a framework that will allow the monitoring of energy markets, in order to effectively detect and deter market abuse and manipulation. In this respect, the Agency for the Cooperation of Energy Regulators (ACER) would have a role to play. Many of the proposed provisions are based on similar provisions in EU financial legislation; in this context it should be noted that two proposals of relevance (*i.e.* containing similar provisions) are being examined in parallel by the Council instances responsible for EU financial legislation: a proposal for a Regulation on OTC derivatives, central counterparties and trade repositories (2010/0250 COD), and a proposal for a Regulation on Short Selling and certain aspects of Credit Default Swaps (2010/0251 COD).

Outline of main issues

5. While most delegations support the aims of the proposal, a majority of delegations still maintain scrutiny reservations, and one delegation maintains a reservation. Without prejudice to particular points of interest of individual delegations, the following issues appear to be the main issues to be resolved:

a) Use of delegated acts

The Commission proposal foresees the use of delegated acts for two issues:

- to specify the definitions set out in Article 2(1) to 2(5)¹, so that they can also cater for future market developments and changes in other EU legislation, as set out in Article 5; and
- to establish in detail the data collection mechanism for wholesale energy market transactions and orders to trade, and for underlying structural information, as set out in Article 7.

Some delegations oppose the use of delegated acts - arguing that the proposed scope for the delegated acts covers *essential* elements - while several call for adding as much detail as possible in the draft Regulation (such as clarifications and examples), in order to define as much as possible the scope for the delegated acts. The Commission has underlined that whereas the use of delegated acts is required for the data collection mechanism (Art. 7), their use for specifying the definitions will be to "*update*" them at a later stage - *i.e.* the current definitions are already fully functional. It was furthermore recalled that in similar cases in the field of financial legislation, the practice of using delegated acts is common practice.

b) Application of the provisions in practice

At this stage of discussions, many questions and some concerns remain on the functioning in practice of the proposed provisions: this relates to the cooperation between the ACER and national regulatory authorities in market monitoring and in case of suspected breach of the provisions (Art. 6 and 11), the practical arrangements for the sharing of relevant information between the ACER, national regulatory authorities, competition authorities and others (Art. 8), and the reporting to be done by market participants or other entities (Art. 7).

¹ Note: these definitions define "inside information", "market manipulation", "attempt to manipulate the market", "wholesale energy products" and "wholesale energy market".

For example, among the concerns and requests expressed are the following:

- delegations underlined that the reporting burden placed on market participants or entities acting on their behalf should be minimised: in this context double reporting should be avoided by taking account of reporting obligations in other legislation;
- a request was voiced for having the possibility to allow individual Member States to "replace" a certain authority (to which this Regulation attributes tasks) with another entity that would, in view of the existing national situation, be well-placed to carry out particular tasks;
- concern was expressed about the way in which national regulatory authorities should respond to requests from the ACER (Article 11).

In addition to these main issues, several delegations have asked to include provisions relating to the harmonisation of penalties (Article 13), which no delegation appears to oppose.

All the aforementioned concerns and requests are under examination, and possible solutions and compromises are being developed.

Conclusion

6. Coreper / Council are invited to take note of this progress report.
