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in Georgia

INTERNATIONAL BEST PRACTICES IN POWER TRADING

SERVICES PROVIDED BY POWER EXCHANGES AND THEIR
RELEVANCE TO GEORGIA

USAID GOVERNING FOR GROWTH (G4G) IN GEORGIA

5 May 2016

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USAID GOVERNING FOR GROWTH (G4G) IN GEORGIA

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ACRONYMS

| | |
|-------|--|
| ACER | Agency for the Cooperation of Energy Regulators |
| APX | UK Power Exchange |
| BM | Balancing Market |
| CH | Clearing House |
| DAM | Day Ahead Market |
| EU | European Union |
| FPN | Final Physical Notification |
| G4G | Governing for Growth in Georgia |
| MCP | Market Clearing Price |
| MiFID | Markets in Financial Instruments Directives |
| MW | Megawatt |
| MWh | Megawatt Hour |
| OTC | Over The Counter |
| PX | Power Exchange |
| REMIT | Regulation on Wholesale Energy Market Integrity and Transparency |
| TSO | Transmission System Operator |
| USAID | United States Agency for International Development |

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INTRODUCTION

In the European context, there is no legislation or mandate that requires that a Power Exchange (PX) is available for trading. Nevertheless, many have sprung up in the wake of electricity market reform, and now many multiples of generated electricity are traded through sophisticated and complex products.

Electricity is a commodity like any other in that there are willing buyers and sellers that can agree a value on the commodity and enter into a trade on that basis. However, electricity has unique set of characteristics which has to be accommodated:

While a kilowatt hour of electricity is completely fungible, the cost of production and hence the value varies constantly over time, depending on the mix of generation plant deployed to produce the energy.

It is impossible to directly store electricity in economic quantities, it must be instantly available to consumers at exactly the same quantity as the demand.

The primary actors in the electricity industry are the generators who produce the electricity, the network organizations who transport the electricity and the consumers that use it. It is virtually impossible to manage instantaneous demand; that will continuously vary with an exogenous variables in the environment. It is also impossible for the generators to respond instantaneously to variations in demand – they have no direct link with the consumers. Therefore, it is left to the managers of the transmission networks to continuously manage the balance.

To manage these conditions, there must be a large array of tools available to the Transmission System Operator (TSO). There are many technical tools that are deployed – sensors that detect small variations in frequency, automatic generation control which can continuously adjust output levels etc. However, the more predictable the behavior of the consumer is, the easier it is to manage the balance and therefore the lower the cost. Since the cost is highly volatile and consumers wish to manage their costs, tools have evolved to enable consumers to manage their costs as close as is possible to real time. These tools are the spot markets - also known as Day Ahead Markets (DAM).

The advent of spot markets encouraged the introduction of derivative products, which introduced much greater levels of liquidity into markets and provided strong pricing signals to the spot markets, which in turn increases the efficiency of the sector.

Georgia is a small market, and would benefit from the liquidity brought by derivative products. However, it is not envisaged that such complexity will be introduced at the outset of reform and so the early emphasis will be on the physical markets.

BILATERAL MARKET

BILATERAL CONTRACTS

A Bilateral Market is a structure which is based upon individual contracts between buyer and seller (freely agreed between the parties) in which the seller agrees to instruct the System Operator to inject a given amount of electricity into the grid at a given time, and the buyer agrees to extract the same amount of power at the same time. Theoretically, the contract may be agreed for any period from a single trading interval to several years. They may have daily and/or seasonal profiles, and may have several different prices although typically there will be standardized contracts imposed by the market rules to simplify the trading process. Generally, long term contracts will be used to secure baseload, and as real time approaches, shorter and shorter contracts will be agreed to enable buyers to match between contracts and real time dispatch to be as close as possible. Agreements may be entered into at any time up until the point at which the market is closed to further transactions to enable the TSO to prepare the dispatch schedule. This is generally 24 hours before dispatch, although more sophisticated markets permit intraday trading before gate closure (the time at which no more contractual adjustments are permitted).

Note that contracts are struck between organizations, not between specific generating units. The seller of electricity is at liberty to run whichever plant will allow the discharge of the contract obligations at best cost. However, the TSO does need to know which plant will run at what level to ensure that the network is properly loaded. To facilitate this, the generating plant must at gate closure

provide their physical notifications (often, physical notifications will be supplied ahead of gate closure to simplify the process, but at gate closer, they must be confirmed – Final Physical Notification (FPN)).

Gate Closure should be as close to real time as possible to give buyers and sellers the maximum opportunity to tune their positions. The length of time is generally a function of the IT systems which enable the TSO to react to the notifications, and range from 1 hour in mature markets with sophisticated IT, to 1 day in less developed environments.

THE BALANCING MARKET

In the bilateral market, contract obligations between buyer and seller are settled without reference to the actual generation and offtake, so if A has sold 200 MWh to B at \$50 MWh, then B pays A \$10,000 at the settlement time regardless of how much A has generated and B consumed. If A has several contracts to sell to different buyers and B has several contracts to buy from different sellers, then at the end of the settlement period, A will receive the sum of his contracts and B will pay the sum of his different set of contracts.

The differences between contracted and actual delivery, and contracted and actual consumption are considered to be sales and purchases to the System Operator, who uses the energy to keep the whole system in physical balance.

Once all of the Physical Notifications have been arranged, the System Operator will consider his own demand forecast for the trading interval and decide if the market is

- Long – expected supply exceeds expected demand
- Short – expected supply is less than expected demand

a. Balancing Market Operation

Since there will always be a variance between the contracts and actual consumption, the TSO needs access to resources to maintain the balance. To achieve this, the TSO will invite offers from participants to increase generation or reduce consumption, and bids to increase consumption or reduce demand. Both bids and offers will include the maximum and minimum amount of electricity to be transacted and the price.

Once the Physical Notifications are received and the Pool Operator has arranged access to the appropriate resources, the system enters real time. In real time, the System Operators prime responsibility is to ensure the safety and security of the system while respecting, as far as is possible, the physical notifications he has received. Resources will be dispatched as appropriate, and then after the trading period has finished the meters will be read and the final positions of the participants will be calculated:

Table 1: Balancing the Market (MWh)

| | Buyer 1 | Buyer 2 | Total Sales Contracts | Actual Production | Balancing Trades |
|--------------------------|---------|---------|-----------------------|-------------------|------------------|
| Seller 1 | 100 | 70 | 170 | 150 | -20 |
| Seller 2 | 20 | 120 | 140 | 180 | 40 |
| Total Purchase Contracts | 120 | 190 | 310 | 330 | 20 |
| Actual Consumption | 160 | 170 | 330 | | |
| Balancing Trades | -40 | 20 | -20 | | |

Note that sellers will be paid for their contracted supply at the contract price and buyers will pay for their contracted consumption regardless of the actual consumption in the trading interval. So subject to their flexibility, a seller will offer to be paid to increase generation at a price at or above his marginal cost and will offer to pay to reduce generation at a price below his marginal cost; a buyer will be paid to reduce consumption at a price higher than his contract price and will pay to increase consumption at a price lower than their contract.

b. Balancing Market Pricing

Offers to increase generation or reduce consumption are Balancing Market 'sells', Bids to reduce generation or increase consumption are balancing market 'buys'. Once the offers and bids have been received, the Offers will be ranked in descending price order and the Bids in ascending price order:

Table 2: Balancing Market Pricing

| Example 1 | | | | Example 2 | | | |
|-----------------------|--------|-----------|-----|-----------|---------|-----|----------------------|
| | Seller | Offers \$ | MWh | Buyer | Bids \$ | MWh | |
| Market Short 70 MW | S1 | 130 | 30 | B1 | 25 | 30 | Market Long 55 MW |
| | S2 | 135 | 20 | B2 | 22 | 20 | |
| | S3 | 140 | 10 | B3 | 20 | 10 | |
| | S4 | 145 | 20 | B4 | 15 | 20 | |
| | S5 | 150 | 20 | B5 | 10 | 20 | |
| | S6 | 155 | 2 | B6 | 8 | 2 | |
| | S7 | 165 | 10 | B7 | 8 | 10 | |

Considering the above (highly simplified) example, the Example 1 shows a market that is short by 70 MW. The TSO will accept offers from Sellers S1 through S3 for the full amount of their offers but only 10 MW from S4. Each will be paid the price they bid. The Pool Operator sells the energy through the balancing market to those who take more than their contracts at the average weighted price, so in the example, the price would be

$$\frac{(130 \times 30) + (135 \times 20) + (140 \times 10) + (145 \times 10)}{70} = \$135 \text{ MWh}$$

In the example on the right, the market is long by 55 MW. The Pool Operator will agree to receive payment for all of the electricity from Buyers B1 and B2, and for half of the energy from B3. The average price paid to increase consumption or decrease generation is

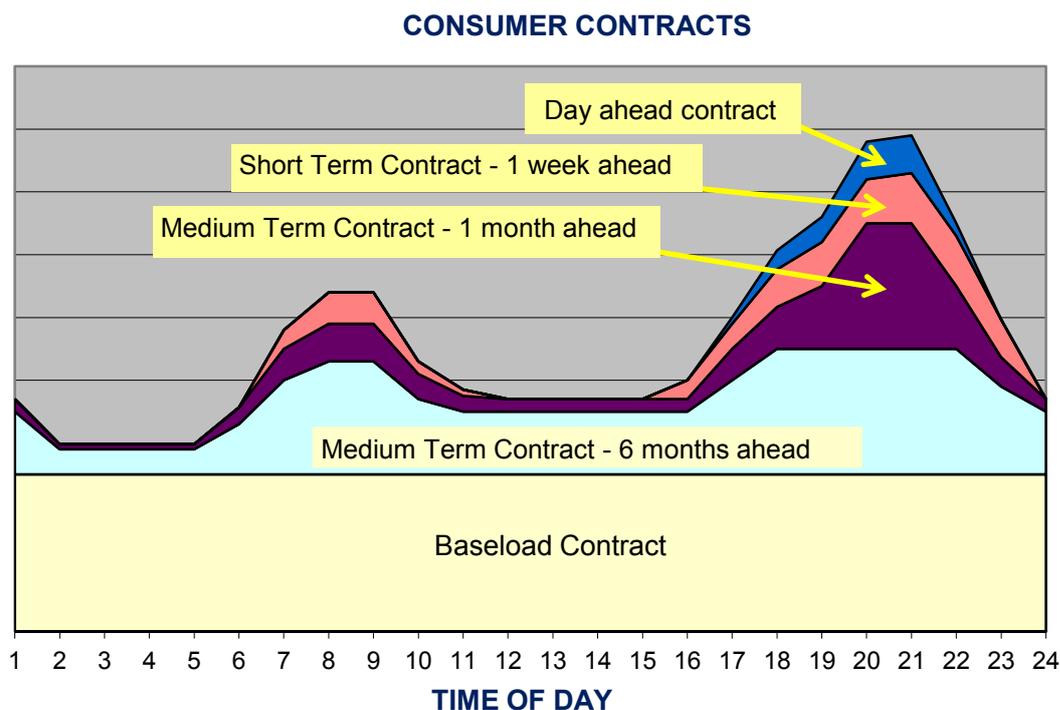
$$\frac{(25 \times 30) + (22 \times 20) + (20 \times 5)}{55} = \$23.45 \text{ MWh}$$

Clearly, the bids and offers that have been accepted and dispatched will only become clear after the end of the trading period when meter readings are collected.

THE DAY AHEAD MARKET

Because of the risks inherent in the balancing market, participants want the ability to lock in prices for as much of their demand as possible before real time to minimize the amount of electricity they need to procure through the Balancing Market (BM). Depending on the individual buying and hedging strategies, long term contracts may be entered into to secure seasonal baseload, medium term contracts to secure conservative daily shapes, and short term contracts to tune the position close to real time as more precise demand forecasts become available. The following figure shows a typical contracted profile for a day:

Figure 1: Contract Profiles



In this example, a contract for baseload has been secured perhaps a year ahead of the day, when prices were favorable. As the demand forecast increases in accuracy, further contracts are added to the shape until the contracts reflect the next day's demand. The final short term contract may be added a day, or even hours in some markets, of real time.

The problems with arranging very short term contracts are:

- Finding a counterparty
- Ensuring the price paid is in line with the market.

To address the liquidity issue, electronic order matching solutions, similar to those in stock markets, have been deployed. The DAM may be run by an independent company – a PX – and remunerated by commission charged on each deal, or may be operated by the Market Operator and paid for through a fee system. The objective of the Spot Market is to match bids and offers of electricity at a price that buyers are prepared to pay and sellers are prepared to accept. The difference between this and bilateral contracts are that the buyers and sellers are unknown to each other and the PX acts as counterparty in all of the deals and guarantees payment. In practice, the Spot Market may match many sellers with a single buyer and vice versa. Transactions in the DAM will be guaranteed through the services of a Clearing House (CH), and therefore the participants will need to lodge collateral with the CH buyers to ensure that it is able to meet necessary payments.

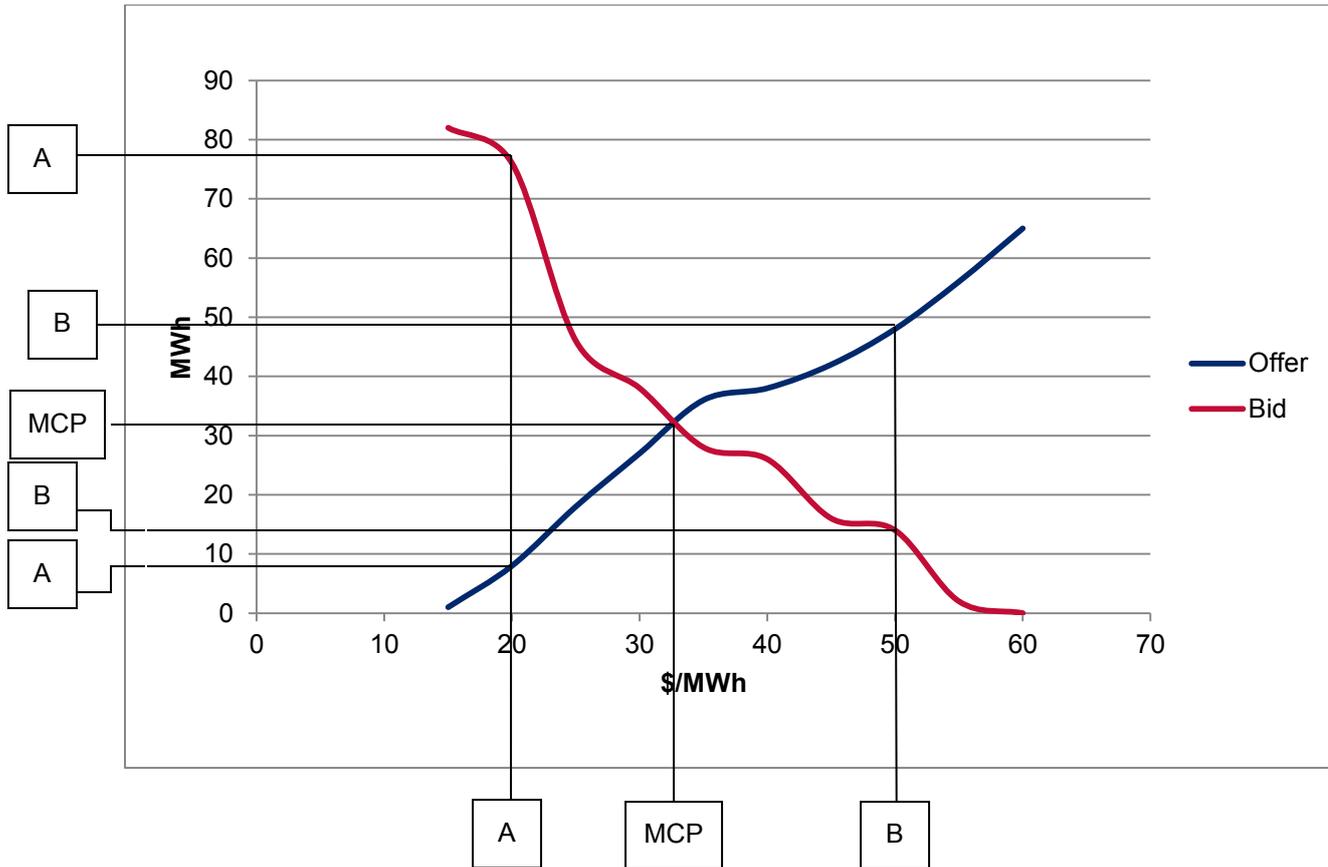
Contracts in the Spot Market are highly standardized, with only the price and quantity being subject to negotiation. There no technical qualifications, it is assumed that if a generator offers a quantity of electricity then it is fully available.

In principle, the market is operated as follows:

- At some moment, the PX opens a trading interval for auction. This may be a day ahead, a week ahead or any time between.
- For the trading interval, the PX invites offers from participants to sell electricity quoting volume and price, and bids from participants to buy electricity, again quoting volume and price.
- Bids may be submitted and withdrawn at any time up to gate closure.
- At gate closure, the auction is closed and all bids and offers on the table at that time are binding.

Once all bids and offers are in, they will be matched, and a market clearing price calculated. The clearing price is the value at which the supply and demand curves intersect:

Figure 2: Market Clearing



In the figure above, the volume of electricity on **offer** to sell increases as the price increases, and the amount of electricity that participants are bid to buy decreases as price increases.

- At point A (\$20/MWh) buyers would buy 78 MWh if it were available, but sellers are only prepared to sell 9 MWh at that price
- At point B (\$50/MWh) sellers would be prepared to sell 49 MWh but buyers are only prepared to buy 14 MWh
- At point **Market Clearing Price** (MCP), the, buyers are prepared to buy 32 MWh at \$33/MWh and sellers are prepared to sell 32 MW at \$33 \$/MWh. The market is said to have cleared.

Once the market clearing price has been established, all sellers with prices up to and including the MCP will be dispatched and will be paid the MCP, and all those with bids over the MCP will receive the requested electricity and will pay the MCP.

In reality, the transactions are much more complex than the simplified illustration above. There will be many products that may be traded in the DAM, for example from the UK Power Exchange (UK APX):

SPOT LIMIT ORDERS

Members can trade hourly instruments, which are traded for each hour of the delivery day. Individual Hourly instruments are traded in pounds/MWh with a precision of two decimals. This is referred to as Spot Limit Orders.

SPOT BLOCK ORDERS

In addition to single hours, Members can trade a freely definable set of consecutive hourly instruments, being subject to a fill-or-kill principle. This is referred to as Spot Block Orders. Spot Block Orders apply to a consecutive number of single hours, where execution is subject to the fulfillment of a Maximum Payment Condition (buy) or a Minimum Income Condition (sell). Profiled Block Orders, where the volume varies over the different hours, are also possible.

LINKED BLOCK ORDERS

Defined as the execution of (a set of) profile block(s) is subject to the execution of another block. (All other standard execution rules apply). This order type allows the member to consider technical and economic constraints such as start-up costs, fuel costs and consumption trends.

EXCLUSIVE BLOCK ORDERS

Is defined as a set of profile blocks where at most once block will be accepted. (Other standard execution rules apply) Order type allows members to trade a portfolio under different production patterns.

The order matching algorithm in the software must be complex and robust to ensure that orders are matched fairly and consistently. There is a further complication in that the System Operator must ensure that there are no transmission constraints that prevent the dispatch of the matched power. If there are, the market will be 'split' into 2 separate markets on each side of the constraint, and the matching process repeated. This will give rise to two different MCP values, which will be a valuable indicator of the cost to the system of the transmission bottleneck.

BEST PRACTICE

European Union (EU) policy is to aim for a single, EU wide internal market for electricity. The critical ingredient for that to happen is for the markets to be 'price coupled'. This means that the method and algorithms for order matching and price discovery must be identical to allow a comparison and re-matching over multiple domains. If, in the long term, Georgia wishes to interconnect with the EU via Turkey, then whichever software is chosen, it must adhere to the constraints above.

Note that within EU countries, there are multiple exchanges providing DAM services to the market, and the traders may choose to trade through chosen exchange. Each will offer the same level of security, clearing and interface with the TSOs (in most cases devolved to the CH). All legislation focuses on the requirement for fair and transparent processes and the need to monitor and take action against market abuse. The power exchanges themselves are the tools used to implement the rules.

APPENDIX 1

TEMPLATES FOR REGULATIONS IN GEORGIA FOR ESTABLISHING A PX

An Electricity PX is understood to be a mechanism through which energy related products may be bought and sold. While there is no particular legislation that insists that the Exchange should be electronic, it is unlikely that an exchange that operated manually would be sufficiently responsive to attract trade.

There are two basic classes of trading for electricity, physical and financial:

- Physical trades exist where the buyer and seller have a delivery obligation for an agreed amount of electricity for a specific duration. Unlike other commodities, electricity trade does not require a specific point of delivery, since it is a particularly fungible commodity. Effectively, the obligation resulting from a trade is for a seller to cause an injection of electricity of the agreed MW for the agreed period, and the buyer has agreed to simultaneously withdraw that energy.
- Financial trades (frequently referred to as derivatives) involve an arrangement which, when mature, are settled in cash. Examples include Contracts for Difference and futures trades.

The electricity trading contracts (generally characterized with physical delivery obligations) may be:

- Bilateral forward contracts struck between two parties without any input from a power exchange (frequently referred¹ to as 'Over the Counter' or OTC contracts);
- Bilateral agreements struck anonymously but cleared through clearing house
- Trading contracts may result from order matching by the exchange. The order matched contracts are the vehicle generally referred to as Day Ahead Contracts, and the enabling spot market is referred to as the Day Ahead Market or the DAM. This does not infer that all deals are for delivery for the next day, it refers to the fact that the trading is typically closed 24 hours before real time to allow the TSO to establish the dispatch requirements. In some relatively developed markets, intraday trading (also known as continuous trading) occurs to enable further position tuning by the Market Participants.

In Georgia, there is no intention to implement a derivatives market in the short term. However, a day ahead market is central to the implementation of market reform, by creating an environment where electricity trading can take place efficiently and anonymously and which will provide for the essential liquidity and transparency.

In Europe, financial markets are generally regulated by the Markets in Financial Instruments Directive (MiFID), directive 2004/39/EC updated by MiFID II, directive 2014/65/EU. However, this directive excludes contracts for physical delivery, therefore only energy derivatives trading is included in the scope. To deal with energy spot markets, Directive 1227/2011/EU entitled 'Regulation on Wholesale Energy Market Integrity and Transparency' (REMIT) has been introduced. PX in Europe must therefore be compliant with REMIT legislation.

European legislation concerning stock exchanges vary considerably. Some, such as Germany and Austria have specific Stock Exchange Acts, which govern the activities of the exchanges – although these date back almost a century and were concerned with the trading 'pits' then extant. Most, however have a mixture of financial and energy primary legislation which govern the exchanges in terms of what should and should not happen, instead of how it should be implemented. Secondary legislation issued by the regulator in the form of detailed market rules places boundaries around the activities of the market.

¹ Note that these definition are not absolute. Some people refer to bilateral contracts as OTC, some say 'forward contracts' instead of bilateral etc. Context is critical.

HUNGARY PX STRUCTURE²

HUNGARIAN POWER EXCHANGE (HUPX)

1. Introduction – strategic regional role of Hungarian electricity transmission grids

Hungary has a strategically important role due to its central geographic location, having six cross-border interconnectors with neighbouring countries. It links Central West (Austria, Slovakia), Central East (Ukraine, Romania) and South East regions (Serbia, Croatia). It appears that international power traders consider Hungary as a hub market for their commercial activities. In light of this it is fair to say that there was a strong need for the development of cross-border capacities and the introduction of an exchange market of electricity.

The Hungarian Power Exchange (“HUPX”) opened on 20 July 2010. Its primary objectives are

- (i) ensuring a transparent and reliable reference price information mechanism (e.g. Hungarian Energy Office uses auction price as benchmark for the calculation of universal service tariff);
- (ii) stimulating electricity trading by increasing market efficiency;
- (iii) development of Hungarian electricity market by supporting its integration into a Central-European, regional electricity market;
- (iv) facilitating the cooperation of market exchanges and market coupling projects.

2. The corporate structure of HUPX

HUPX Hungarian Power Exchange Company (“HUPX Zrt.”), the licensed operator of HUPX power exchange, is a company limited by shares.

The sole owner of HUPX Zrt. is *MAVIR Hungarian Electricity Transmission Grid Operator Company* (“MAVIR” or the “TSO”). MAVIR, a company limited by shares, belongs to the state-owned Magyar Villamos Művek (“MVM”) company group as TSO. MAVIR operates in close cooperation with HUPX in terms of physical deliveries and real-time balance management.

3. Foundation of HUPX Zrt.

Energy Office, by its resolution 740/2008, directed TSO – on the basis of Section 177 of Act LXXXVI of 2007 on electricity (“Electricity Act”) – to apply for an electricity exchange operator licence. MAVIR therefore founded HUPX Zrt. as its licence holder affiliate.

Power exchange market operation is subject to a licence issued by the Energy Office. In principle, any company with legal personality registered in Hungary or the registered branch of any other company registered in the European Union or the European Economic Area, are eligible to obtain a licence.

Besides HUPX Zrt., another licensed operator of power exchange services is the Hungarian branch of POWER EXCHANGE CENTRAL EUROPE (Prague).

4. Transfer of shares held by the TSO

After the first business year of HUPX Zrt. closed with positive after-tax results, the Energy Office will monitor the return on investments achieved.

Once the investments have been recovered, the shares of MAVIR in HUPX Zrt. will have to be transferred (sold). Acquisition of shares in HUPX Zrt. is subject to certain limitations set by the Electricity Act, namely no shareholder may acquire more than 25% of the registered capital or votes cast in HUPX Zrt., while – after the temporary period - shares held by the TSO may not exceed 30%

² <http://www.fdlaw.hu/publications/energy/Energy%20Law%20Update%20October%202010.pdf>

of the registered capital or the votes cast. Shares held by affiliated companies must be taken into account in calculating the referred thresholds.

5. Membership and trading rights

Trading and membership rights are subject to Section 53 of Electricity Act. Generators, traders, universal service providers and users of electricity have unlimited right to trade, while TSOs and DSOs (distribution system operators) rights are restricted.¹

The number of trading members is unlimited. HUPX Zrt. must grant membership, if the conditions set by HUPX's Market Rules are met. Certain documents must be attached to the application form, including – *inter alia* – certain filled-out forms, commercial registry extract, copy of licence issued by Energy Office, the last annual report, other technical forms. A further condition for active trading is a clearing services agreement concluded with a clearing service provider.

6. HUPX trading rules and regulation

Trading on HUPX is governed by a specific documentation composed of the Market Rules, the Code of Conduct and the Operational Rules.

Market Rules define the organization of the exchange, the legal and regulatory framework and the admission procedure.

Operational Rules define the contracts' details and trading parameters, the price list and the technical access rules.

Code of Conduct defines the behaviour rules to be followed by HUPX members. The Code of Conduct prohibits any form of manipulation of the trading at HUPX and the prices as well as the unfair use of the market and its facilities are forbidden. The following, in particular, shall be prohibited:

- entering of orders without trading interest (fictitious orders).
- the conclusion of transactions suitable for the manipulation of the market prices (misleading trading transactions)
- collusions or the collusive co-operation of members among each other or with third parties.
- influencing the settlement of prices or indices so that these do not reflect the fair market value.

The organizational bodies of the HUPX are the Organized Market Committee ("OMC") and the Market Surveillance Office ("MSO").

OMC is a consultative member committee of HUPX market. Its composition reflects the diversity of HUPX members. OMC is entitled to propose changes to the rules and regulations of HUPX and may opine the introduction of new trading systems, market segments and products.

MSO is an independent body within HUPX, responsible for the permanent monitoring of trading on the exchange and the settlement of exchange transactions. It also carries out relevant investigations and may notify the competent person in case of suspected violations of market rules and other grievances affecting proper trading and settlement.

¹ TSO and DSOs are entitled only to purchase electricity for system maintenance and system loss balancing.

7. Membership and service fees of HUPX

A new member of HUPX must pay an entrance fee in the amount of EUR 15,000 due upon the receipt of the notification on its admittance as a HUPX member. The annual membership fee of HUPX is EUR 12,000 which must be paid in quarterly instalments. An additional amount of EUR 6,600 must be paid for the use of EPEX Trading System (providing two user accounts and their respective portfolios). The transaction fee is 0.05 EUR/MWh.

8. Trading

Power contracts are traded on HUPX in a day-ahead auction (*másnapai szállítási villamosenergia aukció*), using the EPEX Trading System. Block products will be introduced later once the liquidity of the market is established on day-ahead market. Trading days are year around.

Orders are registered and accumulated in the order book, which opens 45 days preceding delivery day. Once the order book is closed, orders may not be modified or cancelled and are irrevocable. The auction takes place after the order book has closed. The price corresponds to the matching of members' aggregate supply and demand curves of orders for each contract.

9. Clearing services

European Commodity Clearing AG ("ECC"), based in Leipzig, provides clearing services for the power spot market transactions concluded on HUPX. ECC ensures financial security for all transactions by acting as a central counterparty between buyer and seller and by setting up guarantee mechanisms like security requirements. Clearing rules are described in ECC Clearing Conditions. In the context of the clearing co-operation, the Budapest based KELER Rt. (Central Clearing and Custodian Ltd.) has been approved as a new clearing member of ECC, and therefore, is be entitled to provide clearing services for trading in the HUPX.²

10. Delivery mechanism

Transactions are nominated by ECC on behalf of HUPX to MAVIR, which manages and guarantees delivery through a separated balance circle system (*külön mérlegkör*). Real-time balancing mechanism (*valós idejű kiegyensúlyozási mechanizmus*) managed by MAVIR maintains grid balance in the event of delivery failures.

11. Obligation to sell electricity through HUPX

The Electricity Act introduced a significant market power ("SMP") regime into the wholesale, retail and ancillary services (generation, balancing) markets of electricity. The Energy Office conducts an assessment of significant market power (dominant position) on the relevant markets. The Energy Office may impose certain obligations on market players with SMP, including transparent capacity auctions. For example, Energy Office designated MVM Trade Zrt. as a wholesale trader SMP in 2008 [Resolution no. 739/2008].

According to Section 111 (1) of Electricity Act, the obligation of selling on the power exchange market may be imposed on market players having SMP on wholesale market of electricity. Until now, no such obligation has been imposed by the Energy Office.

² In addition to HUPX, five exchanges are using ECC as their clearing partner. ECC also provides clearing as well as physical and financial settlement of transactions concluded on APX-ENDEX (the Netherlands, Belgium, United Kingdom), the CEGH Gas Exchange (Vienna), EEX (Leipzig), EPEX Spot (Leipzig) and Powernext (Paris). Clearing and settlement of transactions registered for OTC clearing are also carried out by ECC on these exchanges. HUPX trading participants, therefore, benefit from the standardised settlement processes of ECC.

Another pro-competitive instrument is the opened capacity-auction (*nyilvános termelői kapacitás-cukció*) providing equal and free access to generation capacities in Hungary. All generators above 20 MW and traders with available free capacity(!) are subject to an obligation to sell their free capacities scheduled for the next year, i.e. capacities otherwise not sold until 25 September of the current year, under an open and transparent procedure. This obligation may be carried out by selling capacities through power exchange markets.

12. Volume of trading in the HUPX

HUPX's volume of trade in the first month, i.e. from 20 July 2010 and 20 August 2010, generally exceeded the previously expected 1,500 MWh per day. The aggregate amount was over 47,000 MWh. In September 2010, the volume of trade increased by 40% in comparison to the first month: the daily traded amounts were around 2,300 MWh, while the aggregate amount was about 70,000 MWh.

Disclaimer: This memorandum was prepared for information purposes only, it contains general information and does not qualify as legal advice and should not be relied upon as such. Please, always request specific legal advice in individual cases.

I

(Legislative acts)

REGULATIONS

REGULATION (EU) No 1227/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 25 October 2011

on wholesale 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 Functioning of European Union, and in particular Article 194(2) thereof,

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

After consulting the Committee of the Regions of the European Union,

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

(1) It is important to ensure that consumers and other market participants can have confidence in the integrity of electricity and gas markets, that prices set on wholesale energy markets reflect a fair and competitive interplay between supply and demand, and that no profits can be drawn from market abuse.

(2) The goal of increased integrity and transparency of wholesale energy markets should be to foster open and fair competition in wholesale energy markets for the benefit of final consumers of energy.

⁽¹⁾ OJ C 132, 3.5.2011, p. 108.

⁽²⁾ Position of the European Parliament of 14 September 2011 (not yet published in the Official Journal) and Decision of the Council of 10 October 2011.

(3) 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 might not properly address market integrity issues on the electricity and gas markets and recommended the consideration of an appropriate legislative framework tailored to the energy sector which prevents market abuse and takes sector-specific conditions into account which are not covered by other directives and regulations.

(4) Wholesale energy markets are increasingly interlinked across the Union. Market abuse in one Member State often affects not only wholesale prices for electricity and natural gas across national borders, but also retail prices to consumers and micro-enterprises. Therefore the concern to ensure the integrity of markets cannot be a matter only for individual Member States. Strong cross-border market monitoring is essential for the completion of a fully functioning, interconnected and integrated internal energy market.

(5) Wholesale energy markets encompass both commodity markets and derivative markets, which are of vital importance to the energy and financial markets, and price formation in both sectors is interlinked. They include, inter alia, regulated markets, multilateral trading facilities and over-the-counter (OTC) transactions and bilateral contracts, direct or through brokers.

(6) 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.

³ http://www.acer.europa.eu/remit/pages/acer_guidance.aspx

- (7) Behaviour which undermines the integrity of the energy market is currently not clearly prohibited on some of the most important energy markets. In order to protect final consumers and guarantee affordable energy prices for European citizens, it is essential to prohibit such behaviour.
- (8) Derivative trading, which may be either physically or financially settled, and commodity trading are used together on wholesale energy markets. It is therefore important that the definitions of insider trading and market manipulation, which constitute market abuse, be compatible between derivatives and commodity markets. This Regulation should in principle apply to all transactions concluded but at the same time should take into account the specific characteristics of the wholesale energy markets.
- (9) Retail contracts which cover the supply of electricity or natural gas to final customers are not susceptible to market manipulation in the same way as wholesale contracts which are easily bought and sold. None the less, the consumption decisions of the largest energy users can also affect prices on wholesale energy markets, with effects across national borders. Therefore it is appropriate to consider the supply contracts of such large users in the context of ensuring the integrity of wholesale energy markets.
- (10) Taking account of the results of the examination set out in the Commission Communication of 21 December 2010 entitled 'Towards an enhanced market oversight framework for the EU Emissions Trading Scheme', the Commission should consider bringing forward a legislative proposal to tackle the identified shortcomings in the transparency, integrity and supervision of the European carbon market in an appropriate time-frame.
- (11) 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 electricity⁽¹⁾ 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 networks⁽²⁾ 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 fluctuations in the wholesale price.
- (12) The use or attempted use of inside information to trade either on one's own account or on the account of a third party should be clearly prohibited. 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 regarding the market participant's own plans and strategies for trading should not be considered as inside information. Information which is required to be made public in accordance with Regulation (EC) No 714/2009 or (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations, may serve, if it is price-sensitive information, as the basis of market participants' decisions to enter into transactions in wholesale energy products and therefore could constitute inside information until it has been made public.
- (13) Manipulation on wholesale energy markets involves actions undertaken by persons that artificially cause prices to be at a level not justified by market forces of supply and demand, including actual availability of production, storage or transportation capacity, and demand. Forms of market manipulation include placing and withdrawal of false orders; spreading of false or misleading information or rumours through the media, including the internet, or by any other means; 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; and deliberately making it appear that the availability of electricity generation capacity or natural gas availability, or the availability of transmission capacity is other than the capacity which is actually technically available where such information affects or is likely to affect the price of wholesale energy products. Manipulation and its effects may occur across borders, between electricity and gas markets and across financial and commodity markets, including the emission allowances markets.
- (14) 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, or could have, the effect of fixing, directly or indirectly, prices or creating other unfair trading conditions; and the offering, buying or selling of wholesale energy products with the purpose, intention or effect of misleading market participants acting on the basis of reference prices. However, accepted market practices such as those applying in the financial services area, which are currently defined by Article 1(5) 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)⁽³⁾ and which may be adapted if that Directive is amended, could be a legitimate way for market participants to secure a favourable price for a wholesale energy product.

⁽¹⁾ OJ L 211, 14.8.2009, p. 15.

⁽²⁾ OJ L 211, 14.8.2009, p. 36.

⁽³⁾ OJ L 96, 12.4.2003, p. 16.

(30) It is important that the obligation of professional secrecy applies to those who receive confidential information in accordance with this Regulation. The Agency, national regulatory authorities, competent financial authorities of the Member States and national competition authorities should ensure the confidentiality, integrity and protection of the information which they receive.

(31) It is important that the penalties for breaches of this Regulation are proportionate, effective and dissuasive, and reflect the gravity of the infringements, the damage caused to consumers and the potential gains from trading on the basis of inside information and market manipulation. The application of these penalties should be carried out in accordance with national law. Recognising the interactions between trading in electricity and natural gas derivative products and trading in actual electricity and natural 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. Taking account of the consultation on the Commission Communication of 12 December 2010 entitled 'Reinforcing sanctioning regimes in the financial services sector', the Commission should consider presenting proposals to harmonise minimum standards for the penalties systems of Member States in an appropriate time-frame. This Regulation affects neither national rules on the standard of proof nor obligations of national regulatory authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Union law.

(32) Since the objective of this Regulation, namely the provision of a harmonised framework to ensure wholesale energy market transparency and integrity, cannot be sufficiently achieved by the Member States and can therefore 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

1. This Regulation establishes rules prohibiting abusive practices affecting wholesale energy markets which are coherent with the rules applicable in financial markets and with the proper functioning of those wholesale energy markets whilst taking into account their specific characteristics. It provides for the monitoring of wholesale energy markets by the Agency for the Cooperation of Energy Regulators (the Agency) in close collaboration with national regulatory authorities and taking into account the interactions between the Emissions Trading Scheme and wholesale energy markets.

2. This Regulation applies to trading in wholesale energy products. Articles 3 and 5 of this Regulation shall not apply to wholesale energy products which are financial instruments and to which Article 9 of Directive 2003/6/EC applies. This Regulation is without prejudice to Directives 2003/6/EC and 2004/39/EC as well as to the application of European competition law to the practices covered by this Regulation.

3. The Agency, national regulatory authorities, ESMA, competent financial authorities of the Member States and, where appropriate, national competition 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 Article 9 of Directive 2003/6/EC applies and also to one or more wholesale energy products to which Articles 3, 4 and 5 of this Regulation apply.

4. The Agency's Administrative Board shall ensure that the Agency carries out the tasks assigned to it under this Regulation in accordance with this Regulation and Regulation (EC) No 713/2009.

5. The Director of the Agency shall consult the Agency's Board of Regulators on all aspects of implementation of this Regulation and give due consideration to its advice and opinions.

Article 2

Definitions

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

(1) 'inside information' means information of a precise nature which has not been made public, which relates, directly or indirectly, to one or more wholesale energy products and which, if it were made public, would be likely to significantly affect the prices of those wholesale energy products.

For the purposes of this definition, 'information' means:

(a) information which is required to be made public in accordance with Regulations (EC) No 714/2009 and (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations;

(b) information relating to the capacity and use of facilities for production, storage, consumption or transmission of electricity or natural gas or related to the capacity and use of LNG facilities, including planned or unplanned unavailability of these facilities;

- (b) derivatives relating to electricity or natural gas produced, traded or delivered in the Union;
- (c) contracts relating to the transportation of electricity or natural gas in the Union;
- (d) derivatives relating to the transportation of electricity or natural gas in the Union.

Contracts for the supply and distribution of electricity or natural gas for the use of final customers are not wholesale energy products. However, contracts for the supply and distribution of electricity or natural gas to final customers with a consumption capacity greater than the threshold set out in the second paragraph of point (5) shall be treated as wholesale energy products;

- (5) 'consumption capacity' means the consumption of a final customer of either electricity or natural gas at full use of that customer's production capacity. It comprises all consumption by that customer as a single economic entity, in so far as consumption takes place on markets with interrelated wholesale prices.

For the purposes of this definition, consumption at individual plants under the control of a single economic entity that have a consumption capacity of less than 600 GWh per year shall not be taken into account in so far as those plants do not exert a joint influence on wholesale energy market prices due to their being located in different relevant geographical markets;

- (6) 'wholesale energy market' means any market within the Union on which wholesale energy products are traded;
- (7) 'market participant' means any person, including transmission system operators, who enters into transactions, including the placing of orders to trade, in one or more wholesale energy markets;
- (8) 'person' means any natural or legal person;
- (9) 'competent financial authority' means a competent authority designated in accordance with the procedure laid down in Article 11 of Directive 2003/6/EC;
- (10) 'national regulatory authority' means a national regulatory authority designated in accordance with Article 35(1) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity⁽¹⁾ or Article 39(1) of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas⁽²⁾;
- (11) 'transmission system operator' has the meaning set out in point 4 of Article 2 of Directive 2009/72/EC and in point 4 of Article 2 of Directive 2009/73/EC;

⁽¹⁾ OJ L 211, 14.8.2009, p. 55.

⁽²⁾ OJ L 211, 14.8.2009, p. 94.

- (12) 'parent undertaking' means a parent undertaking within the meaning of Articles 1 and 2 of the Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts⁽¹⁾;

- (13) 'related undertaking' means either a subsidiary or other undertaking in which a participation is held, or an undertaking linked with another undertaking by a relationship within the meaning of Article 12(1) of Directive 83/349/EEC;

- (14) 'distribution of natural gas' has the meaning set out in point (5) of Article 2 of Directive 2009/73/EC;

- (15) 'distribution of electricity' has the meaning set out in point (5) of Article 2 of Directive 2009/72/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;

- (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 with access to the information through the exercise of their employment, profession or duties;

- (d) persons who have acquired such information through criminal activity;

- (e) persons who know, or ought to know, that it is inside information.

⁽¹⁾ OJ L 193, 18.7.1983, p. 1.

6. Paragraphs 1 and 2 are without prejudice to the obligations of market participants under Directives 2009/72/EC and 2009/73/EC, and Regulations (EC) No 714/2009 and (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.

7. Paragraphs 1 and 2 are without prejudice to the right of market participants to delay the disclosure of sensitive information relating to the protection of critical infrastructure as provided for in point (d) of Article 2 of Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection⁽¹⁾, if it is classified in their country.

Article 5

Prohibition of market manipulation

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

Article 6

Technical updating of definitions of inside information and market manipulation

1. The Commission shall be empowered to adopt delegated acts in accordance with Article 20 in order to:

(a) align the definitions set out in points (1), (2), (3) and (5) of Article 2 for the purpose of ensuring coherence with other relevant Union legislation in the fields of financial services and energy; and

(b) update those definitions for the sole purpose of taking into account future developments on wholesale energy markets.

2. The delegated acts referred to in paragraph 1 shall take into account at least:

(a) the specific functioning of wholesale energy markets, including the specificities of electricity and gas markets, and the interaction between commodity markets and derivative markets;

(b) the potential for manipulation across borders, between electricity and gas markets and across commodity markets and derivative markets;

(c) the potential impact on wholesale energy market prices of actual or planned production, consumption, use of transmission, or use of storage capacity; and

⁽¹⁾ OJ L 345, 23.12.2008, p. 75.

(d) network codes and framework guidelines adopted in accordance with Regulations (EC) No 714/2009 and (EC) No 715/2009.

Article 7

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 8.

2. National regulatory authorities shall cooperate at regional level and with the Agency in carrying out the monitoring of wholesale energy markets referred to in 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 of this Article, subject to Article 10(2). National regulatory authorities may also monitor trading activity in wholesale energy products at national level.

Member States may provide for their national competition authority or a market monitoring body established within that authority to carry out market monitoring with the national regulatory authority. In carrying out such market monitoring, the national competition authority or the market monitoring body shall have the same rights and obligations as the national regulatory authority pursuant to the first subparagraph of this paragraph, the second sentence of the second subparagraph of paragraph 3 of this Article, the second sentence of Article 4(2), the first sentence of Article 8(5), and Article 16.

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 publicly available. In such reports the Agency shall 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 enhanced market transparency. 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, national competition authorities and ESMA.

All recommendations should be made available to the European Parliament, the Council and the Commission and to the public.

Article 8

Data collection

1. Market participants, or a person or authority listed in points (b) to (f) of paragraph 4 on their behalf, shall provide the Agency with a record of wholesale energy market transactions, including orders to trade. The information reported shall 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 and any other relevant information. While overall responsibility lies with market participants, once the required information is received from a person or authority listed in points (b) to (f) of paragraph 4, the reporting obligation on the market participant in question shall be considered to be fulfilled.

2. The Commission shall, by means of implementing acts:

- (a) draw up a list of the contracts and derivatives, including orders to trade, which are to be reported in accordance with paragraph 1 and appropriate *de minimis* thresholds for the reporting of transactions where appropriate;
- (b) adopt uniform rules on the reporting of information which is to be provided in accordance with paragraph 1;
- (c) lay down the timing and form in which that information is to be reported.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 21(2). They shall take account of existing reporting systems.

3. Persons referred to in points (a) to (d) of paragraph 4 who have reported transactions in accordance with Directive 2004/39/EC or applicable Union legislation on derivative transactions, central counterparties and trade repositories shall not be subject to double reporting obligations relating to those transactions.

Without prejudice to the first subparagraph of this paragraph, the implementing acts referred to in paragraph 2 may allow organised markets and trade matching or trade reporting systems to provide the Agency with records of wholesale energy transactions.

4. 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;
- (c) a trade reporting system;

(d) an organised market, a trade-matching system or other person professionally arranging transactions;

(e) a trade repository registered or recognised under applicable Union legislation on derivative transactions, central counterparties and trade repositories; or

(f) a competent authority which has received that information in accordance with Article 25(3) of Directive 2004/39/EC or ESMA when it has received that information in accordance with applicable Union legislation on derivative transactions, central counterparties and trade repositories.

5. Market participants shall provide the Agency and national regulatory authorities with information related to the capacity and use of facilities for production, storage, consumption or transmission of electricity or natural gas or related to the capacity and use of LNG facilities, including planned or unplanned unavailability of these facilities, for the purpose of monitoring trading in wholesale energy markets. The reporting obligations on market participants shall be minimised by collecting the required information or parts thereof from existing sources where possible.

6. The Commission shall, by means of implementing acts:

- (a) adopt uniform rules on the reporting of information to be provided in accordance with paragraph 5 and on appropriate thresholds for such reporting where appropriate;

(b) lay down the timing and form in which that information is to be reported.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 21(2). They shall take account of existing reporting obligations under Regulations (EC) No 714/2009 and (EC) No 715/2009.

Article 9

Registration of market participants

1. Market participants entering into transactions which are required to be reported to the Agency in accordance with Article 8(1) shall register with the national regulatory authority in the Member State in which they are established or resident or, if they are not established or resident in the Union, in a Member State in which they are active.

A market participant shall register only with one national regulatory authority. Member States shall not require a market participant already registered in another Member State to register again.

The registration of market participants is without prejudice to obligations to comply with applicable trading and balancing rules.

2. Not later than 3 months after the date on which the Commission adopts the implementing acts set out in Article 8(2), national regulatory authorities shall establish national registers of market participants which they shall keep up to date. The register shall give each market participant a unique identifier and shall contain sufficient information to identify the market participant, including relevant details relating to its value added tax number, its place of establishment, the persons responsible for its operational and trading decisions, and the ultimate controller or beneficiary of the market participant's trading activities.

3. National regulatory authorities shall transmit the information in their national registers to the Agency in a format determined by the Agency. The Agency shall, in cooperation with those authorities, determine that format and shall publish it by 29 June 2012. Based on the information provided by national regulatory authorities, the Agency shall establish a European register of market participants. National regulatory authorities and other relevant authorities shall have access to the European register. Subject to Article 17, the Agency may decide to make the European register, or extracts thereof, publicly available provided that commercially sensitive information on individual market participants is not disclosed.

4. Market participants referred to in paragraph 1 of this Article shall submit the registration form to the national regulatory authority prior to entering into a transaction which is required to be reported to the Agency in accordance with Article 8(1).

5. Market participants referred to in paragraph 1 shall communicate promptly to the national regulatory authority any change which has taken place as regards the information provided in the registration form.

Article 10

Sharing of information between the Agency and other authorities

1. The Agency shall establish mechanisms to share information it receives in accordance with Article 7(1) and Article 8 with national regulatory authorities, competent financial authorities of the Member States, national competition authorities, ESMA and other relevant authorities. Before establishing such mechanisms, the Agency shall consult with those authorities.

2. The Agency shall give access to the mechanisms referred to in paragraph 1 only to authorities which have set up systems enabling the Agency to meet the requirements of Article 12(1).

3. Trade repositories registered or recognised under applicable Union legislation on derivative transactions, central counterparties and trade repositories shall make relevant

information regarding wholesale energy products and derivatives of emissions allowances collected by them available to the Agency.

ESMA shall transmit to the Agency reports of transactions in wholesale energy products received pursuant to Article 25(3) of Directive 2004/39/EC and under applicable Union legislation on derivative transactions, central counterparties and trade repositories. Competent authorities receiving reports of transactions in wholesale energy products received pursuant to Article 25(3) of Directive 2004/39/EC shall transmit those reports to the Agency.

The Agency and authorities responsible for overseeing trading in emissions allowances or derivatives relating to emissions allowances shall cooperate with each other and establish appropriate mechanisms to provide the Agency with access to records of transactions in such allowances and derivatives where those authorities collect information on such transactions.

Article 11

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/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁽¹⁾ or the obligations of the Agency, when fulfilling its responsibilities, relating to its processing of personal data under Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data⁽²⁾.

Article 12

Operational reliability

1. The Agency shall ensure the confidentiality, integrity and protection of the information received pursuant to Article 4(2) and Articles 8 and 10. The Agency shall take all necessary measures to prevent any misuse of, and unauthorised access to, the information maintained in its systems.

National regulatory authorities, competent financial authorities of the Member States, national competition authorities, ESMA and other relevant authorities shall ensure the confidentiality, integrity and protection of the information which they receive pursuant to Articles 4(2), 7(2) or 8(5) or Article 10 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.

⁽¹⁾ OJ L 281, 23.11.1995, p. 31.

⁽²⁾ OJ L 8, 12.1.2001, p. 1.

2. Subject to Article 17, the Agency may decide to make publicly available parts of the information which it possesses, provided that commercially sensitive information on individual market participants or individual transactions or individual market places are not disclosed and cannot be inferred.

The Agency shall make its commercially non-sensitive trade database available for scientific purposes, subject to confidentiality requirements.

Information shall be published or made available in the interest of improving transparency of wholesale energy markets and provided it is not likely to create any distortion in competition on those energy markets.

The Agency shall disseminate information in a fair manner according to transparent rules which it shall draw up and make publicly available.

Article 13

Implementation of prohibitions against market abuse

1. National regulatory authorities shall ensure that the prohibitions set out in Articles 3 and 5 and the obligation set out in Article 4 are applied.

Each Member State shall ensure that its national regulatory authorities have the investigatory and enforcement powers necessary for the exercise of that function by 29 June 2013. Those powers shall be exercised in a proportionate manner.

Those powers may be exercised:

- (a) directly;
- (b) in collaboration with other authorities; or
- (c) by application to the competent judicial authorities.

Where appropriate, the national regulatory authorities may exercise their investigatory powers in collaboration with organised markets, trade-matching systems or other persons professionally arranging transactions as referred to in point (d) of Article 8(4).

2. The investigatory and enforcement powers referred to in paragraph 1 shall be limited to the aim of the investigation. They shall be exercised in conformity with national law and 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 relevant 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, the right to summon and hear any such person or principal;

- (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 delegated acts or implementing acts adopted on the basis thereof;
- (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.

Article 14

Right of appeal

Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of the regulatory authority has a right of appeal to a body independent of the parties involved and of any government.

Article 15

Obligations of persons professionally arranging transactions

Any person professionally arranging transactions in wholesale energy products who reasonably suspects that a transaction might breach Article 3 or 5 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 Article 3 or 5.

Article 16

Cooperation at Union and national level

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

The Agency shall publish non-binding guidance on the application of the definitions set out in Article 2, as appropriate.

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

National regulatory authorities, competent financial authorities and the national competition authority in a Member State may establish appropriate forms of cooperation in order to ensure effective and efficient investigation and enforcement and to contribute to a coherent and consistent approach to investigation, judicial proceedings and to the enforcement of this Regulation and relevant financial and competition law.

2. National regulatory authorities shall without delay inform the Agency in as specific a manner as possible where they have reasonable grounds to suspect that acts in breach 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 action in accordance with paragraph 4 of this Article and, if the acts affect financial instruments subject to Article 9 of Directive 2003/6/EC, in accordance with paragraph 3 of this Article.

3. In order to ensure a coordinated and consistent 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 are being, or have been, carried out on wholesale energy markets which constitute market abuse within the meaning of Directive 2003/6/EC and which affect financial instruments subject to Article 9 of that Directive; for these purposes, national regulatory authorities may establish appropriate forms of cooperation with the competent financial authority in their Member State;

(b) the Agency shall inform ESMA and the competent financial authority where it has reasonable grounds to suspect that acts are being, or have been, carried out on wholesale energy markets which constitute market abuse within the meaning of Directive 2003/6/EC and which affect financial instruments subject to 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 in breach of Articles 3 and 5 are being, or have been, carried out on wholesale energy markets in another Member State;

(d) national regulatory authorities shall inform the national competition authority of their Member State, the Commission and the Agency where they have reasonable grounds to suspect that acts are being, or have been, carried

out on wholesale energy market which are likely to constitute a breach of competition law.

4. In order to carry out its functions under paragraph 1, where, inter alia, on the basis of initial assessments or analysis, the Agency suspects that there has been a breach of this Regulation, it shall have the power:

(a) to request one or more national regulatory authorities to supply any information related to the suspected breach;

(b) to request one or more national regulatory authorities to commence an investigation of the suspected breach, and to take appropriate action to remedy any breach found. Any decision as regards the appropriate action to be taken to remedy any breach found shall be the responsibility of the national regulatory authority concerned;

(c) where it considers that the possible breach has, or has had, a cross-border impact, to establish and coordinate an investigatory group consisting of representatives of concerned national regulatory authorities to investigate whether this Regulation has 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. A national regulatory authority receiving a request for information under point (a) of paragraph 4, or receiving a request to commence an investigation of a suspected breach under point (b) of paragraph 4, shall immediately take the necessary measures in order to comply with that request. If that national regulatory authority is not able to supply the required information immediately, it shall without further delay notify the Agency of the reasons.

By way of derogation from the first subparagraph, a national regulatory authority may refuse to act on a request where:

(a) compliance might adversely affect the sovereignty or security of the Member State addressed;

(b) judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities of the Member State addressed; or

(c) a final judgment has already been delivered in relation to such persons for the same actions in the Member State addressed.

In any such case, the national regulatory authority shall notify the Agency accordingly, providing as detailed information as possible on those proceedings or the judgment.

National regulatory authorities shall participate in an investigatory group convened in accordance with point (c) of paragraph 4, 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 17

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 who work or who have worked for the Agency;

(b) auditors and experts instructed by the Agency;

(c) persons who work 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 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, 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 of the Member States, ESMA, bodies or 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 or persons may use that 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. The authority receiving the information may use it for other purposes, provided that the Agency, national regulatory authorities, competent financial authorities of the Member States, ESMA, bodies or persons communicating information consent thereto.

5. This Article shall not prevent an authority in a Member State from exchanging or transmitting, in accordance with

national law, confidential information provided that it has not been received from an authority of another Member State or from the Agency under this Regulation.

Article 18

Penalties

The Member States shall lay down the rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, dissuasive and proportionate, reflecting the nature, duration and seriousness of the infringement, the damage caused to consumers and the potential gains from trading on the basis of inside information and market manipulation.

The Member States shall notify those provisions to the Commission by 29 June 2013 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Member States shall provide that the national regulatory authority may disclose to the public measures or penalties imposed for infringement of this Regulation unless such disclosure would cause disproportionate damage to the parties involved.

Article 19

International relations

In so far as is necessary to achieve the objectives set out in this Regulation and 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 in particular with those impacting the Union energy wholesale market in order to promote the harmonisation of the regulatory framework. 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 supervisory authorities, international organisations and the administrations of third countries.

Article 20

Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Article 6 shall be conferred on the Commission for a period of 5 years from 28 December 2011. The Commission shall draw up a report in respect of the delegation of power not later than 9 months before the end of the 5-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than 3 months before the end of each period.

3. The delegation of power referred to in Article 6 may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 6 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of 2 months of notification of that act to the European Parliament and to the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by 2 months at the initiative of the European Parliament or the Council.

Article 21

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Article 22

Entry into force

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Paragraph 1, the first subparagraph of paragraph 3, and paragraphs 4 and 5 of Article 8 shall apply with effect from 6 months after the date on which the Commission adopts the relevant implementing acts referred to in paragraphs 2 and 6 of that Article.

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

Done at Strasbourg, 25 October 2011.

For the European Parliament

The President

J. BUZEK

For the Council

The President

M. DOWGIELEWICZ

COMMISSION STATEMENT

The Commission considers that the thresholds for reporting transactions within the meaning of Article 8(2)(a) and information within the meaning of Article 8(6)(a) cannot be set through implementing acts.

Where appropriate the Commission will come forward with a legislative proposal to set such thresholds.

COUNCIL STATEMENT

The EU legislator has conferred on the Commission implementing powers in accordance with Article 291 TFEU in relation to measures foreseen in Article 8. That is legally binding for the Commission despite the declaration it made in respect to Article 8(2)(a) and Article 8(6)(a).

Reference Documents:

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|---|---|
| Austrian Stock Exchange Act | http://en.wienerborse.at/static/cms/sites/wbag/media/en/pdf/agb/boerse_gesetz.pdf |
| Hungary PX Market Rules | https://www.hupx.hu/en/Trading%20at%20HUPX/Download%20center/DownloadRulesAndCodes/3%20-%20HUPX%20Market%20Rules%20v7.0%20-%2016.04.2015/3.1%20-%20HUPXMarketRules_20150416_EN_v7.0.pdf |
| London Stock Exchange Rules | http://www.londonstockexchange.com/traders-and-brokers/rules-regulations/rules-lse.pdf |
| MiFID II Financial Regulation | http://europa.eu/rapid/press-release_MEMO-14-305_en.htm?locale=en |
| ACER Guidance to REMIT transposition | http://www.acer.europa.eu/remit/pages/acer_guidance.aspx |
| UK Reg. 1389 'The Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013' | http://www.legislation.gov.uk/uksi/2013/1389/contents/made |
| UK PX Rules | https://www.apxgroup.com/wp-content/uploads/APX-Commodities-Ltd-Market-Rules-Clearing-Migration.pdf |

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