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association of european energy exchanges

EUROPEX position paper in response to the Commission legislative proposal for a "Regulation on indices used as benchmarks in financial instruments and financial contracts"

Benchmarks serve as important and widely used price signals for the energy markets and play a vital role in the price risk mitigation efforts of the real economy. The Association of European Energy Exchanges (EUROPEX[1]), representing numerous major energy price and index providers, fully shares the assessment by the European Commission that the provision of transparent, robust and reliable reference prices is absolutely key to the well-functioning of commodity markets at European and global level.

Energy exchanges today are already comprehensively regulated by a wide set of rules and regulations with a particular focus on price formation, transparency and market integrity. With regard to benchmarks, they fall under the energy sector specific Regulation on wholesale Energy Market Integrity and Transparency (REMIT) as well as the more general Market Abuse Directive (MAD). In addition, energy exchanges are required to conduct constant market surveillance and are themselves systematically supervised by regulatory authorities.

Against this background, we suggest exempting regulated spot and derivatives energy market places from the governance and control requirements of the proposed benchmark regulation as there is simply no need to make them comply with an additional and potentially different set of regulatory rules with the same or similar objectives. The same applies to Central Counter Parties (CCPs) which are evenly well regulated and subject to comprehensive oversight by regulatory authorities.

In the following, please find more detailed remarks and suggestions on the Commission legislative proposal of 18 September 2013:

1) Introduction of an exemption for organised market places (cf. Regulated Markets, Multilateral Trading Facilities and Spot Exchanges) and Central Counter Parties from additional governance and control requirements

- Given the special status of organised market places and CCPs, their neutrality and independence as well as the above mentioned existing comprehensive body of regulation and oversight regimes, they should be exempted from additional governance and control requirements. This avoids overregulation and allows for a more proportionate tailor-made approach:
    - Article 2 (Scope), Paragraph 4 (new) should be added in order to introduce an exemption for organised market places and CCPs from the governance and control requirements in Article 5 and Section A of Annex I.
    - Article 3 (Definitions) should further define the newly introduced category of organised market places as comprising Regulated Markets (RMs), Multilateral Trading Facilities (MTFs) and Spot Exchanges (SEs). In addition, a reference to the definition of Central Counterparties in the European Market Infrastructure Regulation (EMIR) should be added.
    - Please note: Although Recital 15 already takes the special status of CCPs into account, this point needs to be clearly incorporated into the main body of the legislation.

[1] EUROPEX is a not-for-profit association of European energy exchanges. It represents the interests of exchange-based wholesale electricity, gas and environmental markets in relation to regulatory developments in wholesale energy trading and provides a discussion platform at European level.

2) More flexibility for the hierarchy of input data

- The hierarchy for input data should be made more flexible for commodity related benchmarks, reducing its bias towards the use of transaction data:
    - Annex III (Commodity benchmarks; Paragraph 5 "Quality and Integrity of Benchmarks Calculations") needs to be amended to ensure that transactions can be used in conjunction with bids and offers for commodity benchmarks without the suggested reporting requirements.

3) Proportionality of governance and control rules

- Responsibilities for providers of input data must be made more proportionate:
    - The governance and control rules in Article 11 & Annex I, Section E should be amended accordingly:
        - The requirement to log and report the rationale for the usage of judgement and discretion when providing non-transaction based input data should be deleted. (Please note: Input providers would merely be able to explain and keep track of the general rationale for the use of judgement or discretion when requested ex-post by competent authorities.)
        - Requirements for the physical separation of employees, remuneration policy, etc. need to be made more proportionate and less cumbersome.

4) Compatibility of third country rules

- International standards need to be applied where possible in order to ensure international compatibility and to prevent regulatory arbitrage.
    - Recitals 3 and 4 should be altered to reflect that the implementation of the IOSCO Principles for Financial Benchmarks does not lead to market fragmentation but instead helps avoid regulatory arbitrage.
    - The legislation needs to be less prescriptive & onerous and should be brought in line with the IOSCO Principles, particularly as regards:
        - The range of documentation requirements,
        - Controls that need to be put in place by administrators and contributors,
        - Disclosure requirements,
        - The bias towards the usage of transaction data.
    - Once the legislation is (more) in line with international standards, the equivalence arrangements (Article 20) should be amended accordingly.

5) Avoid double reporting

- The requirements for transaction data reporting must reflect that competent authorities should, where possible, make use of existing data reporting streams already available under reporting requirements defined in EMIR, MiFID and REMIT.
    - Article 30 should be amended accordingly.