

**CESR-ERGEG advice to the European Commission in the  
context of the Third Energy Package - Record-Keeping,  
Transparency, Exchange of information:  
Contribution from Powernext**

24 November 2008

*This document is the contribution of Powernext to the Consultation Paper of CESR and ERGEG relating to their advice to the European Commission in the context of the Third Energy Package - Record-keeping (questions D.4 to D.6), Transparency (questions E.11, E.18, E.19), Exchange of information (questions D.7 to D.10).*

*Our contribution is organised as follows:*

- A short introduction gives our general opinion on the draft answers made by CESR-ERGEG and presented in the Consultation Paper;*
- Questions relevant to our scope of activities are then answered separately (the original numbers of the questions to market participants have been kept).*

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**About Powernext:**

*The French Power Exchange Powernext has been launched in 2001. It manages today a spot and a Futures market, which both constitute major tools of risk management and provide essential price references to the market. Powernext is also one of the founding partners of the trilateral market coupling with the power exchanges APX, Belpex and the three local TSOs, and is currently cooperating with EEX to include Germany in the Central Western Europe coupling process. This commitment to European markets integration has been confirmed by the decision of EEX and Powernext to merge their power markets into two joint companies, one for spot and one for derivatives. Finally, Powernext is launching on the 26<sup>th</sup> of November 2008 a new gas trading platform in France, broadening thus its activity in the energy sector. Late 2007, Powernext has sold to NYSE Euronext its spot CO<sub>2</sub> market, Powernext carbon, which imposed itself since its launch in June 2005 as a European leader. It is since then purely focusing on the energy sector.*

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## Introduction

Powernext is fully supportive of the improvement of market efficiency through measures aiming at enhancing market transparency and surveillance. Indeed, market confidence and integrity can only be achieved within a sound regulatory framework, ensuring reliable information and surveillance infrastructures.

The additional measures brought by the 3<sup>rd</sup> Energy Package in terms of record-keeping, transparency and exchange of information between regulators should contribute to the general improvement of market efficiency, provided that these measures are applied on a harmonised, non-discriminatory base. In particular, we explain in our contribution the need of embracing all types of contracts, settlement and trading methodologies in the enforcement of record-keeping and reporting obligations, in order to avoid the risk of regulatory arbitrage and market surveillance gaps.

In order to preserve a high level of confidence towards market structures, it is also crucial that regulators ensure that the increase of record-keeping and reporting obligations is matched by adequate mechanisms of treatment of data, for the purposes of publication and surveillance analysis.

Finally, we would like to stress that, although higher requirements in terms of post-trade information transparency might bring some benefits to the overall market functioning, main competition concerns are unlikely to be solved by that mean. We show in our contribution how the improvement of transparency standards of fundamental data should, in contrast, greatly improve the efficiency of the market by solving some important asymmetries of information currently observed in the European energy markets.

## Section I: Record Keeping

**1. Do you agree with the abovementioned analysis of the purpose of record-keeping obligations for supply undertakings in the Third Energy Package? If not please explain your reasons.**

CESR-EREGG have emphasised in their analysis the legal gap that might prevent persons eligible for a MiFID exemption, and trading exclusively cash-settled financial instruments, to keep any records of their transactions.

Although the current legal framework appears indeed limited, we would like to insist on the seriousness of such regulatory hiatus in terms of market surveillance. Where available, cash-settled products are very common hedging tools, and often constitute a significant share of the applicable derivative market (see for example the case of the German Futures market, where most energy derivatives transactions are cash-settled). The potential share of financial institutions subject to exemption under MiFID and trading exclusively cash-settled products might thus not be negligible. Such a gap might also encourage liquidity transfer from physical to cash-settled products as a result of a regulatory arbitrage, since those two products are perfectly substitutable. Eventually, transparency of the market will also be affected by this regulatory gap, since those data which will not be subject to record-keeping obligation will also not be available for publication by the regulators.

Leaving such a regulatory gap could thus be very detrimental to the overall reliability of the market surveillance and transparency framework.

**2. Taking into account the potential purposes of record-keeping requirements under the Third Energy Package, do you agree with the above mentioned minimum contents for records to be kept by supply undertakings?**

**3. If not, please specify the items not necessary or additional items necessary with respective reasons.**

Today, Pownernext already abides to the MiFID requirements regarding record-keeping and reporting to the regulators [MiFID currently waives the reporting obligations of investment firms to the competent authority, provided that the concerned transactions have been reported directly by a regulated market, an MTF or a trading system approved by the competent authority - MiFID Art. 25-5].

The chart below summarises the compliance of the information currently reported by Pownernext to the energy and securities regulators against the “Additional necessary contents” suggested by CESR-ERGEG. Some types of information, such as the load type, or indexation formula, do not seem to apply to the standards products currently traded on our exchange (see “n/a”). Other types of information are already implicitly provided by the definition of the product itself (see “implicit”): for example, the delivery time of a November Base power futures contract negotiated on Pownernext will always start on the first day of November and ends on the 30<sup>th</sup> of this same month. Again, note that the preceding remarks apply only to the current Pownernext products, which are standardised ones. However, the fact that the information reported today by market parties or market platforms to the regulators may already include some of the additional necessary contents suggested by CESR-ERGEG must be taken into account, in order to avoid redundancies in the enforcement of the new record-keeping obligations.

<i>Information currently sent by Pownernext to the energy and security regulators:</i>		<b>Spot Power (auction)</b>	<b>Spot Power (continuous)</b>	<b>Futures Power</b>	<b>Spot Gaz (continuous)</b>	<b>Futures Gaz</b>
<b>Additional necessary contents (as suggested by CESR-ERGEG)</b>	Daily or hourly quantities	ok	ok	ok	ok	ok
	Load type	n/a	n/a	n/a	n/a	n/a
	Delivery point	ok	implicit	implicit	implicit	implicit
	Delivery Start-Date and time	implicit	ok	implicit	implicit	implicit
	Delivery End-Date and time	implicit	ok	implicit	implicit	implicit
	Option Indicator	n/a	n/a	n/a	n/a	n/a
	Swap Indicator	n/a	n/a	n/a	n/a	n/a
	Indexation formula	n/a	n/a	n/a	n/a	n/a

**5. Which option do you think is most efficient for the purposes of the Third Energy Package?**

When required to transmit data to the regulator, Pownernext has used electronic devices, such as ftp servers; relevant data are typically sent in Excel sheet format. This system has so far proved to be efficient, fast and secured.

## Section II: Transparency

### **8. Do you see a need for a harmonised publication of aggregate market data on an EU/EEA level? Please provide your arguments for/against such publication.**

Energy markets get increasingly interdependent in Europe, and the harmonisation of transparency standards should participate to the development of a level-playing field environment for the market participants. Harmonisation of transparency standards could also facilitate the collaboration between local regulators at the regional level, for instance by facilitating benchmarking between national markets.

If harmonisation principles of data publication were to be implemented, it will be very important that those principles apply, without any discrimination, to any kind of contract, and regardless of the trading method (OTC, bilateral, on a RM, on an MTF...). Indeed, transparency of market data can only be truly enhanced if the publication of data enables to draw a clear and exhaustive picture of the market, in a harmonised, thus readable way. **(See answer to questions 18-19-20)**

However, when setting the harmonisation standards for the publication of aggregate market data, local specificities must be taken into account. For example, although transparency standards of the Nordic market are generally acknowledged as ones of a high quality, those are hardly fully applicable to other types of market structures, less atomistic for example. These local specificities do not allow for full harmonisation of the publication format of information such as market structure indicators or production forecast data (particularly in terms of data aggregation).

In any case, standards of publication will have to be harmonised in terms of transparency results, rather than in terms of format.

### **9. Do you consider that this publication should cover all instruments, including those covered by MiFID?**

We strongly encourage CESR-ERGEG to retain the option which consists in publishing information on the whole market, including products falling under the scope of MiFID, even if that option is not fully compatible with the wording of Articles 22f(3)/24f(3). As emphasised in the draft answer of CESR-ERGEG, such an exhaustive publication is the only way to avoid a regulatory gap that would prevent some types of MiFID-related products to be subject to transparency requirements, despite the fact that they count for a non-negligible share of the contracts traded in energy markets.

### **10. Among the information proposed to be published, which ones are the most useful and why? Which one(s) should be published?**

The publication of both total volume traded and indicators reflecting the structure of the market could help enhancing the transparency of the market by providing useful (although not crucial) information to market players and market operators: benchmarking and market analysis will be rendered more accurate as all contracts traded on every type of platforms (including OTC) or bilaterally will be taken into account in the information released by regulators.

Market structure indicators such as HHI indexes, number of market participants or the aggregate market share of the five biggest market participants, will also facilitate the analysis of the market by market participants and market operators, and could help increasing confidence towards the energy market. Publishing the detailed market shares of the five biggest market participants could reveal to be interesting in the more concentrated market, where confidence of new entrants towards the market might be particularly enhanced by the publication of such information. However, this kind of indicator would *de facto* reveal the market shares of individual market players: the impact of this strong breach of the anonymity principle on the reliability of the market could also be problematic, and must be carefully assessed.

#### **11. Are the two levels of aggregation on products proposed appropriate and useful?**

The publication of standards products by maturities and delivery zones seems indeed to correspond to a relevant level of data aggregation, as this corresponds to the most common classification of products made by market players and operators. It is also important that all standards products are subject to this aggregated publication, regardless whether they have been negotiated bilaterally, on the brokers' screens, on MTFs or on RMs.

Since it would be difficult to integrate non-standard products in that classification, it is also interesting to complete the picture by the publication of the volumes traded overall in the market, and including all types of products, settlement and trading methods.

Again, note that the exclusion of some cash-settled products from these aggregated figures will impede the quality, thus the relevancy of the information released to the market. **(See answer to question 1)**

#### **12. Among the options proposed for the level of aggregation during the period covered, which ones are the most useful and why? Which one should be chosen?**

Even if a daily aggregation of data could provide supplementary information to the market (in terms of short-term evolution of volumes), it may however result into a huge amount of data hard to handle and to interpret. Quarterly aggregation of data should already provide substantial, and probably sufficient information to the market.

#### **13. Among the options proposed for the frequency of publication, which ones are the most useful and why? Which one should be chosen?**

Considering the -somehow limited- benefits induced by the implementation of additional transparency requirements for post-trade information, it might not be useful to go as far as publishing data daily or even monthly (cost for keeping, transferring, treating and publishing the data could be irrelevantly high). Again, quarterly publications should provide a satisfactory level of transparency, while limiting the implementation costs of the disclosure mechanism.



**14. Do you consider that, in practice, as far as transactions in energy related products are concerned, distortion of competition may result from unequal access to or lack of transaction information? Please provide evidence for your agreement or disagreement.**

As already stated in the preceding consultation on this topic, competition is far more impacted by the lack of transparency in the publication of fundamental data than by the unequal access to, or lack of transaction information. **(See answer to question 16)**

**16. Is there any part of the electricity and gas markets (either spot or energy derivatives trading) where there is lack of pre- and post-trade information which affects the efficiency of those markets or a part of them? In any case, please provide examples and your reasoning.**

Rather than the lack of pre- or post- trade information, the lack of fundamental market data information affects greatly the efficiency of European energy markets.

Fundamental data, and especially load forecast data, are key factors for price formation, and are thus essential in order that market participants take sound decisions when bidding in the market. The level of transparency of this crucial information is today far from being satisfactory. To take an example, in France, public load data are today limited to forecasts of generation availabilities, and are not updated during the week-ends. This results in huge information asymmetry between consumers and producers participating in the wholesale market, but also between smaller market players and bigger participants, since only the latter can obtain at very high cost crucial fundamental data from private providers.

In the more atomistic markets, such as the Nordic one, it may be easier to implement strict binding rules regarding disclosure of load data. Comparable measures could however also be adapted to other markets, taking into account their specificities – for example, by aggregating load data by type of production instead of by units, in more concentrated markets. More important is that those data get subject to more binding requirements in terms of monitoring by the national regulatory authorities, reliability and accuracy. In particular, supply undertaking should be made responsible for the accuracy and the timely sending of those data to the relevant publisher.

Regarding pre-trade data, it can be noted that, to a certain extend, information on the market deepness of RMs or MTFs is already available through, for example, publication of resilience indexes (e.g. Powernext Day-Ahead Auction Market resilience).

**18. Do you favour the status quo? Please provide reasons for your opinion?**

**19. Do you favour a key principles approach? If so, what characteristics should it have?**

**20. Do you favour a more comprehensive regime/initiative? If so, what would be its characteristics?**

The cost of shifting from the status quo to a “key principles approach” status or a “comprehensive regime” status could only be justifiable if the new harmonisation requirements were to be applied in a non-discriminatory way (i.e. to any kind of contract, and whether traded OTC, bilateral, on a RMs, or on an MTFs...). Otherwise, it would be highly questionable whether an incomplete harmonisation

framework, applied only to some contracts or market platforms, was to bring any substantial improvements to the overall level of market transparency.

**21. Do you agree with the preliminary analysis included in paragraphs (a) to (e)?**

It would be wise assessing further the impact on liquidity of increasing pre- and post-trade transparency requirements in energy markets. In particular, a fully harmonised implementation of these transparency requirements is necessary between countries, but also between types of markets (RMs, MTFs, OTC, bilateral...), in order to avoid the development of regulatory arbitrage opportunities. However, regulatory arbitrage between EU countries and Third countries is also a risk when obligations of reporting are not the same among them; this risk is particularly relevant for continental European countries not fully subject to EU regulation.

On the contrary, the enhancement of transparency in the publication of fundamental data is likely to increase in any case the confidence in, and the efficiency of European markets.

**22. What other views do you have on the matters covered in this section on trade transparency?**

Generally speaking, special attention should be paid to the issue of confidentiality of the data sent by intermediaries (be it RMs, MTFs, brokers...) to the regulators, if those intermediaries are designated for this specific task. Indeed, those market platforms are still responsible for guaranteeing the confidentiality of the data that their customers have entrusted them with. As a matter of consequence, it is necessary that clear bilateral agreements or legal clauses ensure explicitly that the confidentiality nature of the transmitted data is preserved, especially in the format of its publication.

It is also essential that effective mechanisms between local regulators allow that information is exchanged cross-border safely, and that agreements ensure that the confidential nature of the information exchanged between local regulators is also fully preserved. This last point is a key factor of success for any project of market integration (such as market coupling), which require the coordination of surveillance and transparency practices and requirements.

ERGEG-CESR have also suggested that prices indexes could be subject to publication for transparency purposes. Such a publication could indeed enhance the quality of market information available on a non-discriminatory basis to market participants. However, prices indexes are often directly originated, or derived from prices indexes produced by RMs or MTFs, which generally allow their publication under specific contractual agreement. Those prices indexes are indeed private assets, and should be treated as such: the use and/or distribution of market platforms data remain contingent to contractual agreements.



### Section III: Exchange of information

#### **23. Do you agree with the exchange of information between securities and energy regulators only on a case-by-case basis instead of a periodical and automatic exchange of information?**

There is a strong case for a periodical and automatic exchange of information between securities and energy regulators. Both types of regulators will need to share the whole amount of transaction information in order to achieve an exhaustive surveillance of the market and reach their transparency requirements in terms of publication in a coherent manner. As this shared information would need to be analysed and possibly published in a timely and periodic manner, it seems necessary that securities and energy regulators develop mechanisms allowing for a periodical and possibly automatic exchange of information between them.

Generally speaking, it is crucial that regulators can ensure to market participants that they are sufficiently equipped in order to proceed to a relevant treatment of the data sent to them, both in terms of analysis and, if applicable, publication. Indeed, the confidence towards the market supervision system, and thus the market overall, will be greatly affected if it appears that requirements in terms of record-keeping and reporting are not matched by an appropriate mechanism of supervision.

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