



To CESR and ERGEG

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Call for Evidence on Record Keeping, Transparency, Supply Contracts and Derivatives for Electricity and Gas

Dear Sir or Madam,

We warmly welcome the cooperation of CESR and ERGEG as a good way to further develop the integrity of the wholesale market in energy and thank you for the opportunity to participate in the joint Call for Evidence on Record Keeping, Transparency, Supply Contracts and Derivatives for Electricity and Gas.

We hope that our answers and comments are helpful and are looking forward to a fruitful discussion in the future.

Yours faithfully,

A handwritten signature in blue ink, appearing to read "Wolfgang v. Rintelen".

Dr. Wolfgang von Rintelen

A handwritten signature in blue ink, appearing to read "Daniel Wragge".

Daniel Wragge

**Response to CESR/ERGEG Call for Evidence on
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I General Remarks

EEX welcomes all initiatives which support the harmonisation of the wholesale markets for energy and energy related products. We are very glad that CESR and ERGEG are working together on several topics regarding an efficient and integrated energy wholesale market.

Currently there are at least two bodies responsible for the energy market as far it is standardised. Beside the Exchange Supervisory Authority which exists in Germany and only a few other countries, this bodies are the financial market supervisors which mainly focus on the stock market and the energy regulators which supervise inter alia the energy companies and in some European countries the physical spot market. Due to this special constellation there is a lack of harmonised regulation on the financial as well as on the energy side. Both, the financial derivatives market for energy and the physical day ahead spot market for energy should not treated separately. They are both essential and not severable part of the wholesale energy market and they need, in general, the same legal and regulatory structure. Therefore we acknowledge the establishment of an enhanced Agency for the Cooperation of Energy Regulators (ACER) proposed by the third energy package as an important step. Further we support any development which includes the reasonable tasks of the financial supervisory authorities into the new harmonised energy supervision.

Proposals which are aiming at harmonising and strengthening the power of national regulatory authorities we see as positive. We support the idea that the efficiency of energy markets is conditioned to a genuine, fair and independent surveillance.

II Specific Remarks on Annex I A. Introduction

The mandate for advice to ERGEG and CESR is one of the consequences of the sector inquiry performed by the European Commission. The findings to which the introduction refers to are not always reflecting our view of the market neither today nor at the time of the publication of the sector inquiry. As we stated in our position paper 2006 we think that there is a great confidence in the functioning of the wholesale market of EEX. Visible sign for that is the number of trading participants (March 2008: 200) of which more than a half come from outside Germany including many banks and financial institutions

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known for their high security standards. Further the open interest (open short and long positions) which is currently worth more than 17 Billion Euro, clearly underlines this perception. Please find our remarks on the sector inquiry under <http://ec.europa.eu/comm/competition/sectors/energy/inquiry/eex.pdf>.

From an exchange point of view the wholesale markets are already quite international. The wholesale market prices are due to arbitrage highly correlating (often more than 90 %). Also the number of net sellers on the EEX Spot Market for Power, i.e. of the trading participants who sell more than they buy, is revealing. On an annual average for 2007, there were already more than 40 of these trading participants, more than half of them based in other European countries. This is certainly proof of the fact that the development of a European power market has made far more progress than is frequently assumed.

III Answers to Annex I C. Fact-Finding

(1) EEX does not know the exact number of members of its derivatives markets which are regulated as financial institutions in the sense of MiFID. Most of the members of the energy branch like utilities, suppliers and municipalities are not financial institutions.

(2) The record keeping obligations in Germany only concern financial institutions and not all market participants.

The same applies for the reporting obligations according to Section 9 of the German Securities Trading Act. At the moment EEX is evaluating together with the German Banking Authority (BAFin) on how to manage the new reporting requirement.

(3) The EEX as a regulated market in Germany for spot and derivatives transactions is supervised by the Exchange Supervisory Authority. The members of EEX are supervised by BAFin when they are financial institutions. They may also be regulated by the Bundesnetzagentur. All companies have to comply with the market abuse regulations within the German Securities Trading Act. Beside this supervision, the market behaviour at the spot and derivatives markets of all exchange participants is supervised on a daily basis by the Market Surveillance Office, an independent body of the exchange according to Section 7 of the German Exchange Act.

IV Answers to Annex I D. Record Keeping

Record keeping should be made by all undertakings active in the energy market regardless whether they are financial institutions in the sense of MiFID or not. At present, the record keeping rules according to Art. 13 (6) are binding only for those undertakings which are licensed as financial institutions. By this obligation all responsible supervisory authorities are enabled to monitor the market behaviour occasionally. The obligation of record keeping should be understood as extensively as possible, so that the full range

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of energy related transactions fall within the scope of the measure. This includes all contracts irrespective of whether the transaction has been made at a power exchange, OTC or bilaterally, day ahead or as a financial instrument. For the purpose of detecting market manipulation there is no need for record keeping or reporting of solely bilateral transactions which are not standardised and therefore not comparable with exchange traded spot and derivatives contracts. Such transaction may fall within the scope of cartel offices. By this extensive understanding, the responsible authorities will be entitled to fulfil their legal obligations. It could further improve the range of investigations of the Market Surveillance Office.

In a second step, these transactions should be reported to the authority responsible to monitor the market behaviour. Actually it is not really clear which is the responsible authority. This may differ depending on whether it is a transaction at the spot or at the derivatives markets. Transaction Reporting enables the respective Supervision Authority to detect market abuse and market manipulation on a standardised basis. The EEX Market Surveillance Office for example collects, checks and examines all exchange trading data and the settlement of exchange transactions systematically and carries out any necessary investigations. It would be helpful for the work of the Market Surveillance Office to have also access to these reported data.

V Answers to Annex I E. Transparency

Transparency and record keeping/ transaction reporting have to be distinguished and treated separately. Transparency measures are necessary to enhance the trust in the markets, but not to detect any market abuse or manipulative behaviour.

The confidence which the trading participants have in EEX markets is based on two decisive elements: transparency to the public and market supervision by an independent body. Diverse and intense supervision of energy trading insures that equal opportunities for all trading participants are safeguarded and that the legal provisions are complied with. There is no "secret data" for surveillance purposes. But a well-functioning market requires various motivations which are not public. At EEX we have an anonymous trading by which all member are equal, regardless the role a member may have in the market. The principles of anonymity and equal treatment avoid any kind of moral hazard on the one hand and ensure the variety of different opinions which is essential for the energy market.

(11) We see the Congestions Management Guidelines and the Transparency Report of the Bundesnetzagentur as a sufficient basis for the further development of transparency in the market. Against this backdrop, the publication of transmission system data on the website of EEX in addition to a more sophisticated range of power plant data in the near future is both conceivable and desirable. We enclose for further information the brochure "Transparency at the European Energy Exchange" as of February 2008.

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(12) A good oversight of the current German legal situation gives the report of the Bund-Länder-Ausschuss available in German under <http://www.bundesrat.de/DE/gremienkonf/fachministerkonf/wmk/Sitzungen/07-11-19-20-WMK/07-11-19-20-bericht-bla-verbesserung-markttransparenz-5-2,templateId=raw,property=publicationFile.pdf/07-11-19-20-bericht-bla-verbesserung-markttransparenz-5-2.pdf>.

(14) EEX publishes all transaction data like prices, volumes, bid and ask curves (spot market auction) on its website and via several distribution channels. There are no differences between spot and derivative markets regarding transparency of prices and volumes.

(15) Yes. The OTC market for standardised products is clearly not as transparent as the wholesale market at the exchanges. There is a huge lack of transparency.

(16) Regarding the exchange data, please find enclosed the brochure "Transparency at the European Energy Exchange" as of February 2008.

(17) Yes, all of our market participants have the same information at the same time.

(19) As we mentioned in the beginning, EEX is in favour of the harmonisation of the wholesale markets for energy and energy related products. Both, the financial derivatives market for energy and the physical day ahead spot market for energy should not be treated separately. They are both essential and not severable part of the wholesale energy market. Therefore, they both need the same legal and regulatory structure.

(a) We have no doubt about the price formation process at EEX. Both, the derivatives markets prices for electricity and the spot market price for Germany (Phelix day base and Phelix day peak) have reference character for Europe. With further development of the gas market, the prices for natural gas determined at EEX will have the same status.

Professor Dr. Axel Ockenfels et altera confirmed in his recent expert opinion about the "Price Formation Process at EEX" that the pricing mechanism in the uniform auction of EEX is the best feasible procedure for pricing on the spot market for power. Compared with all other pricing procedures discussed the uniform price auction used by EEX, in particular, has a number of well-documented advantages. These include higher transparency, a clear reference price and the same price for all trading participants. Moreover, it was confirmed that no other procedure is more appropriate for ensuring equal opportunities for all trading participants in the auction process and for restricting the possibilities of exercising market power. Please find the whole expertise on EEX web site.

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(d) Against the backdrop of the strategy pursued by EEX towards more cooperation with other exchanges in Europe and due to the fact that there are no harmonised rules and organisational structure for energy spot and derivatives markets, the exchange council of the EEX has commissioned a compliance committee to develop a concept for the structure and organisation of an energy market in Europe. This concept shall contain an answer to the question of how the tried and tested structures of a regulated spot and derivatives exchange can be a standard for a Europe-wide regulation to avoid “cherry picking” or a shift to a third country to escape regulation. In a first step, this compliance committee develops a code of conduct especially for the energy market.

V Answers to Annex I F. Market Abuse

(20) The rules according insider dealing and market manipulation arose from the stock markets. Neither the definition of an insider nor the definition of insider information nor the reference to the commodity itself are currently practicable for commodities in general. The current structure does not reflect the need of the energy market as a special part of the commodity market.

For the energy market and the commodity market as such a simple adoption of special insider regulations seems not to be the best way to handle it. This topic is very complex and should be further discussed especially for the energy market and not solely in the context of the market abuse directive. In the discussion transparency obligations arising from energy regulations and the need of including the spot market could be considered. Both, the energy regulators and the financial authorities could share their experiences and get involved in the discussion together with the exchange supervisory authorities of these countries, where a separate authority exist.