

Public Consultation on CESR's/ERGEG's advice to the European Commission

in the context of the Third Energy Package – Draft response to Question F.20

– Response of the ECT-Group –

I. Introduction

We are representing the Energy Commodity Traders Group ("ECT-Group"), a group of German energy trading firms which established a joint working and discussion group for the exchange of experiences in financial and physical energy trading and for the co-ordination of the communication with German and European authorities. We would like to respond to CESR's and ERGEG's public consultation in the context of the Third Energy Package.

The ECT-Group consists of entities active in the energy trading sector; several of them pursue also banking activities or render financial services related to energy derivative products. Entities which pursue banking activities or render financial services related to commodity derivatives are according to the German Banking Act investment firms which have to apply for a license in order to carry out the banking activities or financial services related to commodity derivatives and which are supervised by the German Financial Supervisory Authority Bundesanstalt für Finanzdienstleistungsaufsicht ("BaFin"). The ECT-Group serves as a platform for such firms in order to develop common positions with respect to the financial supervision and to communicate them to BaFin and other legislative and administrative bodies. There has been a steady and successful cooperation between BaFin and the ECT-Group in order to develop an adequate supervisory regime for investment firms rendering financial services related to energy derivative products.

II. Statement

The ECT-Group is an advocate of the principles of *Better Regulation*. We believe that each regulation must serve a reasonable and adequate purpose, but can never be an end in itself. Hence, as a first step of any discussion on a new or amended regulation the objectives of such regulation must be clearly defined.

The objective of this consultation on the application of the Market Abuse Directive (MAD) on energy markets is to enhance the markets. In general, it is assumed that transparency obligations, market abuse control and the prevention of insider trading increase the confidence of all market participants in the market and in its price formation processes. High confidence in this respect stands for high liquidity in the market.

The ECT-Group as a group of energy trading firms emphatically welcomes this objective. However, we also ask to keep in mind that any objective should also involve the consideration which effects (as the case may be unintentionally) are triggered off at the same time. If the obligations imposed on the market participants are too strong, this would lead to an increase in costs and the market would possibly become less attractive. Instead of the desired objective to enhance the market, market entry barriers particularly for small market entrants would be created, thus leading to a loss of current and potential future liquidity in the market.

The members of the ECT-Group therefore expect an adequate, balanced and sector-specific regulation for the energy commodity market. The ECT-Group assumes that such a regulation must be applicable to the same extent throughout Europe (creation of a level-playing field), and should not conflict with or be contradictory to already existing provisions laid down by the Financial Market Supervisory Authority or deriving from competition law.

1) Do you agree with the analysis of the market failures in the electricity and gas markets as described above? If not, please provide reasons for your disagreement.

The ECT-Group generally welcomes any measure aiming to prevent market failures in the energy markets. It is also the ECT-Group's perception that the market is not perfect yet. However, this is not astonishing since this is a so called emerging market which has been developing since the liberalisation in 1998.

Particularly due to the ongoing development of the market it is crucial to consider the negative effects of any regulation. From the ECT-Group's point of view, such dangers always arise when no accurate data is available. Hence, the ECT-Group suggest carrying out a comprehensive and up-dated market survey on the basis of which it becomes clear whether the data of the old Sector Inquiry from 2006 (which according to footnote 5 regarding paragraph 16 of the Consultation Paper is possibly deemed to be outdated) is to be updated. Only on the basis of updated data it can be verified if and to what extent market failures still exist and which counter-measures should be taken.

For example, it can be assumed that in implementing the unbundling requirements a number of shortcomings would be remedied. It should also be taken into consideration to what extent the Competition Authorities have meanwhile found their role. If individual market participants meanwhile publish data themselves or via exchange or trading platforms, from the ECT-Group's point of view, this cannot be argued against a legal obligation to pass on physical fundamental data.

- 2) What is your opinion on the analysis provided above on the scope of MAD in relation to the three different areas: disclosure obligations, insider trading and market manipulation?

The ECT-Group supports the results of the Consultation Paper of CESR / ERGEG: Also in our opinion, MAD is not directly applicable to large parts of the energy market. However, it must be pointed out that this does not mean that the energy trading firms may act outside legislation. Irrespective of the specific provisions of MAD, under general competition law any abuse of market power is prevented.

- 3) Do you agree with the conclusion above that greater pre- and post trade transparency would not be sufficient in the context of market abuse?

The ECT-Group agrees with CESR's/ ERGEG's assessment that greater pre- and post trade transparency would not have a considerable impact to remove the postulated market abuse situations.

On the contrary, the ECT-Group sees particularly in this area a huge probability of market entry barriers. If all OTC transactions even from smaller market participants are to be published, this would considerably impede their participation in the trading market.

- 4) Do you agree with the analysis above on the importance of the transparency/disclosure of fundamental data? If yes, would you consider it useful to set up at the European level a harmonised list of fundamental data required to be published? Is an exhaustive list conceivable or is it necessary to publish additional data on an ad hoc basis if it is considered to be price sensitive?

The ECT-Group agrees with the results of CESR / ERGEG that transparency / disclosure of fundamental data is of great significance for the market participants. This data must make the price formation comprehensible to the market participants. Therefore, it must be made available in a non-discriminatory manner and in due time, ideally summarized and in a suitable form (automated processing).

In the opinion of the ECT-Group a European level playing field is priceless, thus the group welcomes every action towards the creation of a Europe-wide binding list of fundamental data to be disclosed, and to provide it with relevant sanctions. The appropriate preparatory

work has already been done by ERGEG and within the framework of the regional initiatives, which could be referred to at short notice. Especially the data gathered in line with the regional initiatives constitutes a good approach to create an adjustment between many Member States, but, this can only be an intermediate step on the way to a Europe-wide provision.

A list composed in such a way should be final. However, it should be considered making the list updatable e.g. by way of comitology in order to enable the adjustment to market developments. In any case, additional ad hoc publications independent therefrom, appear to be too vague and legally uncertain without closer specification of the proposals.

5) Which information retained by specific participants of the electricity and gas markets (e.g. generators, TSO) should be published on an ad hoc basis if it is price sensitive?

In the view of the ECT-Group, it should be specified which circumstances would be that big and significant to justify an ad hoc publication to the market. Possible here would be unplanned power plant failures or the loss of network transmission capacities, be it within a market area or the border transmission capacities. However, relevance thresholds must be determined in this regard. An appropriate solution must also be found to avoid that a power plant operator who must buy electricity due to a sudden power plant failure is improperly used by the other market participants.

6) What is your opinion on the proposals of CESR and ERGEG in the three different areas: disclosure obligations, insider trading and market manipulation?

The ECT-Group supports an independent and sector-specific (tailor made) solution for the energy market.

This independent solution as a whole should present a well thought package of measures and as such it should accordingly be enacted as a directive or regulation. In addition to the adequate implementation and adjustment of the MAD considerations (e.g. the concept of insider trading in energy markets) these provisions must also establish the relation to the financial supervision, to the general competition rules and to the proposals of the Third Energy Package. As already mentioned at the beginning, it basically depends on a balanced regulation that follows its objectives without thwarting them at the same time with negative

consequences, that provides the affected parties with legal security and at the same time does not provoke double burdens either for the companies or for the administrations.

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