

Position Paper

CESR and ERGEG advice to the European Commission in the context of the Third Energy Package

Draft response to

Questions D.4 to D.6 – record-keeping;

Questions E.11, E.18 and E.19 – transparency;

Questions D.7 to D.10 – exchange of information

24 November 2008

Question to market participants

General Remarks

The German Association of Energy and Water Industries (BDEW) represents 1,800 members of the electricity, gas and water industry. In the energy sector, we represent companies active in generation, trading, transmission, distribution and retail.

We welcome the opportunity to comment on the CESR/ERGEG Consultation Paper. With regard to record-keeping obligations, we understand that the purpose of the obligations is to enable the relevant authorities to study the trading behaviour of undertakings on a case-by-case basis, in particular in respect of compliance with competition law. The record-keeping obligations have to be proportionate to this task, and in order to allow flexibility as to the content of the records and in order to minimize the additional burdens for market participants undertakings should be able to decide themselves on the suitable format.

We fully support clear and harmonised rules for market transparency throughout the European Union. In our view, the main purpose of transparency requirements is to identify the relevant price determinants which should be publicly available, thereby ensuring a level playing field for all market participants. Therefore, it is important to ensure transparency of fundamental data, such as data on electricity transmission and generation, gas transportation and storage. Trade transparency as discussed in the Consultation Paper, however, is not the main aspect for market participants to understand price developments. In this respect we believe that the current level of trade transparency is sufficient. We therefore recommend to build on the existing information provided by exchanges and brokers and not to impose additional burdens on market participants.

As to the exchange of data between securities regulators and energy regulators, we believe that an exchange on a case-by-case basis is fully sufficient.

In any case, a high level of protection of business secrets and the confidentiality of business data has to be ensured when information is exchanged.

1. Do you agree with the abovementioned analysis of the purpose of record-keeping obligations for supply undertakings in the Third Energy Package?

CESR and ERGEG rightly state that in order to make a recommendation on the content of the supplementing guidelines for record-keeping under the Third Energy Package, the purpose of the record-keeping obligations has to be considered.

Under the provisions of the Third Energy Package the record-keeping obligations seem to be directly linked to the monitoring of market abuse by competition authorities and/or energy regulators and therefore are to be distinguished from MiFID-style transaction reporting. Consequently, the record-keeping obligations shall facilitate the work of the regulators in specific cases and shall not constitute a general reporting duty. In addition, it has to be noted that with

regard to competition concerns it is rather uncommon to require undertakings to keep records in anticipation of later inquiries of authorities. As the Commission's explanatory memorandum of the Third Energy Package states, the record-keeping obligation shall also increase the trust in the market and thereby stimulate trade and competition. It is therefore necessary that no disproportionate burdens are imposed on undertakings which in particular could discourage smaller undertakings and newcomers from entering the markets.

2. Taking into account the potential purpose 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.

CESR/ERGEG propose a list of minimum contents for records to be kept by supply undertakings under the Third Energy Package. The list is based on the list of contents currently kept under MiFID (Art. 8 Reg. 1287/2006) and CESR/ERGEG propose additional necessary contents for a clear understanding of electricity and gas markets transactions, such as type of commodity, daily or hourly quantities, load type, delivery point, delivery start-date and time, delivery end-date and time, option indicator, swap indicator and indexation formula.

In our view, it is difficult to develop a standard format which fits all different transactions. We therefore deem it reasonable to determine minimum contents ensuring that information potentially needed by regulators is accessible on request within a reasonable timescale. The development and application of standard recording formats, however, is connected with significant costs for the undertakings concerned. Given the different market participants and the different products traded it seems very difficult to find a one-fits-all solution which may be applicable for all transactions. The approach should therefore be flexible and allow adaptations to the format without causing additional costs for the undertakings concerned. We also think that proportionate record-keeping arrangements should be designed and operated in a harmonised European fashion as a way to minimise the administrative burden placed on market players. In addition, they should be practical, consistent with commonly-used IT processes and should not incur disproportionate costs.

For the list of additional requirements, CESR and ERGEG propose an "indexation formula" requirement which in our view should be deleted, as these formulae are often very complex and not fit to be kept in a standard format. Moreover, the additional information derived from this requirement will often be limited.

4. Do you see practical difficulties if investment firms not covered by the scope of the Third Energy Package are not obliged to keep the additional contents of transactions in financial instruments in their records?

Art. 22 f of the draft Electricity Directive and Art. 24f of the draft Gas Directive provide that on undertakings which are already subject to the MiFID record-keeping obligations no additional record-keeping obligations shall be imposed. Consequently, these undertakings would not be obliged to keep the additional content of the records proposed by CESR/ERGEG.

We do not see any practical difficulties connected with this requirement.

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

CESR/ERGEG see two options with regard to the format of the records: Either to let the supply undertaking determine the format of its records or to prescribe an electronic format.

With regard to the MiFID record-keeping obligations, no specific format is prescribed. It has to be kept in mind that Art. 22f of the draft Electricity Directive and Art. 24f of the draft Gas Directive provide that on undertakings which are already subject to the MiFID record-keeping obligations no additional record-keeping obligations shall be imposed. The prescription of an electronic format would therefore exclude the undertakings subject to MiFID record-keeping obligations; a uniform application could consequently not be achieved.

Irrespective of this shortcoming, an electronic format would also have other disadvantages. It would impose costly burdens on the undertakings concerned and would not allow flexibility with regard to the arrangements in particular for smaller undertakings. The adaptation of a prescribed electronic format to new developments would also be more difficult and time-consuming. CESR/ERGEG see the advantage of an electronic format in providing a fast procedure for the provision of information to energy regulators and ensuring easy access for them. As set out above, this would only be true with regard to companies not subject to the MiFID record-keeping obligations and therefore only for part of the market. In addition, as identified by CESR/ERGEG the purpose of the record-keeping obligations is to facilitate investigations with regard to suspected market abuse. For this purpose, it is sufficient that records are kept for the regulators and no electronic format is necessary. The inspection of the records has to be on a case-to-case basis without a requirement to send information to regulators in regular periods. We would also like to point out that an easily accessible electronic format reinforces the question which adequate arrangements to protect confidentiality of data from individual market players are implemented by the regulators. If market perception were that this confidentiality cannot be guaranteed, the introduction of such format might actually hamper liquidity.

- 6. If an electronic format will be required, is it sufficient to leave the design of the specific kind of “database” used to retain the minimum content of the records to each supply undertaking?**
- 7. If possible, please provide indications of the specific costs involved with different electronic formats conceivable (e.g. from Excel sheet to more sophisticated software).**

As set out above, we think that it is sufficient to let the supply undertakings determine the format of their records. However, if an electronic format were prescribed, it would be preferable to leave the design of the database to each supply undertaking, in order to allow for flexibility and to reduce the additional burdens associated with this task.

This approach would allow each undertaking to build on existing systems and to implement a format which is suitable for the amount and kind of transactions it conducts.

- 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.**

BDEW supports transparency in the energy markets. In our view, it is important that the fundamental data necessary to understand the formation of prices (data on electricity transmission and generation, gas transportation and storage) are available for the market participants. BDEW actively supports initiatives to enhance this transparency. The current consultation, however, concerns transparency with regard to trading data. In this respect, we believe that sufficient transparency is already provided by the market. This is also confirmed by the Commission’s Sector Inquiry which did not identify a lack of market transparency with regard to wholesale markets.

As already set out in our position paper on the call for evidence, we do not believe that it is necessary to duplicate the large amount of data already available from exchanges, brokers and other information providers. Transparency on exchanges is ensured by the exchange itself, where market players can see e.g. the traded volumes, bid/ask curves, number of players and clearing prices. Regarding OTC-trading the broker screens in use in modern trading rooms allow for market players to see e.g. the bid and ask prices and the traded volumes. Additionally, a range of further detailed ex-post information is provided by brokers and information providers. In this context we also like to refer to the ERGEG Guidelines for Good Practice on Information Management and Transparency in Electricity Markets (Ref: E05-EMK-06-10) which clearly conclude that information needed to be released to the public should be aggregated information provided through respective exchanges and broker platforms. This would also be sufficient to provide useful information for market newcomers.

In the Consultation Paper, ERGEG favours a system where the national regulation authority has discretion whether to publish aggregated market information. Depending on the existing level of transparency in the respective member state, the regulation authority may decide to publish additional aggregate data.

As stated above we do not see the need for such a proposal. Trade-information relevant for market participants should be made available by the trading platforms (e.g. PXs, broker). It is not the task of the regulators to provide this information.

- 9. Do you consider that this publication should cover all instruments, including those covered by MiFID?**
- 10. Among the information proposed to be published, which ones are the most useful and why? Which one(s) should be published?**
- 11. Are the two levels of aggregation on products proposed appropriate and useful?**
- 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?**
- 13. Among the options proposed for the frequency of publication, which ones are the most useful and why? Which one should be chosen?**

As set out above, we favour a system where the aggregated information is provided through respective exchanges and brokers platforms. In our view, information should cover all instruments, irrespective whether they are covered by MiFID or not; this differentiation is irrelevant, if the data is provided by the a.m. trading venues. The structure of the data and the level of aggregation should be determined according to market needs.

We doubt whether indicators as the Herfindhal-Hirshman Index (HHI) are useful for market participants. In any case, the information provided may not disclose trading strategies of individual players.

- 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.**

We have no indication that in energy related products distortions of competition may result from unequal access to or lack of transaction information. This analysis is in line with the findings of the Commission in its Sector Inquiry.

15. Do you agree with the results of the fact finding exercises and their analysis for the electricity and gas markets as described above? If not, please provide reasons for your disagreement.

We concur with the conclusion that market participants do not see a need for enhanced trade transparency.

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 part of them? In any case, please provide examples and your reasoning.

We do not see a lack of pre- and post-trade information which could affect the efficiency of the markets.

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

As set out above, the current sources of information seem to be sufficient to provide trade transparency. It would therefore be not proportionate to impose additional and costly burdens on market participants.

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?

For the reasons set out under question 17, we favour the status quo. If, however, the publication of additional data is considered, the key principles approach seems to be better suitable than a comprehensive regime as it reduces the costs and burdens for the market participants. We clearly object the 3rd option (comprehensive regime).

21. Do you agree with the preliminary analysis included in paragraphs (a) to (e)?**22. What other views do you have on the matters covered in this section on trade transparency?**

We concur with the observation in paragraph (a) that there is little indication that the current levels of trade transparency in energy markets as a whole are not sufficient in practice. We do not think that introduction of further pre- and post-trade transparency obligations would contribute to a more efficient wholesale price formation process and efficient and secure energy markets. Therefore, if additional data is not supplied through exchanges or brokers, as proposed above, additional transparency requirements, which mean additional costs for market participants, would be disproportionate.

However, it is important that transparency with regard to fundamental data is increased (this is currently subject of various initiatives of the energy industry). This, however, is not subject of the current consultation.

We agree that the alleged shortcomings identified in the Sector Inquiry are not related to a lack of trade transparency. Increased trade transparency may not necessarily bring benefits to market participants, there are even aspects which may even discourage competition, e.g. if trading positions and strategies of market participants become visible.

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?

Based on the purpose of the record-keeping obligations and the competencies of the energy regulators an exchange of information between securities and energy regulators on a case-by-case basis is fully sufficient. In any case, a high level of protection of business secrets and the confidentiality of business data has to be ensured when information is exchanged.

24. Do you agree with the proposal of the establishment of multilateral and bilateral agreements between energy and securities regulators for exchanging information on cross-border and local basis respectively?

The cooperation between energy and securities regulators has to be backed by a sound legal basis in European legislation. The fundamental decisions on the scope and intensity of the cooperation should be made in a harmonised European way. Multilateral and bilateral agreements between regulators should not result in having different levels of cooperation and enforcement throughout Europe.

25. Which securities regulator would you prefer to be responsible for providing the information required by the energy regulators regarding the transactions of a branch of an investment firm: the host Member State securities regulator of the branch or the home Member State securities regulator of the investment firm?

In order to avoid the requirement to provide information to several regulators within the EU, undertakings should only be required to provide information to their home regulator. Consequently, this home regulator would also be responsible to provide information to the energy regulators.