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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

Consultation Paper

October 2008

Contents

Executive Summary

This consultation paper is the result of work done by the Committee of European Securities Regulators (CESR) and the European Regulators' Group for Electricity and Gas (ERGEG) in response to a request for advice by the European Commission (Commission). The Joint Group of CESR and ERGEG experts assigned to carry out this work is chaired by Johannes Kindler (ERGEG Vice President and Vice President of the German Federal Network Agency, BNetzA) and Carlo Comporti (CESR Secretary General).

This paper sets out the draft advice of ERGEG and CESR on the Commission's questions. In accordance with the mandate given by the Commission it is divided into three main parts: record-keeping (questions D.4 – D.6), transparency (questions E.11, E.18. and E.19) and exchange of information (questions D.7 – D.10). CESR and ERGEG will provide their final advice following detailed consideration on the questions below at the end of December 2008. CESR and ERGEG invite the views of market participants to the paper in general and the questions raised in this paper. The deadline for responses to this consultation paper is 24 November 2008.

Record-keeping (Section I)

General considerations relevant for record-keeping obligations

Record-keeping has to be clearly distinguished from transaction reporting or any other form of transmission of information included in the records of supervised firms to competent authorities. Regarding transaction reporting or other forms of transmission of information, the Third Energy Package does not include any requirements. The advice of CESR and ERGEG to the Commission on the content of supplementing guidelines regarding record-keeping will therefore not include any recommendations in this respect.

Taking into account the wording, structure, purpose and consequences of the policy options analysed, CESR and ERGEG are of the view that "supply undertakings", which denote the persons subject to record-keeping obligations under the Third Energy Package, include all persons active in the sale or resale of electricity/gas including investment firms and all other firms which physically supply electricity/gas to wholesale or final customers. The scope of the Third Energy Package thus covers all persons which conclude spot contracts and derivative transactions with physical settlement. Depending on their authorisation as investment firms, the records to be (additionally) kept by them under the Third Energy Package would cover, for non-investment firms, all supply contracts and derivatives with wholesale customers, transmission system operators as well as, under the Gas Directive, storage and LNG operators or, for investment firms, all contracts with these customers not covered by MiFID. Persons trading exclusively cash-settled financial instruments related to electricity and/or gas as underlying will not be treated as supply undertakings under the Third Energy Package. If they are eligible for an exemption under MiFID, they are not legally required to keep any records, neither under MiFID nor the Third Energy Package. Information about transactions undertaken by those persons would not be available to any competent authority on the basis of record-keeping obligations. Even though it can be expected that in practice the shares of these firms and their transactions in terms of amount and volume are marginal, an attempt would need to be made to monitor the actual shares and the development of these shares to assess the potential regulatory gap. However, it has to be stressed that the potential gap cannot be tackled within the given legal framework.

Regarding the instruments falling under the scope of the Third Energy Package, CESR and ERGEG are of the view that all physically-settled energy supply contracts and the financial instruments relating to electricity and gas under MiFID are covered.

D.4: Do regulators believe that there should be a difference between the proposed record-keeping obligations under the proposed amendments to the Electricity Directive and Gas Directive and the existing record-keeping obligations with respect to transactions in electricity and gas derivatives to which investment firms are subject by reason of MiFID (Article 25 and 13(6))?

Having compared the requirements for record-keeping under MiFID with the need of competent authorities under the Third Energy Package to understand transactions in derivative contracts, CESR and

ERGEG reached the view that the contents of records to be kept under Articles 13(6), 25(2) of MiFID and Article 8 of the MiFID Implementing Regulation are not sufficient. Thus, additional information has to be kept by supply undertakings also regarding derivative transactions.

D.5: *Pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC (the Third Energy Package), what methods and arrangements for record-keeping do CESR and ERGEG consider the Commission should specify as guidelines under the legislation for:*

a) transactions in electricity and gas supply (spot) contracts? (To the fullest extent possible this should be a harmonised specification.) If there are any deviations from the obligations relating to commodity derivatives already applicable to investment firms, these should be justified;

b) transactions in electricity and gas derivatives contracts? (To the fullest extent possible this should be a harmonised specification.) If there are any deviations from the recommendations in a), these should be justified.

In answering this question, CESR and energy regulators are asked to consider specifying a single transaction record format based on the content and data to be provided as per Table 1 of Annex I of Regulation EC 1287/2006.

As general methods and arrangements for record-keeping and retention of records, CESR and ERGEG propose to include similar general requirements in the supplementing guidelines of the Commission as specified by Article 51 of the MiFID Implementing Directive.

In this regard, the Commission's guidelines should at least specify that the arrangements for record-keeping should allow the storage of information for future reference in a way which enables the relevant authorities to have readily access to them or receive compiled and complete records on request. Furthermore, the methods and arrangements for retention of the records should be protected against any manipulation or hidden alteration and allow for an easy assessment of any corrections or amendments to the content of the records.

As regards the content of the records, CESR and ERGEG are of the view that to a limited extent a different content for records regarding spot and derivative transactions is necessary. CESR and ERGEG consider it necessary that supply undertakings keep records including the following minimum information: trading day, trading time, buy/sell indicator, commodity type, counterparty identification, price elements, daily or hourly quantity, load type, delivery point, delivery start-date and time, delivery end-date and time, option indicator (only for derivatives contracts) and swap indicator.

D.6: How would this information be most efficiently kept at the disposal of authorities as mentioned under paragraph 1 of Articles 22f/24f in the case of spot transactions and non-investment firms?

Considering the advantages and disadvantages of leaving the choice of the format of records to be kept to the individual supply undertaking or prescribing that records have to be kept electronically, CESR and ERGEG have a preference for an electronic format of the records. However, CESR and ERGEG are conscious about the costs involved and would like to inquire more about these costs.

Transparency (Section II)

The questions in Section E of the Commission mandate deal with transparency. Some of the questions are policy ones: they will be considered in this consultation paper, namely E.11, E.18 and E.19. The remaining questions are fact-finding ones and advice on them has already been submitted to the Commission and published. However, one of the fact-finding questions (E.17) is also covered in this consultation paper, as CESR and ERGEG used the answers on this question to build their reasoning on question E.18.

Question E.11: What guidelines and arrangements do energy regulators propose for the making available of aggregate market data by them under paragraph 3 of Article 22f/24f?

Question E.11 specifically asks energy regulators what guidelines they would propose for the making available of aggregate market data by them (under paragraph 3 of Articles 22f/24f). Therefore, only the view of ERGEG is expressed here.

The rationale is to publish useful and reliable data, giving fair information on the liquidity and the concentration of trading on European electricity and gas wholesale markets while keeping in mind three constraints:

- limiting the burden put on market participants for providing this information;
- avoiding direct and indirect disclosure of commercially sensitive data; and
- avoiding costs exceeding the benefits of publishing the information by not adding obligations when a sufficient level of transparency already exists.

ERGEG considered the costs and benefits of aggregate market data, and proposes that the publication of aggregate date on transactions would be optional: i.e. each energy regulator should assess whether the level of transparency in its Member State is sufficient. If not, regulators should publish missing data under their powers provided by Articles 22f(3)/24f(3) of the Third Energy Package.

ERGEG proposes two options on the scope of the data to be published:

- The first option would be to publish information on all products except those in the scope of MiFID, in accordance with Articles 22f(3)/24f(3) of the Third Energy Package. Under this option, the information covered by the publication from energy regulators would be partial and barely exploitable by market participants. Moreover, it would lead to a regulatory gap, since some products are covered by MiFID – and thus out of the scope of publication by energy regulators – but not covered by any transparency obligation under MiFID.
- The second option would be to publish information on the whole market, including the products falling under the scope of MiFID. This proposition is not compatible with the current wording of Articles 22f(3)/24f(3), and with the current access to data on instruments covered by MiFID by securities regulators. However, ERGEG considers that only this option would give relevant and useful information to market participants.

ERGEG proposes the following information to be published: information on trading volumes, indicators on market structure and optionally some price indices. Furthermore, ERGEG proposes to publish this information under two levels of aggregation on products: aggregated by every product covered by the publication, and split by contracts with certain standard maturities.

There are several options for the frequency of publication (from daily to quarterly) and for the level of aggregation during the publication periods (from daily to quarterly). ERGEG seeks comments of market participants about the different options.

E.17/ E18: Is access to information on traded volumes and prices equal for all parties active in [the electricity and gas wholesale] market? : If not, is unequal access to or general lack of information on trading causing distortion of competition?

On the basis of the information gathered so far (mainly from the Call for Evidence), there seems to be equal access to information in the electricity and gas wholesale markets with the exception of bilateral trading. In relation to that, CESR and ERGEG have no evidence of the markets being distorted. However, that is not a proof it does not happen and further analysis might be necessary.

E19: In light of the findings in the Commission Sector Inquiry on energy and the subsequent study of the electricity wholesale markets, please consider:

a) whether, pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC, greater EU-wide pre- and/or post-trade transparency rules for electricity and gas supply contracts (physical and spot trading) and

electricity and gas derivatives would contribute to a more efficient wholesale price formation process and efficient and secure energy markets;

b) whether such transparency arrangements could be expected to effectively mitigate the concerns identified in the Sector Inquiry above;

c) whether uniform EU-wide pre- and post-trade transparency could have other benefits;

d) whether additional transparency in trading could have negative effects on these markets, for example could liquidity in these markets be expected to decrease? Is there a risk that trading could shift to third countries to escape regulation?

e) If you believe that there are risks arising from additional pre- and post-trade transparency requirements, how do you believe that these risks can be mitigated (e.g. aggregation, delay in publication, anonymity)?

a) From the evidence described above, including responses to the Call for Evidence, there is little indication that the current levels of trade transparency in energy markets as a whole are not sufficient in practice, especially if trading takes place on regulated markets and MTFs. However, a substantial proportion of energy transactions –spot and forwards and futures – are not made on regulated markets and MTFs but on other platforms or OTC where trade transparency in relation to those transactions can be less readily accessible or not available at all as compared with RMs and MTFs. Also, less mature markets might not be as transparent as well-developed markets. In light of the combination of those features, CESR and ERGEG consider that different options in relation to trade transparency should be considered. The first option is to retain the current situation. The second option is to apply key principles to platforms, particularly for post-trade transparency. The third option is to apply a regulatory regime or an industry led initiative within a framework defined by regulators. Following the consultation, CESR and ERGEG expect to be in a position to advice on whether a greater EU-wide pre- and/or post-trade transparency initiative for electricity and gas supply contracts (physical and spot trading) and electricity and gas derivatives would contribute to a more efficient wholesale price formation process and efficient and secure energy markets and, if so, what kind of initiative.

   The extent of the pre- and post-trade transparency needed is still under discussion by CESR and ERGEG. CESR and ERGEG agree that trading of electricity and gas needs to be enhanced and supported. Furthermore, CESR and ERGEG consider that confidence in the integrity of the market is of great importance in this context. However, it has to be examined to what extent additional pre- and post-trade transparency is necessary and at the same time sufficient to support market integrity.

b) The Sector Inquiry shows that concerns about transparency exist. However, transparency in the sense used in the Sector Inquiry focuses mainly on transparency for fundamental data and less on trade transparency. In any event, no trade transparency initiative alone could be expected effectively to mitigate the concerns identified in the Sector Inquiry.

c) The question as to whether uniform EU-wide pre- and post-trade transparency could have the benefits mentioned in question (a) will be described in the response to be given by CESR and ERGEG to that question after the consultation. Other benefits which could arise from adequate trade transparency include an increase in competition, new entrants and market participation, and general engendering of market confidence. However, those benefits may exist already in many energy markets without any trade transparency initiative. It should therefore be addressed whether more transparency would be needed in those markets where this is not the case. As with the approach to question (a) above, CESR and ERGEG will, after the consultation, expect to be in a position to advise on whether those other benefits of trade transparency would be met by a trade transparency initiative, if they do propose any initiative.

d) Additional transparency would not be expected to have negative effects in trading in itself. However, a trade transparency initiative could have other negative effects on these markets. For example, improperly considered requirements for increased trade transparency might reduce liquidity in the market with a consequential increase in volatility in price. Disclosure of more trading information by a market participant could show to the market its trading positions and strategies which can discourage or impede competition and innovation. Any new initiative would be expected to result in technological, legal and compliance costs on market participants and increased costs of supervision and regulation on securities and energy regulators. Given the national and regional nature of the

energy markets and their emphasis on physical trading, there seems to be little risk that trading could shift to third countries to escape regulation.

e) Some risks arising from additional pre- and/or post-trade transparency requirements can be mitigated through three main routes – aggregation, delay in publication and anonymity. The costs of such requirements, and their potential negative effects described above would have to be balanced against the described positive effects. Uniform application of any new trade transparency requirements or initiatives would reduce the scope of regulatory arbitrage.

Exchange of information (Section III)

D.7. How would securities regulators most efficiently provide information to energy regulators pursuant to paragraph 7 of Article 22f/24f?

The proposal of the Commission in Articles 22f/24f of the Third Energy Package contains new obligations for supply undertakings to keep records relating to their transactions. This data shall be kept at the disposal of the national energy regulator, the national competition authority and the Commission. This transaction data shall enable these entities to oversee the electricity and gas markets (recital 19 of the amended Electricity Directive and recital 21 of the amended Gas Directive). In order for the national energy regulator, the national competition authority and the Commission to have access to the data kept by entities falling within the scope of MiFID, securities regulators are obliged to provide data to the former under Articles 22f(7)/24f(7) of the Third Energy Package. CESR and ERGEG propose to start information exchange by request, on a case-by-case basis for fulfilling the legal tasks of energy regulators.

It should be mentioned that transparency provisions recommended by ERGEG (see response to question E.11) cannot be implemented if energy regulators do not get the required information, which would require either that they get the information directly or that they get it, on a periodic basis, from securities regulators. However, securities regulators currently do not have a periodical and automatic access to information on transactions in energy derivatives covered by MiFID. Investment firms are required to keep records about these transactions. However, this data can only be demanded on a case-by-case basis for the purpose of specific investigations, for example. Hence, there are legal and practical obstacles for energy regulators to have periodically access to the data concerning MiFID firms which are not supply undertakings. Due to this, CESR and ERGEG currently have considered only the option of exchanging information on a case-by-case basis.

Additionally, in the view of CESR and ERGEG, the said exchange of information between energy and securities regulators should be backed by a sound legal basis, by European legislation. The opinion of CESR and ERGEG is that a pragmatic option at this stage would be the establishment of multilateral and bilateral agreements among energy and securities regulators for exchanging information on cross-border and local basis respectively.

Such multilateral and bilateral memoranda of understanding among regulators should take into consideration the obligation included in Articles 22f(7)/24f(7), as well as provisions for appropriate confidentiality with respect to the data supplied by securities regulators to energy regulators, national competition authorities and the Commission. Furthermore the MMoU to be established between CESR and ERGEG members would need to include the main provisions to establish cooperation in the field of exchange of information between both energy and securities regulators within the EEA. Ideally this MMoU would be supplemented by bilateral MoUs among local energy and securities regulators addressing legal gaps in certain jurisdictions to exchange information between different regulators.

D.8. Which securities regulator would most efficiently be responsible for such provision in the case of investment firms with more than one branch?

The requirements for exchange of information regarding branches´ transaction reports within the securities regulation are established in Article 25(6) MiFID, which points out that: "When, in accordance with Article 32(7), reports provided for under this Article are transmitted to the competent authority of the host Member State, it shall transmit this information to the competent authorities of the home Member State of the investment firm, unless they decide that they do no want to receive this information."

CESR and ERGEG considered whether a similar approach in case of a necessity to exchange information related to records of supply undertakings would be viable. This would mean that the securities regulator of the host Member State of the branch should provide the information requested by the energy regulator.

A less complex alternative may be to follow an approach where energy regulators always ask the home competent authority for information – no matter whether the transaction was undertaken by the investment firm itself or by its branch since the home Member State securities regulator always has direct access to the records of a branch of an investment firm under Article 13(9) MiFID.

D.9. Would it be feasible and efficient to employ the Transaction Reporting Exchange Mechanism (TREM) or a similar electronic system to exchange this data?

CESR and ERGEG are of the view that TREM would not be appropriate for the exchange of information between energy and securities regulators. First of all, as there would probably be only a few cases for exchange of information, it would not be efficient to invest in new IT. Secondly, TREM is established to enable securities regulators to exchange information within a very short period of time after the transaction was made. Market surveillance based on records kept by supply undertakings – not on transaction reports - as proposed in the energy Directives would not require such a strict time limit.

D.10. Is there a case for data to be forwarded from energy regulators to securities regulators on an automatic basis? If so, what data?

As described above CESR and ERGEG are not proposing at this stage to forward data on an automatic basis. However, the potential MoU could establish reciprocal cooperation between authorities. Therefore, they could also be used to exchange information from energy to securities regulators; especially the information not covered by MiFID and received only by the energy regulators.

Responses to the consultation paper

CESR and ERGEG would welcome responses to the questions raised in this consultation paper, or other comments on the subject of this paper, which should be provided by 24 November 2008.

All contributions shall be submitted via e-mail to ERGEG (mail to fis@ergeg.org) and online via CESR´s website under the heading Consultations at www.cesr.eu. Non-confidential contributions will be published on the CESR and ERGEG websites. Respondents to this consultation paper should, however, endeavour to provide any confidential material in annexes that can be separated from publishable non-confidential material.

According to the mandate of the Commission, CESR and ERGEG have focused on electricity and gas markets. However, they note that there are substantial interdependencies between electricity and gas markets and some other markets, such as emission allowances markets and other energy markets (e.g. coal and oil markets). The products in these markets are traded by the same market participants and there are linkages in the price formation process of these markets. The views of the market participants on these interdependencies would also be very much of interest to CESR and ERGEG.

Background

1. On 21 December 2007, the Commission issued a joint mandate to CESR and ERGEG (see Annex) asking for technical advice pursuant to Articles 22f and 24f and Recitals 20 and 22 respectively in the two proposals for Directives amending Directive 2003/54/EC and Directive 2003/55/EC (the Third Energy Package).

2. CESR and ERGEG established a Joint Group of securities and energy regulators to prepare the advice. The Joint Group is co-chaired by Mr Carlo Comporti, Secretary General of CESR, and Mr Johannes Kindler, Chairman of the CEER Financial Services Working Group. The Joint CESR/ERGEG Group established four drafting teams consisting of representatives of the securities and energy regulators for the drafting of the advice on the respective topics of the mandate (record-keeping, exchange of information, transparency and market abuse).

3. The mandate requests joint advice from CESR and ERGEG on issues concerning record-keeping (questions D.4 to D.6), transparency of transactions in electricity and gas supply contracts and derivatives (questions E.11, E.18 and E.19) as well as exchange of information between energy regulators and securities regulators (questions D.7 to D.10). Advice was also sought on a possible clarification of the scope of the Market Abuse Directive in relation to trading in energy and energy derivatives (question F.20).

4. The advice from CESR and ERGEG is sought by the end of December 2008 with the exception of question F.20 on market abuse and questions C.1 to C.3 and E.12 to E.17 which were considered to be fact-finding questions. A response to the fact-finding questions was sent to the Commission on 30 July 2008 (CESR/08-527). The response to question F.20 was delivered on 1 October 2008 (Ref. CESR/08-739; E08-FIS-07-04).

5. On 18 February 2008, CESR and ERGEG issued a call for evidence asking for views on the Commission's questions. The response period closed on 18 March 2008. Nine responses were received, one of them confidential.

6. CESR and ERGEG have undertaken in-depth considerations on the issues. Whereas the mandate of the Commission addresses the electricity and gas markets, it has been noted that there are substantial interdependencies between electricity and gas markets and some other markets, such as emission allowances markets and other energy markets (e.g. coal and oil markets). The products in these markets are traded by the same market participants and there are linkages in the price formation processes of these markets.

7. While CESR and ERGEG drafted this consultation paper regarding the remaining questions of the mandate, they took into account the advice already given separately by CESR and CEBS (Committee of European Banking Supervisors) with regard to commodities and related derivatives markets. The purpose of this consultation paper from CESR and ERGEG is to seek comments on the findings, the possible policy options and, where already indicated, the draft advice that is proposed to be provided to the Commission. The public consultation will allow CESR and ERGEG to understand and to take into account the views of market participants.

8. Preliminary views on these issues were expressed by industry experts (Consultative Working Group – CWG) in a meeting of the CWG on 2 June 2008. The preliminary findings, options and views expressed in this consultation paper were also discussed with the CWG on 15 September 2008. The CWG consists of technical experts from the markets and firms affected.

Public consultation and timetable

9. CESR and ERGEG invite responses to this consultation paper. In addition to general comments, we would appreciate receiving your views on the specific questions presented within the paper.

10. All contributions shall be submitted via e-mail to ERGEG (mail to **fis@ergeg.org**) and online via CESR's website under the heading Consultations at **www.cesr.eu**. Non-confidential contributions will be published on the CESR and ERGEG websites. Respondents to this consultation paper should, however, endeavour to provide any confidential material in annexes that can be separated from publishable non-confidential material.

11. The consultation closes on 24 November 2008.

12. CESR and ERGEG will consider the responses to the consultation paper and provide the final advice to the Commission by the end of December 2008. A feedback statement: evaluation of comments to the public consultation will also be published.

Structure of the paper and definition of important terms

13. This paper sets out the draft advice of CESR and ERGEG on the Commission's questions. In accordance with the mandate given by the Commission it is divided into three main parts: record-keeping (questions D.4 – D.6), transparency (questions E.11, E.17, E.18. and E.19) and information exchange (questions D.7 – D.10).

14. The terms used throughout this paper will be explained in the following paragraphs.

15. *Record-keeping obligations* refer to the obligations on market participants to keep records of the characteristics of the transactions they make. Particularly, under MiFID, record-keeping provisions describe the content and format of the records of transactions that firms need to keep at the disposal of their securities regulator for at least five years. One purpose of record-keeping obligations is to assist regulators in checking compliance of firms on a case-by-case basis. Record-keeping obligations are covered in Section I of this consultation paper.

16. *Transaction reporting* refers to the transmission by market participants to regulators of the details of the transactions they make. Under MiFID, transaction reporting requirements lead to the transmission of information to securities regulators on transactions in financial instruments, including energy derivatives, admitted to trading on a regulated market, wherever they are made, by the end of the following working day, primarily for the purpose of monitoring market abuse.

17. The term *transparency* is used to describe the level of availability of information or data pertaining to a particular matter to the market. When the term transparency is used on its own, the context of its usage is ambiguous and is open to interpretation. In the following paragraphs, transparency and other related terms are defined with respect to different contexts.

18. *Aggregate market transparency* refers to the dissemination of non-commercially sensitive information on transactions for the market. This term is used in the wording of question E.11 (see Section II), and concerns the data that national regulatory authorities (NRAs) may choose to make available to the market under powers proposed by the Third Energy Package.

19. *Transparency of fundamental data* is the disclosure of information on physical data, such as information on generation, grids, storage and consumption (such as demand forecast, etc.).

20. *Trade transparency* refers to the publication of information on each trading interest or concluded trade on a real/near real-time basis. This kind of transparency is mainly useful for price formation and is dealt with under the discussion for question E.19 (see Section II). Trade transparency means pre- and post-trade transparency.

Section I: Record keeping

Current text of the relevant provisions of the Third Energy Package

21. Since the wording of the proposed legal provisions serves as a basis for the interpretation of the scope and obligations under the proposed amendments in the Third Energy Package, the relevant provisions are cited here (as they currently stand[1]).

22. Article 22f of the Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity (the amended Electricity Directive) relevantly states:

> Record-keeping
>
> 1. Member States shall require supply undertakings to keep at the disposal of the national regulatory authority, the national competition authority and the Commission, for at least five years, the relevant data relating to all transactions in electricity supply contracts and electricity derivatives with wholesale customers and transmission system operators.
>
> 2. The data shall include details on the characteristics of the relevant transactions such as duration, delivery and settlement rules, the quantity, the dates and times of execution and the transaction prices and means of identifying the wholesale customer concerned, as well as specified details of all unsettled electricity supply contracts and electricity derivatives.
>
> 3. The regulatory authority may decide to make available to market participants elements of this information provided that commercially sensitive information on individual market players or individual transactions is not released. This paragraph shall not apply to information about financial instruments which fall within the scope of Directive 2004/39/EC.
>
> 4. To ensure the uniform application of this Article, the Commission may adopt guidelines which define the methods and arrangements for record-keeping as well as the form and content of the data that shall be kept. These measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27b(3).
>
> 5. With respect to transactions in electricity derivatives of supply undertakings with wholesale customers and transmission system operators, this Article shall only apply once the Commission has adopted the guidelines referred to in paragraph 4.
>
> 6. The provisions of this Article shall not create additional obligations vis-à-vis the authorities mentioned in paragraph 1 for entities falling within the scope of Directive 2004/39/EC.
>
> 7. In case the authorities mentioned in paragraph 1 need access to data kept by entities falling within the scope of Directive 2004/39/EC, the authorities responsible under that Directive shall provide the authorities mentioned in paragraph 1 with the required data.

[1] The legislative procedure of the co-decision process is quite advanced. The European Parliament has proposed amendments to the text of the Third Energy Package. A meeting of the Council is scheduled for 10 October 2008 to find a common position among Member States.

Recital 20 states:

> 20. Prior to adoption by the Commission of guidelines defining further the record-keeping requirements, the Agency for the Cooperation of Energy Regulators and the Committee of European Securities Regulators (CESR) should cooperate to investigate and advise the Commission on the content of the guidelines. The Agency and the Committee should also cooperate to further investigate and advise on the question whether transactions in electricity supply contracts and electricity derivatives should be subject to pre and/or post-trade transparency requirements and if so what the content of those requirements should be.

23. As stated in the Commission's mandate, the same provisions apply mutatis mutandis in Article 24f and Recital 22 in the proposal to amend Directive 2003/55/EC for gas (the amended Gas Directive).

24. The Third Energy Package adopted by the Commission includes one Article on record-keeping of transactions. Relevant provisions on record-keeping for electricity contracts are included in paragraphs 1, 2, 4, 5 and 6 of Article 22f of the Electricity Directive. For gas contracts, the respective provisions are included in paragraphs 1, 2, 4, 5 and 6 of Article 24f of the Gas Directive.

25. The following table summarises all characteristics relevant for record-keeping regarding electricity and gas transactions:

	Article 22f for electricity	***Article 24f for gas***
Holding period	Five years	
Firms obliged to keep records	Supply undertakings	
Nature of data	Transactions in electricity supply contracts and derivatives with: - wholesale customers; - transmission system operators (TSO).	Transactions in gas supply contracts and derivatives with: - wholesale customers; - transmission system operators (TSO); - storage operators; - Liquefied Natural Gas (LNG) operators.
Details of information that should be recorded	Characteristics of the relevant transactions, such as: - duration; - delivery and settlement rules; - quantities; - dates of execution; - times of execution; - transaction prices; - identification of concerned wholesale customers; and - specified details of unsettled supply contracts and unsettled derivatives.	
Who may demand access to the records?	Three authorised entities : - the European Commission; - the national competition authority; - the national (energy) regulatory authority.	
Uniform application	The Commission may adopt supplementing guidelines which define:	

	- methods and arrangements for record-keeping; - form and content of the data.
Beginning of validity period of record-keeping provisions for derivatives	With respect to transactions in derivatives, Articles 22f and 24f shall only apply once the Commission has adopted supplementing guidelines.
Link with other obligations under MiFID	The provisions of Articles 22f and 24f shall not create additional obligations for investment firms subject to the requirements under MiFID vis-à-vis the Commission, competitions authorities and (energy) regulatory authorities. In case the authorised entities request data kept by investment firms falling within the scope of MiFID, the securities regulatory authorities shall provide them with the information.

26. Whether the proposed provisions deal with electricity or gas, the content and scope of the record-keeping obligations are almost the same. The only difference is the wider scope of contracts explicitly covered by the Gas Directive. The record-keeping obligations for gas supply contracts also include transactions with Storage Operators and Liquefied Natural Gas (LNG) operators. This difference is a consequence of the different market structure of the electricity and gas markets.

Questions D.4 to D.6

27. The questions in the mandate identified as relevant for record-keeping do not provide for a clear cut and seem to overlap in their scope and content. This is why they will be cited together and no distinction will be made between the questions when discussing general issues regarding record-keeping.

D.4: *Do regulators believe that there should be a difference between the proposed record-keeping obligations under the proposed amendments to the Electricity Directive and Gas Directive and the existing record-keeping obligations with respect to transactions in electricity and gas derivatives to which investment firms are subject by reason of MiFID (Article 25 and 13(6))?*

D.5: *Pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC (the Third Energy Package), what methods and arrangements for record-keeping do CESR and ERGEG consider the Commission should specify as guidelines under the legislation for:*

a) transactions in electricity and gas supply (spot) contracts? (To the fullest extent possible this should be a harmonised specification.) If there are any deviations from the obligations relating to commodity derivatives already applicable to investment firms, these should be justified;

b) transactions in electricity and gas derivatives contracts? (To the fullest extent possible this should be a harmonised specification.) If there are any deviations from the recommendations in a), these should be justified.

In answering this question, CESR and energy regulators are asked to consider specifying a single transaction record format based on the content and data to be provided as per Table 1 of Annex I of Regulation EC 1287/2006.

***D.6**: How would this information be most efficiently kept at the disposal of authorities as mentioned under paragraph 1 of Articles 22f/24f in the case of spot transactions and non-investment firms?*

Scope of the Third Energy Package in relation to the scope of MiFID

28. The Commission's questions call for a harmonisation of the record-keeping rules for investment firms under MiFID and the records to be kept by supply undertakings under the Third Energy Package to the largest extent possible. It can therefore be derived from the formulation of questions D.4 to D.6 that the Commission recognises an overlap between transactions in the instruments covered by MiFID and transactions in supply contracts and derivatives covered by the Third Energy Package.

29. Furthermore, the current draft of the provisions of the Third Energy Package tries to avoid additional obligations of entities falling into the scope of MiFID. This implies that the Commission has also recognised some overlaps of the scope in terms of entities covered by the respective pieces of legislation.

30. Since the scope of Articles 22f/24f of the Third Energy Package is not as clear as it appears at first sight and the scope will influence not only the answers to the questions on record-keeping but all other issues at stake, it seems crucial to reflect on various options and their respective consequences.

Entities in the scope: supply undertakings

31. Articles 22f/24f oblige "supply undertakings" to record transactions in supply contracts and derivatives with "wholesale customers" and transmission system operators as well as, under the Gas Directive, storage and LNG operators. The term "supply" is defined in Article 2 No. 19 of the Electricity Directive as "sale, including resale, of electricity to customers". Thus, a supply undertaking is an entity which is active in the sale or resale of electricity[2]. The term customer in the sector Directives generally includes wholesale and final customers. However, the contracts which have to be recorded comprise only those which supply undertakings conclude with wholesale customers. According to Article 2 No. 8 of the Electricity Directive, "wholesale customers" include natural or legal persons who purchase electricity for the purpose of resale, whereas final customers purchase for their own use.

32. As regards the overlap with investment firms under MiFID, there are several options conceivable on the scope of the record-keeping obligations under the Third Energy Package:

    a) <u>All companies active in the wholesale market (including companies dealing only with cash-settled instruments)</u>

    This interpretation would cover all firms, including investment firms and firms exempted from MiFID, which are active on the wholesale market for electricity/gas under the record-keeping obligations of the Third Energy Package without any distinction of physical or financial settlement of the contracts they trade with wholesale customers. Only contracts with final customers would be excluded.

    It is argued that otherwise the market monitoring of energy regulators would not be complete and information about aggregate data which may be disclosed to the market according to paragraph 3 of Articles 22f/24f could not mirror the whole market. Indeed, for traders cash-

[2] In the Gas Directive the same definition is provided for "supply" of gas.

settled and physically-settled contracts can be substitutes for each other to hedge against price risk. The substitutability of these contracts is confirmed by the fact that the prices of cash-settled and physically-settled contracts are nearly identical on markets were both are traded. This demonstrates that these products belong to the same relevant market for competition analysis and must be monitored simultaneously.

This interpretation would make paragraph 7 of Articles 22f/24f requiring securities regulators to provide data kept by investment firms to the energy regulators and other authorities futile because all transactions to be kept were already available for energy regulators, national competition authorities and the Commission. Furthermore, this interpretation is likely to conflict with the purpose of paragraph 6 of Articles 22f/24f to avoid additional obligations of investment firms vis-à-vis other authorities than the authorities mentioned in MiFID.

b) <u>All companies active in the sale or resale of electricity/gas (i.e. companies trading in spot contracts and derivatives with physical settlement)</u>

This interpretation includes investment firms and all other firms which physically supply electricity/gas to wholesale or final customers. It covers all firms which conclude spot contracts and derivative transactions with physical settlement, thus actually intending to physically deliver electricity/gas. Depending on their authorisation as investment firms, the records to be (additionally) kept by them under the Third Energy Package would cover all supply contracts and derivatives with wholesale customers (for non-investment firms) or all contracts with wholesale customers falling under the scope of the Third Energy Package not covered by MiFID (for investment firms). If these investment firms supplying electricity/gas were not covered, there would be no record-keeping obligations e.g. for all spot transactions of specialised trading subsidiaries of energy producers. However, in some markets these are the largest players in the electricity/gas trading market.

This interpretation raises similar concerns regarding the application of paragraph 6 of Articles 22f/24f as the above mentioned interpretation because - to some extent - there will be additional obligations for record-keeping towards the authorities mentioned in paragraph 1 of Articles 22f/24f.

It is acknowledged under this option that a firm which only deals in "cash-settled derivatives" but falls out of the scope of MiFID (e.g. because of an exemption) will not be covered by any of the EU legislation.

c) <u>All companies active in the sale or resale of electricity/gas excluding investment firms</u>

Under this interpretation the terms "supply undertaking" and "investment firm" are used in a reciprocally exclusive manner. It is based on a very strict interpretation of paragraph 6 of Articles 22f/24f, i.e. that this paragraph excludes any additional requirements of investment firms vis-à-vis other regulators than MiFID authorities. Non-MiFID firms would be covered if they "supply" electricity/gas. The contracts to be recorded by "supply undertakings" are supply contracts and derivatives with wholesale customers.

This interpretation has the advantage that the competencies of securities regulators and energy regulators are strictly separated and firms would not be responsible in any way to two different sector regulators. The other interpretations would lead to the situation that other authorities, including national competition authorities and the Commission, will have in a more or less extended way direct access to the records of investment firms.

However, as indicated above, this interpretation leads to the situation that at least in some markets a large volume of transactions in the spot market that is of genuine interest and most relevance for energy regulators would fall outside any record-keeping obligations.

Furthermore, it may give an incentive to firms active in the sale and resale of electricity/gas to restructure themselves as investment firms to avoid regulation under the Third Energy Package.

33. Considering the wording, structure, purpose and consequences of each policy option, CESR and ERGEG came to the conclusion that option b) is the most appropriate. However, it should be noted that firms which trade exclusively cash-settled financial instruments related to electricity and/or gas as underlying may be exempted from MiFID and will also not be treated as supply undertaking under the Third Energy Package. Information about transactions undertaken by those firms will not be available to any competent authority on the basis of record-keeping obligations. Even though it can be expected that in practice the shares of these firms and their transactions in terms of amount and volume are marginal, an attempt would need to be made to monitor the actual shares and the development of these shares to assess the potential regulatory gap. However, it has to be stressed that the potential gap cannot be tackled within the given legal framework.

Transactions in the scope: supply contracts and derivatives

34. The instruments in the scope of Articles 22f/24f also need to be analysed. The record-keeping requirements cover transactions in supply contracts and derivatives. The proposed amendments to Article 2 of the Electricity Directive include definitions for "electricity supply contract" in No. 32 and "electricity derivative" in No. 33. According to these proposed definitions, "electricity supply contract" means a contract for the supply of electricity but does not include an electricity derivative, and "electricity derivatives" shall cover all financial instruments covered by sections C(5), C(6) and C(7) of Annex I of MiFID[3].

35. According to Article 4(1)(17) of MiFID, financial instruments mean instruments specified in Section C of Annex I of MiFID. Sections C(5), (6) and (7) of Annex I cover the following derivatives[4] relating to the commodities, including electricity and gas:

C(5): Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event);

C(6): Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market and/or an MTF;

C(7): Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise above-mentioned and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls.

36. In other words, like in MiFID, the term "derivative" used in the Third Energy Package covers cash-settled derivatives (or at least those with an option to settle in cash) irrespective whether they are traded on a regulated market, an MTF or OTC. Furthermore, it includes derivatives traded on an RM or MTF in the EEA which may be physically settled.

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[3] In the amended Gas Directive the same definitions are provided for the terms "gas supply contract" and "gas derivative".

[4] MiFID does not define the term "derivatives". Rather, it is used in the context of the description of the term "financial instruments". However, it can be derived from the formulation "any other derivatives" that options, futures, swaps, forwards are considered to be derivatives. Furthermore, all other kinds of derivatives are considered to be financial instruments if they fulfil the specific conditions laid down. On the other hand, transactions in the commodity itself such as spot contracts are not covered by the term "financial instrument".

37. As regards the third category, according to the illustrative conditions set by Article 38 of the MiFID Implementing Regulation, standardised OTC derivatives which can be physically settled and which are cleared by a clearing house or similar entity or provide for margin payments are generally covered as financial instruments. This includes contracts which are traded on a third country trading facility if the other conditions are met.

38. The following description sets out the respective provisions in detail:

Article 38(1) of the MiFID Implementing Regulation specifies the derivative contracts covered by Annex I Section C(7) of MiFID, i.e. options, futures, swaps, forwards and any other derivative contracts not traded on a regulated market or MTF which can be physically settled. This covers a contract other than a spot contract[5] if it satisfies all of the following conditions:

(a) it meets one of the following sets of criteria:

(i) it is traded on a third country trading facility that performs a similar function to a regulated market or an MTF;

(ii) it is expressly stated to be traded on, or is subject to the rules of, a regulated market, an MTF or such a third country trading facility;

(iii) it is expressly stated to be equivalent to a contract traded on a regulated market, MTF or such a third country trading facility;

(b) it is cleared by a clearing house or other entity carrying out the same functions as a central counterparty, or there are arrangements for the payment or provision of margin in relation to the contract;

(c) it is standardised so that, in particular, the price, the lot, the delivery date or other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates.

Article 38(4) specifically excludes a contract if it is entered into with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network, and it is necessary to keep in balance the supplies and uses of energy at a given time.

39. Thus, some electricity and gas derivatives (i.e. electricity and gas derivatives with cash settlement, those traded on regulated markets or MTFs which can be physically settled and the derivatives covered by Article 38 of the MiFID Implementing Regulation) are considered to be financial instruments ("MiFID derivatives"). However, some OTC-derivatives which can be physically settled fall outside the scope of MiFID.

40. This leads to two further questions:

a) Are the derivatives excluded from MiFID also to be excluded from the record-keeping requirements regarding derivatives under Articles 22f/24f?

b) Should the remaining non-standardised OTC contracts with physical settlements be considered as "supply contracts" or do they fall outside the Third Energy Package?

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[5] According to Article 38(2), a spot contract for the purposes of Article 38(1) means a contract for the sale of a commodity, asset or right, under the terms of which delivery is scheduled to be made within the longer of (a) two trading days or (b) the period generally accepted in the market for that commodity, asset or right as the standard delivery period. As a counter exemption, a contract is not considered to be a spot contract if, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the underlying is to be postponed and not to be performed within this period.

41. Under the current wording of the definition in the Third Energy Package, "derivatives" excluded from MiFID are definitely excluded from the record-keeping requirements regarding "derivatives" since this has been aligned with the MiFID term (see definition above in paragraph 34). However, OTC derivatives falling outside MiFID can be physically settled, i.e. they are used for actual supply of electricity/gas. Thus, they can be considered to be "supply contracts". At first sight, this interpretation may be thwarted by the definition of supply contracts in the Third Energy Package because this excludes "energy derivatives". However, it can be argued that the definition of "energy derivatives" again only includes the derivatives in Section C (5) to (7) of Annex I of MiFID and, thus, the instruments with physical delivery falling outside MiFID are not derivatives but transactions in supply contracts.

42. OTC forwards with physical settlement and no clearing house/central counterparty clearing are a very common instrument in the electricity market. They could be standardised, i.e. follow the same specification as products traded on an RM or MTF regarding the product to be delivered, the lot, the maturity and refer to prices established at RM or MTFs, or they could be non-standardised.

43. CESR and ERGEG are therefore of the view that these non-MiFID "OTC derivatives with physical settlement" are included in the scope of the Third Energy Package.

Record-keeping obligations under MiFID

Scope of MiFID record-keeping requirements[6]

44. Investment firms are obliged to keep records of all services and transactions in financial instruments undertaken by them for at least five years. Regarding data on transactions, Article 25(2) of MiFID specifies that investment firms have to keep at the disposal of the securities regulators the relevant data relating to all transactions in financial instruments which they have carried out, whether on own account or on behalf of a client. As outlined above, this may include, in some national markets, a big share of all electricity and gas derivatives, i.e. beside electricity and gas derivatives with cash settlement and those traded on regulated markets or MTFs which can be physically settled also the derivatives covered by Article 38 of the MiFID Implementing Regulation.

45. The records to be kept have to be sufficient to enable the securities regulator to monitor compliance of investment firms with the requirements under MiFID, in particular all obligations with respect to clients or potential clients.

46. Articles 13(6) and 25(2) of MiFID provide general rules for record-keeping of transactions which are very similar to the requirements proposed in paragraph 1 of Articles 22f/24f of the Third Energy Package. In contrast to the Third Energy Package, MiFID allows only the securities regulator to dispose of the data and the record-keeping requirements are not restricted to transaction with certain clients and/or counterparties while the Third Energy Package explicitly foresees a possibility for direct access to the data by the Commission and national competition authorities in addition to the energy regulators and limits the record-keeping obligations to energy supply contracts and derivative transactions undertaken with wholesale customers and other specified operators. In Article 13(6), MiFID also gives some indication about the purpose of the record-keeping obligations ("enable the competent authority to monitor compliance") whereas a legislative purpose is not explicitly mentioned in Articles 22f/24f of the Third Energy Package.

Persons in the scope: investment firms

47. Persons covered by the record-keeping obligations under MiFID are investment firms. Investment firms are legal or natural persons whose regular occupation or business is the provision of one or

[6] For details of the wording of the relevant provisions in MiFID and its implementing measures please see Annex II.

more investment services to third parties and/or the performance of one or more investment activities on a professional basis. This generally also includes all persons acting on own account.

48. There are some exemptions from the scope of MiFID which are relevant for commodity derivatives firms. These exemptions include mainly Article 2(1)(b) for the exclusive provision of services within a group, Article 2(1)(d) for the exclusive trading on own account other than by market making, Article 2(1)(i) for dealing on own account or provision of investment services to clients of the main business (e.g. energy production) and Article 2(1)(k) for persons whose main business consists in dealing on own account in commodities and/or commodity derivatives.

49. The responses to the fact finding questions which CESR and ERGEG delivered to the Commission on 30 July 2008 have shown that there were relatively few investment firms which were at the same time considered as supply undertakings (the fact finding explicitly excluded credit institutions). However, this figure largely depends on the structure of the group of the investment firm and its business organisation.

50. The exemptions from MiFID for those firms trading commodity derivatives are currently reassessed by CESR and CEBS (Committee of European Banking Supervisors) in the framework of a mandate of the Commission in the context of an Article 65 MiFID review. CESR and CEBS propose in their advice to the Commission that the exemptions would be modified but they would continue to deal with the specific commodity related concerns about the incidental provision of investment services and own account trading. It can therefore be concluded that also in the future some commodity derivative firms, particularly those dealing on own account, will continue to be not covered by the record-keeping obligations under MiFID.

51. ***Purpose of record-keeping obligations under MiFID***

52. Records of orders and transactions have multiple purposes under MiFID. They are used for the supervision of the investment firm's compliance with conduct of business rules such as client order handling or best execution and its compliance with the rules on conflict of interest management. They are also used to monitor that investment firms act honestly, fairly and professionally and in a manner which promotes the integrity of the market. They can also provide evidence in investigations regarding market abuse.

53. Securities regulators utilise the records to assess the conduct of market participants on a case-by-case basis. The records are usually checked during on-site inspections by the competent authority or on behalf of the competent authority by a third party (e.g. an external auditor). Securities regulators also have the power to demand copies of any document.

Data to be kept under MiFID

54. Regarding the data to be kept on transactions in financial instruments executed by investment firms[7], Article 8 of the MiFID Implementing Regulation requires the following details to be kept:

- name or other designation of the client;
- trading day and time, buy/sell indicator, instrument identification, unit price and price notation, quantity and quantity notation, counterparty and venue identification[8];
- total price (being the product of the unit price and the quantity);

[7] If the investment firm does not execute the transaction itself but only transmits an order to another person for execution, it has to keep the following details: name or the name or other designation of the client whose order has been transmitted; name or other designation of the person to whom the order was transmitted; terms of the order transmitted; date and exact time of transmission.

[8] The record-keeping provisions of MiFID make reference to some of the fields included in Table 1 of Annex I of the MiFID Implementing Regulation for purposes of transaction reporting; for details see Annex II below.

- nature of the transaction if other than buy or sell; and

- natural person who executed the transaction or who is responsible for the execution.

Methods and arrangements for retention of data under MiFID

55. Besides the content of the records of transactions in financial instruments, MiFID also addresses methods and arrangements for record-keeping by specifying general requirements regarding the retention and accessibility of the records for the competent authority.

56. According to Article 51(2) of the MiFID Implementing Directive[9] records must be retained in a medium that allows the storage of information in a way accessible for future reference by the competent authority and in such a form and manner that the following conditions are met:

(a) the competent authority must be able to access them readily and to reconstitute each key stage of the processing of each transaction;

(b) it must be possible for any corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained; and

(c) it must not be possible for the records otherwise to be manipulated or altered.

57. This provision provides a flexible framework for the retention of records without prescribing the medium, form and manner of storing the information in detail. It mainly requires that the information must be stored in an appropriate way to be accessible for future reference by the competent authority. The securities regulator must be able to readily access the information, to easily ascertain any corrections and amendments and the prior content of the records. Furthermore, records should not be manipulated or altered without a possibility to trace the amendments.

Recommendations for guidelines on record-keeping under the Third Energy Package

58. The Commission's mandate on record-keeping basically asks CESR and ERGEG to evaluate whether there should be a difference in record-keeping obligation regarding electricity and gas derivatives between MiFID and the Third Energy Package. It also asks which methods and arrangements as well as content of the records the Commission should specify in their supplementing guidelines for record-keeping of transactions in supply (spot) contracts and derivative contracts under paragraph 4 of Articles 22f/24f of the Third Energy Package. Lastly, on the format, the Commission specifically asks for a recommendation on how records of spot transactions of non-investment firms would be kept most efficiently.

59. Since most of the answers to these questions depend on the purpose of the record-keeping obligations under the Third Energy Package, we will first discuss the possible use of records kept (Part 1). We will then analyse which content is needed in the context of the Third Energy Package and whether the details to be kept under MiFID are also adequate for transactions in electricity and gas derivatives (as well as supply contracts) under the Third Energy Package (Part 2). Finally, we will analyse what methods and arrangements, including the format of the records to be kept, are adequate and proportionate (Part 3).

60. Where appropriate, we will discuss the benefits and drawbacks of different regulatory options.

[9] Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, OJ L 241, 2.9.2006, p.26.

Part 1: Purpose of record-keeping obligations under the Third Energy Package

61. In order to make a recommendation on the content of the supplementing guidelines for record-keeping under the Third Energy Package to the Commission, the purpose of the record-keeping obligations in the Third Energy Package has to be considered. A description of the records to be kept will naturally be linked to any purpose identified.

62. Records of transactions generally have the purpose to enable a competent authority to check a firm's compliance with legal requirements. The organisational arrangements of a firm to ensure compliance always include record-keeping requirements. Otherwise, compliance cannot be checked by any competent authority in charge of supervision. This is reflected by the inclusion of record-keeping provisions on transactions in energy supply contracts and derivatives within the part on competences and powers within the Third Energy Package.

63. In the context of the Electricity and Gas Directives, record-keeping obligations may also have to be considered in the light of the regulatory authorities' main objectives, duties and powers[10]. The fact that national competition authorities and also the Commission may demand access to the records kept by supply undertakings implies that the records could also be used to assess the conduct of market participants on an ad-hoc basis for competition cases. In addition, the records kept may also be used by national energy regulators to make public some elements of them for aggregate market transparency purposes (paragraph 3 of Articles 22f/24f)[11].

64. Additional purposes of the new record-keeping obligations included in the Third Energy Package may be derived from various (new) competences and responsibilities of energy regulators laid down in the sector legislation:

- Applicable Electricity and Gas Directives state that energy regulators "*shall (…) be responsible for ensuring (…) effective competition and the efficient functioning of the market, monitoring in particular (…) the level of (…) competition*".

- Recital 2.1 of the explanatory memorandum of the Third Energy Package Directives stipulates that "*Electricity and gas differ fundamentally from other traded goods because they are network based products that are impossible or costly to store. This makes them sensitive to market abuse and regulatory oversight over undertakings active in the electricity and gas market needs to be increased. Regulators therefore need to have access to information on the operational decisions of the companies. It is proposed to oblige companies to keep records of the data related to their operational decisions for five years at the disposal of national regulatory authorities, as well as at the disposal of competition authorities and the Commission, so that these authorities are able to control effectively allegations of market abuse. This will limit the scope of market abuse, increase the trust in the market, and thereby stimulate trade and competition. (…) To enable them to perform their duties, regulatory authorities would be given the powers to investigate, to request all necessary information and to impose dissuasive sanctions.*"

- Articles 22b/24b of the Third Energy Package state that one of the main policy objectives of regulatory authorities is to ensure the "*efficient functioning of their national market, and to promote effective competition in cooperation with competition authorities*".

- In addition, under Articles 22c(1)(i)/24c(1)(i) of the Third Energy Package energy regulators have to "*monitor the level of market opening and competition at wholesale and retail levels, including on electricity exchanges (…) as well as any distortion or restriction of competition in cooperation with competition authorities, including providing any relevant information, bringing any relevant cases to the attention of the relevant competition authorities.*"

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[10] For details on the relevant provisions on the objectives, duties and powers of the energy regulators please see Annex III.

[11] This is addressed in detail under question E.11 in Section II (transparency) below.

65. Thus, energy regulators are supposed to monitor electricity and gas markets in order to avoid any distortion that could threat market opening and competition.

66. In order to fulfil their duties, energy regulators are given additional powers in paragraph 3 of Articles 22c/24c of the Third Energy Package. The regulatory authority shall have at least the following powers:

(a) to issue binding decisions on electricity and gas undertakings;

(b) to carry out in cooperation with the national competition authority investigations of the functioning of electricity markets, and to decide, in the absence of violations of competition rules, of any appropriate measures necessary and proportionate to promote effective competition and ensure the proper functioning of the market, including virtual power plants;

(c) to request any information from electricity undertakings relevant for the fulfilment of its tasks;

(d) to impose effective, appropriate and dissuasive sanctions to electricity undertakings not complying with their obligations under this Directive or any decisions of the regulatory authority or of the Agency;

(e) to have appropriate rights of investigations (…).

67. Record-keeping obligations are therefore required to enable energy regulators and competition authorities to investigate the "*operational decisions*" of undertakings in order "*to control effectively allegations of market abuse*" and to assess possible "*distortion or restriction of competition*".

68. Record-keeping obligations could also be used for investigations in the context of potential obligations of energy regulators under a possible future regime for the supervision of market abuse in the energy sector legislation as proposed by CESR and ERGEG in their advice on question F. 20 of the mandate.[12]

Question to market participants:

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.**

Part 2: Content of the record-keeping obligations under the Third Energy Package

Is the content of MiFID record-keeping requirements for derivatives covered by MiFID appropriate for contracts covered by the Third Energy Package?

69. Data to be kept under Articles 22f(2)/24f(2) of the Third Energy Package shall include details on the characteristics of the relevant transactions such as duration, delivery and settlement rules, the quantity, the dates and times of execution and the transaction prices and means of identifying the wholesale customer concerned, as well as specified details of all unsettled electricity supply contracts and electricity derivatives.

70. Under paragraph 4 of Articles 22f/24f of the Third Energy Package, the Commission may adopt supplementing guidelines which define – among others – the content of the data that has to be kept. The mandate asks CESR and ERGEG to give recommendations about which content should be specified in the Commission's guidelines. The recommendation should take into account the content

[12] See http://www.cesr.eu/index.php?page=document_details&id=5270&from_id=53; http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_CONSULT/CLOSED%20PUBLIC%20CONSULTATIONS/CROSS_SECTORAL/Financial%20Services/Market%20abuse%20framework.

and data specified by Table 1 of Annex I of the MiFID Implementing Regulation and, if necessary, differentiate between the content of spot contracts and derivatives.

71. Respondents to the Call for Evidence did not express a uniform view on the potential content of the record-keeping requirements under the Third Energy Package.

72. Three respondents pointed out that the same harmonised set of rules as provided for in MiFID to transactions in financial instruments should also be applied to spot market transactions. One of them pointed out that the specificities of auction based spot markets have to be taken into account while another one of them stressed that the obligation to keep records should be understood as extensively as possible, including all supply and derivative contracts no matter where they were concluded. A fourth contributor also supported the retention of data on both spot and derivatives markets for up to five years, provided the rules for retention of this data are cost-efficient and proportionate.

73. On the contrary, one respondent was of the opinion that the proposed record-keeping provisions should be different from the record-keeping obligations already in force under MiFID. The same record-keeping obligations in electricity and gas markets - including spot and derivatives markets – would not be proportionate in the context of the Third Energy Package. It would appear as an excessive power of intervention in commercial activities and decisions that fall outside of the area of competence of energy regulators.

74. Two contributors pointed out that the record-keeping arrangements should not duplicate the large amount of data already available from other entities, such as exchanges or brokers. One of them held that there should be a harmonised approach for record-keeping; particularly one set of data should be required to be kept for different purposes as befitting the different directives' aims.

75. ESME (European Securities Markets Expert Group) has also received a mandate of the Commission asking for advice on the content and format of the record-keeping obligations under the Third Energy Package. In its advice to the Commission in July 2008, ESME stressed that the record-keeping obligations in the Third Energy Package are not linked with a MiFID-style transaction reporting. Record-keeping obligations therefore should be clearly distinguished from periodic reporting to supervisors. As a consequence, ESME argued in favour of a principles-based approach and rejected a "rigid prescribed-format approach". However, they also suggested specifying a minimum content of information which has to be recorded, including information on non-standardised products. Ideally, the content of the records to be kept for securities regulators and energy regulators respectively should be the same. This would also facilitate a potential information exchange between these regulators.

76. However, ESME is not in favour of uniform prescribed fields such as described in Table 1 of Annex I of the MiFID Implementing Regulation – at least if this is used as a table for transaction reporting purposes. Generally, they consider the development of uniform fields difficult mainly due to non-standardised trades with complex options. In this context, concerns about the development of unique codes to identify each traded product were raised. ESME therefore proposes to specify a minimum content of information to be recorded in order to ensure that regulators can access this information upon request within a reasonable timeframe. In order to mitigate burdens for supply undertakings, ESME also proposes to limit the scope of application of the record-keeping obligations, either by excluding small and medium sized firms which are not relevant for the price formation process or to exclude certain transactions.

77. CESR and ERGEG approached the question which minimum content should be recorded by gathering the information which would be needed to understand the transactions undertaken by supply undertakings. In addition to basic information such as the counterparty identification, the commodity type or the amount of energy to be delivered, CESR and ERGEG consider that the data to be kept under Articles 22f(2)/24f(2) shall include - among others - the subsequent details on the characteristics of the relevant transactions for the following reasons:

    a) Trading day and time: on very volatile markets such as electricity and gas, the price of a transaction can not be assessed without knowing accurately the date and time of the transaction; moreover, this information is required to detect complex price manipulations.

b) Pricing information: to understand the contracts, information on pricing is necessary. This may be a firm fixed price, a floating price, an indexation formula on various price indices, or a fixed price and a strike price for an option.

c) Delivery period (start/end dates/times): since electricity and gas cannot be easily and cheaply stored, prices vary depending on the expected date and the time of the delivery.

d) Delivery profile: since prices vary depending on the date and the time of the delivery, the contract price cannot be analysed without knowing the time profile of the delivery. This is described by the list of delivery periods and associated electricity or daily quantities to be delivered along each period. Standard profiles, such as "Baseload", "Peakload", "Off-peak", can also be used to describe most standardised products.

e) Delivery point: since congestions do not allow for a free exchange of electricity and gas between Member States and sometimes even within one Member State, the same commodity usually has different values – and, consequently, different prices – depending on the location where the energy is delivered. The delivery point can be a physical point (physical location on the system) or a virtual point or zone (notional hub).

78. The table below summarises on a high level basis the contents which CESR and ERGEG consider necessary for the purposes of the record-keeping provisions under the Third Energy Package:

Compulsory contents	Description	Energy markets : electricity or gas	Relevant for spot or derivatives contracts
Trading day	Date on which the transaction was concluded.	Both	Both
Trading time	Time at which the transaction was executed in the local time of the place of incorporation of the supply undertaking.	Both	Both
Buy/Sell indicator	Identifies whether the transaction was a buy or sell from the perspective of the electricity or gas supply undertaking which is making the record.	Both	Both
Commodity type	Electricity or gas.	Both	Both
Counterparty identification	A unique code indicating the counterparty of the transaction, at least for each national market. In the best situation, a European code could be used[13].	Both	Both
Price elements	Price components which indicate the value of the contract that was "negotiated" in the currency of the market where it was traded.	Both	Both

[13] As of today, there is no unique European code for an identification of the counterparty. Nevertheless, national markets show that TSOs are using national identification codes for each market player.

Compulsory contents	Description	Energy markets : electricity or gas	Relevant for spot or derivatives contracts
Daily or hourly quantity	Daily or hourly quantity in MWh (Megawatthours) which corresponds to the underlying commodity.	Both	Both
Load type	Product delivery profile: baseload, peak, off-peak, block hours or other which corresponds to the delivery periods of a day.	Both	Both
Delivery point	Physical or virtual point[14] where the delivery takes place.	Both	Both
Delivery Start-Date and Time	Beginning date and time of energy delivery.	Both	Both
Delivery End-Date and Time	End date and time of energy delivery.	Both	Both
Option indicator	Indication whether it is a buy or a sell option (call or put).	Both	Derivatives
Swap indicator	Indication whether the transaction was a swap or not.	Both	Both
Indexation formula	Price indexation formula of the energy which is delivered. Indexed contracts are based on indexation formulas and multiplying coefficients which are used for the calculation of the value of the contract.	Both	Derivatives
Venue identification	Identification of the venue where the transaction was executed. That identification shall consist in a unique code corresponding to each individual platform (i.e. Regulated Market, MTF, spot exchange, broker). However, for bilateral OTC transactions without involvement of an intermediary, the identification as "OTC" shall suffice.	Both	Both

79. On specific contents such as "option indicator" and "indexation formula", it is generally admitted that derivatives are mostly concerned. Nevertheless, as regards the content "swap indicator", a swap

[14] A virtual point is a place where delivery occurs without consideration of the physical transport of energy (e.g. in France, PEGs (Points d' Echange de Gaz) are virtual points). In Belgium, Zeebrugge is a physical point of delivery where market players have the responsibilities for gas transport.

can possibly be negotiated on spot contracts and is therefore not only relevant for contracts with delivery in the future.

80. Comparing the contents of records which seem to be necessary for a clear understanding of the electricity and gas markets with the contents of records to be kept under MiFID[15], the conclusion that can be drawn is that contents for record-keeping under MiFID are not sufficient for the purposes of record-keeping under the Third Energy Package and additional data needs to be kept. However, the different elements of content about transactions in energy supply contracts and derivatives are an integral part of every standard contract commonly used for transactions in the electricity and gas market.

81. The following table presents the different pieces of content to be kept under MiFID and proposed additional contents which are considered to be necessary (cf. paragraph 78) for a clear understanding of electricity and gas markets transactions:

Contents currently kept under MiFID (Article 8 of Regulation No. 1287/2006/EC)	Designation of the client
	Trading day
	Trading Time
	Buy/Sell indicator
	Instrument identification
	Unit price
	Price notation (currency)
	Quantity
	Quantity notation (number of underlying assets)
	Counterparty ID
	Venue ID
	Total price
	Nature of the transaction if other than buy or sell
	Executer or person responsible for execution of the trade
Additional necessary contents	Commodity (Gas or Electricity)
	Daily or hourly quantities
	Load type
	Delivery point
	Delivery Start-Date and time
	Delivery End-Date and time
	Option Indicator
	Swap Indicator
	Indexation formula

82. It should be noted that one additional content proposed is actually mentioned in Table 1 of Annex I of MiFID Implementing Regulation which relates to the "List of fields for reporting purposes", i.e. the "option indicator" (put/call) in No. 13.

83. CESR and ERGEG also considered the option proposed by one market participant during the Call for Evidence that record-keeping arrangements should not duplicate the large amount of data already available from other entities such as RMs, MTFs and brokers. However, this does not seem to be a viable option in order to mitigate the record-keeping obligations for entities covered by the Third Energy Package because the legal obligation to keep records only includes supply undertakings and there is no specific requirement on an EU level for other entities such as spot exchanges, RMs or MTFs to keep records at the disposal of energy regulators, national competition authorities and the Commission.

[15] For a description of the contents of records to be kept under MiFID, please read Article 8 of the MiFID Implementing Regulation or above paragraph 54.

84. The proposal of CESR and ERGEG that supply undertakings should be obliged to keep the above mentioned additional minimum contents on transactions in supply contracts and derivatives in their records may lead to different contents of the records on MiFID financial instruments kept by investment firms and of those records regarding the same instruments kept by supply undertakings subject to the Third Energy Package. Consequently, securities regulatory authorities may also not be able to provide energy regulators under paragraph 7 of Articles 22f/24f of the Third Energy Package with the information that investment firms (which are not supply undertakings) are not legally required to keep. Since the additional information requested is quite generic and includes very common elements of derivative contracts, it is however presumable that also the records of investment firms often include the additional information anyway.

Questions to market participants:

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.**

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?**

Part 3: Methods and arrangements for record-keeping

Are general arrangements under MiFID also relevant for Third Energy Package?

85. As described above (cf. paragraph 55 et seq.), Article 51(2) of the MiFID Implementing Directive includes general requirements regarding the retention of records. CESR and ERGEG consider it valuable if the Commission's guidelines include similar general rules as one aspect of the methods and arrangements for record-keeping.

86. In this regard, the Commission's guidelines should at least specify that the arrangements for record-keeping should allow the storage of information for future reference in a way which enables the relevant authorities to have readily access to them or receive compiled and complete records on request. Furthermore, the methods and arrangements for retention of the records should be protected against any manipulation or hidden alteration and allow for an easy assessment of any corrections or amendments to the content of the records.

Format of records

87. For record-keeping purposes, MiFID does not prescribe any format of the records. Rather, the records have to be kept by means which are available for future reference. It is therefore allowed to retain and store the information about transactions – among others – as paper copies, CDs, DVDs, computer files or other electronic data.

88. The most important requirement under the Third Energy Package is also that regulatory authorities, in case of enquiries or merely for compliance procedures, can effectively access the information kept by companies. Thus, generally any means for record-keeping under MiFID is also suitable to fulfil the record-keeping requirements under Articles 22f/24f of the Third Energy Package.

89. However, the potentially wider purpose of records under the Third Energy Package leads to the question whether records of supply undertakings should be kept in an electronic format.

90. The four respondents to the Call for Evidence who explicitly addressed the format of the records to be kept expressed divergent views in this regard.

91. Two respondents mentioned that the record-keeping arrangements should be cost-efficient and proportionate. Account should also be taken of current industry practices for retaining these

records serving other regulatory, legal or risk management purposes. One of them claimed that the customised nature of many OTC transactions would make an application of a uniform record-keeping standard very difficult. The methods for record-keeping should therefore be left to each individual company. At the same time, this respondent claimed that a common agreement on data content, standardised formats and electronic storage of the data on a European level should be found. However, the common format for data retention should be principles based. The latter view was also supported by another respondent.

92. Three respondents (among them the two already mentioned) consider a unique format of the data as a potentially costly burden to the firms, as they will have to invest in new data-gathering systems in order to meet regulatory requests. According to them a "single format" for record-keeping would not be necessary, bearing in mind the aim of record-keeping provisions (surveillance of potential market abuse).

93. However, these respondents also expressed the view that record-keeping arrangements should be consistent with commonly used IT processes. Another respondent specifically indicated that in its opinion the most efficient way to keep the data at the disposal of the authorities would be the use of a FTP server. This tool would be simple and secured, would offer a standard formatting and allow for automatic sending of information.

94. As regards the format of records, ESME recommended to the Commission not to prescribe a certain format. Rather, firms should be allowed to compile the information upon request in a format suitable to the specific request of the regulator within a reasonable timescale.

95. CESR and ERGEG identified two possible approaches conceivable regarding the format of records to be kept. In the following paragraphs, we therefore compare the benefits and disadvantages of the solution to let the supply undertaking determine the format of its records (option 1) with a solution to prescribe an electronic format (option 2).

96. Option 1 has the clear benefit for supply undertakings to be less costly. Taking into account the wide range of supply undertakings from the smallest renewable energy producers to the biggest incumbents, it would provide for a calibration between small and very large undertakings. It may even be prohibitively expensive for small and new entrants to convert the transactions in supply contracts and derivatives into an electronic format. This approach would also be in line with the record-keeping provisions of MiFID.

97. However, option 1 has the disadvantage for the energy regulator that in case of a regulatory investigation, it has to be done by means of an on-site inspection or, if provided to the regulatory authority, the procedure could be burdensome (e.g. endless faxing or conversion in electronic format on demand) or very slow (e.g. if copies were sent by post). It may also be that the information in a non-electronic format cannot be compared as easily by the energy regulator as in an electronic format.

98. Option 2 has the advantage of providing for a fast procedure for the provision of information about transactions to energy regulators and would be easily accessible for them. It could also be centrally stored by the regulator. There would be a high level of harmonisation between the data to which all energy regulators could have access. For the purpose of market monitoring[16] and reactivity of energy regulators, it may be necessary to have access to the data on a periodic basis (e.g. by sending a DVD with transactions recorded) which is only possible with records which are stored electronically.

99. The disadvantages of this requirement are the implementation costs for IT systems. If a national energy regulator demands a periodic provision of the data (even if it is in aggregated form) it would not be sufficient to keep the records in an electronic format, it would also be necessary to send the records to the energy regulator. This may demand specific IT systems for both supply undertakings and energy regulators. Since it is commercially sensitive data, there are also risks of breaches of

[16] For market monitoring purpose, please see paragraph 64 above.

confidentiality which have to be addressed by proper encryption procedures or secure transmission lines. Furthermore, energy regulators would need to be equipped with the resources to process and evaluate this data.

100. Considering the advantages and disadvantages of these two options, CESR and ERGEG have a preference for an electronic format of the records. However, even if some supply undertakings presumably have already implemented record-keeping IT systems for internal purposes, CESR and ERGEG are conscious about the costs which may be involved for a number of other supply undertakings and would like to inquire more about these costs. Since these costs will vary depending on the level of prescription of the electronic format of records by regulators, we are specifically interested in the cost implications of the option to leave the choice of the specific "electronic database" (e.g. Excel sheet or more sophisticated programme) used to keep the minimum content about the transactions to each supply undertaking.

Questions to market participants:

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

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).**

Draft response to questions D.4 to D.6:

General considerations relevant for record-keeping obligations

Record-keeping has to be clearly distinguished from transaction reporting or any other form of transmission of information included in the records of supervised firms to competent authorities. Regarding transaction reporting or other forms of transmission of information, the Third Energy Package does not include any requirements. The advice of CESR and ERGEG to the Commission on the content of supplementing guidelines regarding record-keeping will therefore not include any recommendations in this respect.

Taking into account the wording, structure, purpose and consequences of the policy options analysed, CESR and ERGEG are of the view that "supply undertakings", which denote the persons subject to record-keeping obligations under the Third Energy Package, include all persons active in the sale or resale of electricity/gas including investment firms and all other firms which physically supply electricity/gas to wholesale or final customers. The scope of the Third Energy Package thus covers all persons which conclude spot contracts and derivative transactions with physical settlement. Depending on their authorisation as investment firms, the records to be (additionally) kept by them under the Third Energy Package would cover, for non-investment firms, all supply contracts and derivatives with wholesale customers, transmission system operators as well as, under the Gas Directive, storage and LNG operators or, for investment firms, all contracts with these customers not covered by MiFID. Persons trading exclusively cash-settled financial instruments related to electricity and/or gas as underlying will not be treated as supply undertakings under the Third Energy Package. If they are eligible for an exemption under MiFID, they are not legally required to keep any records, neither under MiFID nor the Third Energy Package. Information about transactions undertaken by those persons would not be available to any competent authority on the basis of record-keeping obligations. Even though it can be expected that in practice the shares of these firms and their transactions in terms of amount and volume are marginal, an attempt would need to be made to monitor the actual shares and the development of these shares to assess the potential regulatory gap. However, it has to be stressed that the potential gap cannot be tackled within the given legal framework.

Regarding the instruments falling under the scope of the Third Energy Package, CESR and ERGEG are of the view that all physically-settled energy supply contracts and the financial instruments relating to electricity and gas under MiFID are covered.

D.4: Do regulators believe that there should be a difference between the proposed record-keeping obligations under the proposed amendments to the Electricity Directive and Gas Directive and the existing record-keeping obligations with respect to transactions in electricity and gas derivatives to which investment firms are subject by reason of MiFID (Article 25 and 13(6))?

Having compared the requirements for record-keeping under MiFID with the need of competent authorities under the Third Energy Package to understand transactions in derivative contracts, CESR and ERGEG reached the view that the contents of records to be kept under Articles 13(6), 25(2) of MiFID and Article 8 of the MiFID Implementing Regulation are not sufficient. Thus, additional information has to be kept by supply undertakings also regarding derivative transactions.

D.5: Pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC (the Third Energy Package), what methods and arrangements for record-keeping do CESR and ERGEG consider the Commission should specify as guidelines under the legislation for:

a) transactions in electricity and gas supply (spot) contracts? (To the fullest extent possible this should be a harmonised specification.) If there are any deviations from the obligations relating to commodity derivatives already applicable to investment firms, these should be justified;

b) transactions in electricity and gas derivatives contracts? (To the fullest extent possible this should be a harmonised specification.) If there are any deviations from the recommendations in a), these should be justified.

In answering this question, CESR and energy regulators are asked to consider specifying a single transaction record format based on the content and data to be provided as per Table 1 of Annex I of Regulation EC 1287/2006.

As general methods and arrangements for record-keeping and retention of records, CESR and ERGEG propose to include similar general requirements in the supplementing guidelines of the Commission as specified by Article 51 of the MiFID Implementing Directive.

In this regard, the Commission's guidelines should at least specify that the arrangements for record-keeping should allow the storage of information for future reference in a way which enables the relevant authorities to have readily access to them or receive compiled and complete records on request. Furthermore, the methods and arrangements for retention of the records should be protected against any manipulation or hidden alteration and allow for an easy assessment of any corrections or amendments to the content of the records.

As regards the content of the records, CESR and ERGEG are of the view that to a limited extent a different content for records regarding spot and derivative transactions is necessary.

CESR and ERGEG consider it necessary that supply undertakings keep records including the following minimum information:

Compulsory contents	Description	Energy markets : electricity or gas	Relevant for spot or derivatives contracts
Trading day	Date on which the transaction was concluded.	Both	Both
Trading time	Time at which the transaction was executed in the local time of the place of incorporation of the supply undertaking.	Both	Both
Buy/Sell indicator	Identifies whether the transaction was a buy or sell from the perspective of the electricity or gas supply undertaking which is making the record.	Both	Both
Commodity type	Electricity or gas.	Both	Both

Counterparty identification	A unique code indicating the counterparty of the transaction should exist, at least for each national market. In the best situation, a European code could be used[17].	Both	Both
Price elements	Price components which indicate the value of the contract that was "negotiated" in the currency of the market where it was traded.	Both	Both
Daily or hourly quantity	Daily or hourly quantity in MWh (Megawatt per hour) which corresponds to the underlying commodity.	Both	Both
Load type	Product delivery profile: baseload, peak, off-peak, block hours or other which correspond to the delivery periods of a day.	Both	Both
Delivery point	Physical or virtual point[18] where the delivery takes place.	Both	Both
Delivery Start-Date and Time	Beginning date and time of energy delivery.	Both	Both
Delivery End-Date and Time	End date and time of energy delivery.	Both	Both
Option indicator	Indication whether it is a buy or a sell option (call or put).	Both	Derivatives
Swap indicator	Indication whether the transaction was a swap or not.	Both	Both

D.6: How would this information be most efficiently kept at the disposal of authorities as mentioned under paragraph 1 of Articles 22f/24f in the case of spot transactions and non-investment firms?

Considering the advantages and disadvantages of leaving the choice of the format of records to be kept to the individual supply undertaking or prescribing that records have to be kept electronically, CESR and ERGEG have a preference for an electronic format of the records. However, CESR and ERGEG are conscious about the costs involved and would like to inquire more about these costs.

Section II: Transparency

Questions in Section E of the mandate on transparency

101. The questions in Section E of the Commission mandate deal with transparency. Some of the questions are policy ones: they will be considered in this consultation paper and are highlighted in bold below, namely E.11, E.18 and E.19. The remaining questions are fact-finding ones and advice on them has already been submitted to the Commission and published. However, one of the fact-finding questions (E.17) is also covered in this consultation paper, as CESR and ERGEG used the answer to this question to build their reasoning on question E.18.

11. What guidelines and arrangements do energy regulators propose for the making available of aggregate market data by them under paragraph 3 of Article 22f/24f?

12. What requirements, deriving from national law, are currently put on energy traders, brokers or exchanges to publish information 'post-trade', for example on publishing traded volumes, prices etc?

13. What requirements, deriving from national law, are currently put on energy traders, brokers or exchanges to publish information 'pre-trade', for example on publishing bids to organised markets?

14. Is there a difference in transparency requirements for spot trading compared to future and forward trading? If so, why?

15. Is there a difference in transparency requirements for exchange trading compared to OTC trading? If so, why?

16. What information, other than required by law or regulation, is made public by energy traders, brokers, information services or exchanges?

17. Is access to information on traded volumes and prices equal for all parties active in that market?

18. If not, is unequal access to or general lack of information on trading causing distortion of competition?

19. In light of the findings in the Commission Sector Inquiry on energy and the subsequent study of the electricity wholesale markets, please consider:

a) whether, pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC, greater EU-wide pre- and/or post-trade transparency rules for electricity and gas supply contracts (physical and spot trading) and electricity and gas derivatives would contribute to a more efficient wholesale price formation process and efficient and secure energy markets;

b) whether such transparency arrangements could be expected to effectively mitigate the concerns identified in the Sector Inquiry above;

c) whether uniform EU-wide pre- and post-trade transparency could have other benefits;

d) whether additional transparency in trading could have negative effects on these markets, for example could liquidity in these markets be expected to decrease? Is there a risk that trading could shift to third countries to escape regulation?

e) If you believe that there are risks arising from additional pre- and post-trade transparency requirements, how do you believe that these risks can be mitigated (e.g. aggregation, delay in publication, anonymity)?

EU legislation regarding transparency in the electricity and gas markets

102. This part sets out the EU legal requirements and initiatives with regard to transparency in electricity and gas markets. They have generally been separated into ones which apply to financial instruments (which fall under the scope of MiFID and thus are regulated by securities regulators) and others which apply to the underlying energy product (day-ahead products, not regulated by securities regulators, sometimes regulated by energy regulators). It must be noted that transparency in energy markets can be subject to both securities and energy regulations since many forward contracts fall under the scope of "financial instrument" and some energy regulators may due to national legislation have powers also on forward and futures markets.

EU financial legislation

103. The scope of MiFID only partially covers products traded in energy markets: all intra-day and day-ahead contracts, as well as some physically-settled derivatives fall out of the scope of MiFID (for details see paragraphs 35 to 39 in Section I on record-keeping).

104. MiFID imposes only very generic obligations with respect to the pre- and post-trade transparency for energy derivatives covered by MiFID. The same situation applies to all other financial instruments, except to shares admitted to trading on an EEA regulated market, as described below. Both regulated markets and MTFs are required to have rules and procedures for "fair and orderly" trading (Articles 39(d) and 14(1) of MiFID), while MTFs have to make available, or be satisfied that their users can access sufficient information to make investment judgements (Article 14(2) of MiFID). These requirements can be interpreted to cover pre- and post-trade transparency requirements. Trading on those markets takes place for fairly standardised products. There are no pre- or post-trade transparency obligations under MiFID for investment firms with respect to energy derivatives.

Commission initiatives for securities legislation

105. MiFID requires the Commission to report on the possible extension of the scope of that Directive to transactions in financial instruments other than shares. In April it concluded that there does not seem to be any need to expand the scope of MiFID's trade transparency requirements to financial instruments other than shares and voluntary initiatives in the retail bond market[19]. However, it carved out of the scope of its report the matters covered within the scope of this mandate. CESR and ERGEG are also asked to consider the views expressed during the Commission's Call for Evidence on commodities and the conclusions reached in the subsequent feedback statement.[20] In summarising the responses to its call for evidence on the review of commodity derivatives (published on 14 August 2007), the Commission noted that there was no enthusiasm for extending the type of pre- and post-trade transparency arrangements for shares in MiFID to commodity derivatives. To the extent that respondents thought there was a role for regulatory intervention in this area, it was mainly to suggest the disclosure of aggregate data by trading venues.

106. CESR and ERGEG were asked by the Commission in the mandate to consider the advice on commodities markets and trading given separately by CESR and CEBS in the context of the Commission's ongoing review under Article 65(3) of MiFID, and Articles 48(2) and (3) of Directive 2006/49/EC on Capital Adequacy of Investment Firms and Credit Institutions. CESR and CEBS delivered separately initial advice to the Commission during 2007 and are currently jointly working on delivering further advice. CESR and CEBS conclude, but not unanimously, that they do not believe that there is much benefit to be gained by mandating through legislation greater pre- and post-trade transparency in commodity derivatives markets, whether of the sort which applies to equities under

MiFID or aggregate information about transactions or positions. They continue by stating that it is of course open to market participants to build on existing market-driven transparency. CESR and CEBS advice covers other commodity derivatives covered by MiFID except electricity and gas derivatives.

EU energy legislation and ERGEG's prior work

107. In the European energy regulation, transparency is covered by Regulation 1228/2003 for electricity and Regulation 1775/2005 for gas. These regulations focus on fundamental data transparency (infrastructures and to some extent demand/supply). No obligations exist regarding energy trading.

108. In the public position paper "[Third] legislative package input – transparency requirements for electricity and gas – a coordinated approach", ERGEG advises that "a good level of transparency is usually provided" by platforms "but bilateral trade is still not sufficiently covered. Therefore wholesale markets shall be included in the new transparency legislation as well".

109. ERGEG has also defined guidelines regarding transparency. In electricity, these guidelines (ERGEG "Guidelines for Good Practice on Information Management and Transparency in Electricity Markets" (Ref: E05-EMK-06-1)) suggest the disclosure of, at least:

- Aggregated supply and demand curves, prices and volumes on RMs, MTFs (except brokers that operate MTFs) and spot exchanges;

- Prices and volumes on OTC markets.

110. In these Guidelines, ERGEG wrote concerning transparency of trading that "Information transparency in the wholesale market is crucial for fostering effective competition in the liberalised electricity market (both nationally and across borders). Information on the wholesale market will be of importance to suppliers, generators, energy traders and (large) customers".

111. These guidelines have also been discussed and further developed within the framework of the so called Transparency Reports in Central Western[21], Central Eastern[22] and Northern[23] Electricity Regional Initiatives. While most of the recommendations tackle transparency of infrastructures, some apply to transparency of trading in electricity and gas markets.

Question E.11: What guidelines and arrangements do energy regulators propose for the making available of aggregate market data by them under paragraph 3 of Articles 22f/24f?

112. Question E.11 specifically asks energy regulators what guidelines they would propose for the making available of aggregate market data by them (under paragraph 3 of Articles 22f/24f). Therefore, throughout this section only the view of ERGEG is expressed.

113. To answer to question E.11, firstly the current level of transparency on electricity and gas wholesale markets in Europe will be presented. Secondly, the aim of transparency of aggregate data, and the costs and benefits that can arise from it are explained. Thirdly, the recommendations from ERGEG after analysing several options for the publication of aggregate data on trading are presented.

Current level of transparency on electricity and gas wholesale markets

114. Currently, a partial transparency of aggregate data exists on European electricity and gas wholesale markets because MiFID sets general obligations on RMs and MTFs for fair and orderly trading and some trading platforms publish data on trading (under national obligations or on a voluntary basis).

115. As mentioned before, applicable Electricity and Gas Directives currently do not include any mandatory transparency provisions for trading. The only legislation covering general transparency obligations for some of the trading on energy markets is MiFID.

116. As described in paragraph 104 above, MiFID created a new comprehensive harmonised pre- and post-trade transparency regime for shares admitted to trading on an EEA regulated market which covers trades in these shares executed on regulated markets, MTFs or OTC. Regarding other financial instruments including MiFID energy derivatives, MiFID contains generic obligations that can be interpreted to cover trade transparency. Both regulated markets and MTFs are required to have rules and procedures for 'fair and orderly' trading according to Articles 39(d) and 14(1) of MiFID, whilst MTFs have to make available, or be satisfied that their users have access to sufficient information to make investment judgements (Article 14(2) of MiFID). There are no transparency obligations for investment firms (dealing on own account or acting in a brokerage capacity) in respect of MiFID energy derivatives.

117. Thus, the coverage of MiFID in relation to energy markets is the following:

- Some energy derivatives: Day-ahead and intraday products are not in the scope of MiFID. Moreover, not all forward contracts are financial instruments under MiFID.

- Regulated markets and MTFs: No transparency obligations apply for investment firms not operating an MTF.

- General rules relating to 'fair and orderly' trading: There is no minimum set of pre- or post-trade information to be disclosed.

118. As a consequence, the current MiFID framework does not establish a global and harmonised level of market transparency for energy trading in Europe.

Current level of transparency observed on European electricity and gas wholesale markets

119. Although MiFID's obligations relating to fair and orderly trading do not cover all trading methods and products, most trading platforms publish information on transactions executed via their

systems. This is sometimes voluntary, for example to attract liquidity to their respective platforms, or imposed by national legislation.

120. The level of information about a market thus depends on the repartition of trading between the different trading venues (e.g. on exchanges or bilaterally). Indeed, trading via platforms is generally more transparent than direct bilateral trades. On national markets where all trading goes through a mandatory pool, trading is totally transparent. On markets where trading is mostly brokered, a significant amount of information is available to brokers' customers. For some national markets where most of trading takes place on a direct bilateral basis, hardly any data is available (this is however not always the case since in some markets like the Romanians ones, direct bilateral trades are transparent).

121. This is confirmed in Platts' reply to the Call for Evidence "*a large portion of trade is still conducted over-the-counter and many of these trades are confidential and/or non-standard.*" That is why "*Platts cannot give an indication of total volumes traded for many European electricity and gas markets, nor do we believe can any information provider at this point in time.*"

122. The table below describes the general level of transparency of each method of trading in energy markets.

Trading methods	**RM or MTF (including brokers operating an MTF)**		**Spot exchanges (not qualifying as an RM or MTF)**		**OTC via brokers not operating an MTF**		**OTC : Direct bilateral** **No intermediary**	
Settlement → **Maturity** ↓	**Physical**	**Cash**	**Physical**	**Cash**	**Physical**	**Cash**	**Physical**	**Cash**
Day-ahead + intraday	High for venues that are not brokers' platforms Medium for brokers (depends on the broker)		High		Depends on the broker		Less uniform. Depends on the circumstances	
Energy derivatives	High for venues that are not brokers' platforms Medium for brokers (depends on the broker)		n.a.		Depends on the broker		Less uniform. Depends on the circumstances	

123. This table shows that the level of transparency depends mainly on the trading methods or venues. It also reflects that the level of transparency currently observed due to voluntary publications or national laws covers more than what MiFID requires under transparency obligations. Transparency is high for trading on RMs and MTFs. Yet, this may not give a complete picture since data disclosed by brokers may be limited, and direct bilateral trading is generally less transparent.

Benefits of publication of aggregate information on trading

Aim of aggregate market transparency and market failures that can derive from lack of such transparency

124. As stated in the documents published by the Commission simultaneously to the Sector Inquiry report (Memo 07/01 - FAQ), "*The final report […] identified serious shortcomings in the electricity and gas markets. There is: too much market concentration in most national markets; a lack of liquidity, preventing new entry; too little integration between Member States' markets and; an absence of transparently available information, leading to distrust in the pricing formation*".

125. Lack of transparency may constitute a barrier to entry. A potential entrant who considers entering a market is likely to look for:

- the size of the market and the evolution of this size: to assess whether it will be possible to make a number of transactions high enough to cover the cost of entry and the fixed cost of being active on the market;
- the type of products actively traded. Traders may be specialised in day-ahead or forward trading, physical or financial trading. Moreover, the different products traded in the market are not substitutes and have different purposes in terms of hedging;
- the level of concentration of the buy and sell sides of the market: to assess if prices can be influenced by some market participants' behaviour, and thus, to assess the risk of price manipulation or market power abuse; and
- the characteristics of the price signals (volatility, bid/ask spreads etc.): to assess the price risk and the feasibility of making reliable forecasts of price evolutions and trading for hedging and/or speculative purposes.

126. A new entrant may not risk entering a market for which he does not have this elementary information. Hence, lack of transparency may limit competition, and hence liquidity, and hence the accuracy of price formation and trust in the market. Indeed, as stated in the communication from the Commission for the release of the Sector Inquiry (COM (2006) 851 final), "*Low levels of liquidity are a barrier to entry to both gas and electricity markets*". It is stressed in the case of the gas market that "*ensuring liquidity is crucial to improving confidence in price formation on gas hubs*". In the same document, the Commission exposes "*a chronic lack of transparency, both in electricity and gas wholesale markets*".

127. Moreover, low liquidity of the wholesale market is a direct obstacle to the development of the retail market. Indeed, market participants have two ways to source energy for the delivery to final customers. Either they have generation assets or long-term import contracts and associated transportation capacities respectively for electricity and gas, or they have to buy energy on the wholesale market. As new entrants do not own generation assets or long-term import contracts, they rely on the wholesale market to source their sale. If the wholesale market is illiquid, suppliers will have difficulties to source their sales, and will not take the risk to enter the retail market (see also paragraph 124).

128. Moreover, discrepancy between the levels of transparency between national markets may lead participants to exploit opportunities for regulatory arbitrage and trade more actively on some markets. This may lead to differences in the development of liquidity in markets within the EU, and hence, limit the development of a single integrated European market.

Costs and benefits generally implied by more aggregate market transparency

129. Energy regulators that publish the information referred to in question E.11 will incur costs for aggregating and publishing the data.

130. Any supply undertaking that will have to communicate data on transactions to the regulator will incur costs aggregating the data and transmitting it.

131. Higher aggregate market transparency may encourage market entry, boosting competition and liquidity in the market and thereby fostering market confidence.

132. The Commission publicly considers that the extent to which markets should be transparent should be as large as possible. The document published when the Sector Inquiry was released (Memo 07/01 - FAQ) mentioned that:

"There is general recognition that access to market information should be further enhanced. All relevant market information should be published on a rolling basis in a timely manner. Any exceptions should be very strictly limited to what is required to reduce the risk of collusion. Guidelines, as well as monitoring and eventually adaptation of existing regulation, should serve to further enhance transparency in the gas and electricity sector."

133. The Commission also publicly stated in this document that benefits of more transparency will outweigh the risk of collusion:

"Does transparency not endanger business secrets or facilitate collusion?
While such concerns have to be taken very seriously, we consider that in the current situation, the need for transparency outweighs the fear of collusion. A balance must certainly be found as to what data is published and how it is published, in order to improve transparency without endangering business secrets or facilitating collusion. Transparency is needed to enable market players to take sound commercial decisions. Reliable and publicly available information creates a level playing field and plays an important role in building confidence in the market."

Transmission of data and publication

134. The current draft of the Third Energy Package does not consider how energy regulators would acquire the data needed to compile an aggregate transparency publication. However, it is clear from the mandate that the power in paragraph 3 of Articles 22f/24f to make available to market participants aggregate information relates to information that supply undertakings are required to keep under the record-keeping obligations according to the Third Energy Package and future supplementing guidelines of the Commission.

135. However, energy regulators would need to be given the necessary legal powers in order for them to request the data needed to produce the aggregate data publication they deem would improve the level of transparency in the markets. They would need to be able to request this data from market participants and intermediaries.

136. In terms of the mechanism used to acquire the necessary data, ERGEG does not believe that transaction reporting would be the most effective method for the collection of information for the purpose of making available aggregate market data. They believe that a more feasible way of collecting the necessary data would primarily use the information produced by RMs, MTFs and other platforms for transactions effected there, in order to minimise any burden on market participants. Where RMs, MTFs and other platforms do not cover all transactions on the market, energy regulators should be able to request aggregate data directly from market participants.

137. Further work would have to be done to define the scope of any powers energy regulators would need in order to provide this data to the market. Without new powers, energy regulators would be severely limited in their ability to produce and publish information that is of benefit to market participants. Energy regulators could, for example, periodically request platforms and supply undertakings to provide a completed data return which would aggregate information on their

activities, so as to capture both brokered transactions and direct bilateral transactions between market participants that were not conducted on platforms. The scope of these powers should be designed in a way which does not necessitate one supply undertaking to provide information to several energy regulators but should aim at a more harmonised approach (e.g. some sort of "home Member State" principle).

Options considered for publication of aggregate market data

138. The current wording of paragraph 3 of Articles 22f/24f is as follows :

> *"The regulatory authority may decide to make available to market participants elements of this information provided that commercially sensitive information on individual market players or individual transactions is not released. This paragraph shall not apply to information about financial instruments which fall within the scope of Directive 2004/39/EC."*

139. Energy regulators are in favour of a European harmonised framework for aggregate transparency of transactions. Furthermore, the cost of implementing this type of transparency should be proportionate to the benefits expected.

140. The different options how information could be made available and in what form (e.g. aggregate data) are described below.

Options on the mandatory character of the publication

141. There are three different options for publication: either publication would be mandatory for the energy regulator (M3) or dissemination would be based on the assessment of the sufficiency of existing information (M2). Furthermore, an option would be to keep the status quo (M1).

Option M1: status quo

142. ERGEG considered proposing no arrangement for more publication of aggregate market data.

143. However, as mentioned in paragraphs 124 to 133, ERGEG considers that in some markets, the very poor level of information on the functioning and size of the wholesale market is a real barrier to entry and prevents the development of competition on the retail market (low number of suppliers and high retail prices). On the link between wholesale and retail market see paragraph 127.

144. Although there is no cost for this option, there is no benefit either. For these reasons, ERGEG does not recommend this option.

145. Aggregate market data could always be published under voluntary national initiatives. Nevertheless, this option would not appropriately answer the need for a European harmonised framework for transparency. ERGEG is thus not in favour of this option.

Option M2: dissemination based on the assessment of the sufficiency of existing information

146. Under this option guidelines would be set up by the energy regulators that define a common minimum set of aggregate information to be available to market participants, the level of aggregation of this information and the scope to be covered. In Member States where NRAs consider

that a sufficient level of transparency already exists, no further obligations would be imposed. In Member States where a sufficient level of transparency is not available, NRAs would publish the information defined in the guidelines.

147. ERGEG recommends this option.

Option M3: mandatory dissemination

148. Under this option, every energy regulator would have to publish a common set of aggregate data, irrespective of the current level of information available to the market.

149. However, where sufficient information already exists, mandatory publication would bring with it costs but no benefits.

150. ERGEG is not in favour of a system which brings new obligations of transparency where a sufficient level of information already exists. Thus, ERGEG does not favour this option.

Options on the scope of the publication

151. This section includes a discussion on which products should be covered by the publication of aggregate market data by energy regulators.

Option S1: publication of aggregate data only on instruments not covered by MiFID

152. Paragraph 3 of Articles 22f/24f concerns all transactions except those on "financial instruments which fall under the scope of Directive 2004/39/EC", which is represented in the table below in diagonal "hachure".

Trading methods	RM or MTF (including brokers operating an MTF)		Spot exchanges (not qualifying as an RM or MTF)		OTC via brokers not operating an MTF		OTC : Direct bilateral No intermediary	
Settlement **Maturity**	**Physical**	**Cash**	**Physical**	**Cash**	**Physical**	**Cash**	**Physical**	**Cash**
Day-ahead + intraday	High / Medium	High / Medium	High / Medium	High / Medium	Depends on the broker	Depends on the broker	Less uniform – depends on the circumstances	Less uniform – depends on the circumstances
Energy derivatives	High / Medium	High / Medium	n.a.	n.a.	Depends on the broker ***=> standar-dised and cleared contracts***	Depends on the broker	Less uniform – depends on the circumstances ***=> standar-dised and cleared contracts***	Less uniform – depends on the circumstances
					Depends on the broker ***=> other contracts***		Less uniform – depends on the circumstances ***=> other contracts***	

Products under the scope of MiFID;

General obligations for fair and orderly trading for RMs and MTFs under MiFID;

Possible scope of publication of aggregate data under Articles 22f/24f of the Third Energy Package.

153. The advantage of this option would be to respect the current wording of Articles 22f/24f which excludes financial instruments from the scope of the publication.

154. Under this wording, the following products would be excluded from the publication of aggregate data: all futures contracts, all forward contracts for cash settlement traded OTC, the standardised

and cleared forward contracts for physical settlement traded OTC that fulfill also the other criteria of Article 38 of the MiFID Implementing Regulation.

155. ERGEG considers that no transactions should be excluded from the scope of publication of aggregate data by energy regulators. If some trading methods remain barely transparent and are not covered by any regulation, and if they are the main trading methods, then the level of information available on the market will stay low. The boxes with diagonal bars in the table above represent the products that would not be covered by the aggregate data which may be disclosed by energy regulators under this option. Publication under this option would not represent the whole energy market. The benefits from it seem uncertain.

156. Moreover, the scope of MiFID is complex. It would be difficult for market participants to assess in practice which instruments are covered by the publication of aggregate data by energy regulators and which are not covered. Market participants would also have to collect fragmented data, which can represent an important cost to them.

157. It is likely that the costs of option S1 would be high, whereas the benefits are uncertain. For these reasons, ERGEG does not recommend this option.

Option S2: publication of aggregate data on the whole market (i.e. on all instruments including those covered by MiFID)

158. Under this option, publication would cover all products traded in the market.

159. As explained above, ERGEG considers that in order to have a useful publication for the market no transactions should be excluded from the scope of publication. All types of transactions should be covered, irrespective of their type of settlement, their trading method, their settlement period and consequently, whether they are covered by MiFID or not. Indeed, products that are physically settled may be substitutes to products that are cash-settled. Also, energy derivatives may be substitutes to day-ahead and intraday products. Finally, products traded on an RM, an MTF, a broker's platform or direct bilaterally could be perfect substitutes. Therefore, there is no reason to exclude some products from the publication of aggregate market data. On the contrary, publishing aggregate data only on some segments of the market would prevent market participants from assessing the total size of the market. Aggregate transparency of transactions would then lose significance (see paragraphs 155 to 157).

160. MiFID does not impose any transparency obligations on aggregate market data on electricity and gas markets. Therefore, the publication of aggregate data by energy regulators would not overlap, and would not be redundant with MiFID.

161. In the view of ERGEG, no products should be excluded from the scope of publication of aggregate market data by energy regulators. However, the current wording of Articles 22f/24f does not allow energy regulators to implement such an option. As explained above, the publication envisaged in paragraph 3 of Articles 22f/24f concerns all transactions except those on "financial instruments which fall under the scope of Directive 2004/39/EC". It appears that this prevents energy regulators from publishing information on all instruments (see paragraph 152).

162. However, ERGEG thinks that this option would be preferable, because, contrary to option S1, it would cover all products and thus would not leave any gaps.

163. Some market participants argue that it would lead to an overlap with MiFID - which can also explain the wording of paragraph 6 of Articles 22f/24f. According to those Articles, additional obligations cannot be created vis-à-vis e.g. energy regulators for firms falling within the scope of MiFID (i.e. investment firms). However, under paragraph 7 of the same Articles, energy regulators can receive that data from securities regulators. Indeed, paragraph 7 of Articles 22f/24f states that "in case the authorities mentioned in paragraph 1 need access to data kept by entities falling within

the scope of MiFID, the authorities responsible under that Directive shall provide the authorities mentioned in paragraph 1 with the required data".

164. However, securities regulators currently do not have a periodical and automatic access to information on transactions in derivatives relating to commodities. Investment firms are required to keep records about these transactions. However, this data can only be demanded on an ad-hoc basis for the purpose of specific investigations, for example. Hence, there are legal and practical obstacles for energy regulators to have periodically access to the data concerning MiFID investment firms which are not supply undertakings.

165. Concerning information on market participants that are not falling under the scope of MiFID, energy regulators will have access to them if they are supply undertakings.

166. To sum up, ERGEG is in favour of option S2. However, it is incompatible with the current wording of paragraph 3 of Articles 22f/24f of the Third Energy Package (preventing the publication of data on MiFID derivatives). ERGEG thus questions if this exclusion, taking into account its consequences, was intended by the formulation of paragraph 3 of Articles 22f/24f.

Information to be published

167. ERGEG recommends that aggregate information on transactions to be published under option S1 or S2 should consist of two sets of information:

- **Total volume traded**. This information enables market participants and potential new entrants to assess the size and liquidity of the markets.

- **Indicators reflecting the structure of the market**. These indicators enable market participants and potential new entrants to assess the level of concentration of trading and the quality of the price formation mechanism.

168. Several possible indicators reflecting the level of concentration of trading are proposed below. Energy regulators could publish one or more of these indicators. So far no choice has been made between the options below.

SM1: detailed market shares of the five biggest market participants

169. Under this option, the individual market shares of the five biggest market participants would be published. The data would be anonymous. However, a disadvantage would be that this data can reveal the identity and market shares of some big players.

SM2: aggregate market share of the five biggest market participants

170. Under this option, one global market share figure for the five biggest market participants would be published. The data would be anonymous. Yet, this would not enable market participants to differentiate a situation of quasi-monopolistic from an oligopolistic situation.

SM3: Herfindhal-Hirshman Index (HHI)

171. The HHI is the sum of the squares of market shares. This index is a unique and global figure, which indicates if the market is competitive (<1 000), moderately concentrated (1 000<HHI<1 800), or highly concentrated (HHI>1 800).

SM4: Number of active market participants

172. This indicator would allow market players to assess if the market is rather oligopolistic or atomistic.

173. Aside from information on trading volumes and indicators of market structure, price indices could be published. The figures to be published could be: highest price traded, lowest price traded, average price of trade, weighted average price, deviation from the mean of the price. ERGEG has doubts on the relevance of aggregated information on prices over a long period of time and on several products.

Level of aggregation between products

174. Two sets of data could be published :

- Data on the whole market[24] : from all trading methods (platforms and direct bilateral), for all types of settlement (physical and cash), all types of maturity (day-ahead/intra-day and energy derivatives) split by delivery zone and quality (for gas only).

- For contracts with a standardised maturity (e.g. year-ahead baseload contracts), data split between standardised maturities[25] (and still split by delivery zone and quality for the gas). What is referred to as standardised maturities here are the maturities of the contracts usually traded on RMs, MTFs, and spot exchanges in Europe. The products covered by the publication here would be contracts traded on RMs, MTFs, spot exchanges, brokers' platforms and direct bilaterally, for standardised maturities.

Options on the frequency and delay of publication

175. Generally, data could be published with increasing frequency from quarterly up to daily. The more frequent the data would be the potentially more beneficial it would be to existing and potential market participants.

176. Different frequencies of publication would differ by

- the workload and cost associated with publications, which would increase if publications were frequent; and

- the benefits of the publication, which would decrease if publications were too much delayed and less frequent.

177. The options for disclosure could reach from daily to monthly and quarterly disclosure of information. Daily disclosure would mean that aggregate data would be disclosed once a day, at least one day after the trading day concerned. Monthly and quarterly disclosure could be made with a certain delay for aggregating the data (e.g. two months after the last day of the period concerned).

178. ERGEG does not currently have a preference for any option, as it does not have evidence about the needs of the market regarding this matter. ERGEG invites market participants to provide their opinions on the following options and to explain their needs.

Options on the level of aggregation during the period covered

179. Furthermore, there are different possibilities for the levels of aggregation of data during the period covered. Depending on the level of aggregation (e.g. daily, weekly, monthly or quarterly) the benefits of such a publication would be different. Less aggregation (like daily) would enable participants to evaluate the evolution of the market and its structure. They would have accurate updates on potential events affecting the liquidity of a market. On the other hand, these benefits would have to be mirrored against the rising costs to the ones supplying the info.

180. ERGEG does not currently have a preference for any option, as it does not have evidence about the needs of the market regarding this matter. ERGEG requests market participants to provide their opinions on the possible options and to explain their needs.

Draft response to question E.11:

E.11: What guidelines and arrangements do energy regulators propose for the making available of aggregate market data by them under paragraph 3 of Articles 22f/24f?

Question E.11 specifically asks energy regulators what guidelines they would propose for the making available of aggregate market data by them (under paragraph 3 of Articles 22f/24f). Therefore, only the view of ERGEG is expressed here.

The rationale is to publish useful and reliable data, giving fair information on the liquidity and the concentration of trading on European electricity and gas wholesale markets while keeping in mind three constraints:

- limiting the burden put on market participants for providing this information;
- avoiding direct and indirect disclosure of commercially sensitive data; and
- avoiding costs exceeding the benefits of publishing the information by not adding obligations when a sufficient level of transparency already exists.

ERGEG considered the costs and benefits of aggregate market data, and proposes that the publication of aggregate data on transactions would be optional: i.e. each energy regulator should assess whether the level of transparency in its Member State is sufficient. If not, regulators should publish missing data under their powers provided by Articles 22f(3)/24f(3) of the Third Energy Package.

ERGEG proposes two options on the scope of the data to be published:

- The first option would be to publish information on all products except those in the scope of MiFID, in accordance with Articles 22f(3)/24f(3) of the Third Energy Package. Under this option, the information covered by the publication from energy regulators would be partial and barely exploitable by market participants. Moreover, it would lead to a regulatory gap, since some products are covered by MiFID - and thus out of the scope of publication by energy regulators – but not covered by any transparency obligation under MiFID.
- The second option would be to publish information on the whole market, including the products falling under the scope of MiFID. This proposition is not compatible with the current wording of Articles 22f(3)/24f(3), and with the current access to data on instruments covered by MiFID by securities regulators. However, ERGEG considers that only this option would give relevant and useful information to market participants.

ERGEG proposes the following information to be published: information on trading volumes, indicators on market structure, and optionally some price indices. Furthermore, ERGEG proposes to publish this information under two levels of aggregation on products: aggregated by every product covered by the publication, and split by contracts with certain standard maturities.

There are several options for the frequency of publication (from daily to quarterly) and for the level of aggregation during the publication periods (from daily to quarterly). ERGEG seeks comments of market participants about the different options.

Questions to market participants:

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.**

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?

Question E.17: Is access to information on traded volumes and prices equal for all parties active in [the electricity and gas wholesale] market?

181. CESR and ERGEG already provided an answer to this question as part of the response to the fact-finding question of the Commission mandate. However, it was considered useful to cover this question also in this consultation paper because it forms a background to the discussion on question E.18.

Response to the Commission fact finding question

182. CESR and ERGEG provided the following answer to the Commission fact finding question E.17. "As regards question E.17 there is wide variety in the responses regarding the equality of access to information. Some respondents consider that the access to information is equal to all parties. On the other hand, some respondents point to a general lack of information. Some respondents state that the amount of information available depends on the way of trading. In bilateral trading, there is generally no transparency. Information on the brokered contracts might be available in the brokers' platforms but generally only customers have access to the trade information. Receiving the trade information, e.g. from information services, might also require the payment of a fee. In the case of RMs, MTFs and spot exchanges some provide the same post-trade information to the public as to their members, whereas others provide more information to their members."

Conclusions of the Call for Evidence

183. As regards question E.17 a few respondents to the Call for Evidence agreed that access to information in the electricity and gas wholesale market is equal for all parties active in the market. One respondent added that this is because of the availability of commercially available data. However, CESR and ERGEG are of the view that there might be a need to further analyse whether the same is true on markets where bilateral trading (OTC) is the most important trading method.

184. Some respondents did not comment on equal access to information but made statements about the level of transparency in general. According to them there is a considerable amount of transparency especially in energy related products traded via a platform.

Pan-European market transparency legislation is not available

185. Currently, there is no pan-European legislation imposing pre- and post-trade transparency requirements relating to transactions in energy related products.

186. The pre- and post-trade transparency requirements imposed by MiFID are only applicable to shares which are admitted to trading on a regulated market.

187. Nevertheless, in practice, operators of regulated markets, multilateral trading facilities and other platforms which do not fall under the scope of MiFID, offer some pre- and post-trade transparency concerning products other than shares as they believe transparency attracts liquidity to their respective platforms.

188. It should be noted that MiFID does require investment firms to report transactions in all financial instruments admitted to trading on a regulated market. However, these transaction reports are to be sent to the relevant competent (securities) authority and are not publicly available.

Question E.18: If not, is unequal access to or general lack of information on trading causing distortion of competition?

189. CESR and ERGEG have not carried out a comprehensive competition inquiry. Merely, CESR and ERGEG base their findings on the responses of the CESR and ERGEG members to the fact finding questionnaire circulated in order to provide the response to the Commission fact finding questions, on the Call for Evidence (see Question E.17) and on the Sector Inquiry.

190. From a theoretical perspective, informational shortages and/or imbalances relating to trading information may distort competition if they:

- deter firms from entering the market;
- force firms out of the market; or
- lead to the abuse of market power.

191. Firms considering entering the market may be deterred from doing so because their price discovery process would be hampered as a result of unequal access to trade price and volume information.

192. Firms in the market may be forced to exit it because of insufficient access to trading information resulting in a non-reliable price discovery process and hence an undermined confidence in the functioning of the respective market.

193. The existence of barriers to market entry, for example due to asymmetric information problems, may lead to a situation in which the market is dominated by a relatively small number of incumbent firms. This creates the potential for collusion and the abuse of market power.

194. An uneven distribution of trading information may allow those market participants with an information advantage to manipulate the market (e.g. by manipulating prices and/or trading volumes, affecting volatility), thereby undermining market confidence, discouraging new entry and/or encouraging market exits, and helping maintain their dominant position.

195. Asymmetric information may also lead to a potential for price discrimination, i.e. a firm charges different prices to different groups of consumers for an identical good or service for reasons not associated with the cost of production.

196. Although it is commonly agreed that increased trade transparency, in practice, can improve liquidity and hence functioning of markets, the nine contributions received by CESR and ERGEG for their Call for Evidence did not explicitly mention distortion of competition resulting from unequal access to or lack of information about prices and traded volumes.

197. Moreover, some respondents to the Call for Evidence argued that new entrants may be deterred by the prospect of having trades made public in a timely fashion. New entrants and small firms might be concerned that revealing their trades would give the dominant market participants a tool to further consolidate their position.

198. Nevertheless, responses to the Call for Evidence as well as the Sector Inquiry show that market participants welcome an increase in the transparency of fundamental data. However, transparency of fundamental data does not fall within the scope of question E.18 (see paragraph 202).

199. As noted above, there might be a need to further analyse whether there is equal access to information in the markets where bilateral trading (OTC) is the most important trading method. In those markets, general lack of information may cause distortion of competition.

Draft response to question E.18:

E.18: If not, is unequal access to or general lack of information on trading causing distortion of competition?

On the basis of the information gathered so far (mainly from the Call for Evidence), there seems to be equal access to information in the electricity and gas wholesale markets with the exception of bilateral trading. In relation to that, CESR and ERGEG have no evidence of the markets being distorted. However, that is not a proof that it does not happen and further analysis might be necessary.

Question to market participants:

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.**

Question E.19: Pros and cons of pre- and post-trade transparency

In light of the findings in the Commission Sector Inquiry on energy and the subsequent study of the electricity wholesale markets, please consider:

a) whether, pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC, greater EU-wide pre- and/or post-trade transparency rules for electricity and gas supply contracts (physical and spot trading) and electricity and gas derivatives would contribute to a more efficient wholesale price formation process and efficient and secure energy markets;

b) whether such transparency arrangements could be expected to effectively mitigate the concerns identified in the Sector Inquiry above;

c) whether uniform EU-wide pre- and post-trade transparency could have other benefits;

d) whether additional transparency in trading could have negative effects on these markets, for example could liquidity in these markets be expected to decrease? Is there a risk that trading could shift to third countries to escape regulation?

e) **If you believe that there are risks arising from additional pre- and post-trade transparency requirements, how do you believe that these risks can be mitigated (e.g. aggregation, delay in publication, anonymity)?**

Trade transparency

200. The questions raised by the Commission in question E.19 of the mandate (Transparency) relate to pre- and post-trade transparency (as described above) for transactions in electricity and gas derivatives and spot market transactions.

Market failure/regulatory failure – Sector Inquiry

201. The Sector Inquiry shows that concerns about transparency exist. However, transparency in the sense used in the Sector Inquiry focuses on transparency for fundamental data rather than trade transparency. Similarly the subsequent study of electricity wholesale markets did not directly consider trade transparency. So no problem in relation to trade transparency would have been explicitly identified by those papers.

202. Although not strictly covered by the mandate, experiences of energy regulators and the responses to the Call for Evidence (see paragraphs 218 to 224) have clearly indicated that energy regulators as well as market participants see a need for an improvement of the regulatory framework with regard to the disclosure of information on fundamental data, including for the purpose of increasing public confidence.

Market failure/regulatory failure - Information asymmetry

203. The mandate also specifically refers to another concern. It describes a situation where "*given the different degrees of transparency between transactions on trading fora, including brokers' screens, and OTC transactions, there is a risk that high priced deals could be directed through transparent fora, thus raising the official wholesale price and having a knock-on effect on end-users*". This result could be particularly problematic where a price discovery process takes place on the less transparent forum and the two fora operate somewhat independently of one another. If that result arises in practice, it could lead to a call for an increase of trade transparency on a harmonised basis.

204. Information asymmetry is a market failure that arises where one group of participants has less or worse information than another group and would be expected to change its behaviour if it were in possession of additional or better information. Two forms of asymmetric information can be distinguished depending on the exact timing at which the information asymmetry occurs, i.e. before the transaction is carried out or afterwards. In the first case, the group that has less or worse

information may make poor trading decisions because of this information shortfall. In the second case, if the group with poorer information does not have access to information regarding the trades executed by other market participants, then it will be unable to use any information resulting from previous trades and will have to continue trading from its less well informed position. For these reasons, the group that has less or worse information may make poor trading decisions because of this information shortfall. Information asymmetry is linked to poor levels of transparency.

Fact finding conducted among CESR and ERGEG members

205. As described above, a number of questions on transparency in the mandate were fact finding ones to consider how transparency was dealt with currently on a national level, rather than policy ones.

206. The fact finding highlighted differences in transparency requirements in most countries between the transparency requirements in spot trading (where there are fewer requirements) compared to futures/forward trading on regulated markets and MTFs (where there are more requirements). There is a difference between transparency requirements for the trading on platforms compared to OTC trading as there are generally no transparency requirements for OTC trading. Some responses to the fact finding questionnaire included detailed information on the information published by trading platforms. Some respondents mentioned the role for transparency played by information services (e.g. Platts) in publishing various price and volume information, either for a fee or for free. A few respondents also referred to the role of brokers in providing trade information (in practice only to their clients).

207. On the basis of the fact finding, the competences of the (regulatory) authorities are generally determined on the basis of whether the product traded is the commodity itself (i.e. spot contracts for electricity or gas) or a financial instrument (derivative) with electricity or gas as an underlying, as well as whether trading is conducted on a regulated market, an MTF or OTC. In most EU countries, the trading in electricity and gas derivatives is supervised by the securities regulator whereas trading/transactions in electricity and gas (spot contracts) are supervised by the energy regulator. There are in practice fewer platforms trading gas or gas derivatives, as contrasted with the trading of electricity or electricity derivatives. In many cases, OTC trading in the underlying (electricity or gas spot contracts) is not subject to any supervision. France is an exception as the energy regulator has a power of surveillance on every product (both electricity and gas and related derivatives) for delivery/settlement in France, for every maturity and every venue (including OTC).

Further fact finding

208. CESR and ERGEG were invited, where applicable, to build on the answers provided in CESR's initial advice to the Commission on commodity and exotic derivatives and related business (CESR/07-429, July 2007). Information was compiled by CESR and ERGEG from that initial advice, the fact finding among CESR and ERGEG members described in paragraphs 205 to 207 and other sources to focus on the kind of pre- and post-trade data currently disclosed by platforms. The purpose of compiling that information was to facilitate the discussion about a necessity of further harmonisation of pre- and/or post-trade transparency on these platforms (e.g. by minimum disclosure standards).

209. Although the data collected was not comprehensive it should be sufficient to draw some tentative conclusions.

210. The availability of pre-trade information even to market participants largely depends on the trading system for the electricity and gas spot or derivative contracts. Trading systems tend to differentiate according to the products traded (electricity or gas, spot or derivative). There is a great variety of trading systems in place. For example, day-ahead electricity spot trading works with an auction system on most trading venues. In continuous trading systems, best bid/ask offers are available to market participants and real-time data is sometimes also available via data vendors. Those findings would lead to the view that any potential pre-trade transparency requirements across different venues should not be prescriptive but rather of a fairly general and high level nature.

211. As regards post-trade information, the publication or dissemination of trading information about energy futures tends to be much more detailed than for spot contracts. On the other hand, if there is

a spot auction with a single price, this price and the volumes traded at this price will in most cases be made public as soon as possible after the price is established.

212. In principle, MTFs operate differently from brokers. The main difference is the involvement of the broker in the transaction. Brokers can also provide their clients with market information. By contrast, MTFs are required to have transparent and non-discretionary rules and procedures for fair and orderly trading. In practice, however, it is not easy sometimes to distinguish between the service of a major energy broker, particularly when it is using its electronic screens, and its operation of an MTF. MTFs and broking, in some ways, may appear to operate similarly. Brokers act somewhat like platforms by bringing together selling and buying interests of one client with another client. So, it may be appropriate to include the brokers in any proposal for a transparency regime.

213. The fact-finding has also shown that regulated markets and spot exchanges tend to publish, either because of respective requirements in the law or regulations of a Member State or their own rules, post-trade information free of charge – at least with a certain delay of 15 minutes up to the end of the day. In contrast, MTFs and brokers only disclose post-trade data to their clients or for a charge to data vendors or other market participants. Consideration therefore could be given as to whether a certain minimum post-trade requirement, e.g. with end of day data which is free of charge, should be made available to the public in order to establish a certain level playing field.

214. However, it seems that, with access to a broker's screen, quotes (bid-ask) pre-trade are shown on screens electronically and details post-trade of prices and volumes are available (if electronic trading is used and mostly if voice broking is used), although a few large trades may not have the same level of transparency. Access to those screens is mainly for a broker's clients and many market participants (e.g. investment banks active in energy derivatives, big energy companies) are their clients. In addition, some of their information can be purchased by a non-client. If a market participant is a client of all the main brokers, then its traders will be able to see the whole broker market. Further, all the main brokers use the same system which can provide to their clients, for a fee, consolidated data from all their screens. In some, but not all, Member States, the broker market makes up the bulk of the OTC energy market.

215. Some OTC transactions made in some Member States (e.g. the UK and Germany), although not all, can be cleared on a platform and so details of their prices and volumes would be disclosed as a part of that market's data.

216. Energy derivatives use predominately physical delivery rather than cash settlement.

217. Generally, from discussions with market participants, most, but not all, do not support increased trade transparency and consider that sufficient information on prices and volumes is available for trading on platforms and OTC. Some consider that trade transparency for OTC transactions would be very costly. They are supportive of harmonisation, to the extent any action is taken, because it is easier to comply with uniform requirements than it is to comply with different requirements for individual markets in individual Member States. Some market participants are of the view that, through the information produced by platforms and other information providers, they can have knowledge of most of the standard transactions which take place in the energy markets and, through related hedging activity and otherwise, many of the complex energy market transactions which take place as well.

Question to market participants:

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.

Call for Evidence

218. The responses to the Call for Evidence for the mandate often focused on other types of transparency, particularly transparency of fundamental data, and it was sometimes difficult to interpret the respondents' views on trade transparency. This consultation can give respondents an opportunity to provide their specific views on trade transparency. The majority of responses mentioned

transparency of fundamental data and suggested that transparency of that type should be given a higher priority than transparency of trading in order to understand how prices form in energy markets. They agreed with the interpretation of CESR and ERGEG that the Sector Inquiry does not indicate that there is evidence that a lack of transparency concerning electricity and gas supply contracts nor electricity and gas derivative contracts is the main factor undermining an efficient price formation process. Some respondents expressly opined that improving trade transparency would not address the problems identified in the Sector Inquiry and one respondent was also of the view that measures which address those problems first will go a long way towards creating more liquid wholesale electricity and gas markets in which there is greater consumer confidence and more competitive prices.

219. Complaints about a lack of transparency by market participants can be a sign of asymmetric information or other market or regulatory failure. Five respondents can be viewed as being against additional trade transparency requirements on the basis that existing trade transparency is sufficient, no justification exists for new transparency requirements or an increase in trade transparency (or requirements for it) may have disadvantages. One of those respondents, however, suggested EU rules for transparency for spot trading and other physical markets, but not bilateral contracts. Another respondent discussed trade transparency, but did not appear either to support or to be against additional requirements for trade transparency. Other than those six respondents, the remaining three respondents did not express themselves on new requirements for trade transparency, although one of those respondents suggested that more data on prices and volumes could be published by platforms for spot and energy derivatives markets and, for standard spot and derivatives OTC contracts, through brokers. Nevertheless, a number of respondents noted that there was a lack of transparency in the OTC markets which was described as "huge" by one respondent. There was little in the responses to suggest that the respondents considered that the efficiency of trading in electricity and gas (particularly in derivatives) would be improved by mandating additional transparency requirements. Overall, the weight of opinion was against increased trade transparency requirements.

220. Amongst the reasons referred to by respondents to explain their lack of support for new trade transparency requirements are those described below:

- Much of the information that may be considered as trade transparency is already available to the market, e.g., through information services or brokers.

- Mandating increased trade transparency may reduce liquidity in the market (presumably because market participants may be more conservative in making bids and offers), with a consequential increase in volatility in price.

- Disclosure of more trading information by a market participant can show to the market its trading positions and strategies which can discourage or impede competition and innovation.

- Bespoke and non-standard trades take place in the OTC energy markets for which increased transparency may not be easy or desirable.

- Costs would be incurred by market participants for increased trade transparency. No respondent really attempted to estimate the scale of the costs involved. However, one respondent pointed out that smaller players would not have resources for compliance and also expressed the view that transparency requirements could result in market participants leaving the market or could be a barrier to entry.

- Protection of retail investors was referred to as being a key rationale for increased transparency, but it was noted that wholesale energy markets have only limited retail participation (as opposed to retail interest in energy markets as consumers of energy). What little retail participation there is appears to be concentrated in products, e.g. exchange traded funds for energy, for which there seems to be sufficient transparency.

221. Respondents also mentioned the benefits of transparency including that it

- promotes liquidity and enhances market efficiency;
- facilitates competition, new entrants and market participation; and
- engenders market confidence.

222. Some respondents described trade transparency as a balance between having enough information for the purposes of market liquidity and efficiency (and other advantages mentioned in paragraph 221), while not having too much information (or requirements for providing that information) as a result of the difficulties described in the reasons given against increased trade transparency requirements (as noted in paragraph 220).

223. As mitigating potential risks associated with increased trade transparency, respondents identified the following features:

- Anonymity in disclosing information on prices and volumes, aggregation of trading data or a delay in publication are the three main methods which can be used to protect the trading strategies and positions of market participants. Trade information on prices and volumes usually is disclosed anonymously, but market participants can possibly nonetheless often glean information about individual participant's trading.
- Any new transparency requirements should be implemented throughout the EU to avoid regulatory arbitrage and ensure a level playing field.

224. The Commission's mandate asks specifically about whether increased transparency requirements could lead to a migration of trading away from the EU to escape regulation. One respondent expressed the view that given the regional and national nature of the energy markets, it was difficult to envisage a large shift of trading in the physical markets to countries outside the EU. Nonetheless, respondents viewed that one consequence of increased trade transparency may be that financial markets participants may decide to focus their activities on markets other than energy with a corresponding reduction in liquidity.

Considerations for policy options

225. From the evidence described above, including responses to the Call for Evidence, there is little indication that the current levels of trade transparency in energy markets as a whole are not sufficient in practice, especially if trading takes place on regulated markets or MTFs.

226. However, as described in more detail above, a substantial proportion of energy transactions – both spot and energy derivative – are made otherwise than on regulated markets and MTFs where trade transparency requirements apply mainly stemming from national laws or internal rules. Trade transparency in relation to the former type of transactions can be less readily accessible as compared with transactions made on regulated markets and MTFs. In light of the combination of those features, and the concerns and perceptions they may raise, CESR and ERGEG consider that different options in relation to trade transparency, along with arguments in support of and against increased trade transparency initiatives, should be considered for the purposes of this consultation paper and the views which it may elicit.

227. Transparency for OTC activity is often driven by the markets themselves, depending on the nature of the instrument involved, the market in which it trades and the needs of the given community of users. Through information services and other sources of information, information on prices and volumes in other markets may be available to market participants. Energy markets, both spot and energy derivative, in each Member State are not uniform. If there exists particular markets where problems of trade transparency have been identified, a further description of those concerns would be helpful.

Question to market participants:

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.

17.

228. The advantages of any new trade transparency requirements would need to be balanced against the main disadvantages which have been outlined by market participants in paragraph 220. Market participants would be expected to incur technological, legal and compliance costs, while energy and securities regulators would bear increased costs of supervision or regulation.

229. Other considerations that could be taken into account in relation to a trade transparency initiative:

- To the extent that concerns about trade transparency are identified which should be addressed, the industry could be prompted to take action for itself or be involved in that action.

- Although bearing in mind the advantages of a harmonised approach, any trade transparency initiatives could be limited to those products or energy markets where there are sound reasons in their favour. So, for example, potential action might not need to be focussed on occasional OTC transactions which use price information arising from platforms and, in turn, are so bespoke that they do not add materially to the price discovery process.

- A trade transparency initiative could focus on standardised products which are most relevant for price formation purposes. By contrast, to cover some transactions, e.g. highly bespoke derivatives, would require more complexity. Any information for those transactions might be of little or no value for price formation purposes because they are bespoke and relatively infrequent. However, one difficulty which may be encountered is describing standardised products because an otherwise fairly standard product can fairly easily be changed so that it is not.

- In the energy sector, where there are platforms involved, they could take on some of the burden of disclosure of information on prices and volumes and thereby reduce the burden on individual firms.

- For OTC transactions, the negotiation and other communication before a deal is struck would often be bespoke and so provisions on pre-trade transparency (however generic) would not work. By contrast, post-trade disclosure could be considered. The burden of disclosure would fall on individual counterparties for direct bilateral trades and they in turn would require a mechanism for disclosure. Disclosure of information of that nature would result in a fairly comprehensive regime, but the benefits might be diminished if the information would not be available in a consolidated format.

- Information on prices and volumes may not be available free of charge. That information, if it is available on a reasonable commercial basis, would still constitute information available for trade transparency, applying principles arising from work on MiFID.

230. The extent of the pre- and post-trade transparency needed is still under discussion by CESR and ERGEG. CESR and ERGEG agree that trading of electricity and gas needs to be enhanced and supported. Furthermore, CESR and ERGEG consider that confidence in the integrity of the market is of great importance in this context. However, it has to be examined to what extent additional pre- and post-trade transparency is necessary and at the same time sufficient to support market integrity.

Policy Options

Option 1: Keep status quo

231. One option would be to keep the present position.

232. Information gathered from a variety of sources has been described above. Fact finding has been carried out to answer specific factual questions in the mandate and to build on previous work referred to in the mandate. Further fact finding on how energy markets operate has also been conducted. Feedback from market participants has also been sought and received. The Call for Evidence also yielded both a greater understanding of how those markets operate and the views of market participants.

233. Transparency for OTC activity is often driven by the markets themselves, depending on the circumstances existing for those markets, and, in particular, based on the needs of market participants. For some markets, especially for RMs and MTFs, information on the standard products traded on those markets is easily available directly from those markets or elsewhere. In other markets, it may not be as readily accessible for all transactions, but it is nonetheless available to market participants, including through information services. Market participants have indicated that they use information from a variety of sources and consider that they generally have enough information for their trading.

234. Accordingly, in their opinion no material problem would appear to exist in relation to the scenario put forward by the Commission as described in paragraph 203 above, nor in relation to information asymmetry, as described in paragraph 204.

235. This option would have the benefit that the energy markets and their participants could determine themselves, based on their particular circumstances, how to make available trade information. This status quo option would not have any additional costs.

Question to market participants:

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

Option 2: Initiative for key principles in trade transparency

236. A second option would be for CESR and ERGEG to specify key principles for trade transparency that they think would be desirable in order for platforms to operate well. Regulators could then assess whether those key principles are fulfilled. If they are not fulfilled, then more effort on trade transparency would be needed. This option would apply to the standardised products traded on those platforms. It would not apply to other transactions.

237. The key principles could be drafted in a generic way so the particular circumstance of each individual platform could be taken into account. Alternatively, they could be drafted in a more prescriptive way with the result that the information arising from the platforms could be more uniform. The key principles could have a regulatory basis or they could be achieved through an industry-led initiative (cf. Option 3).

238. The key principles would be expected to focus more on post-trade transparency, rather than pre-trade transparency, because there is generally more uniformity in the information produced by platforms on trades made there, as described in paragraphs 210 and 211. For example, the key principles might specify that details on prices and volumes would be published by the end of a trading day.

239. Although options could be pursued which could be broader or narrower in terms of the markets or transactions they cover, this option would have the advantage of reducing the potential for regulatory arbitrage, and increasing trade transparency amongst platforms.

240. Given the national or regional nature of energy markets throughout the EU and their diversity, this option could have the advantage of providing for increased trade transparency in markets which would now be unlikely to meet the principles set, but without the difficulties of identifying a more specific regime.

241. The disadvantages outlined above (in paragraph 220) could apply to this option, although they would be expected to have a smaller impact as compared with their effects under the imposition of a more comprehensive transparency regime (in Option 3).

242. Ways to mitigate the disadvantages of using this option could include a delay in publication or aggregation, although delays and aggregation may also reduce any advantages for price formation correspondingly. Their use may not reduce all the costs involved, including on the technical side. Anonymity should be respected in any event.

243. The costs of key principles would be expected to be higher if they were applied to all platforms rather than only to regulated markets and MTFs. In that case, they would however be lower than if they were applied also to OTC contracts (not traded on a platform) with their more diverse terms and ways of transacting.

Question to market participants:

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

Option 3: More comprehensive regime/initiative for trade transparency

244. A third option would be a more comprehensive regulatory regime or an industry led initiative within a framework defined by regulators. This option could take a variety of forms.

245. Building on principles already applying to regulated markets and MTFs, one approach could be for CESR to provide guidance on those principles which specifically relate to trade transparency.

246. This type of initiative could vary in whether it applies:

- general or more specific criteria;
- to regulated markets and MTFs or instead has a more broad application (other platforms, OTC*);* or
- to standardised products or more broadly.

247. Advantages of increased trade transparency may result from the use of this option to remedy any market failures identified.

248. The disadvantages outlined above (in paragraph 220) could potentially all apply to the alternatives under this option and would vary depending on the approach taken. Generally, they would be expected to have a larger effect than under Option 2 and the costs of a comprehensive regime could be significant. However, this option could also bring benefits to the market, especially taking into account the establishment of a pan-European harmonised framework and a level playing field across various trading methods.

249. Ways to mitigate the disadvantages of using this option would be similar to those described under Option 2.

250. Although the MiFID regime for shares admitted to trading on a regulated market could form a basis for designing this type of a regime CESR and ERGEG consider that a comprehensive MiFID type regime for trade transparency is neither needed nor appropriate for energy markets and so are not recommending it.

Question to market participants:

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

Draft response to question E.19

E.19: In light of the findings in the Commission Sector Inquiry on energy and the subsequent study of the electricity wholesale markets, please consider:

- **a) whether, pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC, greater EU-wide pre- and/or post-trade transparency rules for electricity and gas supply contracts (physical and spot trading) and electricity and gas derivatives would contribute to a more efficient wholesale price formation process and efficient and secure energy markets;**
- **b) whether such transparency arrangements could be expected to effectively mitigate the concerns identified in the Sector Inquiry above;**
- **c) whether uniform EU-wide pre- and post-trade transparency could have other benefits;**
- **d) whether additional transparency in trading could have negative effects on these markets, for example could liquidity in these markets be expected to decrease? Is there a risk that trading could shift to third countries to escape regulation?**
- **e) If you believe that there are risks arising from additional pre- and post-trade transparency requirements, how do you believe that these risks can be mitigated (e.g. aggregation, delay in publication, anonymity)?**

(a) From the evidence described above, including responses to the Call for Evidence, there is little indication that the current levels of trade transparency in energy markets as a whole are not sufficient in practice, especially if trading takes place on regulated markets and MTFs. However, a substantial proportion of energy transactions –spot and forwards and futures – are not made on regulated markets and MTFs but on other platforms or OTC where trade transparency in relation to those transactions can be less readily accessible or not available at all as compared with RMs and MTFs. Also, less mature markets might not be as transparent as well-developed markets. In light of the combination of those features, CESR and ERGEG consider that different options in relation to trade transparency should be considered. The first option is to retain the current situation. The second option is to apply key principles to platforms, particularly for post-trade transparency. The third option is to apply a regulatory regime or an industry led initiative within a framework defined by regulators. Following the consultation, CESR and ERGEG expect to be in a position to advice on whether a greater EU-wide pre- and/or post-trade transparency initiative for electricity and gas supply contracts (physical and spot trading) and electricity and gas derivatives would contribute to a more efficient wholesale price formation process and efficient and secure energy markets and, if so, what kind of initiative.

The extent of the pre- and post-trade transparency needed is still under discussion by CESR and ERGEG. CESR and ERGEG agree that trading of electricity and gas needs to be enhanced and supported. Furthermore, CESR and ERGEG consider that confidence in the integrity of the market is of great importance in this context. However, it has to be examined to what extent additional pre-and post-trade transparency is necessary and at the same time sufficient to support market integrity.

(b) The Sector Inquiry shows that concerns about transparency exist. However, transparency in the sense used in the Sector Inquiry focuses mainly on transparency for fundamental data and less on trade transparency. In any event, no trade transparency initiative alone could be expected effectively to mitigate the concerns identified in the Sector Inquiry.

(c) The question as to whether uniform EU-wide pre- and post-trade transparency could have the benefits mentioned in question (a) will be described in the response to be given by CESR and ERGEG to that question after the consultation. Other benefits which could arise from adequate trade transparency include an increase in competition, new entrants and market participation, and general engendering of

market confidence. However, those benefits may exist already in many energy markets without any trade transparency initiative. It should therefore be addressed whether more transparency would be needed in those markets where this is not the case. As with the approach to question (a) above, CESR and ERGEG will, after the consultation, expect to be in a position to advise on whether those other benefits of trade transparency would be met by a trade transparency initiative, if they do propose any initiative.

(d) Additional transparency would not be expected to have negative effects in trading in itself. However, a trade transparency initiative could have other negative effects on these markets. For example, improperly considered requirements for increased trade transparency might reduce liquidity in the market with a consequential increase in volatility in price. Disclosure of more trading information by a market participant could show to the market its trading positions and strategies which can discourage or impede competition and innovation. Any new initiative would be expected to result in technological, legal and compliance costs on market participants and increased costs of supervision and regulation on securities and energy regulators. Given the national or regional nature of the energy markets and their emphasis on physical trading, there seems to be little risk that trading could shift to third countries to escape regulation.

(e) Some risks arising from additional pre- and/or post-trade transparency requirements can be mitigated through three main routes - aggregation, delay in publication and anonymity. The costs of such requirements, and their potential negative effects described above, would have to be balanced against the described positive effects. Uniform application of any new trade transparency requirement or initiative would reduce the scope of regulatory arbitrage.

Questions to market participants:

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?

Section III: Exchange of Information

Questions in Section D of the mandate on exchange of information

251. The questions in Section D of the Commission mandate regarding exchange of information between securities and energy regulators are the following :

D.7. How would securities regulators most efficiently provide information to energy regulators pursuant to paragraph 7 of Article 22f/24f?

D.8. Which securities regulator would most efficiently be responsible for such provision in the case of investment firms with more than one branch?

D.9. Would it be feasible and efficient to employ the Transaction Reporting Exchange Mechanism (TREM) or a similar electronic system to exchange this data?

D.10. Is there a case for data to be forwarded from energy regulators to securities regulators on an automatic basis? If so, what data?

MiFID requirements

Legal provisions on exchange of information between competent authorities and transaction reporting

252. MiFID sets out requirements in order to strengthen the duties of assistance and cooperation between securities regulators and reinforces provisions on exchange of information between them.

253. According to Article 56 of MiFID, the competent authorities of different Member States shall cooperate with each other whenever necessary for the purpose of carrying out their duties. Securities regulators shall render assistance to the competent authorities of other Member States. In particular, they shall exchange information and cooperate in any investigation or supervisory activities.

254. In addition, MiFID also establishes reporting obligations applicable to transactions executed in financial instruments admitted to trading on a regulated market, whether or not such transactions were executed on a regulated market.

255. Article 25(3) MiFID states that: "Member States shall require investment firms which execute transactions in any financial instruments admitted to trading on a regulated market to report details of such transactions to the competent authority as quickly as possible, and no later than the close of the following working day."

256. Article 25(4) also establishes that: "The reports shall, in particular, include details of the names and number of the instruments bought or sold, the quantity, the dates and times of execution and the transaction prices and means of identifying the investment firms concerned."

257. Article 25(5) provides that: "Member States shall provide for the reports to be made to the competent authority either by the investment firm itself, a third party acting on its behalf or by a trade-matching or reporting system approved by the competent authority or by the regulated market or MTF through whose systems the transaction was completed. In cases where transactions are reported directly to the competent authority by a regulated market, an MTF, or a trade-matching or reporting system approved by the competent authority, the obligation on the investment firm laid down in paragraph 3 may be waived."

Transaction reporting

258. The primary use of transaction reports is to detect and investigate suspected market abuse (insider trading and market manipulation). On the basis of transaction reports it is possible to analyse all transactions executed by a given investment firm, in a given financial instrument, for a given client or over a certain time period.

259. The Annex I (Table 1) of the MiFID Implementing Regulation outlines a list of fields for reporting purposes:

- Reporting firm identification
- Trading day
- Trading time
- Buy/sell indicator
- Trading capacity
- Instrument identification (ISIN)
- Unit price
- Price notation
- Quantity
- Counterparty code
- Venue identification
- Client code
- Transaction reference number.

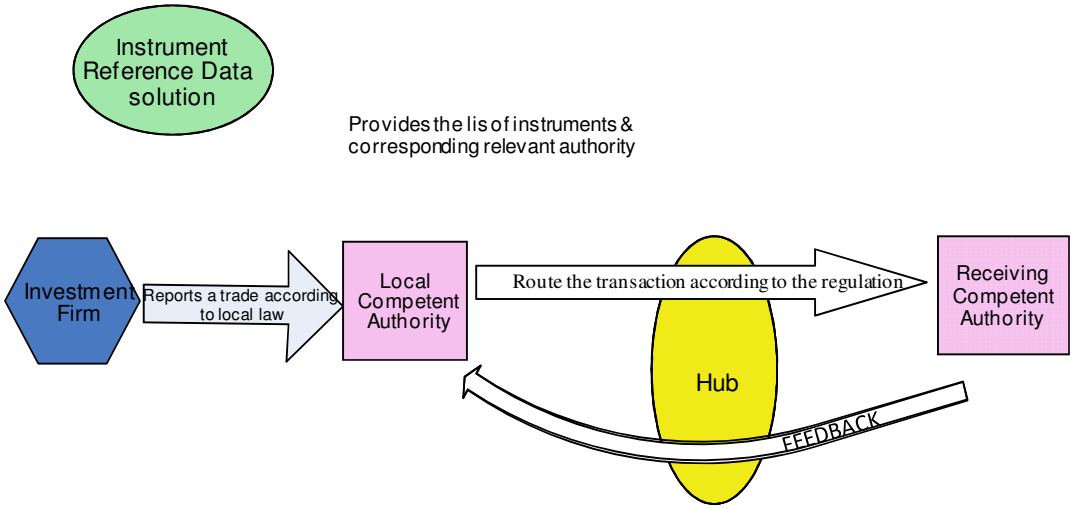
260. Currently, only investment firms have to submit transaction reports to the securities regulators and only transactions in financial instruments admitted to trading on a regulated market and with ISIN codes are subject to transaction reporting obligations and exchange of those reports between competent authorities.

261. The reporting of non-securities derivatives (commodities, interest rates, exchange rates and other economic variables) required under MiFID will be carried out by the regulated markets where the trade has been made and not by investment firms. The reason for this is the technical difficulties with the establishment and cost implications of such a reporting system. A compromise involving EU securities regulators and the Commission was reached under which, among others, energy and other commodity derivatives were excluded from transaction reporting, apart from those transactions made on a regulated market. For transactions made on a regulated market, each regulated market is responsible for reporting the transactions executed on its market to the regulator for that market[26].

Exchange of information

262. The principle of exchange of information on transaction reports is established in MiFID and is required for the purposes of carrying out the duties of the competent authorities. The competent authorities shall, in accordance with Article 14 of the MiFID Implementing Regulation, establish the necessary arrangements in order to ensure that the competent authority of the most relevant market in terms of liquidity (relevant competent authority) for a financial instrument also receives the transaction reports[27]. To achieve this, CESR has established TREM (Transaction Reporting Exchange Mechanism).

263. At this moment, the solution implemented to exchange information between competent authorities can be described by the following diagram:



264. The solution adopted uses a central distribution system (hub), which provides the functionalities needed for distributing the transaction files. The exchange of information between competent authorities is based on the instrument reference data. Each authority identifies the transactions which need to be forwarded to the relevant competent authority (outgoing transactions) and for that the following information is needed:

- The list of instruments admitted to trading on all regulated markets in the EEA; and
- The relevant competent authority for all the instruments.

265. Exchange of information is required in three specific situations:

- Another competent authority is the relevant competent authority for the financial instrument in which the transaction is executed;
- The transaction is reported by or on behalf of a branch of an investment firm; and
- There is a request by one or more competent authority for the information.

Question D.7: How would securities regulators most efficiently provide information to energy regulators pursuant to paragraph 7 of Article 22f/24f?

266. Questions D.7 to D.10 of the Commission's mandate to CESR and ERGEG deal with information exchange between securities and energy regulators.

267. In the Call for Evidence market participants were asked to submit their views regarding these questions. Only three of the nine responses contained views on these questions. Regarding question D.7, the respondents' common view was that implementation of such an information exchange should not duplicate the efforts of market participants. Additionally, one respondent stated that information should not be exchanged between energy and securities regulators periodically but only for individual cases. Also confidentiality should be observed.

268. In the responses to the Call for Evidence, two possible solutions were named. On one hand, a system for periodic exchange of information could be established between securities and energy regulators. Here, information would be exchanged automatically. An example for such a system is the TREM system used by securities regulators. On the other hand, energy and securities regulators could exchange their information on a case-by-case basis.

269. CESR and ERGEG propose to start information exchange by request (on a case-by-case basis) for fulfilling the legal tasks of energy regulators like monitoring the market. The proposal of the Commission in Articles 22f/24f of the Third Energy Package contains new obligations for supply undertakings to keep records relating to their transactions. This data shall be kept at the disposal of the national energy regulator, the national competition authority and the Commission. This transaction data shall enable these entities to oversee the electricity and gas markets (recital 19 of the amended Electricity Directive and recital 21 of the amended Gas Directive). In order for the national energy regulator, the national competition authority and the Commission to have access to the data kept by entities falling within the scope of MiFID, securities regulators are obliged to provide data to the former under Articles 22f(7)/24f(7) of the Third Energy Package.

270. It should be mentioned that transparency provisions recommended by ERGEG (see response to question E.11) cannot be implemented if energy regulators do not get the required information, which would require either that they get the information directly or that they get it, on a periodic basis, from securities regulators. However, securities regulators currently do not have a periodical and automatic access to information on transactions in energy derivatives covered by MiFID. Investment firms are required to keep records about these transactions. However, this data can only be demanded on a case-by-case basis for the purpose of specific investigations, for example. Hence, there are legal and practical obstacles for energy regulators to have periodically access to the data concerning MiFID firms which are not supply undertakings. Due to this, CESR and ERGEG currently have considered only the option of exchanging information on a case-by-case basis.

271. Additionally, in the view of CESR and ERGEG, the said exchange of information between energy and securities regulators should be backed by a sound legal basis. This should be given by European legislation. It is the opinion of CESR and ERGEG that a pragmatic option at this stage would be the establishment of multilateral and bilateral agreements among energy and securities regulators for exchanging information on cross-border and local basis respectively.

272. Such multilateral and bilateral memoranda of understanding among regulators should take into consideration the obligation included in Articles 22f(7) and 24f(7), as well as provisions for appropriate confidentiality with respect to the data supplied by securities regulators to energy regulators, national competition authorities and the Commission.

273. A good and practical example of cooperation between regulators in the field of exchange of information is provided by the existing Multilateral Memorandum of Understanding – MMoU – on the Exchange of Information and Surveillance of Securities Activities signed by CESR members - formerly FESCO - in 1999.

274. The MMoU to be established between CESR and ERGEG members would need to include the main provisions to establish cooperation in the field of exchange of information between both energy and securities regulators within the EEA.

275. Ideally this MMoU among CESR and ERGEG members would be supplemented by bilateral MoUs among local energy and securities regulators addressing legal gaps in certain jurisdictions to exchange information between different regulators.

276. With this respect there are already existing examples of cooperation among local energy and securities regulators. In one jurisdiction a formal memorandum of understanding has been already signed between the energy and the securities regulators, while in another jurisdiction formal cooperation between energy and securities regulators should be legally enacted shortly. Formal and informal meetings among local energy and securities regulators appear to be also very common in certain jurisdictions.

Draft response to question D.7:

D.7:.How would securities regulators most efficiently provide information to energy regulators pursuant to paragraph 7 of Article 22f/24f?

The proposal of the Commission in Articles 22f/24f of the Third Energy Package contains new obligations for supply undertakings to keep records relating to their transactions. This data shall be kept at the disposal of the national energy regulator, the national competition authority and the Commission. This transaction data shall enable these entities to oversee the electricity and gas markets (recital 19 of the amended Electricity Directive and recital 21 of the amended Gas Directive). In order for the national energy regulator, the national competition authority and the Commission to have access to the data kept by entities falling within the scope of MiFID, securities regulators are obliged to provide data to the former under Articles 22f(7)/24f(7) of the Third Energy Package. CESR and ERGEG propose to start information exchange by request, on a case-by-case basis for fulfilling the legal tasks of energy regulators.

It should be mentioned that transparency provisions recommended by ERGEG (see response to question E.11) cannot be implemented if energy regulators do not get the required information, which would require either that they get the information directly or that they get it, on a periodic basis, from securities regulators. However, securities regulators currently do not have a periodical and automatic access to information on transactions in energy derivatives covered by MiFID. Investment firms are required to keep records about these transactions. However, this data can only be demanded on a case-by-case basis for the purpose of specific investigations, for example. Hence, there are legal and practical obstacles for energy regulators to have periodically access to the data concerning MiFID firms which are not supply undertakings. Due to this, CESR and ERGEG currently have considered only the option of exchanging information on a case-by-case basis.

Additionally, in the view of CESR and ERGEG, the said exchange of information between energy and securities regulators should be backed by a sound legal basis, by European legislation. The opinion of CESR and ERGEG is that a pragmatic option at this stage would be the establishment of multilateral and bilateral agreements among energy and securities regulators for exchanging information on cross-border and local basis respectively.

Such multilateral and bilateral memoranda of understanding among regulators should take into consideration the obligation included in Articles 22f(7)/24f(7), as well as provisions for appropriate confidentiality with respect to the data supplied by securities regulators to energy regulators, national competition authorities and the Commission. Furthermore, the MMoU to be established between CESR and ERGEG members would need to include the main provisions to establish cooperation in the field of exchange of information between both energy and securities regulators within the EEA. Ideally this MMoU would be supplemented by bilateral MoUs among local energy and securities regulators addressing legal gaps in certain jurisdictions to exchange information between different regulators.

Question D.8: Which securities regulator would most efficiently be responsible for such provision in the case of investment firms with more than one branch?

277. Article 32(7) of MiFID regarding the establishment of a branch provides that: "The competent authority of the Member State in which the branch is located shall assume responsibility for ensuring the services provided by the branch within its territory comply with the obligations laid down in Articles 19, 21, 22, 25, 27 and 28 and in measures adopted pursuant thereto. The

competent authority of the Member State in which the branch is located shall have the right to examine branch arrangements and to request such changes as are strictly needed to enable the competent authority to enforce the obligations under Articles 19, 21, 22, 25, 27 and 28 and measures adopted pursuant thereto with respect to the services and/or activities provided by the branch within its territory." On the basis of this, securities regulators were required to collect information not only from domestic investment firms but also from branches of EEA investment firms located in their Member State.

278. The exchange of information regarding branches' transaction reports is regulated in Article 25(6) of MiFID, which points out that: "When, in accordance with Article 32(7), reports provided for under this Article are transmitted to the competent authority of the host Member State, it shall transmit this information to the competent authorities of the home Member State of the investment firm, unless they decide that they do not want to receive this information."

279. CESR and ERGEG considered whether a similar approach in case of a necessity to exchange information related to branches would be viable. This would mean that the securities regulator of the host Member State of the branch should provide the information requested by the energy regulator. However, since the home Member State securities regulator always has direct access to the records of a branch of an investment firm as recognised under Article 13(9) of MiFID, it may be a less complex alternative to follow an approach where energy regulators always ask the home competent authority for information – no matter whether the transaction was undertaken by the investment firm itself or by its branch.

Draft response to question D.8:

D.8: Which securities regulator would most efficiently be responsible for such provision in the case of investment firms with more than one branch?

The requirements for exchange of information regarding branches´ transaction reports within the securities regulation are established in Article 25(6) MiFID, which points out that: "When, in accordance with Article 32(7), reports provided for under this Article are transmitted to the competent authority of the host Member State, it shall transmit this information to the competent authorities of the home Member State of the investment firm, unless they decide that they do no want to receive this information."

CESR and ERGEG considered whether a similar approach in case of a necessity to exchange information related to records of supply undertakings would be viable. This would mean that the securities regulator of the host Member State of the branch should provide the information requested by the energy regulator.

A less complex alternative may be to follow an approach where energy regulators always ask the home competent authority for information – no matter whether the transaction was undertaken by the investment firm itself or by its branch since the home Member State securities regulator always has direct access to the records of a branch of an investment firm under Article 13(9) MiFID.

Question D.9: Would it be feasible and efficient to employ the Transaction Reporting Exchange Mechanism (TREM) or a similar electronic system to exchange this data?

280. Regarding question D.9 the common view of the respondents expressed during the Call for Evidence is that TREM would not be appropriate for the exchange of information between energy and securities regulators. On one hand, they supported a model where information exchange would happen on the basis of special requests by the relevant authorities, i.e. on a case-by-case basis, whereas TREM is used for a permanent and automatic exchange. On the other hand, the data exchanged under TREM does not fit to the needs of energy regulators.

281. CESR and ERGEG agree with market participants. TREM would not be appropriate for the exchange of information between energy and securities regulators. First of all, as there would probably be only

a few cases for exchange of information, it would not be efficient to invest in new IT. Secondly, TREM is established to enable securities regulators to exchange information within a very short period of time after the transaction was made. Market surveillance as proposed in the energy Directives, i.e. based on records kept by supply undertakings, would not require such a strict time limit.

Draft response to question D.9:

D.9: Would it be feasible and efficient to employ the Transaction Reporting Exchange Mechanism (TREM) or a similar electronic system to exchange this data?

CESR and ERGEG are of the view that TREM would not be appropriate for the exchange of information between energy and securities regulators. First of all, as there would probably be only a few cases for exchange of information, it would not be efficient to invest in new IT. Secondly, TREM is established to enable securities regulators to exchange information within a very short period of time after the transaction was made. Market surveillance based on records kept by supply undertakings – not on transaction reports - as proposed in the energy Directives, would not require such a strict time limit.

Question D.10: Is there a case for data to be forwarded from energy regulators to securities regulators on an automatic basis? If so, what data?

282. Given the above, CESR and ERGEG are not proposing at this stage to forward data on an automatic basis. However, the potential Memorandum of Understanding could establish reciprocal cooperation between authorities. Therefore, they could also be used to exchange information from energy to securities regulators; specially the information not covered by MiFID and received only by the energy regulators.

Draft response to question D.10:

D.10: Is there a case for data to be forwarded from energy regulators to securities regulators on an automatic basis? If so, what data?

As described above CESR and ERGEG are not proposing at this stage to forward data on an automatic basis. However, the potential MoU could establish reciprocal cooperation between authorities. Therefore, they could also be used to exchange information from energy to securities regulators; especially the information not covered by MiFID and received only by the energy regulators.

Questions to market participants:

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?

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?

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?**

Glossary

Broker	Intermediary who executes orders on behalf of clients.
Cash-settled transaction	A transaction settled in cash form (i.e. by delivering cash and not the underlying).
Energy	Electricity and gas
Energy derivatives	All energy transactions longer than spot contracts. It includes MiFID energy derivatives and energy supply contracts longer than spot contracts (if the market for a specific product is meant, then the product is mentioned).
Energy markets	Markets for all kinds of energy derivatives and all kinds of spot contracts related to energy (if the market for a specific product is meant, then the product is mentioned).
Energy supply contracts	An energy supply contract is "*a contract for the supply of electricity/gas*" that "*does not include an [energy] derivative*" (defined in the Third Energy Package). Given the definition of an energy derivative, energy supply contract thus cover: - spot contracts; - forward contracts which can be physically settled but which are not MiFID derivatives.
Forward	A contract that includes an obligation of at least one of the counterparties that has a due date which is later than for spot contracts in the sense of Article 38(2)(a) of the MiFID Implementing Regulation. Not all forwards are MiFID derivatives.
Futures	Standardised forward contracts that are traded on an RM or an MTF. All futures are MiFID derivatives.
MiFID	Markets in Financial Instruments Directive (2004/39/EC), OJ L 145, 30.4.2004, p.1.
MiFID Implementing Regulation	Commission Regulation (EC) No. 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency , admission of financial instruments to trading, and defined terms for the purpose of that Directive, OJ L 241, 2.9.2006, p.1,
MiFID energy derivatives (equivalent to "MiFID financial instruments" related to energy)	Financial instruments under MiFID which are derivatives related to energy and listed in Annex I, Section C(5) to (7) of MiFID and Article 38 of the MiFID Implementing Regulation. MiFID energy derivatives thus cover: - futures products traded on RMs and MTFs; - forward products traded OTC that are cash-settled; - forward products traded OTC that are physically settled if they are standardised. An analysis of the precise content of MiFID financial instruments is done in paragraphs 35 to 39.
MiFID firms	Investment firms under MiFID that are not eligible for an exemption under MiFID.

MTF	A Multilateral Trading Facility as defined in Article 4 (15) of *MiFID*. It is a multilateral system, operated by an investment firm or market operator, which brings together multiple third-part buying and selling interests in MiFID derivatives. As long as financial instruments are admitted to trading, the trading of spot contracts does not change the qualification as MTF.
Non-MiFID energy derivatives	Derivatives related to energy which are not MiFID derivatives.
NRAs	National regulatory authorities (this term refers only to members of ERGEG, not members of CESR).
Platform	Regulated markets, MTFs, spot exchanges, broker platforms and other electricity and gas venues with a similar function.
OTC	Over the counter (i.e. any transaction conducted outside a regulated market or *MTF*).
Physically-settled contracts	A contract settled in physical form (i.e. by delivering the underlying).
Regulated market or RM	A Regulated Market as defined in Article 4 (14) of *MiFID.* It is a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third party buying and selling interests in MiFID derivatives in a way that results in a contract, in respect of the MiFID derivatives admitted to trading under its rules and/or systems.
Retail market	Direct sale to the "final customers" (*i.e. "customers purchasing electricity/gas for their own use"*; defined in Directive 2003/54/EC and 2003/55/EC).
Sector Inquiry	A competition report of the Commission as described in paragraph 126.
Spot energy contract	Contracts in the sense of Article 38(2)(a) of Commission Regulation 1287/2006.
Spot exchange	Platform where only spot contracts are traded.
Spot market (also called day-ahead and intra-day market)	Within each market for a type of underlying, the *spot market* is limited to spot contracts.
Third Energy Package	Proposals for Directives amending Directive 2003/54/EC and Directive 2003/55/EC.
Wholesale market	Purchases and sales between 'wholesale customers' (i.e. "*any natural or legal persons who purchase electricity/gas for the purpose of resale inside or outside the system where they are established*"; defined in Directive 2003/54/EC and 2003/55/EC).

Annex I: The Mandate

Mandate

to the Committee of European Securities Regulators (CESR)and the Energy Regulators' Group for Electricity and Gas (ERGEG)

for technical advice pursuant to Articles 22f and 24f and Recitals 20 and 22 respectively in the two proposals for Directives amending Directive 2003/54/EC and Directive 2003/55/EC (The Third Energy Package)

This mandate requests joint advice from CESR and ERGEG on issues concerning record keeping and transparency of transactions in electricity and gas supply contracts and derivatives. The mandate is given in order to find out if additional measures are necessary with respect to transparency in energy trading, as announced by Commissioners Piebalgs and McCreevy following the adoption of the legislative proposals for the internal gas and electricity markets. It is also meant to provide to the Commission the adequate technical background to adopt the guidelines under Articles 22f/24f and Recitals 20 and 22 in the two proposals for Directives amending Directive 2003/54/EC and Directive 2003/55/EC.

This is a draft provisional mandate; it will possibly be completed by additional provisional mandates, depending on the development of the negotiation process before the Council and the European Parliament in relation to the proposed amendments to Directive 2003/54/EC and 2003/55/EC.

This mandate does not prejudice in any way the ongoing negotiations on any article in the Council and the European Parliament in the context of the co-decision procedure. A formal mandate may be sent to CESR and ERGEG once the amendments have been adopted in the co-decision procedure by the European Parliament and Council.

Advice is also sought on a possible clarification of the scope of the Market Abuse Directive in relation to trading in commodities and commodity derivatives.

The present mandate takes into full consideration the agreement on implementing the Lamfalussy recommendations reached with the European Parliament on 5 February 2002. In this agreement, the Commission committed itself to a number of important points, including full transparency. For this reason, this request for technical advice will be published on DG Internal Market's and DG Energy and Transport's web site and the European Parliament will be duly informed.

1. BACKGROUND AND LEGAL FRAMEWORK

The European Commission is to adopt guidelines pursuant to the following:

Article 22f of the Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity relevantly states:

> Article 22f
>
> Record keeping
>
> 1. Member States shall require supply undertakings to keep at the disposal of the national regulatory authority, the national competition authority and the Commission, for at least five years, the relevant data relating to all transactions in electricity supply contracts and electricity derivatives with wholesale customers and transmission system operators.
>
> 2. The data shall include details on the characteristics of the relevant transactions such as duration, delivery and settlement rules, the quantity, the dates and times of execution and the

transaction prices and means of identifying the wholesale customer concerned, as well as specified details of all unsettled electricity supply contracts and electricity derivatives.

3. The regulatory authority may decide to make available to market participants elements of this information provided that commercially sensitive information on individual market players or individual transactions is not released. This paragraph shall not apply to information about financial instruments which fall within the scope of Directive 2004/39/EC.

4. To ensure the uniform application of this Article, the Commission may adopt guidelines which define the methods and arrangements for record keeping as well as the form and content of the data that shall be kept. These measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27b(3).

5. With respect to transactions in electricity derivatives of supply undertakings with wholesale customers and transmission system operators, this Article shall only apply once the Commission has adopted the guidelines referred to in paragraph 4.

6. The provisions of this Article shall not create additional obligations vis-à-vis the authorities mentioned in paragraph 1 for entities falling within the scope of Directive 2004/39/EC.

7. In case the authorities mentioned in paragraph 1 need access to data kept by entities falling within the scope of Directive 2004/39/EC, the authorities responsible under that Directive shall provide the authorities mentioned in paragraph 1 with the required data.

Recital 20 states:

20. Prior to adoption by the Commission of guidelines defining further the record keeping requirements, the Agency for the Cooperation of Energy Regulators and the Committee of European Securities Regulators (CESR) should cooperate to investigate and advise the Commission on the content of the guidelines. The Agency and the Committee should also cooperate to further investigate and advise on the question whether transactions in electricity supply contracts and electricity derivatives should be subject to pre and/or post-trade transparency requirements and if so what the content of those requirements should be.

The same provisions apply mutatis mutandis in Article 24f and Recital 22 in the proposal to amend Directive 2003/55/EC for gas.

The mandate also asks CESR and ERGEG for their views on possible clarifications to the scope of the Market Abuse Directive in the context of the review of that directive by the Commission to be completed in early 2009.

2. CONSULTATION AND SOURCES OF ADVICE

The Commission is to act 'on the basis of public consultation and in the light of discussions with competent authorities'. The Commission's White Paper on Financial Services Policy 2005-2010 set out our commitment to open and transparent consultation:[28]

Open consultations (including with stakeholder groups) will continue to play a central role and will be required before any legislation is deemed necessary. The Commission will continue to publish responses received to its consultations, practical summaries and feedback statements.

In its advice CESR and ERGEG are asked to consider the advice on commodities markets and trading given separately by CESR and CEBS, the Committee of European Banking Supervisors, in the context of the Commission's ongoing review under Article 65(3) of Directive 2004/39/EC on Markets in Financial Instruments, and Article 48(2) and (3) of Directives 2006/49/EC on Capital Adequacy of Investment Firms and Credit Institutions. CESR and ERGEG are also asked to consider the views

expressed during the Commission's Call for Evidence on commodities and the conclusions reached in the subsequent feedback statement.[29]

3. THE PRINCIPLES TO WHICH CESR AND ERGEG SHOULD HAVE REGARD

As regards its working approach, CESR and ERGEG are invited to take account of the following principles:

- The principles set out in the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001;
- CESR and ERGEG should provide comprehensive advice on the matters described in Annex I;
- CESR and ERGEG should address to the Commission any questions which arise in the course of its work;
- CESR and ERGEG should also have close regard for the respective roles and functions of their members in various EU jurisdictions, as well as the relationship and levels of cooperation there are between energy and securities regulators in each. To the fullest, they should take this into account when issuing their advice.

4. QUESTIONS IN RELATION TO WHICH TECHNICAL ADVICE IS SOUGHT

Please consult **Annex I** for a list of questions in relation to which advice is sought.

5. DUE DATE

The advice from CESR and ERGEG is sought **by the end of May 2008** for questions in Sections C, E and F, and **by the end of December 2008** for questions in Sections D and G.

ANNEX I

A. INTRODUCTION

Well-functioning wholesale energy markets are an essential part of efficient energy markets. As competition develops trading becomes more and more important in the energy market. This means that financial and energy market regulation increasingly intertwine to achieve the goal of an internal energy market.

The Sector Inquiry as performed by DG Competition gave rise to concerns on the trust in and regulatory oversight over trading in energy markets. It concluded that "customers have little trust in the functioning of wholesale markets. They suspect market manipulation on the spot and forward markets by large generators to be the main reason for recent price increases. Concentration is a key factor in the proper analysis of the price developments. Other factors are the developments in fuel prices and the impact of the EU Emission Trading System.

Most wholesale markets have remained national in scope. The level of concentration in generation has remained high in most Member States giving generators scope for market power. The level of concentration in trading markets is less striking than in generation, particularly on forward markets where electricity can be traded several times before delivery. However, all spot and forward markets, even the most developed forward markets, remain dependent on the few players which enjoy a net excess of generation compared to their retail supplies.

Further, an analysis of who determines the clearing price at certain power exchanges indicates that there is scope to directly influence prices by excessive bidding prices for operators in Italy, Spain and Denmark. Possibilities to move prices might also exist in other markets.

In addition to excessive bidding, large operators can push up prices by withdrawing capacity. In that respect, it appears that load factors of generation units have increased over time in Germany and in France suggesting higher efficiency levels and a tighter supply/demand balance. However, significant generation capacity – most of it with low marginal costs – was retired in Germany despite slowly increasing demand. Also, certain plants with rather low marginal costs did not operate fully at all times."

DG Competition then carried out a detailed study of the functioning of the electricity markets in six Member States and the final report was published in April. The first part of the study looks at how many operators are effectively competing on the market on an hourly basis. The second part of the study reports on the difference between what the price of the market was in the period and what it would have been if the markets in DE, ES, NL, and UK had been perfectly competitive. This difference, referred to in the study as the "mark-up", was calculated by stimulating a perfectly competitive market for each hour of the period. The study shows that the mark ups vary over time and between Member States. Mark-ups are generally higher in DE and ES, and lower in GB and NL. The mark-up identified in the study is not the same as the profit of each company.

The third part of the study looks at the relationship between the number of operators competing at a given time and the "mark-ups". This analysis shows that there is a statistically relevant correlation between the numbers of generators who have spare capacity and the mark-ups in each hour: in other words, the more needed generators are, the higher the mark-ups in the market become.

More information on the sector inquiry and the electricity study can be found via http://ec.europa.eu/comm/competition/sectors/energy/inquiry/index.html.

As prices in bilateral contracts with end-customers are increasingly linked to wholesale market prices either directly or indirectly, there will be a growing incentive for the large energy undertakings to use their market power to influence wholesale market prices. The Commission therefore proposed strengthening the transparency requirements on physical information in its legislative proposals of 19 September 2007. It is currently considering the need for additional transparency requirements on trading activities. For example, given the different degrees of transparency between transactions on trading fora, including brokers' screens, and OTC transactions, there is a risk that high priced deals could be directed through transparent fora, thus raising the official wholesale price and having a knock-on effect on end-users.

Commissioners Piebalgs and McCreevy have stated, at the time of the adoption of the legislative proposals for the internal energy market, that transparency of trading in energy markets is a topic that needs further study to see if additional measures are necessary. They have agreed to cooperate with ERGEG and CESR on this topic, and to reach a conclusion by May 2008. Therefore the Commission services have the following mandate for advice to ERGEG and CESR.

B. DEFINITIONS

Market failure: any significant sub-optimality in market functioning. For example, where applicable, evidence of this could take the form of a wide dispersion of market prices, persistent concentrated market shares, persistent excess profits, a high level of investor complaints, significant information asymmetries leading to misallocation of resources, excessive risk-taking leading to a potentially high level of systemic risk, etc.

Regulatory failure: a regulatory state of affairs (including at European or at Member State level) which has the effect of:

(i) creating significant competitive distortions; or

(ii) significantly impairing the free movement of services between Member States; or

(iii) encouraging market participants to engage in a significant degree of regulatory arbitrage.

C. FACT-FINDING

1. How many of the following also fall under the definition of investment firms under Article 4(1)(1) of Directive 2004/39/EC (MiFID):

   (a) undertakings active in 'supply' of electricity within the meaning of Directive 2003/54/EC (Art 2.19)?

   (b) undertakings active in the 'supply' of natural gas within the meaning of the Directive 2003/55/EC (Art 2.7 and 2.8)?

2. What are the existing record-keeping obligations with respect to transactions in electricity and gas derivatives to which investment firms are subject by reason of MiFID? Consider both the transaction reporting obligation of firms under Article 25 of MiFID as well as the record-keeping obligations under Article 13(6) of MiFID.

3. What (regulatory) authority oversees trading activities in energy markets in EU Member States?

D. RECORD-KEEPING

4. Do regulators believe that there should be a difference between the proposed record-keeping obligations under the proposed amendments to the electricity Directive and gas Directive and the existing record-keeping obligations with respect to transactions in electricity and gas derivatives to which investment firms are subject by reason of MiFID (Articles 25 and 13(6))?

5. Pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC (the Third Energy Package), what methods and arrangements for record keeping do CESR and ERGEG consider the Commission should specify as guidelines under this legislation for:

   (a) transactions in electricity and gas supply (spot) contracts? (To the fullest extent possible this should be a harmonised specification.) If there are any deviations from the obligations

relating to commodity derivatives already applicable to investment firms, these should be justified;

(b) transactions in electricity and gas derivatives contracts? (To the fullest extent possible this should be a harmonised specification.) If there are any deviations from the recommendations in a), these should be justified.

In answering this question, CESR and energy regulators are asked to consider specifying a single transaction record format based on the content and data to be provided as per Table 1 of Annex I of Regulation EC 1287/2006.

6. How would this information be most efficiently kept at the disposal of authorities as mentioned under paragraph 1 of Article 22f/24f in the case of spot transactions and non-investment firms?

7. How would securities regulators most efficiently provide information to energy regulators pursuant to paragraph 7 of Article 22f/24f?

8. Which securities regulator would most efficiently be responsible for such provision in the case of investment firms with more than one branch?

9. Would it be feasible and efficient to employ the Transaction Reporting Exchange Mechanism (TREM) or a similar electronic system to exchange this data?

10. Is there a case for data to be forwarded from energy regulators to securities regulators on an automatic basis? If so, what data?

E. TRANSPARENCY

In answering the following, CESR and ERGEG are invited, where applicable, to build on the answers provided in CESR's initial advice to the Commission on commodity and exotic derivatives and related business (CESR/07-429, July 2007).

11. What guidelines and arrangements do energy regulators propose for the making available of aggregate market data by them under paragraph 3 of Article 22f/24f?

12. What requirements, deriving from national law, are currently put on energy traders, brokers or exchanges to publish information 'post-trade', for example on publishing traded volumes, prices etc?

13. What requirements, deriving from national law, are currently put on energy traders, brokers or exchanges to publish information 'pre-trade', for example on publishing bids to organised markets?

14. Is there a difference in transparency requirements for spot trading compared to future and forward trading? If so, why?

15. Is there a difference in transparency requirements for exchange trading compared to OTC trading? If so, why?

16. What information, other than required by law or regulation, is made public by energy traders, brokers, information services or exchanges?

17. Is access to information on traded volumes and prices equal for all parties active in that market?

18. If not, is unequal access to or general lack of information on trading causing distortion of competition?

19. In light of the findings in the Commission Sector Inquiry on energy and the subsequent study of the electricity wholesale markets, please consider:

a) whether, pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC, greater EU-wide pre- and/or post-trade transparency rules for electricity and gas supply contracts (physical and spot trading) and electricity and gas derivatives would contribute to a more efficient wholesale price formation process and efficient and secure energy markets;

b) whether such transparency arrangements could be expected to effectively mitigate the concerns identified in the Sector Inquiry above;

c) whether uniform EU-wide pre- and post-trade transparency could have other benefits;

d) whether additional transparency in trading could have negative effects on these markets, for example could liquidity in these markets be expected to decrease? Is there a risk that trading could shift to third countries to escape regulation?

e) If you believe that there are risks arising from additional pre- and post-trade transparency requirements, how do you believe that these risks can be mitigated (e.g. aggregation, delay in publication, anonymity)?

F. MARKET ABUSE

20. Is the scope of Directive 2003/6/EC on insider dealing and market manipulation (market abuse) such as to properly address market integrity issues in the electricity and gas markets? Would the assessment be different if greater transparency obligations in line with the analysis above were adopted? What suggestions do regulators have to mitigate any shortcomings?

G. GENERAL

21. What timelines or delays should be built into the implementation of any of the above recommendations?

Impact analysis

CESR and ERGEG should analyse the options that they identify in an initial screening for further study in terms of likely impacts (costs and benefits) on market quality, and on market users including intermediaries and consumers/suppliers of commodities.

To the extent possible, in developing their advice CESR and ERGEG should apply the framework for impact analysis recently drawn up by the 3 Lamfalussy Level 3 Committees.

Wherever possible, quantitative and statistical data and economic analysis should be provided to justify conclusions.

Annex II: Provisions of MiFID on record-keeping of transactions in financial instruments

Article 13(6) of MiFID

6. An investment firm shall arrange for records to be kept of all services and transactions undertaken by it which shall be sufficient to enable the competent authority to monitor compliance with the requirements under this Directive, and in particular to ascertain that the investment firm has complied with all obligations with respect to clients or potential clients.

Article 25(2) of MiFID

2. Member States shall require investment firms to keep at the disposal of the competent authority, for at least five years, the relevant data relating to all transactions in financial instruments which they have carried out, whether on own account or on behalf of a client. In the case of transactions carried out on behalf of clients, the records shall contain all the information and details of the identity of the client, and the information required under Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering.

Article 51(2) and (3) of Directive 2006/73/EC (Implementing Directive)

2. The records shall be retained in a medium that allows the storage of information in a way accessible for future reference by the competent authority, and in such a form and manner that the following conditions are met:

   (a) the competent authority must be able to access them readily and to reconstitute each key stage of the processing of each transaction;

   (b) it must be possible for any corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained;

   (c) it must not be possible for the records otherwise to be manipulated or altered.

3. The competent authority of each Member State shall draw up and maintain a list of the minimum records investment firms are required to keep under Directive 2004/39/EC and its implementing measures.

Article 8 of Regulation (EC) No. 1287/2006

(Record-keeping of transactions)

1. Immediately after executing a client order, or, in the case of investment firms that transmit orders to another person for execution, immediately after receiving confirmation that an order has been executed, investment firms shall record the following details of the transaction in question:

   (a) the name or other designation of the client;

   (b) the details specified in points 2, 3, 4, 6 and 16 to 21, of Table 1 of Annex I;

   (c) the total price, being the product of the unit price and the quantity;

   (d) the nature of the transaction if other than buy or sell;

   (e) the natural person who executed the transaction or who is responsible for the execution.

2. If an investment firm transmits an order to another person for execution, the investment firm shall immediately record the following details after making the transmission:

   (a) the name or other designation of the client whose order has been transmitted;

   (b) the name or other designation of the person to whom the order was transmitted;

   (c) the terms of the order transmitted;

(d) the date and exact time of transmission.

Relevant fields of Table 1 of Annex I of Regulation (EC) No. 1287/2006

2. Trading day	The trading day on which the transaction was executed.
3. Trading time	The time at which the transaction was executed, reported in the local time of the competent authority to which the transaction will be reported, and the basis in which the transaction is reported expressed as Coordinated Universal Time (UTC) +/- hours.
4. Buy/sell indicator	Identifies whether the transaction was a buy or sell from the perspective of the reporting investment firm or, in the case of a report to a client, of the client.
6. Instrument identification	This shall consist of: — a unique code, to be decided by the competent authority (if any) to which the report is made identifying the financial instrument which is the subject of the transaction, — if the financial instrument in question does not have a unique identification code, the report must include the name of the instrument or, in the case of a derivative contract, the characteristics of the contract.
16. Unit price	The price per security or derivative contract excluding commission and (where relevant) accrued interest. In the case of a debt instrument, the price may be expressed either in terms of currency or as a percentage.
17. Price notation	The currency in which the price is expressed. If, in the case of a bond or other form of securitised debt, the price is expressed as a percentage, that percentage shall be included.
18. Quantity	The number of units of the financial instruments, the nominal value of bonds, or the number of derivative contracts included in the transaction.
19. Quantity notation	An indication as to whether the quantity is the number of units of financial instruments, the nominal value of bonds or the number of derivative contracts.
20. Counterparty Identification of the counterparty to the transaction.	That identification shall consist of: — where the counterparty is an investment firm, a unique code for that firm, to be determined by the competent authority (if any) to which the report is made, — where the counterparty is a regulated market or MTF or an entity acting as its central counterparty, the unique harmonised identification code for that market, MTF or entity acting as central counterparty, as specified in the list published by the competent authority of the home Member State of that entity in accordance with Article 13(2),

	— where the counterparty is not an investment firm, a regulated market, an MTF or an entity acting as central counterparty, it should be identified as 'customer/client' of the investment firm which executed the transaction.
21. Venue identification	Identification of the venue where the transaction was executed. That identification shall consist in: — where the venue is a trading venue: its unique harmonised identification code, — otherwise: the code 'OTC'.

CESR Level 3 Recommendations on the List of minimum records in article 51(3) of the MiFID Implementing Directive (Ref.: CESR/06-552c, February 2007)

'*Article 13 (6) of the Directive 2004/39/EC (hereinafter 'Level 1') establishes that investment firms shall arrange for records to be kept of all services and transactions undertaken by it which shall be sufficient to enable the competent authority to monitor compliance with the requirements under the Directive, and in particular to ascertain that the investment firm has complied with all obligations with respect to clients or potential clients.*

Article 51(3) of the Directive 2006/73/EC (hereinafter 'Level 2') establishes that competent authorities shall draw up and maintain a list of the minimum records investment firms are required to keep under MiFID and its implementing measures.

CESR is hereby issuing a recommendation to its members with the content of the list of minimum records that competent authorities need to draw up according to article 51(3) of Level 2.'

Regarding orders received or arising or decision to deal taken in providing the service of portfolio management, the records provided for under Art. 7 of the Regulation (EC) 1287/2006 should be kept. Firms may wish to consider also include in the records the date and hour when the order was sent by the investment firm for execution. The record should be created immediately after receipt of the order or after taking the decision.

Regarding orders executed on behalf of clients the records provided for under Art. 8(1) of the Regulation 1287/2006 should be kept. The record should be created at the time of the execution of the order.

Regarding transactions effected for own account, the records provided for under Art. 8(1) of the Regulation (EC) 1287/2006 should be kept. The records should be created immediately after the transaction is carried out.

As regards the transmission of orders received by the investment firm, the records provided for under Article 8(2) of the Regulation (EC) 1287/2006 should be kept. The records should be created immediately after [receipt and] transmission of the order and immediately after receiving the confirmation that an order has been executed.

Annex III: Policy objectives of energy regulators

Article22b (electricity)
Policy objectives of the regulatory authority

In carrying out the regulatory tasks specified in this Directive, the regulatory authority shall take all reasonable measures to achieve the following objectives:

(a) the promotion, in close cooperation with the Agency, regulatory authorities of other Member States and the Commission, of a competitive, secure and environmentally sustainable internal electricity market within the Community, and effective market opening for all consumers and suppliers in the Community;

(b) the development of competitive and properly functioning regional markets within the Community in view of the achievement of the objective mentioned in point (a);

(c) the suppression of restrictions to electricity trade between Member States, including the development of appropriate cross border transmission capacities to meet demand, enhance integration of national markets and to enable unrestrained electricity flow across the Community;

(d) ensuring the development of secure, reliable and efficient systems, promoting energy efficiency, system adequacy, and research and innovation to meet demand and the development of innovative renewable and low carbon technologies, in both short and long term; (e) ensuring that network operators are granted adequate incentives, in both the short and the long term, to increase efficiencies in network performance and foster market integration;

(f) ensuring the efficient functioning of their national market, and to promote effective competition in cooperation with competition authorities.

Article24b (gas)
Policy objectives of the regulatory authority

In carrying out the regulatory tasks specified in this Directive, the regulatory authority shall take all reasonable measures to achieve the following objectives:

(a) the promotion, in close cooperation with the Agency, regulatory authorities of other Member States and the Commission, of a competitive, secure and environmentally sustainable internal gas market within the Community, and effective market opening for all consumers and suppliers in the Community;

(b) the development of competitive and properly functioning regional markets within the Community in view of the achievement of the objective mentioned in point (a);

(c) the suppression of restrictions to natural gas trade between Member States, including the development of appropriate cross border transmission capacities to meet demand, enhance integration of national markets and to enable unrestrained natural gas flow across the Community;

(d) ensuring the development of secure, reliable and efficient systems, promoting energy efficiency, system adequacy and research and innovation to meet demand and the development of innovative renewable and low carbon technologies, in both short and long term;

(e) ensuring that network operators are granted adequate incentives, in both the short and the long term, to increase efficiencies in network performance and foster market integration;

(f) ensuring the efficient functioning of their national market

Relevant parts of Article 22c (electricity) in connexion with record-keeping
Duties and powers of the regulatory authority

1. The regulatory authority shall have the following duties:

(a) ensuring compliance of transmission and distribution system operators, and where relevant system owners, as well as of any electricity undertakings, with their obligations under this Directive and other relevant Community legislation, including as regards cross border issues;

(i) monitoring the level of market opening and competition at wholesale and retail levels, including on electricity exchanges, household prices, switching rates, disconnection rates and household complaints in an agreed format, as well as any distortion or restriction of competition in cooperation with competition authorities, including providing any relevant information, bringing any relevant cases to the attention of the relevant competition authorities;

3. Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties referred to in paragraph 1 and 2 in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the following powers:

(a) to issue binding decisions on electricity undertakings;

(b) to carry out in cooperation with the national competition authority investigations of the functioning of electricity markets, and to decide, in the absence of violations of competition rules, of any appropriate measures necessary and proportionate to promote effective competition and ensure the proper functioning of the market, including virtual power plants;

(c) to request any information from electricity undertakings relevant for the fulfilment of its tasks;

(d) to impose effective, appropriate and dissuasive sanctions to electricity undertakings not complying with their obligations under this Directive or any decisions of the regulatory authority or of the Agency;

(e) to have appropriate rights of investigations, and relevant powers of instructions for dispute settlement under paragraphs 7 and 8;

(f) to approve safeguards measures as referred to in Article 24.

9. Member States shall create appropriate and efficient mechanisms for regulation, control and transparency so as to avoid any abuse of a dominant position, in particular to the detriment of consumers, and any predatory behaviour. These mechanisms shall take account of the provisions of the Treaty, and in particular Article 82 thereof.

Relevant parts of Article 24c (gas) in connexion with record-keeping
Duties and powers of the regulatory authority

1. The regulatory authority shall have the following duties:

(a) ensuring compliance of transmission and distribution system operators, and where relevant system owners, as well as of any natural gas undertakings, with their obligations under this Directive and other relevant Community legislation, including as regards cross border issues;

(i) monitoring the level of market opening and competition at wholesale and retail levels, including on natural gas exchanges, household prices, switching rates, disconnection rates and household complaints in an agreed format, as well as any distortion or restriction of competition in cooperation with competition authorities, including providing any relevant information, bringing any relevant cases to the attention of the relevant competition authorities;

3. Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties referred to in paragraph 1 and 2 in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the following powers:

(a) to issue binding decisions on gas undertakings;

(b) to carry out in cooperation with the national competition authority investigations of the functioning of gas markets, and to decide, in the absence of violations of competition rules,, of any appropriate measures necessary and proportionate to promote effective competition and ensure the proper functioning of the market, including gas release programs;

(c) to request any information from natural gas undertakings relevant for the fulfilment of its tasks;

(d) to impose effective, appropriate and dissuasive sanctions to natural gas undertakings not complying with their obligations under this Directive or any decisions of the regulatory authority or of the Agency;

(e) to have appropriate rights of investigations, and relevant powers of instructions for dispute settlement under paragraphs 7 and 8;

(f) to approve safeguards measures as referred to in Article 26.

9. Member States shall create appropriate and efficient mechanisms for regulation, control and transparency so as to avoid any abuse of a dominant position, in particular to the detriment of consumers, and any predatory behaviour. These mechanisms shall take account of the provisions of the Treaty, and in particular Article 82 thereof.

Annex IV: standard products traded on electricity and gas markets

Electricity	*Gas*
Split between the products below - *Intraday* - *Day-ahead* - *Week (including 2/3/4 days-ahead, Week-ends, working days, weeks-ahead, etc.)* - *M+1* - *M+2* - *M+3* - *Q+1* - *Q+2* - *Q+3* - *Q+4* - *Calendar year : Y+1* - *Calendar year : Y+2* - *Calendar year : Y+3*	*Split between the products below* - *Within-day* - *Day-ahead* - *Week (including 2/3/4 days-ahead, Week-ends, working days, weeks-ahead, etc.)* - *M+1* - *M+2* - *M+3* - *Q+1* - *Q+2* - *Q+3* - *Q+4* - *Seasons* - *Gas or calendar year : Y+1* - *Gas year or calendar: Y+2* - *Gas year or calendar: Y+3*