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Position Paper of Stadtwerke München GmbH

CESR and ERGEG advice to the European Commission on record-keeping, transparency and exchange of information

The Stadtwerke Munich GmbH is the major municipal utility company of the Bavarian capital city of Munich and has around 6,600 employees. The Group sales is totalled to € 4.5 billion in 2007. The Stadtwerke Munich GmbH uses a mix of energy generation, based on combined heat and power (CHP) and renewable electricity generation. The power trading of the undertaking is operated by its 50 % affiliate, the citiworks AG.

The Stadtwerke Munich GmbH appreciates the opportunity to comment on the draft of the ERGEG and CESR.

General Remarks

With regard to the consultation paper we assess the following main issues to be kept in mind:

1. We absolutely agree with ERGEG and CESR's assessment, that record-keeping has to be clearly distinguished from transaction reporting or any other form of transmission of information. In our view those two supervisory instruments have to be assessed individually, taking into account their different purpose to avoid disproportional regulation. There is a clear need for record keeping to prevent market abuse, but it does not deliver additional transparency to market participants, if trade data is published.
2. The aim of the 3rd Energy Package is to achieve a harmonised and competitive European market. Therefore, the requirements in regard to record-keeping and transparency should be harmonised but not hinder actual or new market participants to operate in the energy trading market.
3. In regard to the whole relevant provisions of the 3rd Energy Package consulted in Section I to III, a high level of security of the recorded or transmitted data has to be implemented in any way, when the information is exchanged.

I. Record Keeping (Section I)

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))?

Draft Answer ERGEG/CESR:

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.

Our point of view to the draft answer:

We do not agree with the abovementioned conclusion, that additional information has to be kept. In the MiFID directive the derivative transactions are covered in Annex I, only the OTC power and gas market trades are not. Therefore, the MiFID regulations are sufficient in regard to the derivatives.

Questions to market participants:

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

- 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.**

Under cipher 62 of the consultation paper ERGEG and CESR state that “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.”

The purpose is then to enable the mentioned authorities to “check the compliance with legal requirements”. For this purpose, the record-keeping of the relevant information in the undertakings for a “ex-post” control by the authorities is sufficient.

We agree therefore with the obligation to keep records to enable the authorities in a ex post control in case of a reasonable suspicion, but there shall not be a general reporting duty. And it has to be kept in mind that the purpose of record-keeping to check compliance with legal requirements is another purpose than the requirements of transparency to facilitate the energy trade for more competition. Therefore the scale of the information to be kept depends on the purpose.

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

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?

Defining the minimum contents for the records to be kept the purpose of the 3rd Energy Package and the record keeping has -as already mentioned under cipher 1- to be taken into account. The minimum contents have to serve the purpose of enabling the authorities to check ex post the compliance with legal requirements. In regard to the requirements of MiFID there should be harmonised contents to avoid a double data collection.

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?*

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.

Draft Answer ERGEG/CESR:

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 recordkeeping 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.

Our point of view to the draft answer:

In the draft answer ERGEG and CESR conclude that the Commission should specify that the arrangements for record-keeping should allow the storage of information for future reference through providing the relevant authorities with **readily access** or **transmit compiled and complete records**. With regard to the already described purpose of record-keeping, the enabling of the relevant authorities to check compliance with its legal requirements; our point of view is, that the option of receiving compiled and complete data is very sufficient to check the supply undertaking in cases of enquiries or for compliance procedures as described under cipher 88 of the consultation paper.

Part 3: Methods and arrangements for record-keeping

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

Like EFET we propose that CESR and ERGEG should recommend that each supply undertaking should decide on the format of the record it keeps, albeit observing the CESR-ERGEG recommendations regarding minimum contents for these records.

Rather than a prescribed electronic format a principle-based approach could be more appropriate for the intended purpose of record-keeping. The principle-based approach could specify the minimum information that have to be kept by the relevant undertakings to ensure an adequate consistency between all the recorded data. This would fulfil the purpose of checking the legal compliance and ensure that information that is potentially needed by the relevant authorities is accessible upon request within a reasonable timescale.

If ERGEG and CESR nevertheless recommend the prescription of an electronic format for all relevant energy undertakings it is of high importance that the security and confidentiality of the recorded data is in any case guaranteed.

Under the purpose of record-keeping it has as well to be taken into account that the recorded data in an electronic format are only used for enquiries in cases of reasonable suspicion and not in advance.

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).

In the case that the perception of ERGEG and CESR will led to a prescribed electronic format, the costs for the implementation of this format will depend at least on three positions. According to our economic valuation the implementation of such an electronic format will generate costs as

high as a few 100.000,- EUR, which is definitely a high burden for smaller entities and could hinder new trading participants to enter the market.

Transparency (Section II)

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?

Draft Answer ERGEG/CESR:

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.

Our comment about the different options:

In the draft answer ERGEG proposes different options on the scope of data to be published. The first option would be to publish information on all products except those in the scope of MiFID; the second option would be to publish information on the whole market, including the products falling under the scope of MiFID.

In our point of view only the second option fulfils the purpose of increasing the competition on the energy market. Publishing only information on all products except those in the scope of MiFID would not give a complete overview on the energy trade market. Therefore it wouldn't be very useful for the current market participants as well for new entrants, which is the aim of the 3rd Energy Package. Without the products falling under the scope of MiFID the published data were not very meaningful.

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.*

When considering the need for a harmonised publication of aggregated market data one has to keep in mind the purpose and conclusions of the Sector Inquiry that was published on January 10th 2007: The purpose of the Sector Inquiry was to analyze distortions of competition that could be addressed by competition law, as well as to identify problems in the regulatory field which could be addressed by further legislation. The Sector Inquiry requires increased information transparency in the following areas: technical availability of interconnectors, technical availability of the transmission networks, generation availability, balancing and reserve power, load, generation production, to increase the efficiency of the energy markets. But it has to be stressed that the demand of the Sector Inquiry for increased information transparency did not refer to transparency in the wholesale and derivatives markets as a factor influencing wholesale or derivatives energy prices.

For example in Germany there is already a transparency initiative of the relevant market participants, supported by the Federal Ministry of Economics to increase the transparency of **generation** data, which is the focus of the mentioned Sector Inquiry. But the current consultation

paper concerns matters of transparency in regard to **trading** data. In regard to the required trading data, transparency in our point of view is already sufficient for the current and potential new market participants, since regulated markets and spot exchanges constantly publish post-trade information free of charge and most MTFs and brokers provide insight in post-trade information concerning to market participants against payment. A harmonised publication of aggregated market data would not have a reasonable benefit for the market participants.

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

If the conclusion of ERGEG and CESR would be to publish harmonised aggregated market data we would recommend to publish the following data which are already available, to avoid additional cost burdens to the market participants:

- grid availability
- gas cross-sections
- aggregated gas storage data
- power plant availability
- planned plant revisions and/or outages of any kind
- cross border capacities

All Information including additional data, not only from supply undertakings, but also grid operators in cases of maintenance or any disturbing incidents.

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?*

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?

Draft Answer ERGEG/CESR:

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)?**

Draft Answer ERGEG/CESR:

- 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 posttrade 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.*

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

We join the analysis of the European Securities Market Expert (ESME) in their (draft) answers to the questions of the Mandate on page 93:

“ESME considers that, in line with the analysis carried out in the Sector Inquiry, “greater pre- and post-trade transparency for electricity and gas supply contracts (physical and spot trading) and derivatives” would not contribute to a more efficient price formation process, if transparency is understood in terms of disclosure of information about the state of the market and wholesale transactions, supply contracts and derivatives. On the contrary, it may provide improper information, due to the relatively low degree of standardisation of transactions in this market.

Instead, more information about technical availability of interconnections and technical availability of TSO networks is needed to increase the efficiency and security in electricity and gas markets. Market participants need to be able to predict the likely evolution of supply and demand fundamentals and their ability to move energy around the transmission systems. Access to information about electricity transmission and generation, gas transportation and gas storage would help new entrants to turn third party access from legal theory into a real business tool. Transparency on the use of the network infrastructures would reduce risk, provide confidence and bring efficiency, liquidity and improved security of supply. This information should be made public, based on the ERGEG guidelines mentioned above. In this context it has to be noted that already today there do exist many transparency obligations for these activities (see annex “transparency regulations for the electricity and gas sectors” to this section), which already guarantee a certain level of transparency.

Additionally, and according to the same guidelines, exchanges (e.g. EEX) and MTFs (brokers) could provide public access to post-trade information about the commodity derivatives transactions which are concluded / cleared through them. This would not mean obligations by participants of these platforms, but rather the obligation of the

operator of such a platform to show to the public the available information on the transactions. This would serve the aim of transparency to improve the participants' trust in the market and its price-building mechanisms. The inclusion of MTFs (broker platforms) in such a transparency regime would also encompass OTC transactions (in standardised instruments) to a sufficient degree. It is our opinion that increased pre-trade transparency is not required due to the wholesale character of the market and is not technically feasible for the reasons detailed earlier in this paper.”

- 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.**

See as well our answer to question 8.

- 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. –

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

As already described in the answer to question 8, there is already a sufficient transparency concerning trading data. Therefore we are in favour of keeping the status quo. This would have the benefit that there are no additional costs and burdens for the current and new market participants.

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

As already mentioned we stress that there is no need for additional initiatives for key principals in trade transparency, because there is already a sufficient trade transparency. But if market perception were to implement Option 2 (initiative for key principles in trade transparency) we would recommend aggregated market data without the individual exchange. In any case there is

no need for particular and individual details on the counterparty, traded volumes per undertaking.

If Option 2 will be implemented, it is important in our point of view that the relevant aggregated data were complete, because otherwise the data might not be meaningful to the possible recipients.

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