UNION OF THE ELECTRICITY INDUSTRY
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EURELECTRIC Response to ERGEG/CESR Call for Evidence on Record-Keeping, Transparency, Supply Contracts & Derivatives for Electricity & Gas

The following paper presents EURELECTRIC's response to the questions put forward in the call for evidence. Below is a summary of the main points EURELECTRIC would like to convey:

- The problems outlined in the Commission's Sector Inquiry – those relating to vertical foreclosure, market concentration, lack of market integration or price level – are not related to the lack of transparency on supply contracts and derivatives for electricity and gas;

- It should also be noted that the aims of MiFID differs considerably from the aims of the draft energy directives. However, regarding record-keeping, there should only be one set of respective arrangements necessary; i.e. the same record-keeping information can be used for different purposes, as befitting the different directives' aims;

- Regarding record-keeping, EURELECTRIC is of the view that proportionate arrangements should be designed and operated in a harmonised European fashion as a way to minimise the administrative burden placed on market players. In addition, they should be practical, consistent with commonly-used IT processes and should not incur disproportionate costs. EURELECTRIC is at the Commission's, ERGEG's & CESR's disposal to contribute to the development of harmonised European rules for record-keeping;

- Regarding the needs of market monitoring, the regulators should make the maximum use of the existing sources of information on the market (exchanges, information providers, brokers) as a way of actively supervising the market while minimising the requests to market participants;

- There is a fundamental need to separate **transparency arrangements** from **monitoring arrangements**. There is a difference between what information is released to the market for understanding price formation and what information is provided for regulators for the purpose of assessing market behaviour;

- Nevertheless, as has been concluded in the above sector inquiry and as outlined our position paper[1] on transparency published in February 2006, EURELECTRIC is supporting the provision of more market-related information on the use of the network, generation and load. Indeed this is welcome by market participants as it helps to a better performance of market actors. Further, it is necessary that the same arrangements for this disclosure exist across Europe;

- Finally, while market transparency is aimed at increasing trust, the issuance of commercially-sensitive information to other market participants would not be appropriate and would raise concerns in relation to EC Competition Law. Ultimately the aim of transparency arrangements is limited to the need to understand price formation – the proposals contained in EURELECTRIC's Transparency position of February 2006 allows all market participants to do this;

[1] *EURELECTRIC Position Paper on market transparency (as further to the request of the 12th Florence Forum).*

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)?

At the moment many undertakings currently active in both the supply of electricity and in wholesale markets could fall under the MiFiD definition of investment firm. However, in the majority of cases energy undertakings can avail one or several of the exemptions provided under MiFiD. For this reason exempted companies have no obligations related to record-keeping under MiFID.

In terms of investment firms, due to differing national implementation of the MiFID provisions, the absolute number of investment firms falling under this article may not be a relevant indicator. This situation may change in the future following potential follow-up actions to the current MiFID review being undertaken by the European Commission.

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.

No specific response.

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

This varies from country-to-country. Besides security of supply, one of the main aims of energy market supervision is competition. In some cases the national energy regulatory authority has the task of supervising the market and reporting issues to the national competition authority. The harmonisation of regulators' activities in this area should be considered.

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))?

The important point here is that the aims of the MiFiD differs considerably from the aims of the draft energy directives. This does not mean that there should be two different sets of record-keeping arrangements. Indeed for efficiency reasons, only one set should be required to be kept. However, the same record-keeping information can be used for different purposes, as befitting the different directives' aims.

In addition, in order to increase objectivity, record keeping should only relate to collection of facts (i.e. data). This principle should be taken into account when developing provisions such as Article 5(6) of the proposal to amend Cross Border Trade Regulation 1228/2003.

EURELECTRIC is of the view that proportionate record-keeping arrangements should be designed and operated in a harmonised European fashion as a way to minimise the administrative burden placed on market players. In addition, they should be practical, consistent with commonly-used IT processes and should not incur disproportionate costs. They should also not duplicate with the large amount of data already kept available by exchanges, brokers and other information providers. Likewise, it is also of vital importance that any relevant authority asking for those data has in place adequate arrangements to protect confidentiality of data from individual market players.

EURELECTRIC would like to contribute to the development of harmonised rules for record-keeping.

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.

See answer to question 4 above. Certainly, EURELECTRIC would like to contribute to the development of harmonised rules for record-keeping.

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?

Overall EURELECTRIC believes that there may be a strong need for harmonisation as most companies are active in different European markets. Data content, formats, etc should be described in detail in order to facilitate production of data whenever necessary. Nevertheless, companies should also be given reasonable time to update or adapt their IT systems, because not all players might have all (required) data available in their processes or in their data bases.

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

Provision of information should be done in a way which minimises duplication of effort and should be premised on the likelihood of a market failure caused by a lack of information. Provision of data for its own sake should be avoided. In addition, the provision of information should only take place **where safeguards concerning the confidentiality of data are in place**.

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

As per MiFID, the securities regulator responsible for the Member State in which the energy firm is based should be the responsible party.

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

Article 22f of the proposed Electricity Directive concerns record-keeping and exchange of data only on a case-by-case basis (i.e. no permanent exchange of data). Therefore, the deployment of the Transaction Reporting Exchange Mechanism or a similar electronic system is not necessary.

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

No specific response.

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).

Although DG Competition's Sector Inquiry describes a number of problems affecting wholesale markets (such as vertical integration, lack of integration of national markets), it does not signal any problem involving commodity and commodity derivatives trading, nor does it propose specific measures concerning transparency or supervision of energy commodity markets. Our February 2006 position paper on transparency provides a list of transparency requirements which we consider to be needed by market participants to understand price formation and to trade efficiently.

In line with the aims of Directive 2003/54/EC, our position paper actually calls for regional and ultimately pan-European rules, thereby creating a level playing field for all market participants. While a description of the actual data to be issued is too complex for this response, any data provided should:

- be made available under similar conditions to all market participants. In particular, they should be authoritative, issued at the same time and be easily accessible;
- as far as possible use standardised definitions and formats to facilitate processing and analysis by market participants and allow harmonisation across national borders;
- enable market participants to operate with a sufficient degree of confidence.

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?

First of all, Article 22f establishes obligations for 'record-keeping' and data that can be requested on an *ad-hoc* basis by regulators. This is very different from the type of data or information issued to the market. Any guidelines should be strongly based on the need to separate **transparency arrangements** from **monitoring arrangements**. There is a fundamental difference between what transparency information is released to the market for the purpose of understanding price formation and what information is provided for regulators for the purpose of assessing market behaviour. While market transparency is aimed at increasing trust, the issuance of commercially-sensitive information to other market participants would not be appropriate and would raise concerns in relation to EC Competition Law. Ultimately the aim of transparency arrangements is limited to the need to understand price formation – the proposals contained in our transparency position allows all market participants to do this.

In addition, as noted in the proposed Article 22f (4), there is also a strong need for uniform application of guidelines and arrangements, be they for record keeping or transparency purposes. In the case that regulators decide to release data to the public, this should not be arbitrary but in an aggregated, standardised and harmonised way, whereby individual confidential or sensitive company information should not be divulged.

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?

This would appear to be a question for the regulators. However, more harmonised rules would be welcome.

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?

This would appear to be a question for the regulators. However, more harmonised rules would be welcome. Finally, publication of individual bids is counter-productive as it could be seen to result in collusive behaviour.

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

Neither the sector inquiry nor the ERGEG guidelines have provided any argument for further transparency requirements for spot trading or forward/futures trading in energy. The ERGEG guidelines have identified that the only information to be published is aggregated information provided by brokers and exchanges.

Normally, transparency in spot trading is actually ensured via the power exchanges:- market players can see the volumes, bid/ask curves, number of players and clearing prices. Regarding forward and future trading, normally the broker screens in use in modern trading rooms allow for market players to see the bid and ask prices, the volumes and the traded volumes. Brokers and information providers also provide a wealth of detailed ex post information. As an example, we enclose a file with OTC deals carried out in a European market in 2006, prepared with information provided by brokers.

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

See answer to question 14.

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

This can vary from company to company and from country –to country. EURELECTRIC's view is that a harmonised level playing field should be established.

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

Yes, subject to subscription to the platform(s) in question (i.e. brokers or power exchanges). In addition, public information from power exchanges can be accessed on a general basis. The enclosed file mentioned above provides an example of this type of available information.

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

Not applicable

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;

See introductory text to this section.

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

Problems about vertical foreclosure, market concentration, lack of market integration or price level are not related to the lack of transparency on supply contracts and derivatives. Nevertheless, it is clear that more information on the variables that may influence price formation (related to the network, the generation and the load) is welcome because it helps to a better performance of the market actors. Besides it is absolutely necessary that the published information must be the same across Europe.

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

As noted in our position paper, market transparency is important for a number of closely inter-related reasons, but primarily because it:

1. promotes market liquidity and enhances market efficiency;
2. facilitates new entry;
3. engenders market confidence; and
4. facilitates regulatory oversight.

Market transparency undoubtedly facilitates 1, 2 & 3 above. Market monitoring alone (as opposed to market transparency) should help achieve benefit 4. However, with regard to liquidity (benefit 1), a balance must be sought between the burden of providing information and benefit that this information has for the market. Too much information could be perceived as being counter-productive – see below.

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?

Firstly, it is unclear what is meant by *additional* transparency requirements. In our view, the set of data for the different categories as laid out in our position paper on transparency – as referred to above – provides for sufficient transparency, in line with the needs identified in the Sector Inquiry.

If requirements are too high, potential market participants may see this as a barrier to entry. Particularly, smaller and medium-sized companies may not have the necessary resources to comply with additional transparency requirements and hence will leave the market or not enter the market as a new entrant. As regards the risk of trading moving to non-EEA countries, policy-makers should always bear in mind that the higher the level of unnecessary regulation, the more likely trading activities will move outside of the European Union and the less likely smaller market parties will participate in trading.

Finally, and as mentioned above, the level of transparency should be balanced in terms of what is optimal for competition – too much information could be seen as counter-productive.

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)?

We reiterate our view that there is a need for publication of information influencing price formation (related to the network, generation and load) but the case has not been made for the publication of information on supply contracts and derivatives beyond what is currently available from exchanges, brokers and information providers.

Depending on the required information, the best form to mitigate risks can be to present *ex ante* information in an aggregate way. *Ex post* information can be disclosed with more detail, with some delay. The aggregation level will be dependant on how sensitive is the required information from a commercial point of view.

As the relevant aggregation level for information in wholesale markets is the "price zone", an aggregation level per bidding area seems to be appropriate. Therefore, if data should be aggregated, we advocate a mandatory aggregation of data at the level of "bidding areas" as this is the relevant standard concerning price formation. The additional publication of certain data, which is relevant for evaluating security of supply, per country, should only be disclosed with the regulators.

Finally, the data should, as far as possible, use standardised definitions and formats to facilitate processing and analysis by market participants and allow harmonisation across national borders.

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?

Concerns about market abuse could be allayed by the provision of information on generation, particularly power plant outages, as detailed in our paper on transparency.

G. General

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

Depending on the outcome of this consultation, any changes to be implemented should give companies sufficient and reasonable time to update or adapt their IT systems - not all players might have all (required) data available in their processes or in their data bases. Again, a European-wide harmonised approach should ensure optimal implementation.