

Brussels, 1st September

CESR/ERGEG Consultation on Market Abuse & the Electricity & Gas Sectors

Dear Sir/Madam,

EURELECTRIC, representing the European electricity industry, welcomes the opportunity to comment on the CESR/ERGEG consultation paper on the application of the Market Abuse Directive to electricity markets.

Summary View

EURELECTRIC believes that European wholesale electricity markets would benefit considerably from increased market transparency and has thus, in 2006¹ developed recommendations regarding information that is relevant to market participants with a view to creating a level-playing field.

We agree with the general analysis carried out by CESR/ERGEG in that it would be inappropriate to expand the scope of MAD to the physical markets, given the specific features of the electricity sector, in particular namely the non-storability of electricity. Therefore, **we support the proposal for energy-specific harmonised, mandatory transparency² obligations at EU level and we believe that the current, on-going transparency work taking place under the ERGEG regional initiatives should provide a good basis for such provisions.**

However, with a mandatory harmonised market transparency regime in place, **we strongly question whether a case has been made, or practical evidence has been presented, for an energy-specific market abuse framework.** As in any market, EURELECTRIC takes the view that competition law should be the main tool to control and prevent market abuse. As such, energy sector market conduct rules relating to market behaviour should be coherent with, and not supersede or replace, existing competition law. Moreover, the consultation paper does not provide any convincing reasons why the problems identified cannot be dealt with using an adequate transparency framework coupled with the application of existing competition law.

Overall, in our view, if proper market transparency arrangements are agreed and implemented in full across the EU, then there does not seem to be scope for 'abuse' or 'manipulation' to take place. Therefore, there does not appear to be a need for an additional separate market abuse framework.

¹ EURELECTRIC, Position Paper on Market Transparency (as further to the request of the 12th Florence Forum), February 2006.

² We refer here to 'transparency' as the consultation paper is not clear what items should be disclosed to the public (i.e. transparency) and what should only be disclosed to the relevant regulator (i.e. monitoring). Therefore, where specific EU monitoring arrangements are put place, these should also be harmonised and mandatory. However, it is our understanding that proposals for monitoring arrangements will be subject to separate consultation by CESR/ERGEG later this year. In any case, no commercially-sensitive data should be released to the public domain,.

A European Market Transparency Framework

We regard the CESR/ERGEG consultation document as reiterating the urgent need for European electricity markets to establish harmonised mandatory minimum transparency standards that are applied consistently across the European Union. In our view, these disclosure standards must be robust enough to give confidence to all market players that price discovery processes are fair and impartial.

We would like to note, however, that there is already a considerable amount of work on-going regarding the development of adequate disclosure arrangements. Within the ambit of the ERGEG electricity regional initiatives there has been lengthy discussion on the scope and content of market transparency which has led to the publication of a number of detailed transparency reports, and disclosure requirements will be further strengthened as a result of the 'Third Package'. We believe that these initiatives – together with EURELECTRIC's market transparency proposals – now provide a sufficient basis for the development of a European market transparency framework. It is now time to implement such a framework, which should be completed without delay. Once in place, this should remedy the problems raised by ERGEG and CESR.

In terms of how the information provided for in these reports could be made available, we agree that this data should be disclosed in (i) an equal and timely manner and (ii) on a standardised basis. In addition, while this information could be published on a single information platform (if practical!), it could also be delivered via a more market-driven solution, whereby information services are developed to meet market needs. Nonetheless, **EURELECTRIC does see the need for a European-level harmonised list of 'fundamental' data.** As energy wholesale markets are becoming increasingly European in nature, we feel that purely individual approaches on the national-level would not provide for a level-playing field, would increase costs and encourage regulatory arbitrage. Indeed, regional and European wide market integration will be hampered if a fair level-playing field in transparency is not put in place.

Overall, the level of detail should be sufficient to ensure consistent implementation among Member States. Disclosure should encompass generation, network and demand data and specific deadlines should be included. In terms of whether a list should be exhaustive or not, we would argue that **any harmonised list should in itself be complete and transparent, and should not be 'ad hoc'**. This would provide regulatory certainty. Therefore, a transparency list should be exhaustive.

In contrast to the consultation paper, the emphasis here should be on transparency and not on the separate issue of ensuring transmission unbundling. The approach to tackling this problem has nothing to do with market transparency or market abuse, but rather with unbundling issues, which will be dealt with by the third energy package. Therefore the arguments put forward on this issue by the regulators here are not relevant.

Finally, there is no need for further measures on pre- and post-trade transparency; this is in line with the findings of the DG Competition sector inquiry which has not identified any need for further action in this area.

Proposed Market Abuse Framework

Given a harmonised mandatory European transparency framework, the wealth of competition case law currently in existence and the depth of energy market rules in place (soon to be updated through the Third Package), **EURELECTRIC does not believe that a case has been made, or practical evidence has been presented, for an energy-specific European framework covering ‘market abuse’.**³

The first and main tool to control and prevent market abuse should be competition law. Indeed, any market abuse which occurs in the energy sector can be dealt with effectively by a combination of EU competition law, national regulation and national or regional market rules. If certain behaviour is not covered in competition law, then it could potentially be handled via changes in the energy market rules, dealt with either by market surveillance committees inside existing power exchanges or by energy/financial regulators themselves where trade is conducted outside the exchanges. Conversely, both the regulators and the Commission should be very wary of proposing market abuse legislation that is independent of competition legislation. Indeed for participants, competition law – which is well-established – offers more guarantees of due process. For market participants, without further clarity as to how such a regime would work, an energy-sector market abuse framework would bring the risk of duplicate regulation, introducing uncertainty about which route regulators would pursue. This uncertainty would be likely to deter new investment, new entry and competition.

The lack of an energy-specific market abuse framework does not mean that the regulators/authorities should not have the means/powers to enforce market disclosure rules effectively. On the contrary, **EURELECTRIC believes that regulators should have the necessary powers to enforce those rules which are within their remit.** In order to better link oversight of the physical market with competition law and the financial markets, close cooperation between energy, competition and financial regulators should be promoted. Such cooperation should not only be established on a Member State basis; it should take place on a regional and European-wide level, whereby the proposed ACER should be allocated the necessary remit (at least with regard to cooperation between energy regulators). **Overall, the Commission and regulators need to be clear as to who does what and under what regime. A clear designation of duties – across the European Union - would reduce regulatory uncertainty.** Clarity on this vital issue is lacking in the CESR/ERGEG proposals.

Finally, if the Commission still sees a need for a specific energy-sector market abuse framework, it should, at the very least, be underpinned by what constitutes market transparency, and be supported by a clear business case and a clear allocation of roles and procedures. In any case there needs to be an impact assessment with proper consultation process.

³ We refer here to ‘abuse’ and not to ‘insider trading’ or ‘market manipulation’ as neither to these practices have been defined within the context of the physical energy sector.

Consultation Process

Despite the tight timelines given by the Commission to CESR/EREGG for the delivery of advice, we are concerned at both the timing of the consultation (i.e. holiday period) as well as the length of timing given to respond (i.e. five weeks) to this important consultation. For a European association co-ordinating national associations across 27 different member states, the timelines given to respond in full to the consultation have been very difficult to adhere to. In this case, the time given was insufficient to allow for a full and open consultation process. In this letter, we have, in our view, addressed the main strands of the consultation. We are currently drafting a response to the detailed questions posed by CESR/EREGG and will send you our response to these questions as soon as possible.

If you have any questions on this response, please do not hesitate to contact Niall Lawlor (nlawlor@eurelectric.org; phone: +32.2.515 10 27).

With best regards,



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