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**CESR and ERGEG advice to the European Commission in the context of the Third  
Energy Package (Ref: CESR/08-753 and C08-FIS-07-03)**

24. November 2008

Dear Madam, Dear Sir

EnBW Trading GmbH is happy to provide comments on the CESR and ERGEG draft advice to the European Commission in the context of the Third Energy Package. Following the respective mandate by the EC, the consultation paper covers the three parts of record keeping, transparency and exchange of information.

We are glad to see that the two groups of regulators have joint together to work on the mandate. In our view this is very important as the content of the mandate covers both the energy and the financial world. At the same time it is very important to recognise that the electricity and gas markets do have specific characteristics that need to be taken into account also when looking into the issues covered by draft advice (record-keeping; transparency). We would like to emphasise that issues of fundamental data transparency and transaction reporting requirements are not part of the mandate as it is also stated in the draft advice. In our view this distinction is important and should be also made clear in the final advice to the Commission.

Generally, we appreciate the work CESR and ERGEG have done in conducting the analysis on the issues raised in the mandate. Thus, we support properly defined harmonised rules on record-keeping that are proportionate and cost-efficient. The same holds for trade transparency as discussed in the draft advice, while we are of the opinion that in this respect there is already a significant level of information on trade activities available in the market (e.g. via PX, broker platforms or other information providers).

At the same time we like to stress that any requirements put onto the market participants need to follow a sensible cost-benefit relation; i.e. there should be no

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excessive additional burden for market players. In our view, this means that any record-keeping obligations for supply undertakings should have sufficient elements of flexibility for the market participants. Regarding the issue of an improved trade transparency, we would like to suggest that relevant post-trade information should be made available by the trading platforms. In our view, this would be the most efficient approach to publish aggregated data, ensuring that the data is available as close to the market as possible. We do not support any approach where each individual market participant would be obliged (neither should it be the regulators' task). In respect of exchange of information between securities regulators and energy regulators we support the "home-state-regulator" approach as it is the most efficient and least burdensome approach.

In the following we like to provide some further comments on the specific questions raised for the market participants.

## Section I: Record-Keeping

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.*

We generally agree that certain provisions for record-keeping obligations are necessary in order to allow competent authorities to oversee the efficient functioning of the energy wholesale market. However, record-keeping obligations should not be mixed up with any form of MiFID-style reporting obligations, which are clearly not part of the mandate (i.e. there are no such requirements stated in the 3<sup>rd</sup> Energy Package). In our view, regulators should have access to the records only on a case-by-case basis. Thus we do not support any permanent reporting requirements as this is not part of the mandate and would put significant additional burdens on supply undertakings that are disproportionate and may be a barrier of market entry.

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.*

Regarding the list proposed in para 78 as necessary items for the purposes of the record-keeping provisions under the 3<sup>rd</sup> Energy Package, we like to point to the following items:

- “load type”  
We like to point out that there is no uniform definition of the different load types across all EU energy trading markets.
- “indexation formula”  
We are of the opinion that this information should not be part of a common record-keeping obligation as this complex information does not deliver additional value for the regulators to assess price formation, but would put significant burden on the market participants.

The table provided under para 81 presents a list of minimum contents proposed for record-keeping obligations based on the contents to be kept under MiFID with additional energy specific items. In this context, we believe that some of the items (additional to the ones previously described) do not necessarily fit for the energy market:

- “quantity notation (number of underlying assets)”  
This information is not different to item “quantity” and thus we propose to delete it.
- “executer or person responsible for execution of the trade”  
The main purpose of the record-keeping obligation is to enable regulators

to assess the functioning of the markets (including to investigate operational decisions of undertakings). The a.m. item does not contribute to this task. We propose to delete it.

- “unit prices”  
We support the keeping of information on prices as long as this is limited to standardised trading products.

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?*

No, we do not see any practical difficulties if investment firms that are not covered by the scope of the 3<sup>rd</sup> Energy Package are not obliged to keep the additional contents of transactions in financial instruments in their records as they will fall under MiFID provisions.

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

We believe that option 1 is the most pragmatic and efficient approach. Based on a set of principles a supply undertaking should be able to determine the format of its records. We also believe that the advantages of this option as set out in para 96 do clearly outweigh the alleged disadvantages as they are described in para 97. As there is no obligation to send the data on a permanent but rather on an ad-hoc basis, we do not see that the flexibility in the format will present any problems for the regulators.

6. *If an electronic format will be required, is it sufficient to leave the design of the specific kind of “database” used to retain the minimum content of the records to each supply undertaking?*

7. *If possible, please provide indications of the specific costs involved with different electronic formats conceivable (e.g. from Excel sheet to more sophisticated software).*

As stated under Q 5, we are of the opinion that supply undertakings should have the flexibility to determine the format of the records they have to keep. In case an electronic format will be required, it is in our view sufficient to leave the (principle-based) specific design of the specific database up to each supply undertaking. Regarding attributing specific costs, due to the short consultation period and the still open process in respect to specific requirements we are not in a position to provide a reliable cost indication.

## Section II: Transparency

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.*

We generally support transparency initiatives supporting improved trust and liquidity for the market. Regarding trade transparency the mandate foresees the possibility that the regulatory authority may decide to publish aggregated trade data to all market participants. This would mean that it is up to the discretion of the respective regulator if such data is made available. However, in our view this would not necessarily lead to an harmonised transparency coverage. Rather, we believe that there is already a sufficient level of trade transparency available in the market. Most power exchanges already publish relevant data on a daily basis (e.g. [www.eex.com/en/transparency](http://www.eex.com/en/transparency)). There, aggregated information on e.g. prices, volumes, number of participants, relative share of participants etc. are published. We do not see any additional benefit if regulators also publish such data. Market relevant trade data should be available as close to the market as possible. Thus, we would prefer an approach where the relevant post-trade information (i.e. on standard products) would be published on an anonymous and aggregated basis -to ensure that no commercially sensitive data is being revealed- on the various trading venues (PXs, broker platforms). This would be the most pragmatic, efficient and beneficial approach.

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

Generally, we believe that a publication should cover standard products that can be aggregated (following the thrust of option S2 which covers exchange-listed products and equivalent standard screen-based traded products).

10. *Among the information proposed to be published, which ones are the most useful and why? Which one(s) should be published?*

Relevant for the market participants are mainly post-trade information on volumes, average prices and number of deals on standard products (exchange-traded products or equivalents traded OTC). We do not consider the publication of detailed market shares of the five biggest market participants as useful (as this may even reveal the positions and strategies of individual participants); the publications of aggregated market shares (SM2) and the total number active market participants (SM4) is fully sufficient. The publication of HHI (SM3) in this context seems not to be a relevant indicator as this is of no use for the market participants to assess the market developments.

Again, we like to refer to the website of the EEX, where already a huge array of trade-related information is being published, which in our view sets the standard regarding trade transparency on European PXs ([www.eex.com/en/transparency](http://www.eex.com/en/transparency)). These issues are also being continuously discussed in the exchange council of

EEX, where all sections of the energy trading market are represented. Additionally, the market surveillance unit of EEX has started to publish a quarterly monitoring report which provides further information to the interested public ([www.eex.com/en/EEX/Exchange/Market%20Surveillance](http://www.eex.com/en/EEX/Exchange/Market%20Surveillance)).

*11. Are the two levels of aggregation on products proposed appropriate and useful?*

Yes, we agree with the proposed levels of aggregation on products. Again, it should only cover standardised products (exchange-traded products or OTC-equivalents).

*12. Among the options proposed for the level of aggregation during the period covered, which ones are the most useful and why? Which should be chosen?*

Trade-related information should be aggregated (per price area), as only this is relevant and of benefit for the market participants. It should only comprise contracts with standardised maturities as they are already published by PXs (e.g. [www.eex.com/en/Market%20Data](http://www.eex.com/en/Market%20Data)) and other publicly available information providers (e.g. Platts).

*13. Among the options proposed for the frequency of publication, which ones are the most useful and why? Which one should be chosen?*

As we strongly propose that this information is provided by PXs and broker platforms, this aggregated anonymous information is available with a delay after closing of the markets. The frequency of publication should follow a strict cost-benefit evaluation. Again, we like to stress that we do not support any potential obligation on individual market participants to publish trade information.

*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.*

No, we do not think that there is a distortion of competition resulting from unequal access or lack of transaction information. Neither the energy sector inquiry nor analyses by the financial regulators have detected any competitive distortion due to a lack of trade transparency.

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

We generally agree with the analysis as it reflects the view of the market that there is no lack of trade transparency and no actual need for an increased pre- and post trade transparency. In respect to the sector inquiry aspects, we strongly like to stress that the current mandate does not cover the issue of fundamental data raised there (as stated in para 202). In respect to para 203 and 204 we do not agree with the alleged assumption that there may be market failure due to information asymmetry.

*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.*

No, we do not believe that there is a lack of pre- or post trade transparency in the electricity and gas markets which would affect the efficiency of these markets. Market participants active in gas and electricity wholesale markets are professionals that do have access to trade information on the relevant trading platforms. Again, neither the energy sector inquiry nor analyses by the financial regulators have detected any competitive distortion due to a lack of trade transparency.

*17. No question 17 in the consultation document.*

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

We generally believe that currently already a significant array of market-relevant information is available for the market participants. Nevertheless, as previously mentioned, we fully support if all relevant trading platforms provide aggregated anonymous post-trade data on standard products (as mentioned in para 229). Although market participants do already have access to these data, we would support if this information (on an aggregated and anonymous basis) would be made generally accessible.

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

If it will be decided not to keep the status quo, an approach with key principles is our favoured option, specifying the minimum content of the records to be kept by the market participants. We support the issues discussed in para 236 and 238 and also think that these key principles should then be drafted in a generic way as described in para 237.

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

No, in line with para 250, we do not support a more comprehensive regime as there is neither a need for it nor is it appropriate for energy markets (see also our answers to Q 17 and Q 18).

*21. Do you agree with the preliminary analysis included in paragraphs (a) to (e)?*

re [a]: We fully agree with the view that there is little indication that there is a lack of trade transparency in energy markets as a whole.

re [b]: We agree. As this analysis (transparency in respect of fundamental data) is not relevant for the current mandate, this should be made clear as it is very important not to confuse the different issues.

re [c]: We agree that the described benefits do already exist in energy markets without any specific trade transparency initiative (in the case of EEX, this was initiated by the exchange council). As a general comment we like to mention that particularly in less developed and illiquid markets, other reasons than the alleged lack of trade transparency should be mentioned, such as price caps and other regulatory market interventions that result in the mentioned shortcomings. Trade transparency initiatives will not solve these fundamental problems.

re [d]: We agree with the statements and like to emphasise that any initiatives should follow a thorough impact assessment with a strict cost-benefit analysis. However, we do see the risk of a shift of trading activities to non-EU markets, if additional burdensome regulation would be introduced.

re [e]: We generally agree with the statements (see also d).

*22. What other views do you have on the matters covered in this section on trade transparency?*

On a general basis, we like to state that it should not be the task of the regulators to publish trade data. In our view, the trading places are the "natural" provider of these data.

### Section III: Exchange of Information

*23. Do you agree with the exchange of information between securities and energy regulators only on a case-by-case basis instead of periodical and automatic exchange of information?*

Yes, we fully agree that the exchange of information between securities and energy regulators should only be done on a case-by-case basis. We do not see the need for an automatic exchange on a permanent basis.

*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?*

Yes, this seems to be a pragmatic approach. At the same time, a certain degree of harmonisation should be ensured. Also the specific details of these agreements should be made transparent to market participants.

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

In our view, the home Member State regulator of the branch should be the responsible securities regulator to provide information required by the energy regulators as this seems to create the least efforts to coordinate. This would also ensure that undertakings active in several European markets only have one specific regime to deal with.

We hope that our comments are useful in the further development of the CESR and ERGEG technical advice to the European Commission concerning the questions on record-keeping, transparency and exchange of information.

For any further questions please do not hesitate to contact us.

Sincerely,

Dr. Bernhard Walter