

Public Consultation on CESR's/ERGEG's advice to the European Commission

in the context of the Third Energy Package – Draft response regarding record-keeping, transparency and exchange of information

– Response of the ECT-Group –

I. Introduction

We are representing the Energy Commodity Traders Group ("ECT-Group"), a group of mostly German energy trading firms which established a joint working and discussion group for the exchange of experiences in financial and physical energy trading and for the co-ordination of the communication with German and European authorities. We would like to respond to CESR's and ERGEG's public consultation in the context of the Third Energy Package.

The ECT-Group consists of entities active in the energy trading sector; several of them pursue also banking activities or render financial services related to energy derivative products. Entities which pursue banking activities or render financial services related to commodity derivatives are according to the German Banking Act investment firms which have to apply for a license in order to carry out the banking activities or financial services related to commodity derivatives and which are supervised by the German Financial Supervisory Authority Bundesanstalt für Finanzdienstleistungsaufsicht ("BaFin"). The ECT-Group serves as a platform for such firms in order to develop common positions with respect to the financial supervision and to communicate them to BaFin and other legislative and administrative bodies. There has been a steady and successful cooperation between BaFin and the ECT-Group in order to develop an adequate supervisory regime for investment firms rendering financial services related to energy derivative products.

II. Statement

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.

Generally yes. But in this respect we would already like to point out that from the purposes determined automatically follows that reporting obligations for all transactions and for all supply undertakings are not required.

However, the general idea of records to be kept under record-keeping obligations is not in line with the presumed purpose of complete and regular market monitoring. But in

the consultation paper there are several indications that CESR and ERGEG are considering demanding access to data on a regular basis and without immediate cause. In this case, however, there would be no difference between record-keeping obligations and general transaction reporting requirements. This dividing line has to have a meaning.

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?

The minimum contents are sufficient to obtain a clear picture of transactions in energy. The subdivision of the data seems to be partly superfluous since this information can be already obtained from the product name (which is frequently based upon standard products, such as e.g. Cal 10 Base – base load delivery from the first till the last day of the calendar year 2010). The item “indexation formula” could practically cause unnecessary inconvenience. Here other commodities such as coal or oil will be presumably primarily used as indices, the formulas are mostly complex and generally won't help the price formation purpose.

3. If not, please specify the items not necessary or additional items necessary with respective reasons.

With regard to the record-keeping obligations under MiFID, additional contents seem to be superfluous since all standard products are likely to comprise this information in their clear identification.

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 practical difficulties are to be expected since the additional information relating to financial instruments as listed under 3. is hardly likely to possess any new information.

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

The most efficient solution within the meaning of the Third Energy Package is always the one representing the maximum advantage for the market. Easy handling and predictable costs particularly for small undertakings are both necessary items. From our point of view, there is much to be said for using electronic formats but without

prescribing its details (principles-based approach). This guarantees a fast provision of information to the authorities without requiring each undertaking to establish specific interfaces etc. While large-scale undertakings certainly use specialised trading software, small undertakings are likely to continue to use ordinary spreadsheets. However, there has to be enough time for transition.

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?

See answer to question 5: Yes, it would be sufficient to leave the design of the kind of database to each 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).

Unfortunately, it is very difficult to determine exact costs. Presumably they range from noticeable to burdensome.

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.

The European energy market shall be a harmonised European market. This is the reason why, in order to create a level-playing-field, harmonised publication rules throughout Europe are to be favoured. Therefore, it must be ensured that in all states market participants have access to the same information in a comparable manner. To the extent that the market makes this information available on its own accord, it is of course not necessary for the regulator to carry out this work again. But it would be problematic if the national regulators set standards for publication independently.

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

We agree with the consultation paper that the published data would be of much higher value if both the data on transactions in regulated markets and data on OTC-platforms (which are otherwise extremely comparable) were published together. This relates to standardised and comparable products. In as far as individually bespoke trades are concerned, we don't see a need for publication (e.g. different maturities etc.).

Therefore, the members of the ECT-group are very interested in finding a solution at reasonable costs to present the data jointly and centrally concentrated. To the extent that the Directives do not have any legal basis for such a procedure, it would also be feasible that for this purpose the undertakings covered by MiFID voluntarily submit the aggregate data (via the platforms) to the energy regulators. Only if these ways turn out to be not successful, one could consider a stricter legal regime.

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

Useful for the market would be the options SM 2, SM 3 and SM 4, which can be realised without involving the risk that several big market participants would be individually allocable.

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

Both sets of data proposed would be 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?

A trader would of course prefer the highest possible resolution of aggregated data; this need, however, must be in due proportion to the hereto related costs. As long as it concerns information that the energy regulators can get directly from the platforms, it is possible to consider a daily data publication with a corresponding aggregation level. If the data, however, has to be collected from the market participants – which should be avoided –, a considerably longer time period should be assumed.

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.

In the opinion of the ECT-Group, transparency regarding fundamental data is of decisive significance. Even though the group generally welcomes every improvement of transparency also on the commercial market, it cannot detect any market distortion due to lack of transaction information.

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.

The ECT-Group can confirm that its experience is consistent with the result of the fact finding. It can also sense the jeopardy that the enhancement of transparency would only be possible at a prohibitive expense. This notwithstanding, ways should be searched for in order to provide the market with improved data at no major expense. Since in this case primarily the broker platforms would be referred to, the solution to look for should take into consideration their economic interest.

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.

According to our experience, there is no market that would become useless due to lack of pre- or post-trade transparency. In a market like Germany, in which a big part of the trade takes place in the OTC sector, smaller energy trading companies (or companies that are active in the market only for their own supply) would make a certain profit because of the improved transparency as they are not active in all trading platforms. Since, however, this involves a frequent collaboration with a broker, these restrictions do not hinder the whole market; they would rather promote cooperation. Whereas improvements would be beneficial, these would not have especially strong effects so that they should be adjusted to the hereto related costs.

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

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

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

As it can be seen in the previous answers, the ECT-Group does not see any crucial need to change the status quo. A careful and cost efficient enhancement of post trade transparency in terms of a key principles approach, however, has the potential to advance the market. A limitation to standardised products of RMs, MTFs and broker platforms would be sufficient, as the individual (schedule) deliveries are too complex to

allow a reasonable contribution to the market overview. Therefore, we would favour a European-wide, careful provision of key principles.

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

The members of the ECT-Group agree with the preliminary analysis that transparency at the physical level is most important. They also share the concerns that high costs and too strict requirements may have negative effects on the market. Therefore, the Group remains curious about the answers that CESR and ERGEG are going to give after the consultation.

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

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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?

We agree and think that the home securities regulator seems to be the most fitting choice.

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