



European Federation of Public Service Unions (EPSU)

Comments on the Consultation Paper

CESR and ERGER advise the European Commission in the context of the Third Energy Package Draft Response to Question F.20 – Market Abuse. July 2008

Dear Madam, Sir,

The European Commission has requested ERGEG and CESR to comment on the issue of record keeping, transparency of transactions and the Market Abuse Directive in relation to the Third Package of measures to open up the markets for electricity and gas. ERGEG and CESR have jointly issued a consultation paper in July 2008 and requested comments before 29 August. They will publish their final version thereafter.

EPSU welcomes the opportunity to comment on the paper. The issue of market abuse is important to our members, their families and the communities in which they live.

General comments

- While rising prices for electricity and gas are attributed to rising prices of fuels (oil, gas...) they are also connected with a *malfunctioning market*. There is a continued lack of liquidity on wholesale markets, increased market power and lack of new generation. Many consider that the prices are higher than they would have been in a regulated market. Addressing market abuse is hence important but it is the consequences of expected developments, *inherent* in liberalised markets in electricity and gas as EPSU has long argued and implicitly recognised in the consultation paper. Politicians and regulators hold large *responsibility* for the continued problems and the exposure of citizens and business to risks and high prices. Purchasing power is diminished, more families face fuel poverty and many jobs are threatened.
- EPSU is concerned that regulators display a *lack of intellectual honesty* by failing to address these fundamental problems inherent in liberalised markets and therefore seek solutions in only one direction – creating more competition. For example, should a commodities derivatives market really be pursued in the electricity sector or is it more worthwhile to prohibit the use of derivatives, and the speculative element part of it, in such a market given the social and public good dimension of electricity?
- Nonetheless, the consultation paper does address a number of issues and recommends a number of actions which are worthwhile. Greater transparency/ disclosure are supported. Record keeping is important to allow control afterwards. We do not accept the argument of commercial sensitive information in such important public services as electricity and gas.

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- National regulators do require the powers *to control prices and do need sanctions* to punish those market participants engaged in exploiting citizens and business. A more stringent regime is needed as suggested and ERGER and CESR should not be so apologetic about the additional costs of compliance, benefits valuable
- The European Parliament should be involved in the development of a legally binding system of obligations and guidelines. The EP has made it clear its priority is to ensure vulnerable users are not hurt, prices are not abusive, etc.
- *The consultation process itself* is flawed. *First*, it is an issue of timing. The consultation is opened during the summer period (July, August). This will reduce the possibilities that the paper will be noted and remarked upon. This will likely apply more to non-governmental, municipal and other smaller organisations and companies as large companies and organisations have the resources to monitor the work of ERGER (and CESR) on a more permanent basis. We are aware that many large companies employ permanent lobby and law firms to this end. There is hence a risk of regulatory capture, or bias given comments from large players. *A second issue* and while related and structural as well is distinct, is the opportunities for certain organisations to contribute their views to the consultation process. Organisations active in the defence of vulnerable users and citizens (e.g. anti-poverty organisations, social housing and many other social groups) lack the resources (time, money, expertise...) to comment. The issues are important but get hidden by a technical process and technical language. ERGER should look for a more *structural solution* to this issue. EPSU has argued for advisory boards made up of representatives of a broad range of organisations, consumer advocates etc.

Specific comments

Question:

- 1) *Do you agree with the analysis of the market failures in the electricity and gas markets as described above? If not, please provide reasons for your disagreement.*
- We do not agree with the continued obsession of regulators and the Commission with vertically integrated companies. It is not the issue. The analysis rightly speaks about perception more than about proof and facts. Professor for Energy Policy Steve Thomas, PSIRU of the University of Greenwich has thrashed the "evidence" presented by the European Commission in its sector inquiry and its staff in other publications. There is no evidence that vertically integrated companies do deliver worse quality or higher prices. Electricity price increases are not related to unbundling of vertically integrated companies. To the extent that vertically integrated companies abuse their networks this is an issue of regulators who fail to do their job.

To read more:

<http://www.psiru.org/reports/2007-07-E-Unbundling.doc>

analysing the position of the Commission on ownership unbundling

<http://www.psiru.org/reports/2007-11-E-Impactassess.doc>

commenting on the impact assessment especially regarding ownership unbundling

<http://www.psiru.org/reports/2007-09-E-Lowecritique.doc>

critique of the scientific evidence presented by Commission staff on costs of vertical integration

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- EPSU agrees with the issue of market failure addressed in the analysis and welcome the recognition (26/27) of information asymmetry. This is an issue for citizens. Market asymmetry is inherent in the electricity and gas market. EPSU and others (Energywatch, UK for example) have drawn attention to this. Theoretically it has been underlined by Keynes (see *annex box*). While we agree with the focus on transparency and the need for data reliability, these do not address the continuing asymmetry.
- EPSU also agrees with the regulators when they identify free entrance and exit, for example through the withholding of power. This is an issue inherent in the liberalised markets and the proposed measures will not solve this. To prevent the withholding of power stringent measures will be needed which are tantamount to ensuring a regulated market with which we do agree.
- We agree that more data need to be provided on outages and repairs. These acts need regulation. However, monitoring also needs resources. We are concerned that the regulators have not produced a report on the maintenance and repair provisions of the security of supply directive (2005/89/EC of January 2006)
- The confidence in markets is undermined by the working of the market itself which the report describes as a seller's market. It is once again disturbing that this was entirely foreseeable, but that regulators and the European Commission have failed to act, and undertook actions to deepen the problem.

For more information and previous positions of EPSU

<http://www.epsu.org/r/198>

<http://www.epsu.org/a/2805>

2) *What is your opinion on the analysis provided above on the scope of MAD in three different areas: disclosure obligations, insider trading and market manipulation?*

- From the consultation document it appears that MAD is not sufficient to address disclosure obligations, insider trading and market manipulation. The consultation document however does present scant in-depth analysis of how MAD fails to address these issues.
- In general we would welcome sector specific measures and MAD does not appear to be such an instrument. EPSU does not agree that electricity (and gas) are labelled as commodities. This does not recognise the social nature of the product and service that is provided. EPSU questions if commodities and commodity derivatives should have a place in this sector. If the regulators and Commission develop sector specific measures these need to recognise the public service obligations and hence appropriate processes of consultation and discussion.

3) *Do you agree with the conclusion above that greater pre- and post trade would not be sufficient in the context of market abuse?*

- First of all despite many years of trying volumes traded on wholesale markets remain low. It remains unknown what the prices are that are traded OTC. Market volumes are difficult to disclose. Market foreclosure generation and retail is an issue that is not addressed. It is

assumed that fair trade and competition are possible, but this is hard to swallow given the continued problems and the years of experience regulators, Commission and Member states now have to prevent this. EPSU has concluded that these problems are inherent in the liberalized markets. *Second*, existing measures to disclose information are not legally binding and should become so. *Third*, it is important to ensure reporting but also monitoring which is not addressed or hardly so.

- 4) *Do you agree with the analysis above on the importance of the transparency/fundamental data? If yes, would you consider it useful to set up at the European harmonized list of fundamental data required to be published? Is it conceivable or is it necessary to publish additional data on an ad hoc basis if to be price sensitive?*

- Disclosure of fundamental data is essential to protect users and this should go forward.
- While it appears logical to have such disclosure rules set at European level to ensure similar rules in different countries (see also point 74), Member States must be in a position to have *additional disclosure and transparency rules* if decided upon by the democratic process to reflect a particular situation or deal with a noted problem. We would oppose a European scheme that does not allow for such subsidiarity.
- The system must also be amendable and under the control of the European Parliament (rather than Commission or regulators themselves)
- The rules must not allow for exclusions of “commercially sensitive” data. We note that the free flow of information is essential to start to deal with the problem of asymmetry of information.

- 5) *Which information retained by specific participants of the electricity and gas generators, TSO should be published on an ad hoc basis if it is price sensitive?*

All relevant (and price sensitive) information should be disclosed.

- 6) *What is your opinion on the proposals of CESR and ERGEG in the three different areas: disclosure obligations, insider trading and market manipulation?*

- We support the proposal to have tailor-made disclosure obligations for the electricity and gas sector reflecting the public and social nature of this sector.
- We miss the possibility that organizations can bring cases to the attention of the regulators. Such organizations for example which protect the interests of vulnerable users may need assistance to deal with the complexity of the electricity and gas system and the different regulations. Any proposed legal framework should establish a mechanism whereby such organizations can call upon expertise.

The EPSU response is sent to ERGER fis@er geg.org EPSU's reaction is non-confidential.

EPSU is the European Federation of Public Service Unions. It is a member of the ETUC. EPSU represents over 215 trade unions with 8 million members in public services in local and regional government, public administration, health and social services and utilities.

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Annex 1

Keynes views on why competition might not emerge

"The beauty and the simplicity of such a theory [competition producing economic efficiency] are so great that it is easy to forget that it follows not from the actual facts, but from an incomplete hypothesis introduced for the sake of simplicity. Apart from other objections to be mentioned later, the conclusion that individuals acting independently for their own advantage will produce the greatest aggregate of wealth, depends on a variety of unreal assumptions to the effect that the processes of production and consumption are in no way organic, that there exists a sufficient foreknowledge of conditions and requirements, and that there are adequate opportunities of obtaining this foreknowledge. For economists generally reserve for a later stage of their arguments the complications which arise -- (1) when the efficient units of production are large relatively to the units of consumption, (2) when overhead costs or joint costs are present, (3) when internal economies tend to the aggregation of production, (4) when the time required for adjustments is long, (5) when ignorance prevails over knowledge, and (6) when monopolies and combinations interfere with equality in bargaining -- they reserve, that is to say, for a later stage their analysis of the actual facts. Moreover, many of those who recognise that the simplified hypothesis does not accurately correspond to fact conclude nevertheless that it does represent what is 'natural' and therefore ideal. They regard the simplified hypothesis as health, and the further complications as disease." (Keynes, 1972)

Keynes, J. M. "The End of Laissez-faire" in The Collected Writings of John Maynard Keynes, Vol. 9, Essays in Persuasion, London, The Macmillan Press, 1972