

Responses to the CESR / ERGEG – Consultation Paper on record keeping, transparency and exchange of information in the electricity and gas markets, October 2008

This consultation is based on the EU-Commission's draft directives on the internal electricity and gas markets dated 19.9.2007 Art. 22 f (electricity) respectively Art. 24f (gas), where record keeping is required with regard to transactions in supply contracts and derivatives with wholesale customers and transmission system operators as well as storage and LNG operators. Record keeping for these segments is supported for the sake of providing the basis for more confidence in the functioning of the market. Hence, the access to such records builds an essential basis for the conduct of proper investigations about potential malfunctioning of the market.

For VIK, thereby, four aspects for the design of the detailed rules for record keeping and the use of such records are of major importance:

- A clear distinction between contracts on the wholesale market versus contracts on the retail market has to be made. In our opinion, the record-keeping should be related solely to the wholesale market, in line with the wording of the draft directives. The contracts with regard to the direct supply of end-consumers should therefore be out of the scope of record-keeping, because they are considered to be retail market deals. Such contracts comprise bilateral deals between supply companies and any kind of end consumer – private, commercial or industrial – for deliveries of electricity or gas to cover their individual demand. This is e.g. also related to supply contracts between industrial consumers delivering energy to their own affiliates or end users.
- The conservation of commercially sensitive data is a crucial issue. It must not be forgotten, that the record-keeping of supply undertakings contains the energy supply conditions of customers. For customers from the energy intensive industries these data will be one of the most important ones for maintaining competitiveness within their markets. These conditions are one of the most important business secrets within these companies. Therefore, the secrecy requirements must be very high and trustworthy. This is relating both to the storage (at the supply undertaking or at the authorities) as well as to the transmission and ultimately the - aggregated - publication of data.
- It is important that the specific characteristics of the electricity markets are taken into account. Therefore, regarding record keeping and transparency requirements, organised markets and OTC markets should be treated the same way.
- Moreover, VIK urges the authorities to develop the appropriate legislation to guarantee that CO₂ markets are also under the supervision of energy and securities regulators. Identical provisions developed for wholesale electricity and gas markets should apply also for emission allowances.

SECTION 1: 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.*

Record-keeping is a substantial element of a proper surveillance system for any market and must therefore be established properly to overcome the still existing deficiencies in the electricity and gas markets. In these markets which are so sensitive to market abuse on the side of powerful companies and to mistrust in the market's functioning on the side of small and new players, it is high time to fill in the gaps. Record-keeping which covers also the currently hidden, intransparent areas of the market provides the necessary basis for any investigations with respect to the prosecution of suspicion in offenses against a proper functioning. We therefore support the analysis made in the consultation paper regarding the purposes of record-keeping.

We regret that contracts entered into with TSOs to keep in balance the supplies are specifically excluded. This will limit the capability of regulators to analyse potential market abuse in the balancing markets.

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 undertaking?*

We presume the proposed minimum content to be appropriate.

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

See question 2.

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?*

Investment firms operating in the gas and electricity markets should be submitted to the same obligations as any other wholesale partner. Otherwise, data considered necessary to properly describe a supply contract in the electricity and gas market (as seen by ERGEG and supported by us, see question 2) will be missing for this segment of the market. This would be a clear limitation for conducting comprehensive investigations of a concrete case as well as for monitoring on how the market functions. Therefore, it should be seen as a further need to prepare the legal ground for bringing these two segments in line within the nearer future.

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

With regard to the format for record-keeping any prescriptions about it must in no way lead to building obstacles and market barriers to entry, since, the ultimate goal of establishing record-keeping obligations is a more vital and competitive market by means

of building confidence in its functioning. Therefore, the cost of establishing and running a record-keeping system is a very crucial argument. However, to establish a record-keeping system only makes sense if this leads to a workable solution. A form of record-keeping without any harmonizing prescriptions and the possibility to bring several data sets together in a comparable way would therefore be a useless exercise. As a consequence, in our electronically oriented times such data sets should be in an electronic format which is as standardized as possible (giving space for customization where needed; see tailor-made OTC products) but also as simple as possible. That means that we prefer a simple and cheap option 2 solution oriented on the minimum requirements.

It could be however discussed if the level of harmonization could differ on the different aggregation levels. Hence, for concrete investigations of regulators or other authorities in case of suspicion of market power abuse or manipulation, it might be acceptable to work with more individualized formats. Whereas for monitoring and transparency reasons only aggregated data are needed, and it might be a simplification if such aggregation could be done already on the level of the supply undertakings and only the format for transferring the aggregated data have to be set and uniform.

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?*

A minimum level of harmonization would be required with regard to the format in which the data is transferred to the relevant authorities upon their request. The cost aspects, however, must be taken into consideration.

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).*

Not possible.

SECTION 2: Transparency

8. *Do you see a need for a harmonized publication of aggregate market data on an EU/EEA level? Please provide your arguments for / against such publication.*

Since we are aiming to move to an EU wide electricity and gas market, the overall aim should be to have a harmonized publication level all over the Member States. However, such goal could be achieved stepwise and not in one single shot. Therefore, clear guidelines on where the market is aiming to, prepared by the regulators should exist, accompanied by a clear timetable. For a transitional period, deviations from that should be possible, if the time and efforts to be spent would be too high.

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

A coverage that contains also the MiFiD-part would be preferential. Otherwise, it would be simply impossible to assess the data published in terms of, how relevant are they for the market? How much do they really reflect?

Moreover, transactions with TSO related with balancing mechanisms or balancing markets should also be submitted to publication obligations.

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

The three information areas mentioned in the report are all equally important:

- Trading volumes
- Prices indices
- Market structure indicators

ERGEG mentioned doubts about the relevance of aggregated information on prices over a long period of time and on several products. Such doubts are unclear, since the prices traded e. g. on a daily basis are considered to be a very useful and meaningful indicator of the market functioning.

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

They are considered to be useful.

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

It could be a reasonable approach to start with a wider level of aggregation (e.g. quarterly) and then see how the market receives this, and from that experience then to judge whether a lower aggregation level is worthwhile to apply.

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

See question 12.

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.*

The trading between generation/trading arms and retail arms within vertically integrated companies might be built on elements of cross subsidization thus discriminating other suppliers. Therefore, more transparency over the transactions between such interconnected players might bring a more level playing field into the market. Generally, the intransparent parts of the OTC market might build a well-prepared field to give impulses to the transparent market areas which provide the price references. Such considerations currently are the basis of mistrust with no way of proving and checking the real background. Record-keeping and the possibility to make competent investigations would provide a clearer picture and thus more confidence.

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 agree with the results of the fact finding. A certain minimum post-trade data publication requirements for major broker platforms, where the bulk of transactions takes place, would be welcome.

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.*

Especially the trade transactions within vertically integrated companies are lacking transparency and give space for competitive distortions (see question 14).

17. --

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

No. See question 19.

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

This option seems to be a reasonable compromise. However, it must not be a sole regulators' initiative, but should also be developed together with the key stakeholders. Therefore the characteristics of an "industry led initiative" as foreseen in option 3 should also be a leading idea for developing the key principles of option 2.

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

See question 19.

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

We mainly agree to this preliminary analysis.

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

Generally, we do not share the view that transparency may reduce liquidity. Motivation for trade will remain even if margins become narrower because of a higher transparency.

SECTION 3 : 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 a periodical and automatic exchange of information?*

Any transparency, which is meant to reflect the whole, or at least the majority of the market, cannot be sufficiently outlined without taking into account also the data covered under the MiFiD record-keeping requirements. Therefore, if a regular data publication on an aggregated level is foreseen, then also these data have to be included. That means: in this case a regular data transfer seems to be a prerequisite.

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?*

We agree.

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?*

No preference from our side perceptible.