UNION OF THE ELECTRICITY INDUSTRY
eurelectric

Brussels, 24 November 2008

Re: ERGEG/CESR draft Advice to the European Commission on Record-Keeping, Trade Transparency, & Data Exchange: EURELECTRIC Response

Dear Sir/Madam,

The Union of the Electricity Industry – EURELECTRIC welcomes the opportunity to comment on the abovementioned ERGEG/CESR Consultation paper.

EURELECTRIC supports the aim of having in place clear, proportionate and harmonised EU/EEA trade transparency arrangements which provide equal and easy access to data relevant for market participants to understand price formation. Likewise EURELECTRIC supports the introduction of harmonised, robust and proportionate EU/EEA record-keeping arrangements which, if needed, will help regulators understand market behaviour.

However, **we are concerned that the consultation paper fails to draw a clear distinction between the separate aims of record-keeping, trade transparency and monitoring**. In particular, we believe that the consultation paper should be clearer with regard to (a) how information is to be collected (e.g. case-by-case for records and periodic reporting for trade transparency), (b) how this information may be used (e.g. publication of aggregated data; records for regulators only) and (c) for what purpose (e.g. application of financial and energy oversight rules or for the purpose of applying competition law?). In this regard paragraphs 61 to 68 of the paper are simply too open-ended and vague. As open-ended regulation creates uncertainty, the introduction of a number of tightly-worded objectives/principles governing points (a) to (c) above would provide some clarity here.

With regard to **record-keeping** procedures, EURELECTRIC is of the view that record-keeping arrangements must be designed and operated in a harmonised European fashion in a way which minimises the administrative burden placed on market players. Concerning the data content of records, subject to certain changes (on prices and indexation formulas), EURELECTRIC believes that a certain level of standardisation of exchange and broker data should be possible. On the other hand, database design should be left to individual participants. The issue of whether there should be common formats is more difficult in that a sudden harmonisation will result in unnecessary costs. Therefore, a transition to common formats over a number of years is perhaps the best solution here. Finally, and where relevant, the content of financial and physical trading records should be similar. On a company level, this will allow for the avoidance of unnecessary, duplicative administration costs.

Concerning **trade transparency,** we welcome the conclusion that current pre- and post-trade transparency arrangements (aka rules for publication of aggregate market data) are sufficient. However, contrary to the consultation paper, rather than giving each NRA discretion to judge whether additional trade transparency measures are needed, we believe that the Commission and/or ACER should determine one, unique set of trade transparency guidelines to be applied in all Member States. Otherwise, the introduction of different rules by different NRAs could result in increased, unnecessary barriers to trade.

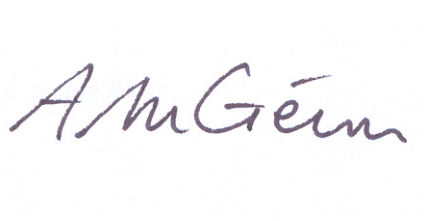
Union of the Electricity Industry - EURELECTRIC - A.I.S.B.L.
Boulevard de l'Impératrice, 66 - bte2 - B - 1000 BRUXELLES
Tel. : + 32 2 515 10 00 - Fax. : + 32 2 515 10 10
www.eurelectric.org
TVA : BE 0462 679 112

In addition, only aggregated information on exchange-based or standardised broker-based products should be published thereby guaranteeing anonymity and taking full care of the commercial sensitivity of the data. In particular, methods used to aggregate data should be developed in such a way which ensures that information on individual operators or plants cannot be surmised or be derived from the said aggregated data. Finally, we would like to reiterate the point that a large amount of data is already available from exchanges, brokers and other information providers. These platforms should be the first port-of-call or source for aggregated market data. It simply does not make sense to ask individual participants for information which can and should be provided by exchanges and brokers, especially if such information is to be reported on a frequent basis (e.g. every day, week or month).

Finally, regarding **data exchange**, ideally participants should only have to send the data once. However, we recognise that this may not always be possible (i.e. where energy and financial regulators' competencies are strictly delimited). In any case, legal and practical arrangements for the transfer of information from energy to securities regulators, and vice versa, and between regulators of different member states regardless of whether they are security or energy regulators, should be put in place. In addition, it is vital that the confidentiality of this data is assured at all times. Overall, the overarching principles governing data exchange should be cost minimisation for market participants and confidentiality of data.

The attached annex contains our responses to the questions posed in the consultation. If you have any further question, please do not hesitate to contact Niall Lawlor (nlawlor@eurelectric.org; phone: +32.2.515 10 27).

Kind regards,



Anne-Malorie GERON
Head of Markets Unit

Bernhard WALTER
Chairman of TF Transparency, Monitoring & Record-keeping

Annex: Response to Individual Questions

(1) Response to ERGEG/CESR Draft Recommendations on Record-keeping

Q1. 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.

To our understanding, this paper covers the two issues of:

(1) how the keeping, or recording, of trade transactions/contracts, as proposed by article 22(f) of the proposed electricity Directive may be used by regulators to oversee wholesale electricity trading; and

(2) how this article, and the equivalent article in the MiFID, are applied by the energy and financial regulators in a logical and least-cost manner across the EU-27/EEA?

As such, our belief is that this article (22f) covers arrangements for record-keeping and transparency of supply and derivatives contracts to apply equally across the EU-27/EEA. In particular it provides all EU-27 energy and financial regulators with the legal basis to only investigate, on a case-by-case basis, the area of supply and derivatives trading/contracting.

This article does not, to our understanding, cover any other powers (monitoring of market opening, levels of competition etc) which the energy and/or financial regulators may or may not have, in particular concerning transaction reporting requirements.

Q2. 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?

Q3. If not, please specify the items not necessary or additional items necessary with respective reasons.

Answers 2 & 3:

The different pieces of content to be kept under MiFID (as indicated under paragraph 81) do not exactly match with the necessary content under the Third Energy Package.

We believe that some of the items mentioned are not relevant for energy markets:

- the “executer or person responsible for execution of the trade” item should be omitted. Although it is necessary for financial institutions it is useless in the case of supply undertakings.

- the “quantity notation (number of underlying assets)” item should be omitted as the quantity and the quantity notation is the same in electricity and gas markets; it should also be clarified what quantity exactly means as in some specific contracts, the volumes depend on the call of optional rights, or some contracts might contain swing options giving the buyer/seller the right to change the volumes during the delivery period.

- the "indexation formula" item should be removed from the 'additional requirements', as these formulae are often extremely complex and, in most cases, add little or no value for price formation purposes, as noted in paragraph 229 bullet point 3 of the consultation paper. That said, some additional work may need to be done to allow for the clear separation of products which are actually non-standard from those products which are 'standard' in all but name.

As for prices, again we would agree with stating prices as long as this is related to standard contracts, but not, as proposed, to calculate the value of the contract as this would lead to tremendous additional efforts in case of non fixed (or indexed) price contracts or non fixed "quantity" contracts (due to optional rights etc) with no positive support for monitoring purposes.

Regarding Load Type, one should be aware that delivery profile definitions are different in different Member States, e.g. Peak Hour definitions are different regarding hours and application on public holidays

Regarding information on counter-parties, we would agree on stating names but not on identification through unique codes as this would also create additional unnecessary work, work which makes no contribution to market oversight. The necessary time and costs to implement identification through all existing IT processes should be carefully considered; this would not only affect trading between market participants, but also affect communication with TSOs.

Also, if data are supplied to authorities they should strictly stay with authorities. If data are published (*under trade transparency rules, not record-keeping rules*!), then this should only happen in aggregated terms and only on an *ex-post basis*, i.e. it should be ruled out that details on contracts concluded today but with settlement some time in the future, are published before settlement (only *ex-post* publication!). Finally, where a company's data is being published, the said company should be contacted first.

Q4. 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.

Q5. Which option do you think is most efficient for the purposes of the Third Energy Package *(i.e. (a) electronically or (b) in any format (aka MiFiD)?*

In the short term, EURELECTRIC believes that Option 1 as described in the consultation – to let the supply undertakings to determine the format of its records – is the best option. We believe that a more principles-based approach with minimum information that should be recorded is more appropriate than a strict standardised format.

In any case, '*any format*' record-keeping (free formatting aka MiFID) should not present any problems for regulators as any need for records will be on an *ad-hoc* basis. Indeed, Article 22 requires "supply undertakings to keep at the disposal of the national regulatory authority (…) for at least five years, the relevant data (…)".

There is no requirement to send this information to regulators in a periodic way. As mentioned, the transmission of data must be done on a case-by-case basis in order to enable regulators and competition authorities to investigate and assess possible instances of restriction of competition. Any mass immediate movement to electronic records would be disproportionate and unnecessary at least in the short to medium term.

Q6. 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?

We would like to stress that the standardisation of data content is different from standardisation of data formats which is different again from harmonisation of database design. All three issues should be treated separately.

Yes, **there should be a defined set of minimum and maximum data requirements**. As stated earlier, this set should be standardised through the EU-27/EEA (see answer to Questions 2 and 3 above).

Yes, the information should be easily extractable.

No, **there should not be a harmonised database design on national or European level** as this duplicates costs. Obviously the design of the database must be left to each supply undertaking. Nevertheless, it should be possible to easily extract from the supply undertakings database an extract to a database design as needed by regulators. Therefore, it is necessary that regulators define EU/EEA harmonised data content requirements so as to simplify case-by-case data exchange between supply undertakings and the regulators (regardless of whether they are financial or energy regulators).

Regarding past transactions, some flexibility should be granted where players do not have all (required) data available in their processes or in their data bases.

Finally, while a standard format may make sense where data is actually capable of being put in the same format (i.e. this may make sense for standardised products like those sold on exchanges, or those frequently traded on the screen-based OTC markets, but not for bespoke contracts between two parties with specific and sometimes complex or even unique contract deal features) any standardisation of formats should be introduced gradually and should allow companies to avoid unnecessary additional IT costs.

Q7. If possible, please provide indications of the specific costs involved with different electronic formats conceivable (e.g. from Excel sheet to more sophisticated software).

Of course an immediate move to electronic formats will add costs – IT costs are always substantial, regardless of whether the affected company's system is being adapted, modified or replaced. This move would be especially burdensome for smaller companies with small IT budgets and for merging companies with IT different systems.

However, it is very difficult to specify how much these systems cost, much of which is commercially sensitive information.

(2) Response to ERGEG/CESR Draft Recommendations on Trade Transparency

Q8. 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.

Yes. If the purpose is to increase trust in the market, and in turn increase participation and liquidity, then all standard exchange-listed[1] products, or equivalent (e.g. standard broker screen-traded OTC products), should be reported in a harmonised way on an EU/EEA level (the precise methodology regarding how this information exchange should work should be discussed in greater detail in the not-too-distant future). Regarding who is best placed to do this, **EURELECTRIC's view is that information which can be provided via exchanges or via brokers** could replace any obligation placed on individual market participants/supply companies. It simply does not make sense to ask individual participants for information which can be provided by exchanges and brokers, especially if such information is to be reported on a frequent basis (e.g. day, week or month).

Concerning how harmonised publication arrangements are implemented at Member State level, we believe that the level of information available in each Member State, or Bidding area, should be equivalent. In this light we believe that more clarity is required from the regulators regarding the meaning of the statement – '*each energy regulator should assess whether the level of transparency in its Member State is sufficient'*. EURELECTRIC believes that only equivalent measures will lead to a level-playing field.

Therefore, perhaps one of the future roles of the ACER would be ensure that levels of transparency are sufficiently harmonised. As such, Member States regulators should not ask for transparency arrangements which differ from what the CESR/ACER/Commission deem as necessary and proportionate. The existence of diverse Member State-level arrangements runs counter to the purpose of having an internal market.

Therefore, while we broadly agree with the spirit of option M2 (paragraphs 146/147), the relevant guidelines should be set at European level and should not be applied in an *ad-hoc* manner by NRAs.

Q9. Do you consider that this publication should cover all instruments, including those covered by MiFID?

Yes for standardised exchange-listed products and for equivalent standard screen-based traded products. Publication should be limited to these products, MiFID or non-MiFID. While the jurisdictional limits of energy and financial regulators should be respected, it does not make sense to publish only some of the data – all data must be published.

Regarding non-standardised products which cannot be aggregated, these cannot be published without revealing commercially-sensitive information. In any case, firstly, such specific products are traded between "experts", and secondly, they are based on underlying standard products that are available in the market. Therefore publication need not and should not cover all instruments.

Therefore we favour a version of option S2 which only covers exchange-listed products and for equivalent standard screen-based traded products.

[1] 'Exchange-based' in the broad sense: including MTFs etc. If product is sold by broker and cleared by an Exchange, then the Exchange should do the reporting.

Q10. Among the information proposed to be published, which ones are the most useful and why? Which one(s) should be published?

Volumes, number of deals, and average prices for standard exchange traded products. This information is useful for assessment of liquidity[2].

Regarding structural indicators, **we are concerned about the publication of information that can be tracked back to trading strategies of individual companies.** As such, we are in favour of the proposals SM2 (aggregate CR5), SM3 (HHI) and SM4 (number of active players) which do not reveal individual participant's positions. On the other hand, we are against SM1 (individual market shares) as this information – combined with other market information – would allow for trading strategies of individual players to be known to the market. From the text in paragraph 169, we understand that ERGEG/CESR share this concern.

Other mentioned items such as information on volumes/prices/delivery date/time of execution should be published by exchanges, broker platforms as these are the best placed to do so.

Q11. Are the two levels of aggregation on products proposed appropriate and useful?

Yes, the proposed levels of aggregation are useful insofar as standard exchange traded products or equivalents are concerned.

Q12. 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?

See answer to Questions 9/10/11.

[2] Examples of what could be published can be found at the following (and other) internet addresses: www.eex.com; www.belpex.be; www.nordpool.com

Q13. Among the options proposed for the frequency of publication, which ones are the most useful and why? Which one should be chosen?

Publication should be frequent enough to allow participants assess levels of liquidity in the market. Depending on the term of the products however, frequency should differ. For instance, daily and intraday products should be published on a daily basis, with an aggregated overview on monthly basis, while for monthly and yearly products a monthly publication might suffice, subject that the daily closing prices or average prices on a daily basis are also published; while a strict cost-benefit test should be performed. Again the best-placed entities to do this are the exchanges and brokers.

Q14. 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.

We do not see a link between distortion of competition and those pieces of transaction information.

As has been described in the CESR-CEBS CAD/MiFID Commodity Firm consultation process, the vast majority of participants in commodity derivatives markets are sophisticated firms. Indeed the recent CEBS/CESR report recognises that participants have not been deterred from participating in these markets.

On the ground, our experience is that any market participant that wants to procure/sell on the wholesale market, regardless of the maturity in that market, will in principle be able to make his/her own price discovery and liquidity discovery via existing channels (such as Platts, Heren etc) or via his own active requests for quotes in the market.

While transaction reporting is an additional tool which a participant might use, it would be unwise for any new entrant to rely only on this data for the purpose of deciding to participate or not in a given market.

In summary, we do not believe that there is any distortion of competition as far as transactions in energy related products are concerned.

Q.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.

Overall, we agree with the conclusions presented in paragraph 217 where it is noted that '*from discussions with market participants, most, but not all, do not support increased trade transparency and consider that sufficient information on prices and volumes is available for trading on platforms and OTC'*.

However, we disagree with the comments made in paragraphs 203/204 which infer that market failure may exist due the differences between exchange and OTC trading.

Q.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.

See answer to questions 18 to 20.

Q17. No Question 17

Q18. Do you favour the status quo? Please provide reasons for your opinion?

Q19. Do you favour a key principles approach? If so, what characteristics should it have?

Q20. Do you favour a more comprehensive regime/initiative? If so, what would be its characteristics?

In general, we believe that markets do provide transparent information to participants through existing platforms. Thus, as the main users of exchanges, we are of the view that market participants generally have enough information for trading. As such, for existing markets, the status quo is sufficient.

That said, if a 'principles approach' (Option 2) leads to greater EU/EEA harmonisation, we would be in favour of such an approach.

Some high-level principles could provide that any aggregated data which is published should:

- be made available under similar conditions to all market participants. In particular, they should be authoritative, issued at the same time and be easily accessible;
- as far as possible use standardised definitions and formats to facilitate processing and analysis by market participants and allow harmonisation across national borders;
- enable market participants to operate with a sufficient degree of confidence

Again such an approach should cover exchange and standardised broker trades.

Q21. Do you agree with the preliminary analysis included in paragraphs (a) to (e)?

The points made in section b) are out-of-scope as fundamental data transparency is being dealt with in other forums (e.g. regional initiatives). That said we agree that "*no trade transparency initiative alone could be expected effectively to mitigate the concerns identified [in the DG Comp Sector Inquiry]*".

We particularly agree with the points under:

- a) saying that there is "*little indication that the current levels of trade transparency in energy markets as a whole are not sufficient*" and with the statements under
- d) that "*Some risks arising from additional pre- and/or post-trade transparency requirements can be mitigated through three main routes - aggregation, delay in publication and anonymity. The costs of such requirements, and their potential negative effects described above, would have to be balanced against the described effects*". Therefore, any detailed requirements would have to be clearly justified.

Q22. What other views do you have on the matters covered in this section on trade transparency?

Publication of trading data should not be the task of regulators, market participants or TSOs. Publication of relevant trading data should be done by exchanges and brokers, albeit always on an aggregated level, so as not to disclose individual Broker positions.

(3) Response to ERGEG/CESR Draft Recommendations on Exchange of Information (E.11, E.17, E.18, E.19)

Q23. 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?

Yes. Concerning the use of records, the exchange of data should happen on a case-by-case basis. Nevertheless, as participants should only have to provide information to one regulator (home regulator), a streamlined approach to data exchange will allow regulators to reduce administrative costs and thus ensure that firms are only exposed to one regime.

Where a market participant is requested to send records on physical and financial transactions, the question arises as to whether (i) he/she sends all required information to one regulator and then allows the recipient regulator to forward the records to the other regulator or (ii) whether the records should be divided into physical records sent to the energy regulator and financial records to the financial regulator.

The former option allows for lower costs while the latter allows for consistent application of rules to energy and non-energy firms. Ultimately, and as mentioned in the answer to Question 4 on record-keeping, the first-order issue for participants is that costs are minimised and that rules are applied equally across the EU. The question of whether the same or similar information is sent to one or to two regulators is secondary. What is important is that any case-by-case reporting of records minimises costs for participants.

Q24. 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, we agree. However, such agreements must have a sound legal basis whereby data confidentiality is assured at all levels. Again we would like to reiterate the point that confidentiality of data is very important for electricity market participants.

Q25. 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?

The data exchange process should cause as little coordination effort as possible. Therefore, we would prefer the home member state securities regulator of the branch to be responsible.