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FRANCE

EEX-Position regarding CESR Consultation Paper October 2004 (Ref.: CESR/04-562)

Dear Sir or Madam,

As operator of the largest regulated derivatives exchange for energy products in Central Europe we are directly affected by CESR's position regarding commodity derivatives.

Our name is our program because our 123 participants are based in 16 different countries and also our shareholders are from 11 different states. Currently the trading volume in our electricity futures is approximately equivalent to Germany's electricity consumption. In addition to our futures we have introduced options contracts in November and we will launch a spot market for CO₂-emission allowances in March 2005.

State supervision and capital adequacy requirements represent additional effort to many of our market participants. For them this creates an incentive to find ways to conduct their business outside the scope of the MiFiD. Hence, it is important to identify reliable indicators for commercial trading on the OTC-market. We suppose that the criterion should be an explicit declaration by the management upon the conclusion of a contract. Since non-commercial trading is possible among all kinds of market participants considering the status of a producer or a user as an indicator for commercial trading is not helpful.

Please find attached our answers to your Consultation Paper.

Yours sincerely,

Dr. Hans-Bernd Menzel

Dr. Stefan Nießen

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List of Financial Instruments (Article 4 – Annex I Section C)

Questions 2.1.: *Should “commodities” for this purpose be limited to goods?*

2.2.: *Alternatively, should an approach be taken that permits rights or property specifically mentioned in C(10) and other intangibles to be treated as “commodities” as well?*

EEX supports the approach CESR proposes in its consultation paper: it is reasonable to treat electricity as a commodity along with other energy supplies because of the similar trading structures and participants that exist. Electricity should therefore be covered by the term “goods”. Emission allowances for themselves are no financial instruments but should be merely regarded as a factor of production.

Question 2.7.: *Should there be an initial filter to exclude contracts which are likely to be spot contracts? If so, do you agree with the proposed approach of excluding contracts whose settlement period does not exceed the lesser of two business days and the general accepted settlement period in the relevant market?*

Such an initial filter will prove useful as long as it bears in mind the uneven trading calendars across Europe: public holidays and thus non working days differ considerably among the member states. A criterion which focuses on calendar days instead of business days would therefore be preferable.

Questions 2.8.: *Should the status of the parties to the contract only be relevant for determining whether the exemptions in Articles 2(1)(i) and (k) or should it also be taken into consideration as an indicative factor for determining whether there is a commodity derivative as opposed to a commercial contract for the supply of commodities?*

2.9.: *Should commercial merchants be required to rely on the intention to deliver test or should the producer and user indicating factor apply to them as well? If so how can a commercial merchant be differentiated from a speculator?*

The relevance of status should be limited to the exemptions in Articles 2 (1) (i) and (k), since the status of a producer or user does not presuppose that he intends to take delivery. It is decisive for a level-playing-field between OTC- and organized markets to identify reliable indicators for the differentiation between commercial and non-commercial trades. We welcome CESR’s view that the settlement through clearing houses is not conclusive for identifying non-commercial trades, since this would give incentives for not using this risk-reducing service for commercial trades. On the same time, the test for commercial trades should be simple in order to not give opportunities for eluding regulation by claiming exceptions or choosing an “unsuspicious” counterparty. We suppose to rely on a kind of “intention to deliver”-test: The criterion should be an explicit declaration by the management upon the conclusion of a contract. A company’s management shall determine by declaration before a transaction is closed, whether the purpose of this transaction is hedging, procurement or speculation. The auditors shall verify during their routine checks the veracity of these declarations, an activity that they have to perform anyway when auditing on the basis of IAS39.

In our view this would be the least complicated and effective way to determine, whether a contract is commercial or non-commercial. That way, regulation takes into account that non-commercial trading is possible among all kinds of market participants. The difficult differentiation between a commercial merchant and a speculator could also be avoided.

Questions 2.10.: *Do you agree with an approach under which the status of the contract for both parties is based on a consideration of the status and/or intent of either of the parties?*

2.11.: *If both elements of (2) are present should this be conclusive or indicative? If indicative, if only one is present is that still an indicator?*

It is important not to generate counterproductive incentives by enabling parties to elude regulation. Hence, only an approach requiring both parties to have the status of a producer or user in order to indicate a commercial contract is acceptable. Since a wholesale contract between for example an electricity generation company and an investment firm would never result in a physical delivery of electricity, it is only consequent not to allow the producer company to claim that its intention for the contract is commercial. If not both have the legal capacity as well as the necessary permits or licences to make or take delivery of the concerned commodity it should be very certain that the contract is not for commercial purposes. However, if both elements are present that is not conclusive since it does not presuppose that both parties intend to take delivery. The “intention to deliver”-Test as supposed above should therefore apply as well.