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CESR and ERGEG advice to the European Commission in the context of the Third Energy Package

Questions D.4 to D.6 – record-keeping
Questions E.11, E.18 and E.19 – transparency
Questions D.7 to D.10 – exchange of information

December 2008

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Executive Summary

This advice is the result of work done by the Committee of European Securities Regulators (CESR) and the European Regulators' Group for Electricity and Gas (ERGEG) in response to a request for advice by the European Commission (Commission). The Joint Group of CESR and ERGEG experts assigned to carry out this work is chaired by Johannes Kindler (ERGEG Vice President and Vice President of the German Federal Network Agency, BNetzA) and Carlo Comporti (CESR Secretary General).

This paper sets out the final advice of CESR and ERGEG on the Commission's questions. In accordance with the mandate given by the Commission it is divided into three main parts: record-keeping (questions D.4 to D.6), transparency (questions E.11, E.18. and E.19) and exchange of information (questions D.7 to D.10).

CESR and ERGEG launched a public consultation on 23 October 2008 to seek comments on the findings, the possible policy options and, where already indicated, the draft advice to be provided to the Commission. 27 responses were received to the consultation which ended on 24 November 2008. When drafting this final advice, the views expressed in the consultation were duly taken into account.

Record-keeping (Section I)

General considerations relevant for record-keeping obligations

Record-keeping has to be clearly distinguished from transaction reporting or any other form of transmission of information included in the records of supervised firms to competent authorities. Regarding transaction reporting or other forms of transmission of information, the Third Energy Package does not include any requirements. CESR and ERGEG have therefore neither assessed the benefits nor the costs of transaction reporting yet, even if this kind of regular reporting about transactions might be a helpful tool to monitor the integrity of the market. The advice of CESR and ERGEG to the Commission on the content of supplementing guidelines regarding record-keeping does therefore not include any recommendations in this respect. However, it may be sensible to reconsider this issue at a later stage, possibly in connection with a potential EU regime for market abuse as proposed by CESR and ERGEG in their previous advice to the Commission.

Taking into account the wording, structure, purpose and consequences of the options analysed, CESR and ERGEG are of the view that "supply undertakings", which denote the persons subject to record-keeping obligations under the Third Energy Package, include all persons active in the sale or resale of electricity/gas including investment firms and all other firms which physically supply electricity/gas to wholesale or final customers. The advice of CESR and ERGEG therefore is based on this definition of "supply undertaking". The scope of the Third Energy Package consequently covers all persons which conclude spot contracts and derivative transactions with physical settlement. Depending on their authorisation as investment firms, the records to be (additionally) kept by them under the Third Energy Package would cover, for non-investment firms, all supply contracts and derivatives with wholesale customers, transmission system operators as well as, under the Gas Directive, storage and LNG operators or, for investment firms, all contracts with these customers not covered by MiFID. Persons trading exclusively cash-settled financial instruments related to electricity and/or gas as underlying will not be treated as supply undertakings under the Third Energy Package. If they are eligible for an exemption under MiFID, they are not legally required to keep any records, neither under MiFID nor under the Third Energy Package. Although theoretically existent, CESR and ERGEG have no information about the

relevance of this gap at present. Information about transactions undertaken by those persons would not be available to any competent authority on the basis of record-keeping obligations. Even though in practice the current market share of these firms and their transactions in terms of amount and volume may be marginal, market participants might try to benefit from the existence of this gap by adjusting their behaviour. For traders cash-settled and physically-settled contracts can be substitutes for each other. Thus it is necessary to monitor the actual shares and the development of these shares to assess the potential regulatory gap. CESR and ERGEG therefore recommend assessing the dimension and impact of this regulatory gap taking into account a potential amendment of MiFID exemptions as proposed by CESR and CEBS. Since this gap cannot be tackled within the existing legal framework and keeping in mind that the behaviour of market participants can change, the Commission should take action to explore the possibility to amend the Electricity and Gas Directives in order to close the gap in case of a significant market share of these transactions.

Regarding the instruments falling under the scope of the Third Energy Package, CESR and ERGEG are of the view that all physically-settled energy supply contracts and the financial instruments relating to electricity and gas under MiFID are covered.

Question D.4: Do regulators believe that there should be a difference between the proposed record-keeping obligations under the proposed amendments to the Electricity Directive and Gas Directive and the existing record-keeping obligations with respect to transactions in electricity and gas derivatives to which investment firms are subject by reason of MiFID (Article 25 and 13(6))?

Having compared the requirements for record-keeping under MiFID with the need of competent authorities under the Third Energy Package to understand transactions in derivative contracts, CESR and ERGEG reached the view that the contents of records to be kept under Articles 13(6), 25(2) of MiFID and Article 8 of the MiFID Implementing Regulation are not sufficient. Thus, additional information has to be kept by supply undertakings also regarding derivative transactions.

Question D.5: Pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC (the Third Energy Package), what methods and arrangements for record-keeping do CESR and ERGEG consider the Commission should specify as guidelines under the legislation for:

a) transactions in electricity and gas supply (spot) contracts? (To the fullest extent possible this should be a harmonised specification.) If there are any deviations from the obligations relating to commodity derivatives already applicable to investment firms, these should be justified;

b) transactions in electricity and gas derivatives contracts? (To the fullest extent possible this should be a harmonised specification.) If there are any deviations from the recommendations in a), these should be justified.

In answering this question, CESR and energy regulators are asked to consider specifying a single transaction record format based on the content and data to be provided as per Table 1 of Annex I of Regulation EC 1287/2006.

As general methods and arrangements for record-keeping and retention of records, CESR and ERGEG propose to include similar general requirements in the supplementing guidelines of the Commission as specified by Article 51 of the MiFID Implementing Directive.

In this regard, the Commission's guidelines should at least specify that the arrangements for record-keeping should allow the storage of information for future reference in a way which enables the relevant authorities to have readily access to them or receive compiled and complete records on request. Furthermore, the methods and arrangements for retention of the records should be protected against any manipulation or hidden alteration and allow for an easy assessment of any corrections or amendments to the content of the records.

As regards the content of the records, CESR and ERGEG are of the view that a principles based approach is most suitable for record-keeping purposes under the Third Energy Package. To a limited extent a different content for records regarding spot and derivative transactions is necessary.

CESR and ERGEG consider it necessary that supply undertakings keep records which include the following minimum information or contract specifications where the relevant minimum information to understand the contract can be easily derived from:

- Trading day
- Trading time
- Buy/Sell indicator
- Commodity type
- Counterparty identification
- Price elements
- Quantity
- Daily or hourly quantity
- Load type
- Delivery point
- Delivery Start-Date and Time
- Delivery End-Date and Time
- Option indicator
- Swap indicator
- Indexation formula
- Venue identification

CESR and ERGEG note that, as a principle, supply undertakings should be able to extract all necessary information to understand the contract from the records to be kept. The minimum list is of particular relevance for non-standardised contracts and spot transactions. If specific contents included in the minimum list can already be derived from the contract specifications (e.g. the name of a standardised contract), the principle based approach means that it is not compulsory to separately keep the contents that can be derived. Furthermore, CESR and ERGEG note that the specific items of information (e.g. indexation formula) naturally only have to be kept where they are relevant for the specific contract. For non-standardised contracts, the list of minimum contents remains the same but flexibility can be allowed for complex data, especially as regards potential transmission to the competent authorities.

The divergence between the content of records to be kept by supply undertakings and by MiFID firms which are not supply undertakings does not seem to be a major regulatory gap at first sight. Respondents to the consultation expressed the view that the record-keeping requirements would be sufficient to cover the content of most standardised contracts. However, CESR and ERGEG will monitor the practical implication of this discrepancy, particularly for non-standardised contracts.

Question D.6: How would this information be most efficiently kept at the disposal of authorities as mentioned under paragraph 1 of Articles 22f/24f in the case of spot transactions and non-investment firms?

On the basis of the comments received in the consultation, CESR and ERGEG recommend that supply undertakings would be allowed to choose the methods of retaining their records that are most suitable for their business organisation, i.e. in an electronic format or otherwise, provided that they comply with the minimum requirements for the methods and arrangements specified in the Commission's guidelines for data retention. However, at the request of the authorities mentioned in paragraph 1 of Articles 22f/24f of the Third Energy Package they should be able to extract the relevant information from these records for the inquiry purposes and to send it in an electronic format to the requesting authorities. Considering the costs and the benefits, supply undertakings should be able, as a minimum, to provide non-complex data derived from the records in an Excel format.

CESR and ERGEG are aware that confidentiality of the information has to be ensured during the entire process of transmission and further utilisation of the confidential data. The authorities requesting information should therefore provide for adequate methods and arrangements to secure this. The specific methods in this regard do not need to be harmonised, neither on a national, nor on an EU level.

Transparency (Section II)

The questions in Section E of the Commission mandate deal with transparency. Some of the questions are policy ones: they will be considered in this consultation paper, namely E.11, E.18 and E.19. The remaining questions are fact-finding ones and advice on them has already been submitted to the Commission and published. However, one of the fact-finding questions (E.17) is also covered in this consultation paper, as CESR and ERGEG used the answers on this question to build their reasoning on question E.18.

Question E.11: What guidelines and arrangements do energy regulators propose for the making available of aggregate market data by them under paragraph 3 of Article 22f/24f?

Question E.11 specifically asks energy regulators what guidelines and arrangements they would propose for the making available of aggregate market data by them (under paragraph 3 of Articles 22f/24f). Therefore, only the view of ERGEG is expressed here.

The rationale is to have available useful and reliable data, giving fair information on the liquidity and concentration of trading on European electricity and gas wholesale markets while keeping in mind three constraints:

- limiting the burden put on market participants for providing this information;
- avoiding direct and indirect disclosure of commercially sensitive data; and
- avoiding costs exceeding the benefits of publishing the information by not introducing additional obligations when a sufficient level of transparency already exists.

Question E.11 addresses the publication of data by energy regulators themselves. ERGEG members see benefits in publication by energy regulators themselves as it would provide a unique and centralised source of data. However, a publication by energy regulators would require a frequent, periodic transaction reporting by market participants. This was considered burdensome by market participants. Furthermore, many respondents to the consultation stated that the data

should be provided by platforms. Although pure OTC trades cannot be covered with this solution, at this stage ERGEG recommends a publication of aggregate data by platforms, i.e. regulated markets, MTFs, spot exchanges, and broker platforms.

ERGEG recommends a daily publication of information on standardised contracts. This should include derivatives irrespective of whether they are financial instruments according to MiFID or not and spot contracts. Besides relevant volume and price information the publication should include the number of trades and indices describing the structure of the market (without relieving information about the market shares of the different market participants). The publications should be harmonised between the different platforms existing in Member States: the format and content of publication should be the same.

The information should be available to all interested parties on a non-discriminatory and reasonable commercial basis.

Questions E.17/ E18: Is access to information on traded volumes and prices equal for all parties active in [the electricity and gas wholesale] market? : If not, is unequal access to or general lack of information on trading causing distortion of competition?

On the basis of the information gathered (mainly from the Call for Evidence and responses to the consultation), there seems to be equal access to information in many electricity and gas wholesale markets with the exception of bilateral trading. In relation to that, CESR and ERGEG have not received any significant evidence of the markets being distorted. However, that is not a proof that it does not happen and further analysis might be necessary.

Question E.19: In light of the findings in the Commission Sector Inquiry on energy and the subsequent study of the electricity wholesale markets, please consider:

a) whether, pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC, greater EU-wide pre- and/or post-trade transparency rules for electricity and gas supply contracts (physical and spot trading) and electricity and gas derivatives would contribute to a more efficient wholesale price formation process and efficient and secure energy markets;

b) whether such transparency arrangements could be expected to effectively mitigate the concerns identified in the Sector Inquiry above;

c) whether uniform EU-wide pre- and post-trade transparency could have other benefits;

d) whether additional transparency in trading could have negative effects on these markets, for example could liquidity in these markets be expected to decrease? Is there a risk that trading could shift to third countries to escape regulation?

e) If you believe that there are risks arising from additional pre- and post-trade transparency requirements, how do you believe that these risks can be mitigated (e.g. aggregation, delay in publication, anonymity)?

(a) On the basis of the responses to the CESR/ERGEG Call for Evidence and consultation, the availability of post-trade transparency data from platforms was considered to be important, whereas few requests were presented for the availability of pre-trade transparency data. Many respondents were of the opinion that in the case of platforms, sufficient level of trade transparency seems to already exist in most Member States. On the other hand, the market

participants did not express a need for receiving trade transparency data on trading conducted outside platforms.

However, in line with many comments received, CESR and ERGEG are conscious of the fact that the level of post-trade transparency information available from platforms is not necessarily uniform throughout the EU. In order to contribute to a more efficient wholesale price formation process and efficient and secure energy markets, CESR and ERGEG consider that the existence of a reasonable level of post-trade transparency information should be reached on a pan-EU basis. Thus CESR and ERGEG consider that all EU regulated markets, MTFs, spot exchanges and broker platforms should make public harmonised post-trade information on standardised electricity and gas supply contracts and derivatives traded on or cleared through these platforms on a trade-by-trade basis. Trade-by-trade information is relevant for platforms trading on a continuous (or rolling) basis. Wholesale markets organised as auction sessions determining a market clearing price for each delivery hour of the following day would need to make public aggregated information on hourly volumes and prices shortly after price determination. If this data is already available and compliant with standards to be defined, no further measures would need to be taken by the platforms.

Some market participants favoured the publication of post-trade transparency information on aggregated basis only, and by delaying the publication until at least the end of the trading day. However, CESR and ERGEG are of the opinion that publication of data on individual trades with a relatively short delay is more suited for the aim of reaching the goal of contributing to a more efficient wholesale price formation process. In practice many platforms already now make available the trades on a real-time basis. Thus CESR and ERGEG consider that the aim should be that all platforms publish post-trade information as close to real-time as possible, but with a maximum delay of 15 minutes. Beyond that time limit, the value of the data for price formation purposes decreases significantly. The data should be available to all interested parties on a non-discriminatory and reasonable commercial basis.

However, CESR and ERGEG note that before deciding on the application of the suggested delay of 15 minutes, further analysis would need to be conducted on whether there would be a need to provide longer delays for certain types of trades, in particular large trades made for own account (cf. delays provided by the MiFID post-trade transparency regime). However, such a framework would need to be carefully tailored for the needs of the particular energy and energy derivatives markets. The same applies to how information is accessed. The content of the information to be published should facilitate appropriate identification of the supply contract or derivative as well as include the following information - as appropriately adjusted to the particular needs of each product - for each trade:

- price (including the currency in which the trade was made);
- quantity; and
- trading day and time.

(b) The Sector Inquiry shows that concerns about transparency exist. However, transparency in the sense used in the Sector Inquiry focuses mainly on transparency of fundamental data and less on trade transparency. In any event, no trade transparency initiative alone could be expected effectively to mitigate the concerns identified in the Sector Inquiry.

(c) Other benefits which could arise from uniform EU-wide post-trade transparency include an increase in competition, new entrants and market participation as well as general engendering of market confidence.

(d) Additional transparency would not be expected to have negative effects in trading in itself. However, an improperly considered trade transparency initiative could have other negative effects on these markets, e.g. by reducing liquidity in the market with a consequential increase in volatility. Disclosure of more trading information by a market participant could also show to the market its trading positions and strategies. An improperly considered initiative would also be expected to result in unjustified technological, legal and compliance costs on market participants and costs of supervision and regulation on securities and energy regulators. Given the national or regional nature of the energy markets and their emphasis on physical trading, there seems to be little risk that trading could shift to third countries to escape regulation.

CESR and ERGEG have taken the possible negative effects into account when deciding on the scope of their proposed framework. CESR and ERGEG are of the opinion that the possible negative effects of the proposed framework are outweighed by the positive effects of contributing to a more efficient price formation process and efficient and secure energy markets. Negative effects can also be avoided by a careful design of the framework (see also the following answer).

(e) In order to avoid the risks related to disclosing information on the counterparties of a trade, the framework proposed by CESR and ERGEG is based on making public only anonymous post-trade information. In addition, CESR and ERGEG propose to further analyse the need for additional delays for certain types of trades beyond the standard deadline of 15 minutes (see answer to question E.19a).

Exchange of information (Section III)

Question D.7. How would securities regulators most efficiently provide information to energy regulators pursuant to paragraph 7 of Article 22f/24f?

The proposal of the Commission in Articles 22f/24f of the Third Energy Package contains new obligations for supply undertakings to keep records relating to their transactions. This data shall be kept at the disposal of the national energy regulator, the national competition authority and the Commission. This transaction data shall enable these entities to oversee the electricity and gas markets (recital 19 of the amended Electricity Directive and recital 21 of the amended Gas Directive). In order for the national energy regulator, the national competition authority and the Commission to have access to the data kept by entities falling within the scope of MiFID, securities regulators are obliged to provide data to these entities under Articles 22f(7)/24f(7) of the Third Energy Package. CESR and ERGEG propose to start information exchange upon request, on a case-by-case basis for fulfilling the legal tasks of energy regulators. This was considered appropriate by most of the respondents to the public consultation.

Additionally, in the view of CESR and ERGEG, the abovementioned exchange of information between energy and securities regulators should be backed by a sound legal basis, by European legislation. The opinion of CESR and ERGEG is that a pragmatic option at this stage would be the establishment of multilateral and bilateral agreements among energy and securities regulators for exchanging information on cross-border and local basis respectively - addressing legal gaps to exchange information between different regulators.

Such multilateral and bilateral memoranda of understanding among regulators should take into consideration the obligation included in Articles 22f(7)/24f(7), as well as provisions for appropriate confidentiality with respect to the data supplied by securities regulators to energy regulators, national competition authorities and the Commission. Furthermore, the MMoU to be established between CESR and ERGEG members would need to include the main provisions to establish cooperation in the field of exchange of information between both energy and securities regulators within the EEA. Ideally this MMoU would be supplemented by bilateral MoUs among local energy and securities regulators addressing legal gaps in certain jurisdictions to exchange information between different regulators.

Question D.8. Which securities regulator would most efficiently be responsible for such provision in the case of investment firms with more than one branch?

CESR and ERGEG considered whether the securities regulator of the host Member State of the branch should provide the information requested by the energy regulator. This would have been similar to the current MiFID requirements regarding transaction reporting. On the other hand, since also the home Member State securities regulator has direct access to the records of a branch of an investment firm as recognised under Article 13(9) of MiFID, it was noted that it could be an alternative to follow an approach where energy regulators always ask the home competent authority for information.

A large number of respondents to the consultation favoured the home Member State principle for information exchange among energy and securities regulators. A reason provided for this was that a single point of contact to the regulators would be preferred by market participants.

CESR and ERGEG consider it appropriate to allow for both alternatives. This would mean that the energy regulator may ask the home and the host Member State securities regulator of the branch of the investment firm to provide the necessary data. For market participants this will not increase administrative burdens given that according to MiFID already now both the home Member State and the local securities regulators may ask for the records of the branch.

Question D.9. Would it be feasible and efficient to employ the Transaction Reporting Exchange Mechanism (TREM) or a similar electronic system to exchange this data?

CESR and ERGEG are of the view that TREM would not be appropriate for the exchange of information between energy and securities regulators. First of all, as there would probably be only a few cases for exchange of information, it would not be efficient to invest in new IT. Secondly, TREM is established to enable securities regulators to exchange information within a very short period of time after the transaction was made. Market surveillance based on records kept by supply undertakings - not on transaction reports - as proposed in the energy Directives, would not require such a strict time limit.

This view was supported by the respondents to the public consultation.

Question D.10. Is there a case for data to be forwarded from energy regulators to securities regulators on an automatic basis? If so, what data?

As described above CESR and ERGEG are not proposing at this stage to forward data on an automatic basis. However, the potential MoUs could establish reciprocal cooperation between authorities. Therefore, they could also be used to exchange information from energy to securities regulators; in particular the information not covered by MiFID and received only by the energy regulators.

Background

1. On 21 December 2007, the Commission issued a joint mandate to CESR and ERGEG (see Annex) asking for technical advice pursuant to Articles 22f and 24f and Recitals 20 and 22 respectively in the two proposals for Directives amending Directive 2003/54/EC and Directive 2003/55/EC (the Third Energy Package).

2. CESR and ERGEG established a Joint Group of securities and energy regulators to prepare the advice. The Joint Group is co-chaired by Mr Carlo Comporti, Secretary General of CESR, and Mr Johannes Kindler, Chairman of the CEER Financial Services Working Group. The Joint CESR/ERGEG Group established four drafting teams consisting of representatives of the securities and energy regulators for the drafting of the advice on the respective topics of the mandate (record-keeping, exchange of information, transparency and market abuse).

3. The mandate requested joint advice from CESR and ERGEG on issues concerning record-keeping (questions D.4 to D.6), transparency of transactions in electricity and gas supply contracts and derivatives (questions E.11, E.18 and E.19) as well as exchange of information between energy regulators and securities regulators (questions D.7 to D.10). Advice was also sought on a possible clarification of the scope of the Market Abuse Directive in relation to trading in energy and energy derivatives (question F.20).

4. The advice from CESR and ERGEG was sought by the end of December 2008 with the exception of question F.20 on market abuse and questions C.1 to C.3 and E.12 to E.17 which were considered to be fact-finding questions. A response to the fact-finding questions was sent to the Commission on 30 July 2008 (CESR/08-527). The response to question F.20 was delivered on 1 October 2008 (Ref. CESR/08-739; E08-FIS-07-04).

5. On 18 February 2008, CESR and ERGEG issued a Call for Evidence asking for views on the Commission's questions. The response period closed on 18 March 2008. Nine responses were received, one of them confidential.

6. CESR and ERGEG have undertaken in-depth considerations on the issues. Whereas the mandate of the Commission addressed the electricity and gas markets, it has been noted that there are substantial interdependencies between electricity and gas markets and some other markets, such as emission allowances markets and other energy markets (e.g. coal and oil markets). The products in these markets are traded by the same market participants and there are linkages in the price formation processes of these markets.

7. CESR and ERGEG launched a public consultation on 23 October 2008 to seek comments on the findings, the possible policy options and, where already indicated, the draft advice to be provided to the Commission. 27 responses were received to the consultation which ended on 24 November 2008.[1] When drafting this final advice, the views expressed in the consultation were duly taken into account.

[1] The responses have been published on the CESR and ERGEG websites, see http://www.cesr.eu/index.php?page=responses&id=123 and http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_CONSULT/OPEN%20PUBLIC%20CONSULTATIONS/Record-keeping%20transparency%20and%20information%20exchange/RR

8. While CESR and ERGEG drafted this advice regarding the remaining questions of the mandate, they took into account the advice already given separately by CESR and CEBS (Committee of European Banking Supervisors) with regard to commodities and related derivatives markets.

9. Preliminary views on these issues were expressed by industry experts (Consultative Working Group – CWG) in a meeting of the CWG on 2 June 2008. The preliminary findings, options and views expressed in the consultation paper were also discussed with the CWG on 15 September 2008. The policy conclusions of the final advice were discussed with the members of the CWG on 3 December 2008. The CWG consists of technical experts from the markets and firms affected.

Structure of the paper and definition of important terms

10. This paper sets out the final advice of CESR and ERGEG on the Commission's questions. In accordance with the mandate given by the Commission it is divided into three main parts: record-keeping (questions D.4 to D.6), transparency (questions E.11, E.17, E.18. and E.19) and exchange of information (questions D.7 to D.10).

11. The terms used throughout this paper will be explained in the following paragraphs.

12. *Record-keeping obligations* refer to the obligations on market participants to keep records of the characteristics of the transactions they make. Particularly, under MiFID, record-keeping provisions describe the content and format of the records of transactions that firms need to keep at the disposal of their securities regulator for at least five years. One purpose of record-keeping obligations is to assist regulators in checking compliance of firms on a case-by-case basis. Record-keeping obligations are covered in Section I of this consultation paper.

13. *Transaction reporting* refers to the transmission on a frequent, periodic basis by market participants to regulators of the details of the transactions they make. Under MiFID, transaction reporting requirements lead to the transmission of information to securities regulators on transactions in financial instruments, including energy derivatives, admitted to trading on a regulated market, wherever they are made, by the end of the following working day, primarily for the purpose of monitoring market abuse.

14. The term *transparency* is used to describe the level of availability of information or data pertaining to a particular matter to the market. When the term transparency is used on its own, the context of its usage is ambiguous and is open to interpretation. In the following paragraphs, transparency is defined with respect to different contexts.

15. *Aggregate market transparency* refers to the dissemination of non-commercially sensitive information on transactions for the market. This term is used in the wording of question E.11 (see Section II), and concerns the data that national regulatory authorities (NRAs) may choose to make available to the market under powers proposed by the Third Energy Package.

16. *Transparency of fundamental data* is the disclosure of information on physical data, such as information on generation, grids, storage and consumption (such as demand forecast, etc.).

17. *Trade transparency* refers to the publication of information on each trading interest or concluded trade on a real/near real-time basis. This kind of transparency is mainly useful for price formation and is dealt with under the discussion for question E.19 (see Section II). Trade transparency means pre- and post-trade transparency.

Section I: Record-keeping

Text of the Commission proposal for the relevant provisions of the Third Energy Package

18. Since the wording of the proposed legal provisions serves as a basis for the interpretation of the scope and obligations under the proposed amendments in the Third Energy Package, the relevant provisions are cited here (as they currently stand[2]).

19. Article 22f of the Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity (the amended Electricity Directive) relevantly states:

> Record-keeping
>
> 1. Member States shall require supply undertakings to keep at the disposal of the national regulatory authority, the national competition authority and the Commission, for at least five years, the relevant data relating to all transactions in electricity supply contracts and electricity derivatives with wholesale customers and transmission system operators.
>
> 2. The data shall include details on the characteristics of the relevant transactions such as duration, delivery and settlement rules, the quantity, the dates and times of execution and the transaction prices and means of identifying the wholesale customer concerned, as well as specified details of all unsettled electricity supply contracts and electricity derivatives.
>
> 3. The regulatory authority may decide to make available to market participants elements of this information provided that commercially sensitive information on individual market players or individual transactions is not released. This paragraph shall not apply to information about financial instruments which fall within the scope of Directive 2004/39/EC.
>
> 4. To ensure the uniform application of this Article, the Commission may adopt guidelines which define the methods and arrangements for record-keeping as well as the form and content of the data that shall be kept. These measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27b(3).
>
> 5. With respect to transactions in electricity derivatives of supply undertakings with wholesale customers and transmission system operators, this Article shall only apply once the Commission has adopted the guidelines referred to in paragraph 4.

[2] The legislative procedure of the co-decision process is quite advanced. The European Parliament has proposed amendments to the text of the Third Energy Package. A Common Position of the Council has been agreed among Member States with no substantial changes of the relevant provisions (cf. Common Position regarding Article 39 of the proposed Electricity Directive and Article 43 of the proposed Gas Directive).

6. The provisions of this Article shall not create additional obligations vis-à-vis the authorities mentioned in paragraph 1 for entities falling within the scope of Directive 2004/39/EC.

7. In case the authorities mentioned in paragraph 1 need access to data kept by entities falling within the scope of Directive 2004/39/EC, the authorities responsible under that Directive shall provide the authorities mentioned in paragraph 1 with the required data.

Recital 20 states:

20. Prior to adoption by the Commission of guidelines defining further the record-keeping requirements, the Agency for the Cooperation of Energy Regulators and the Committee of European Securities Regulators (CESR) should cooperate to investigate and advise the Commission on the content of the guidelines. The Agency and the Committee should also cooperate to further investigate and advise on the question whether transactions in electricity supply contracts and electricity derivatives should be subject to pre and/or post-trade transparency requirements and if so what the content of those requirements should be.

20. As stated in the Commission's mandate, the same provisions apply mutatis mutandis in Article 24f and Recital 22 in the proposal to amend Directive 2003/55/EC for gas (the amended Gas Directive).

21. The Third Energy Package adopted by the Commission includes one Article on record-keeping of transactions. Relevant provisions on record-keeping for electricity contracts are included in paragraphs 1, 2, 4, 5 and 6 of Article 22f of the Electricity Directive. For gas contracts, the respective provisions are included in paragraphs 1, 2, 4, 5 and 6 of Article 24f of the Gas Directive.

22. The following table summarises all characteristics relevant for record-keeping regarding electricity and gas transactions:

	Article 22f for electricity	***Article 24f for gas***
Holding period	Five years	
Firms obliged to keep records	Supply undertakings	
Nature of data	Transactions in electricity supply contracts and derivatives with: - wholesale customers; - transmission system operators (TSO).	Transactions in gas supply contracts and derivatives with: - wholesale customers; - transmission system operators (TSO); - storage operators; - Liquefied Natural Gas (LNG) operators.
Details of information	Characteristics of the relevant transactions, such as:	

that should be recorded	- duration; - delivery and settlement rules; - quantities; - dates of execution; - times of execution; - transaction prices; - identification of concerned wholesale customers; and - specified details of unsettled supply contracts and unsettled derivatives.
Who may demand access to the records?	Three authorised entities : - the European Commission; - the national competition authority; - the national (energy) regulatory authority.
Uniform application	The Commission may adopt supplementing guidelines which define: - methods and arrangements for record-keeping; - form and content of the data.
Beginning of validity period of record-keeping provisions for derivatives	With respect to transactions in derivatives, Articles 22f and 24f shall only apply once the Commission has adopted supplementing guidelines.
Link with other obligations under MiFID	The provisions of Articles 22f and 24f shall not create additional obligations for investment firms subject to the requirements under MiFID vis-à-vis the Commission, competition authorities and (energy) regulatory authorities. In case the authorised entities request data kept by investment firms falling within the scope of MiFID, the securities regulatory authorities shall provide them with the information.

23. Whether the proposed provisions deal with electricity or gas, the content and scope of the record-keeping obligations are almost the same. The only difference is the wider scope of contracts explicitly covered by the Gas Directive. The record-keeping obligations for gas supply contracts also include transactions with Storage Operators and Liquefied Natural Gas (LNG) operators. This difference is a consequence of the different market structure of the electricity and gas markets.

Questions D.4 to D.6

24. The questions in the mandate identified as relevant for record-keeping do not provide for a clear cut and seem to overlap in their scope and content. This is why they will be cited together and no distinction will be made between the questions when discussing general issues regarding record-keeping.

D.4: *Do regulators believe that there should be a difference between the proposed record-keeping obligations under the proposed amendments to the Electricity Directive and Gas Directive and the existing record-keeping obligations with respect to transactions in electricity and gas derivatives to which investment firms are subject by reason of MiFID (Article 25 and 13(6))?*

D.5: *Pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC (the Third Energy Package), what methods and arrangements for record-keeping do CESR and ERGEG consider the Commission should specify as guidelines under the legislation for:*

a) transactions in electricity and gas supply (spot) contracts? (To the fullest extent possible this should be a harmonised specification.) If there are any deviations from the obligations relating to commodity derivatives already applicable to investment firms, these should be justified;

b) transactions in electricity and gas derivatives contracts? (To the fullest extent possible this should be a harmonised specification.) If there are any deviations from the recommendations in a), these should be justified.

In answering this question, CESR and energy regulators are asked to consider specifying a single transaction record format based on the content and data to be provided as per Table 1 of Annex I of Regulation EC 1287/2006.

***D.6**: How would this information be most efficiently kept at the disposal of authorities as mentioned under paragraph 1 of Articles 22f/24f in the case of spot transactions and non-investment firms?*

Scope of the Third Energy Package in relation to the scope of MiFID

25. The Commission's questions call for a harmonisation of the record-keeping rules for investment firms under MiFID and the records to be kept by supply undertakings under the Third Energy Package to the largest extent possible. It can therefore be derived from the formulation of questions D.4 to D.6 that the Commission recognises an overlap between transactions in the instruments covered by MiFID and transactions in supply contracts and derivatives covered by the Third Energy Package.

26. Furthermore, the current draft of the provisions of the Third Energy Package tries to avoid additional obligations of entities falling into the scope of MiFID. This implies that the Commission has also recognised some overlaps of the scope in terms of entities covered by the respective pieces of legislation.

27. Since the scope of Articles 22f/24f of the Third Energy Package is not as clear as it appears at first sight and the scope will influence not only the answers to the questions on record-keeping but all other issues at stake, it seems crucial to reflect on various options and their respective consequences.

Entities in the scope: supply undertakings

28. Articles 22f/24f oblige "supply undertakings" to record transactions in supply contracts and derivatives with "wholesale customers" and transmission system operators as well as, under the Gas Directive, storage and LNG operators. The term "supply" is defined in Article 2 No. 19 of the Electricity Directive as "sale, including resale, of electricity to customers". Thus, a supply undertaking is an entity which is active in the sale or resale of electricity[3]. The term customer in the sector Directives generally includes wholesale and final customers. However, the contracts which have to be recorded comprise only those which supply undertakings conclude with wholesale customers. According to Article 2 No. 8 of the Electricity Directive, "wholesale customers" include natural or legal persons who purchase electricity for the purpose of resale, whereas final customers purchase for their own use.

29. As regards the overlap with investment firms under MiFID, there are several possible options for interpretations on the scope of the record-keeping obligations under the Third Energy Package:

a) <u>All companies active in the wholesale market (including companies dealing only with cash-settled instruments)</u>

This interpretation would cover all firms, including investment firms and firms exempted from MiFID, which are active on the wholesale market for electricity/gas under the record-keeping obligations of the Third Energy Package without any distinction of physical or financial settlement of the contracts they trade with wholesale customers. Only contracts with final customers would be excluded.

It can be argued that otherwise the market monitoring of energy regulators would not be complete. Indeed, for traders cash-settled and physically-settled contracts can be substitutes for each other to hedge against price risk. The substitutability of these contracts is confirmed by the fact that the prices of cash-settled and physically-settled contracts are nearly identical on markets were both are traded. This demonstrates that these products belong to the same relevant market for competition analysis and should be monitored simultaneously.

However, this interpretation would make paragraph 7 of Articles 22f/24f requiring securities regulators to provide data kept by investment firms to the energy regulators and other authorities futile because all transactions to be kept were already available for energy regulators, national competition authorities and the Commission. Furthermore, this interpretation is likely to conflict with the purpose of paragraph 6 of Articles 22f/24f to avoid additional obligations of investment firms vis-à-vis other authorities than the authorities mentioned in MiFID.

b) <u>All companies active in the sale or resale of electricity/gas (i.e. companies trading in spot contracts and derivatives with physical settlement)</u>

This interpretation includes investment firms and all other firms which physically supply electricity/gas to wholesale or final customers. It covers all firms which conclude spot contracts and derivative transactions with physical settlement, thus actually

[3] In the Gas Directive the same definition is provided for "supply" of gas.

intending to physically deliver electricity/gas. Depending on their authorisation as investment firms, the records to be (additionally) kept by them under the Third Energy Package would cover all supply contracts and derivatives with wholesale customers (for non-investment firms) or all contracts with wholesale customers falling under the scope of the Third Energy Package not covered by MiFID (for investment firms). If these investment firms supplying electricity/gas were not covered, there would be no record-keeping obligations e.g. for all spot transactions of specialised trading subsidiaries of energy producers. However, in some markets these are the largest players in the electricity/gas trading market.

This interpretation raises similar concerns regarding the application of paragraph 6 of Articles 22f/24f as the above mentioned interpretation because - to some extent - there will be additional obligations for record-keeping towards the authorities mentioned in paragraph 1 of Articles 22f/24f.

It is acknowledged under this interpretation that a firm which only deals in "cash-settled derivatives" but falls out of the scope of MiFID (e.g. because of an exemption) will not be covered by any of the current or proposed EU legislation.

c) <u>All companies active in the sale or resale of electricity/gas excluding investment firms</u>

Under this interpretation the terms "supply undertaking" and "investment firm" are used in a reciprocally exclusive manner. It is based on a very strict interpretation of paragraph 6 of Articles 22f/24f, i.e. that this paragraph excludes any additional requirements of investment firms vis-à-vis other regulators than MiFID authorities. Non-MiFID firms would be covered if they "supply" electricity/gas. The contracts to be recorded by "supply undertakings" are supply contracts and derivatives with wholesale customers.

This interpretation has the advantage that the competencies of securities regulators and energy regulators are strictly separated and firms would not be responsible in any way to two different sector regulators. The other interpretations would lead to the situation that other authorities, including national competition authorities and the Commission, will have in a more or less extended way direct access to the records of investment firms.

However, as indicated above, this interpretation leads to the situation that at least in some markets a large volume of transactions in the spot market that is of genuine interest and most relevance for energy regulators would fall outside any record-keeping obligations. Furthermore, it may give an incentive to firms active in the sale and resale of electricity/gas to restructure themselves as investment firms to avoid regulation under the Third Energy Package.

30. Considering the wording, structure and purpose of the Third Energy Package proposals and the consequences of each option, CESR and ERGEG came to the conclusion that option b) is the most appropriate. In terms of content, all supply undertakings should keep the minimum content set out in the future guidelines of the Commission.

31. However, it should be noted that firms which trade exclusively cash-settled financial instruments related to electricity and/or gas as underlying may be exempted from MiFID and will also not be treated as supply undertaking under the Third Energy Package. Although theoretically existent, CESR and ERGEG have no information about the relevance of this gap at present. Information about transactions undertaken by those firms would not be available to any competent authority on the basis of record-keeping obligations. Even though in practice the current market share of these firms and their transactions in terms of amount and volume may be marginal, market participants might try to benefit the existence of this gap by adjusting their behaviour. For traders cash-settled and physically-settled contracts can be substitutes for each other. Thus it is necessary to monitor their actual share and the development of their market share in the different Member States to assess the potential regulatory gap. This concern has also been stressed by some respondents to the public consultation. CESR and ERGEG therefore recommend assessing the dimension and impact of this regulatory gap in each jurisdiction taking into account a potential future amendment of the MiFID exemptions as proposed by CESR and CEBS[4]. Since this potential gap cannot be tackled within the given legal framework and keeping in mind that the behaviour of market participants can change, the Commission should initiate appropriate action to explore the possibility to amend the Electricity and Gas Directives to close this gap in case of a significant market share of these transactions or an identifiable trend to avoid regulation using this regulatory gap.

Transactions in the scope: supply contracts and derivatives

32. The instruments in the scope of Articles 22f/24f also need to be analysed. The record-keeping requirements cover transactions in supply contracts and derivatives. The proposed amendments to Article 2 of the Electricity Directive include definitions for "electricity supply contract" in No. 32 and "electricity derivative" in No. 33. According to these proposed definitions, "electricity supply contract" means a contract for the supply of electricity but does not include an electricity derivative, and "electricity derivatives" shall cover all financial instruments covered by sections C(5), C(6) and C(7) of Annex I of MiFID[5].

33. According to Article 4(1)(17) of MiFID, financial instruments mean instruments specified in Section C of Annex I of MiFID. Sections C(5), (6) and (7) of Annex I cover the following derivatives[6] relating to the commodities, including electricity and gas:

C(5): Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event);

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[4] See http://www.cesr.eu/index.php?page=document_details&id=5306&from_id=53.

[5] In the amended Gas Directive the same definitions are provided for the terms "gas supply contract" and "gas derivative".

[6] MiFID does not define the term "derivatives". Rather, it is used in the context of the description of the term "financial instruments". However, it can be derived from the formulation "any other derivatives" that options, futures, swaps, forwards are considered to be derivatives. Furthermore, all other kinds of derivatives are considered to be financial instruments if they fulfil the specific conditions laid down. On the other hand, transactions in the commodity itself such as spot contracts are not covered by the term "financial instrument".

C(6): Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market and/or an MTF;

C(7): Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise above-mentioned and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls.

34. In other words, like in MiFID, the term "derivative" used in the Third Energy Package covers cash-settled derivatives (or at least those with an option to settle in cash) irrespective whether they are traded on a regulated market, an MTF or OTC. Furthermore, it includes derivatives traded on an RM or MTF in the EEA which may be physically settled.

35. As regards the third category, according to the illustrative conditions set by Article 38 of the MiFID Implementing Regulation, standardised OTC derivatives which can be physically settled and which are cleared by a clearing house or similar entity or provide for margin payments are generally covered as financial instruments. This includes contracts which are traded on a third country trading facility if the other conditions are met.

36. The following description sets out the respective provisions in detail:

Article 38(1) of the MiFID Implementing Regulation specifies the derivative contracts covered by Annex I Section C(7) of MiFID, i.e. options, futures, swaps, forwards and any other derivative contracts not traded on a regulated market or MTF which can be physically settled. This covers a contract other than a spot contract[7] if it satisfies all of the following conditions:

(a) it meets one of the following sets of criteria:

(i) it is traded on a third country trading facility that performs a similar function to a regulated market or an MTF;

(ii) it is expressly stated to be traded on, or is subject to the rules of, a regulated market, an MTF or such a third country trading facility;

(iii) it is expressly stated to be equivalent to a contract traded on a regulated market, MTF or such a third country trading facility;

[7] According to Article 38(2), a spot contract for the purposes of Article 38(1) means a contract for the sale of a commodity, asset or right, under the terms of which delivery is scheduled to be made within the longer of (a) two trading days or (b) the period generally accepted in the market for that commodity, asset or right as the standard delivery period. As a counter exemption, a contract is not considered to be a spot contract if, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the underlying is to be postponed and not to be performed within this period.

(b) it is cleared by a clearing house or other entity carrying out the same functions as a central counterparty, or there are arrangements for the payment or provision of margin in relation to the contract;

(c) it is standardised so that, in particular, the price, the lot, the delivery date or other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates.

Article 38(4) specifically excludes a contract if it is entered into with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network, and it is necessary to keep in balance the supplies and uses of energy at a given time.

37. Thus, some electricity and gas derivatives (i.e. electricity and gas derivatives with cash settlement, those traded on regulated markets or MTFs which can be physically settled and the derivatives covered by Article 38 of the MiFID Implementing Regulation) are considered to be financial instruments ("MiFID derivatives"). However, some OTC-derivatives which can be physically settled fall outside the scope of MiFID.

38. This raises two further questions:

a) Are the derivatives excluded from MiFID also to be excluded from the record-keeping requirements regarding derivatives under Articles 22f/24f?

b) Should the remaining non-standardised OTC contracts with physical settlements be considered as "supply contracts" or do they fall outside the Third Energy Package?

39. Under the current wording of the definition in the Third Energy Package, "derivatives" excluded from MiFID are definitely excluded from the record-keeping requirements regarding "derivatives" since this has been aligned with the MiFID term (see definition above in paragraph 32). However, OTC derivatives falling outside MiFID can be physically settled, i.e. they are used for actual supply of electricity/gas. Thus, they can be considered to be "supply contracts". At first sight, this interpretation may be thwarted by the definition of supply contracts in the Third Energy Package because this excludes "energy derivatives". However, it can be argued that the definition of "energy derivatives" again only includes the derivatives in Section C (5) to (7) of Annex I of MiFID and, thus, the instruments with physical delivery falling outside MiFID are not derivatives but transactions in supply contracts.

40. OTC forwards with physical settlement and no clearing house/central counterparty clearing are a very common instrument in the electricity market. They could be standardised, i.e. follow the same specification as products traded on an RM or MTF regarding the product to be delivered, the lot, the maturity and refer to prices established at RM or MTFs, or they could be non-standardised.

41. CESR and ERGEG are therefore of the view that these non-MiFID "OTC derivatives with physical settlement" are included in the scope of the Third Energy Package.

Record-keeping obligations under MiFID

Scope of MiFID record-keeping requirements[8]

42. Investment firms are obliged to keep records of all services and transactions in financial instruments undertaken by them for at least five years. Regarding data on transactions, Article 25(2) of MiFID specifies that investment firms have to keep at the disposal of the securities regulators the relevant data relating to all transactions in financial instruments which they have carried out, whether on own account or on behalf of a client. As outlined above, this may include, in some national markets, a big share of all electricity and gas derivatives, i.e. beside electricity and gas derivatives with cash settlement and those traded on regulated markets or MTFs which can be physically settled also the derivatives covered by Article 38 of the MiFID Implementing Regulation.

43. The records to be kept have to be sufficient to enable the securities regulator to monitor compliance of investment firms with the requirements under MiFID, in particular all obligations with respect to clients or potential clients.

44. Articles 13(6) and 25(2) of MiFID provide general rules for record-keeping of transactions which are very similar to the requirements proposed in paragraph 1 of Articles 22f/24f of the Third Energy Package. In contrast to the Third Energy Package, MiFID allows only the securities regulator to dispose of the data and the record-keeping requirements are not restricted to transaction with certain clients and/or counterparties while the Third Energy Package explicitly foresees a possibility for direct access to the data by the Commission and national competition authorities in addition to the energy regulators and limits the record-keeping obligations to energy supply contracts and derivative transactions undertaken with wholesale customers and other specified operators. In Article 13(6), MiFID also gives some indication about the purpose of the record-keeping obligations ("enable the competent authority to monitor compliance") whereas a legislative purpose is not explicitly mentioned in Articles 22f/24f of the Third Energy Package.

Persons in the scope: investment firms

45. Persons covered by the record-keeping obligations under MiFID are investment firms. Investment firms are legal or natural persons whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis. This generally also includes all persons acting on own account.

46. There are some exemptions from the scope of MiFID which are relevant for commodity derivatives firms. These exemptions include mainly Article 2(1)(b) for the exclusive provision of services within a group, Article 2(1)(d) for the exclusive trading on own account other than by market making, Article 2(1)(i) for dealing on own account or provision of investment services to clients of the main business (e.g. energy production) and Article 2(1)(k) for persons whose main business consists in dealing on own account in commodities and/or commodity derivatives.

[8] For details of the wording of the relevant provisions in MiFID and its implementing measures please see Annex II.

47. The responses to the fact finding questions which CESR and ERGEG delivered to the Commission on 30 July 2008 have shown that there were relatively few investment firms which were at the same time considered as supply undertakings (the fact finding explicitly excluded credit institutions). However, this figure largely depends on the national law, the structure of the group of the investment firm and its business organisation.

48. The exemptions from MiFID for those firms trading commodity derivatives are currently reassessed by CESR and CEBS (Committee of European Banking Supervisors) in the framework of a mandate of the Commission in the context of an Article 65 MiFID review. CESR and CEBS propose in their advice to the Commission that the exemptions would be modified but they would continue to deal with the specific commodity related concerns about the incidental provision of investment services and own account trading. It can therefore be concluded that also in the future some commodity derivative firms, particularly those dealing on own account, will continue not to be covered by the record-keeping obligations under MiFID (but by the Third Energy Package if considered as supply undertakings).

49. ***Purpose of record-keeping obligations under MiFID***

50. Records of orders and transactions have multiple purposes under MiFID. They are used for the supervision of the investment firm's compliance with conduct of business rules such as client order handling or best execution and its compliance with the rules on conflict of interest management. They are also used to monitor that investment firms act honestly, fairly and professionally and in a manner which promotes the integrity of the market. They can also provide evidence in investigations regarding market abuse.

51. Securities regulators utilise the records to assess the conduct of market participants on a case-by-case basis. The records are usually checked during on-site inspections by the competent authority or on behalf of the competent authority by a third party (e.g. an external auditor). Securities regulators also have the power to demand copies of any document.

Data to be kept under MiFID

52. Regarding the data to be kept on transactions in financial instruments executed by investment firms[9], Article 8 of the MiFID Implementing Regulation requires the following details to be kept:

- name or other designation of the client;
- trading day and time, buy/sell indicator, instrument identification, unit price and price notation, quantity and quantity notation, counterparty and venue identification[10];
- total price (being the product of the unit price and the quantity);

[9] If the investment firm does not execute the transaction itself but only transmits an order to another person for execution, it has to keep the following details: name or the name or other designation of the client whose order has been transmitted; name or other designation of the person to whom the order was transmitted; terms of the order transmitted; date and exact time of transmission.

[10] The record-keeping provisions of MiFID make reference to some of the fields included in Table 1 of Annex I of the MiFID Implementing Regulation for purposes of transaction reporting; for details see Annex II below.

- nature of the transaction if other than buy or sell; and
- natural person who executed the transaction or who is responsible for the execution.

Methods and arrangements for retention of data under MiFID

53. Besides the content of the records of transactions in financial instruments, MiFID also addresses methods and arrangements for record-keeping by specifying general requirements regarding the retention and accessibility of the records for the competent authority.

54. According to Article 51(2) of the MiFID Implementing Directive[11] records must be retained in a medium that allows the storage of information in a way accessible for future reference by the competent authority and in such a form and manner that the following conditions are met:

(a) the competent authority must be able to access them readily and to reconstitute each key stage of the processing of each transaction;

(b) it must be possible for any corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained; and

(c) it must not be possible for the records otherwise to be manipulated or altered.

55. This provision provides a flexible framework for the retention of records without prescribing the medium, form and manner of storing the information in detail. It mainly requires that the information must be stored in an appropriate way to be accessible for future reference by the competent authority. The securities regulator must be able to readily access the information, to easily ascertain any corrections and amendments and the prior content of the records. Furthermore, records should not be manipulated or altered without a possibility to trace the amendments.

Recommendations for guidelines on record-keeping under the Third Energy Package

56. The Commission's mandate on record-keeping basically asks CESR and ERGEG to evaluate whether there should be a difference in record-keeping obligation regarding electricity and gas derivatives between MiFID and the Third Energy Package. It also asks which methods and arrangements as well as content of the records the Commission should specify in its supplementing guidelines for record-keeping of transactions in supply (spot) contracts and derivative contracts under paragraph 4 of Articles 22f/24f of the Third Energy Package. Lastly, on the format, the Commission specifically asks for a recommendation on how records of spot transactions of non-investment firms would be most efficiently kept.

57. Since most of the answers to these questions depend on the purpose of the record-keeping obligations under the Third Energy Package, the possible use of records kept is discussed first (Part 1). The advice then analyses which content is needed in the context of the Third Energy Package and whether the details to be kept under MiFID are also adequate for transactions in electricity and gas derivatives (as well as supply contracts) under the Third

[11] Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, OJ L 241, 2.9.2006, p.26.

Energy Package (Part 2). Finally, it analyses what methods and arrangements, including the format of the records to be kept, are adequate and proportionate (Part 3).

58. Where appropriate, the report discusses the benefits and drawbacks of different regulatory options.

Part 1: Purpose of record-keeping obligations under the Third Energy Package

59. In order to make a recommendation on the content of the supplementing guidelines for record-keeping under the Third Energy Package to the Commission, the purpose of the record-keeping obligations in the Third Energy Package has to be considered. A description of the records to be kept will naturally be linked to any purpose identified.

60. Records of transactions generally have the purpose to enable a competent authority to check a firm's compliance with legal requirements. The organisational arrangements of a firm to ensure compliance always include record-keeping requirements. Otherwise, compliance cannot be checked by any competent authority in charge of supervision. This is reflected by the inclusion of record-keeping provisions on transactions in energy supply contracts and derivatives within the part describing the competences and powers of national regulatory authorities within the Third Energy Package.

61. In the context of the Electricity and Gas Directives, record-keeping obligations may also have to be considered in the light of the regulatory authorities' main objectives, duties and powers[12]. The fact that national competition authorities and also the Commission may demand access to the records kept by supply undertakings implies that the records could also be used to assess the conduct of market participants on an ad-hoc basis for competition cases.

62. Additional purposes of the new record-keeping obligations included in the Third Energy Package may be derived from various (new) competences and responsibilities of energy regulators laid down in the sector legislation:

- Applicable Electricity and Gas Directives state that energy regulators "*shall (…) be responsible for ensuring (…) effective competition and the efficient functioning of the market, monitoring in particular (…) the level of (…) competition*".

- Recital 2.1 of the explanatory memorandum of the Third Energy Package Directives stipulates that "*Electricity and gas differ fundamentally from other traded goods because they are network based products that are impossible or costly to store. This makes them sensitive to market abuse and regulatory oversight over undertakings active in the electricity and gas market needs to be increased. Regulators therefore need to have access to information on the operational decisions of the companies. It is proposed to oblige companies to keep records of the data related to their operational decisions for five years at the disposal of national regulatory authorities, as well as at the disposal of competition authorities and the Commission, so that these authorities are able to control effectively allegations of market abuse. This will limit the scope of market abuse, increase the trust in the market, and thereby stimulate trade and competition. (…) To enable them to perform their duties, regulatory authorities would be given the powers to investigate, to request all necessary information and to impose dissuasive sanctions.*"

[12] For details on the relevant provisions on the objectives, duties and powers of the energy regulators please see Annex III.

- Articles 22b/24b of the Third Energy Package state that one of the main policy objectives of regulatory authorities is to ensure the "*efficient functioning of their national market, and to promote effective competition in cooperation with competition authorities*".

- In addition, under Articles 22c(1)(i)/24c(1)(i) of the Third Energy Package energy regulators have to "*monitor the level of market opening and competition at wholesale and retail levels, including on electricity exchanges (…) as well as any distortion or restriction of competition in cooperation with competition authorities, including providing any relevant information, bringing any relevant cases to the attention of the relevant competition authorities.*"

63. Thus, energy regulators are supposed to monitor electricity and gas markets in order to avoid any distortion that could threat market opening and competition.

64. In order to fulfil their duties, energy regulators are given additional powers in paragraph 3 of Articles 22c/24c of the Third Energy Package. The regulatory authority shall have at least the following powers:

(a) to issue binding decisions on electricity and gas undertakings;

(b) to carry out in cooperation with the national competition authority investigations of the functioning of electricity markets, and to decide, in the absence of violations of competition rules, of any appropriate measures necessary and proportionate to promote effective competition and ensure the proper functioning of the market, including virtual power plants;

(c) to request any information from electricity undertakings relevant for the fulfilment of its tasks;

(d) to impose effective, appropriate and dissuasive sanctions to electricity undertakings not complying with their obligations under this Directive or any decisions of the regulatory authority or of the Agency;

(e) to have appropriate rights of investigations (…).

65. Record-keeping obligations are therefore required to enable energy regulators and competition authorities to investigate the "*operational decisions*" of undertakings in order "*to control effectively allegations of market abuse*" and to assess possible "*distortion or restriction of competition*".

66. Record-keeping obligations could also be used for investigations in the context of potential obligations of energy regulators under a possible future regime for the supervision of market abuse in the energy sector legislation as proposed by CESR and ERGEG in their advice on question F. 20 of the mandate.[13]

67. In summary, record keeping requirements for transactions in supply contracts and derivatives for supply undertakings serve several purposes. They allow the relevant regulatory authorities to check compliance with various legal requirements (e.g. trading rules, competition rules) and carry out investigations on the efficient functioning of

[13] See http://www.cesr.eu/index.php?page=document_details&id=5270&from_id=53; http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_CONSULT/CLOSED%20PUBLIC%20CONSULTATIONS/CROSS_SECTORAL/Financial%20Services/Market%20abuse%20framework.

electricity and gas markets on an ad hoc/case-by-case basis in case of a suspicion of non-compliance or inefficiencies. The Third Energy Package does not foresee any obligations on regulatory authorities to provide evidence for suspicions in case access to records is required by them.

68. Regarding transaction reporting or other forms of transmission of information, the Third Energy Package does not include any requirements. Thus, CESR and ERGEG have not yet analysed the costs and benefits of frequent, periodic transaction reporting. CESR and ERGEG recognise that deciding on an adequate system for transaction reporting would demand an in-depth analysis including proper cost-benefit considerations, and if implemented, detailed planning and an appropriate implementation phase both for supply undertakings and for regulatory authorities. However, a frequent, periodic reporting of transactions and/or positions may be a useful tool for monitoring the integrity of the market. In this respect, CESR and ERGEG see value in reconsidering this issue at a later stage, possibly in connection with a potential EU regime for market abuse as proposed by CESR and ERGEG in their previous advice to the Commission.

Part 2: Content of the record-keeping obligations under the Third Energy Package

Is the content of MiFID record-keeping requirements for derivatives covered by MiFID appropriate for contracts covered by the Third Energy Package?

69. Data to be kept under Articles 22f(2)/24f(2) of the Third Energy Package shall include details on the characteristics of the relevant transactions such as duration, delivery and settlement rules, the quantity, the dates and times of execution and the transaction prices and means of identifying the wholesale customer concerned, as well as specified details of all unsettled electricity supply contracts and electricity derivatives.

70. Under paragraph 4 of Articles 22f/24f of the Third Energy Package, the Commission may adopt supplementing guidelines which define - among others - the content of the data that has to be kept. The mandate asks CESR and ERGEG to give recommendations about which content should be specified in the Commission's guidelines. The recommendation should take into account the content and data specified by Table 1 of Annex I of the MiFID Implementing Regulation and, if necessary, differentiate between the content of spot contracts and derivatives.

71. Respondents to the Call for Evidence did not express a uniform view on the potential content of the record-keeping requirements under the Third Energy Package.

72. Three respondents pointed out that the same harmonised set of rules as provided for in MiFID to transactions in financial instruments should also be applied to spot market transactions. One of them pointed out that the specificities of auction based spot markets have to be taken into account while another one of them stressed that the obligation to keep records should be understood as extensively as possible, including all supply and derivative contracts no matter where they were concluded. A fourth contributor also supported the retention of data on both spot and derivatives markets for up to five years, provided the rules for retention of this data are cost-efficient and proportionate.

73. On the contrary, one respondent was of the opinion that the proposed record-keeping provisions should be different from the record-keeping obligations already in force under MiFID. The same record-keeping obligations in electricity and gas markets - including spot and derivatives markets - would not be proportionate in the context of the Third Energy Package. It would appear as an excessive power of intervention in commercial activities and decisions that fall outside of the area of competence of energy regulators.

74. Two contributors pointed out that the record-keeping arrangements should not duplicate the large amount of data already available from other entities, such as exchanges or brokers. One of them held that there should be a harmonised approach for record-keeping; particularly one set of data should be required to be kept for different purposes as befitting the different directives' aims.

75. ESME (European Securities Markets Expert Group) also received a mandate of the Commission asking for advice on the content and format of the record-keeping obligations under the Third Energy Package. In its advice to the Commission in July 2008, ESME stressed that the record-keeping obligations in the Third Energy Package are not linked with a MiFID-style transaction reporting. Record-keeping obligations therefore should be clearly distinguished from periodic reporting to supervisors. As a consequence, ESME argued in favour of a principles-based approach and rejected a "rigid prescribed-format approach". However, they also suggested specifying a minimum content of information which has to be recorded, including information on non-standardised products. Ideally, the content of the records to be kept for securities regulators and energy regulators respectively should be the same. This would also facilitate a potential information exchange between these regulators.

76. However, ESME was not in favour of uniform prescribed fields such as described in Table 1 of Annex I of the MiFID Implementing Regulation - at least if this is used as a table for transaction reporting purposes. Generally, they consider the development of uniform fields difficult mainly due to non-standardised trades with complex options. In this context, concerns about the development of unique codes to identify each traded product were raised. ESME therefore proposed to specify a minimum content of information to be recorded in order to ensure that regulators can access this information upon request within a reasonable timeframe. In order to mitigate burdens for supply undertakings, ESME also proposed to limit the scope of application of the record-keeping obligations, either by excluding small and medium sized firms which are not relevant for the price formation process or to exclude certain transactions.

77. CESR and ERGEG approached the question which minimum content should be recorded by determining which information would be needed to understand the transactions undertaken by supply undertakings. Based on the responses to the consultation, CESR and ERGEG recommend a principles based approach on the content of the records to be kept leaving some flexibility regarding the specific content to be kept. The 'minimum content list' is intended to provide legal certainty on what is considered to be necessary to understand the transaction, particularly for non-standardised contracts. The list does not require the development of uniform fields with unique codes.

78. Respondents to the consultation did not provide a uniform view on the proposed minimum content. Seven respondents specifically agreed with the minimum content. Others made general proposals as to the possibility to distinguish between standardised contracts where a lot of the specific contents mentioned could already be derived from the contract specifications included in the "name of the contract". Some demanded more explanations of

some of the specific pieces of contents to be kept. Several respondents were sceptical about the usefulness and practicality of some items of information such as indexation formula, counterparty ID, person responsible for execution, load type, quantity notation and unit price.

79. In response to some of these concerns, CESR and ERGEG reiterate the importance to keep the indexation formula of complex contracts. Since delivery of this information to the regulators may be difficult, CESR and ERGEG note that regulators should at least have access to this information on a case-by-case basis for the purpose of investigations, i.e. the information does not have to be provided in an electronic format as requested for less complex data on transactions. The retention of this information does not seem to be too burdensome since it must be available to the supply undertaking for price calculation anyway. Furthermore, the specification of the load type is an important piece of information which cannot be omitted. The fact that the hours included in the "peak load" or the "base load" may differ from one Member State to another does not seem to create practical problems which could not be overcome. Firstly, national regulators will mostly be interested in contracts which were traded and/or physically delivered within their territory and therefore refer to the same definition of "base" or "peak". Secondly, for the majority of standardised contracts, the load type is included in the contract specifications. Regulatory authorities would not expect these to be converted to a period used in another jurisdiction.

80. The concern about a missing unique European code to identify the counterparty can be mitigated by the requirement to keep records of the precise name of the counterparty which should be sufficient to accurately identify it. In case of an involvement of a Central Counterparty (CCP), it should at least be possible to derive from the records the information that a certain CCP was involved.

81. CESR and ERGEG agree with the respondents to the consultation that information about the person executing the transaction seems to be relevant in the MiFID context (e.g. compliance with order handling rules, conflict of interest management, rules on personal transactions), whereas for supply undertakings this information is not proposed to be part of the minimum content. For some contracts (e.g. transactions in a number of the same standardised futures contracts) the unit price and the quantity with quantity notation seem to be useful information to keep. Where relevant, this information required under MiFID's record keeping requirements should also be kept by supply undertakings.

82. CESR and ERGEG therefore recommend that in addition to basic information such as the counterparty identification, the commodity type or the amount of energy to be delivered, the data to be kept under Articles 22f(2)/24f(2) shall include - among others - the subsequent details on the characteristics of the relevant transactions for the following reasons:

    a) Trading day and time: on very volatile markets such as electricity and gas, the price of a transaction cannot be assessed without knowing accurately the date and time of the transaction; moreover, this information is required to detect complex price manipulations.

    b) Pricing information: to understand the contracts, information on pricing is necessary. This may be a firm fixed price, a floating price, an indexation formula on various price indices, or a fixed price and a strike price for an option. The information should also indicate the price notation (i.e. the currency). If the transaction includes several contracts with the same contract specifications, this information should also include an indication

of the unit price (e.g. of the futures contract) and the number of these contracts included in the transaction ("quantity").

c) Delivery period (start/end dates/times): since electricity and gas cannot be easily and cheaply stored, prices vary depending on the expected date and time of delivery.

d) Delivery profile: since prices vary depending on the date and time of the delivery, the contract price cannot be analysed without knowing the time profile of the delivery. This is described by the list of delivery periods and associated electricity or gas quantities to be delivered during each period. Standard profiles, such as "Baseload", "Peakload", "Off-peak", can also be used to describe most standardised products.

e) Delivery point: since congestions do not allow for a free exchange of electricity and gas between Member States and sometimes even within one Member State, the same commodity usually has different values – and, consequently, different prices – depending on the location where the energy is delivered. The delivery point can be a physical point (physical location on the system) or a virtual point or zone (notional hub).

83. The table below summarises on a high level basis the contents which CESR and ERGEG consider necessary for the purposes of the record-keeping provisions under the Third Energy Package, particularly to understand non-standardised contracts:

Compulsory contents	Description	Energy markets: electricity or gas	Relevant for spot or derivatives contracts
Trading day	Date on which the transaction was concluded.	Both	Both
Trading time	Time at which the transaction was executed in the local time of the place of incorporation of the supply undertaking.	Both	Both
Buy/Sell indicator	Identifies whether the transaction was a buy or sell from the perspective of the electricity or gas supply undertaking which is making the record.	Both	Both
Commodity type	Electricity or gas.	Both	Both
Counterparty identification	An identification of the counterparty of the transaction.	Both	Both

Compulsory contents	Description	Energy markets: electricity or gas	Relevant for spot or derivatives contracts
	In the absence of a unique European code[14], this could be the precise name of the counterparty. If a CCP was involved in the transaction, the relevant CCP should be mentioned.		
Price elements	Price components which indicate the value of the contract. As relevant, this should include the unit price (e.g. price per derivative contract) and the price notation (i.e. the currency in which the price is expressed).	Both	Both
Quantity	Where relevant, number of contracts included in the transaction.	Both	Both
Daily or hourly quantity	Daily or hourly quantity in MWh (Megawatthours) which corresponds to the underlying commodity.	Both	Both
Load type	Product delivery profile: baseload, peak, off-peak, block hours or other which corresponds to the delivery periods of a day.	Both	Both
Delivery point	Physical or virtual point[15] where the delivery takes place.	Both	Both
Delivery Start-Date and Time	Beginning date and time of energy delivery.	Both	Both
Delivery End-Date and Time	End date and time of energy delivery.	Both	Both

[14] As of today, there is no unique European code for the identification of a counterparty in the energy markets. In some national markets TSOs are using national identification codes for each market player.

[15] A virtual point is a place where delivery occurs without consideration of the physical transport of energy (e.g. in France, PEGs (Points d'Echange de Gaz) are virtual points). In Belgium, Zeebrugge is a physical point of delivery where market players have the responsibilities for gas transport.

Compulsory contents	Description	Energy markets: electricity or gas	Relevant for spot or derivatives contracts
Option indicator	Indication whether it is a buy or a sell option (i.e. call or put).	Both	Derivatives
Swap indicator	Indication whether the transaction was a swap or not.	Both	Both
Indexation formula	Price indexation formula of the energy which is delivered. Indexed contracts are based on indexation formulas and multiplying coefficients which are used for the calculation of the value of the contract.	Both	Derivatives
Venue identification	Identification of the venue where the transaction was executed, specifying at least the precise name necessary to identify each individual platform (i.e. regulated market, MTF, spot exchange, broker). However, for bilateral OTC transactions without involvement of an intermediary, the identification as "OTC" together with the counterparty identification shall suffice.	Both	Both

84. On specific contents such as "option indicator" and "indexation formula", it is generally recognised that derivatives are mostly concerned. Nevertheless, as regards the content "swap indicator", a swap can possibly be negotiated on spot contracts and is therefore not only relevant for contracts with delivery in the future.

85. Comparing the contents of records which seem to be necessary for a clear understanding of the electricity and gas markets with the contents of records to be kept under MiFID[16], the conclusion that can be drawn is that contents for record-keeping under MiFID are not sufficient for the purposes of record-keeping under the Third Energy Package and additional data needs to be kept, particularly regarding spot contracts and non-standardised derivatives. However, the recommended elements of content about transactions in energy supply contracts and derivatives are an integral part of all contracts commonly used for transactions in the electricity and gas market.

[16] For a description of the contents of records to be kept under MiFID, please read Article 8 of the MiFID Implementing Regulation or above paragraph 52.

86. The following table presents the different pieces of content to be kept under MiFID and proposed additional contents which are considered to be necessary (cf. paragraph 83) for a clear understanding of electricity and gas market transactions:

Contents to be kept under MiFID (Article 8 of Regulation No. 1287/2006/EC)	Designation of the client
	Trading day
	Trading Time
	Buy/Sell indicator
	Instrument identification
	Unit price
	Price notation (currency)
	Quantity
	Quantity notation (number of underlying assets)
	Counterparty ID
	Venue ID
	Total price
	Nature of the transaction if other than buy or sell
	Natural person who executed the transaction or who is responsible for the execution
Additional necessary contents	Commodity (Gas or Electricity)
	Daily or hourly quantities
	Load type
	Delivery point
	Delivery Start-Date and time
	Delivery End-Date and time
	Option Indicator
	Swap Indicator
	Indexation formula

87. It should be noted that one additional content proposed is actually mentioned in Table 1 of Annex I of MiFID Implementing Regulation which relates to the "List of fields for reporting purposes", i.e. the "option indicator" (put/call) in No. 13.

88. CESR and ERGEG also considered the option proposed by one market participant during the Call for Evidence that record-keeping arrangements should not duplicate the large amount of data already available from other entities such as RMs, MTFs and brokers. However, this does not seem to be a viable option in order to reduce the record-keeping obligations for entities covered by the Third Energy Package because the legal obligation to keep records only includes supply undertakings and there is no specific requirement on an EU level for other entities such as spot exchanges, RMs or MTFs to keep records at the disposal of energy regulators, national competition authorities and the Commission.

89. CESR and ERGEG note that, as a principle, supply undertakings should be able to extract all necessary information to understand the contract from the records to be kept. The minimum list is of particular relevance for non-standardised contracts and spot transactions. If specific contents included in the minimum list can already be derived from the contract specifications (e.g. the name of a standardised contract), the principles based approach means that it is not compulsory to separately keep the contents that can be derived. Furthermore, CESR and ERGEG note that the specific items of information (e.g. indexation formula) naturally only have to be kept where they are relevant for the specific contract.

90. The proposal of CESR and ERGEG that supply undertakings should be obliged to keep the above mentioned additional minimum contents on transactions in supply contracts and

derivatives in their records may lead to different contents of the records on MiFID financial instruments kept by investment firms and of those records regarding the same instruments kept by supply undertakings subject to the Third Energy Package. Consequently, securities regulatory authorities may also not be able to provide energy regulators under paragraph 7 of Articles 22f/24f of the Third Energy Package with the information that investment firms (which are not supply undertakings) are not legally required to keep. Since the additional information requested is quite generic and includes very common elements of derivative contracts, it is however presumed that - at least for standardised contracts - the records of investment firms often include the additional information anyway. Respondents in the consultation did not specifically elaborate on practical problems involved with this discrepancy.

Part 3: Methods and arrangements for record-keeping

Are general arrangements under MiFID also relevant for Third Energy Package?

91. As described above (cf. paragraph 53 et seq.), Article 51(2) of the MiFID Implementing Directive includes general requirements regarding the retention of records. CESR and ERGEG recommend that the Commission's guidelines include similar general rules as one aspect of the methods and arrangements for record-keeping.

92. In this regard, the Commission's guidelines should at least specify that the arrangements for record-keeping should allow the storage of information for future reference in a way which enables the relevant authorities to have readily and within an appropriate timeframe (e.g. 10 working days) access to them or receive compiled and complete records on request. Furthermore, the methods and arrangements for retention of the records should be protected against any manipulation or hidden alteration and allow for an easy assessment of any corrections or amendments to the content of the records.

Format of records

93. For record-keeping purposes, MiFID does not prescribe any format of the records. Rather, the records have to be kept by means which are available for future reference. It is therefore allowed to retain and store the information about transactions - among others - as paper copies, CDs, DVDs, computer files or other electronic data.

94. The most important requirement under the Third Energy Package is also that regulatory authorities, in case of enquiries or merely for compliance procedures, can effectively access the information kept by companies. Thus, generally any means for record-keeping under MiFID is also suitable to fulfil the record-keeping requirements under Articles 22f/24f of the Third Energy Package.

95. On the basis of the comments received in the consultation, CESR and ERGEG recommend that supply undertakings would be allowed to choose the methods of retaining their records that are most suitable for their business organisation, i.e. in an electronic format or otherwise, provided that they comply with the minimum requirements for the methods and arrangements specified in the Commission's guidelines for data retention (see the general requirements laid down above under D.5). However, on request of the authorities mentioned in paragraph 1 of Articles 22f/24f of the Third Energy Package they should be able to extract the relevant information for the purpose of the inquiry from these records and to send this information from the records in an electronic format to the requesting authorities.

Considering the costs and benefits, supply undertaking should be able, as a minimum, to provide this data at request in an Excel format.

96. CESR and ERGEG are aware that confidentiality of the information has to be ensured during the entire process of transmission and further utilisation of the confidential data. The authorities requesting information should therefore provide for adequate methods and arrangements to secure this. The specific methods in this regard do not need to be harmonised, neither on a national, nor on an EU level.

Response to questions D.4 to D.6:

General considerations relevant for record-keeping obligations

Record-keeping has to be clearly distinguished from transaction reporting or any other form of transmission of information included in the records of supervised firms to competent authorities. Regarding transaction reporting or other forms of transmission of information, the Third Energy Package does not include any requirements. CESR and ERGEG have therefore neither assessed the benefits nor the costs of transaction reporting yet, even if this kind of regular reporting about transactions might be a helpful tool to monitor the integrity of the market. The advice of CESR and ERGEG to the Commission on the content of supplementing guidelines regarding record-keeping does therefore not include any recommendations in this respect. However, it may be sensible to reconsider this issue at a later stage, possibly in connection with a potential EU regime for market abuse as proposed by CESR and ERGEG in their previous advice to the Commission.

Taking into account the wording, structure, purpose and consequences of the options analysed, CESR and ERGEG are of the view that "supply undertakings", which denote the persons subject to record-keeping obligations under the Third Energy Package, include all persons active in the sale or resale of electricity/gas including investment firms and all other firms which physically supply electricity/gas to wholesale or final customers. The advice of CESR and ERGEG therefore is based on this definition of "supply undertaking". The scope of the Third Energy Package consequently covers all persons which conclude spot contracts and derivative transactions with physical settlement. Depending on their authorisation as investment firms, the records to be (additionally) kept by them under the Third Energy Package would cover, for non-investment firms, all supply contracts and derivatives with wholesale customers, transmission system operators as well as, under the Gas Directive, storage and LNG operators or, for investment firms, all contracts with these customers not covered by MiFID. Persons trading exclusively cash-settled financial instruments related to electricity and/or gas as underlying will not be treated as supply undertakings under the Third Energy Package. If they are eligible for an exemption under MiFID, they are not legally required to keep any records, neither under MiFID nor under the Third Energy Package. Although theoretically existent, CESR and ERGEG have no information about the relevance of this gap at present. Information about transactions undertaken by those persons would not be available to any competent authority on the basis of record-keeping obligations. Even though in practice the current market share of these firms and their transactions in terms of amount and volume may be marginal, market participants might try to benefit from the existence of this gap by adjusting their behaviour. For traders cash-settled and physically-settled contracts can be substitutes for each other. Thus it is necessary to monitor the actual

ERGEG therefore recommend assessing the dimension and impact of this regulatory gap taking into account a potential amendment of MiFID exemptions as proposed by CESR and CEBS. Since this gap cannot be tackled within the existing legal framework and keeping in mind that the behaviour of market participants can change, the Commission should take action to explore the possibility to amend the Electricity and Gas Directives in order to close the gap in case of a significant market share of these transactions.

Regarding the instruments falling under the scope of the Third Energy Package, CESR and ERGEG are of the view that all physically-settled energy supply contracts and the financial instruments relating to electricity and gas under MiFID are covered.

D.4: Do regulators believe that there should be a difference between the proposed record-keeping obligations under the proposed amendments to the Electricity Directive and Gas Directive and the existing record-keeping obligations with respect to transactions in electricity and gas derivatives to which investment firms are subject by reason of MiFID (Article 25 and 13(6))?

Having compared the requirements for record-keeping under MiFID with the need of competent authorities under the Third Energy Package to understand transactions in derivative contracts, CESR and ERGEG reached the view that the contents of records to be kept under Articles 13(6), 25(2) of MiFID and Article 8 of the MiFID Implementing Regulation are not sufficient. Thus, additional information has to be kept by supply undertakings also regarding derivative transactions.

D.5: Pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC (the Third Energy Package), what methods and arrangements for record-keeping do CESR and ERGEG consider the Commission should specify as guidelines under the legislation for:

a) transactions in electricity and gas supply (spot) contracts? (To the fullest extent possible this should be a harmonised specification.) If there are any deviations from the obligations relating to commodity derivatives already applicable to investment firms, these should be justified;

b) transactions in electricity and gas derivatives contracts? (To the fullest extent possible this should be a harmonised specification.) If there are any deviations from the recommendations in a), these should be justified.

In answering this question, CESR and energy regulators are asked to consider specifying a single transaction record format based on the content and data to be provided as per Table 1 of Annex I of Regulation EC 1287/2006.

As general methods and arrangements for record-keeping and retention of records, CESR and ERGEG propose to include similar general requirements in the supplementing guidelines of the Commission as specified by Article 51 of the MiFID Implementing Directive.

In this regard, the Commission's guidelines should at least specify that the arrangements for record-keeping should allow the storage of information for future reference in a way which enables the relevant authorities to have readily access to them or receive compiled and complete records upon request. Furthermore, the methods and arrangements for retention of

the records should be protected against any manipulation or hidden alteration and allow for an easy assessment of any corrections or amendments to the content of the records.

As regards the content of the records, CESR and ERGEG are of the view that a principles based approach is most suitable for record-keeping purposes under the Third Energy Package. To a limited extent a different content for records regarding spot and derivative transactions is necessary.

CESR and ERGEG consider it necessary that supply undertakings keep records which include the following minimum information or contract specifications where the relevant minimum information to understand the contract can be easily derived from:

Compulsory contents	Description	Energy markets : electricity or gas	Relevant for spot or derivatives contracts
Trading day	Date on which the transaction was concluded.	Both	Both
Trading time	Time at which the transaction was executed in the local time of the place of incorporation of the supply undertaking.	Both	Both
Buy/Sell indicator	Identifies whether the transaction was a buy or sell from the perspective of the electricity or gas supply undertaking which is making the record.	Both	Both
Commodity type	Electricity or gas.	Both	Both
Counterparty identification	An identification of the counterparty of the transaction. In the absence of a unique European code[17], this could be the precise name of the counterparty. If a CCP was involved in the transaction, the relevant CCP should be mentioned.	Both	Both
Price elements	Price components which indicate the value of the contract. As relevant, this should include the unit price (e.g. price per derivative contract) and the price notation (i.e. the currency in which the	Both	Both

	price is expressed).		
Quantity	Where relevant, number of contracts included in the transaction.	Both	Both
Daily or hourly quantity	Daily or hourly quantity in MWh (Megawatthours) which corresponds to the underlying commodity.	Both	Both
Load type	Product delivery profile: baseload, peak, off-peak, block hours or other which corresponds to the delivery periods of a day.	Both	Both
Delivery point	Physical or virtual point[18] where the delivery takes place.	Both	Both
Delivery Start-Date and Time	Beginning date and time of energy delivery.	Both	Both
Delivery End-Date and Time	End date and time of energy delivery.	Both	Both
Option indicator	Indication whether it is a buy or a sell option (i.e. call or put).	Both	Derivatives
Swap indicator	Indication whether the transaction was a swap or not.	Both	Both
Indexation formula	Price indexation formula of the energy which is delivered. Indexed contracts are based on indexation formulas and multiplying coefficients which are used for the calculation of the value of the contract.	Both	Derivatives
Venue identification	Identification of the venue where the transaction was executed, specifying at least the precise name necessary to identify each individual platform (i.e. regulated market, MTF, spot exchange, broker). However, for bilateral OTC transactions without involvement of an	Both	Both

	intermediary, the identification as "OTC" together with the counterparty identification shall suffice.		

CESR and ERGEG note that, as a principle, supply undertakings should be able to extract all necessary information to understand the contract from the records to be kept. The minimum list is of particular relevance for non-standardised contracts and spot transactions. If specific contents included in the minimum list can already be derived from the contract specifications (e.g. the name of a standardised contract), the principle based approach means that it is not compulsory to separately keep the contents that can be derived. Furthermore, CESR and ERGEG note that the specific items of information (e.g. indexation formula) naturally only have to be kept where they are relevant for the specific contract. For non-standardised contracts, the list of minimum contents remains the same but flexibility can be allowed for complex data, especially as regards potential transmission to the competent authorities.

The divergence between the content of records to be kept by supply undertakings and by MiFID firms which are not supply undertakings does not seem to be a major regulatory gap at first sight. Respondents to the consultation expressed the view that the record-keeping requirements would be sufficient to cover the content of most standardised contracts. However, CESR and ERGEG will monitor the practical implication of this discrepancy, particularly for non-standardised contracts.

D.6: How would this information be most efficiently kept at the disposal of authorities as mentioned under paragraph 1 of Articles 22f/24f in the case of spot transactions and non-investment firms?

On the basis of the comments received in the consultation, CESR and ERGEG recommend that supply undertakings would be allowed to choose the methods of retaining their records that are most suitable for their business organisation, i.e. in an electronic format or otherwise, provided that they comply with the minimum requirements for the methods and arrangements specified in the Commission's guidelines for data retention. However, at request of the authorities mentioned in paragraph 1 of Articles 22f/24f of the Third Energy Package they should be able to extract the relevant information from these records for the inquiry purposes and to send it in an electronic format to the requesting authorities. Considering the costs and the benefits, supply undertakings should be able, as a minimum, to provide non-complex data derived from the records in an Excel format.

CESR and ERGEG are aware that confidentiality of the information has to be ensured during the entire process of transmission and further utilisation of the confidential data. The authorities requesting information should therefore provide for adequate methods and arrangements to secure this. The specific methods in this regard do not need to be harmonised, neither on a national, nor on an EU level.

Section II: Transparency

Questions in Section E of the mandate on transparency

97. The questions in Section E of the Commission mandate deal with transparency. Some of the questions are policy ones: they will be considered in this consultation paper and are highlighted in bold below, namely E.11, E.18 and E.19. The remaining questions are fact-finding ones and advice on them has already been submitted to the Commission and published. However, one of the fact-finding questions (E.17) is also covered in this consultation paper, as CESR and ERGEG used the answer to this question to build their reasoning on question E.18.

11. What guidelines and arrangements do energy regulators propose for the making available of aggregate market data by them under paragraph 3 of Article 22f/24f?

12. What requirements, deriving from national law, are currently put on energy traders, brokers or exchanges to publish information 'post-trade', for example on publishing traded volumes, prices etc?

13. What requirements, deriving from national law, are currently put on energy traders, brokers or exchanges to publish information 'pre-trade', for example on publishing bids to organised markets?

14. Is there a difference in transparency requirements for spot trading compared to future and forward trading? If so, why?

15. Is there a difference in transparency requirements for exchange trading compared to OTC trading? If so, why?

16. What information, other than required by law or regulation, is made public by energy traders, brokers, information services or exchanges?

17. Is access to information on traded volumes and prices equal for all parties active in that market?

18. If not, is unequal access to or general lack of information on trading causing distortion of competition?

19. In light of the findings in the Commission Sector Inquiry on energy and the subsequent study of the electricity wholesale markets, please consider:

a) whether, pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC, greater EU-wide pre- and/or post-trade transparency rules for electricity and gas supply contracts (physical and spot trading) and electricity and gas derivatives would contribute to a more efficient wholesale price formation process and efficient and secure energy markets;

b) whether such transparency arrangements could be expected to effectively mitigate the concerns identified in the Sector Inquiry above;

c) whether uniform EU-wide pre- and post-trade transparency could have other benefits;

d) whether additional transparency in trading could have negative effects on these markets, for example could liquidity in these markets be expected to decrease? Is there a risk that trading could shift to third countries to escape regulation?

e) If you believe that there are risks arising from additional pre- and post-trade transparency requirements, how do you believe that these risks can be mitigated (e.g. aggregation, delay in publication, anonymity)?

EU legislation regarding transparency in the electricity and gas markets

98. This part sets out the EU legal requirements and initiatives with regard to transparency in electricity and gas markets. They have generally been separated into ones which apply to financial instruments (which fall under the scope of MiFID and thus are regulated by securities regulators) and others which apply to the underlying energy product (day-ahead products, not regulated by securities regulators, sometimes regulated by energy regulators). It must be noted that transparency in energy markets can be subject to both securities and energy regulations since many forward contracts fall under the scope of "financial instrument" and some energy regulators may due to national legislation have powers also on forward and futures markets.

EU securities legislation

99. The scope of MiFID only partially covers products traded in energy markets: all intra-day and day-ahead contracts, as well as some physically-settled derivatives fall out of the scope of MiFID (for details see paragraphs 33 to 37 in Section I on record-keeping).

100. MiFID imposes only very generic obligations with respect to the pre- and post-trade transparency for energy derivatives covered by MiFID. The same situation applies to all other financial instruments, except to shares admitted to trading on an EEA regulated market, as described below. Both regulated markets and MTFs are required to have rules and procedures for "fair and orderly" trading (Articles 39(d) and 14(1) of MiFID), while MTFs have to make available, or be satisfied that their users can access sufficient information to make investment judgements (Article 14(2) of MiFID). These requirements can be interpreted to cover pre- and post-trade transparency requirements. Trading on those markets takes place for fairly standardised products. There are no pre- or post-trade transparency obligations under MiFID for investment firms with respect to energy derivatives.

Commission initiatives for securities legislation

101. Article 65(1) of MiFID requires the Commission to report on the possible extension of the scope of that Directive to transactions in financial instruments other than shares. In April 2008 it concluded that there does not seem to be any need to expand the scope of MiFID's

trade transparency requirements to financial instruments other than shares and voluntary initiatives in the retail bond market[19]. However, it carved out of the scope of its report the matters covered within the scope of this mandate. CESR and ERGEG are also asked to consider the views expressed during the Commission's Call for Evidence on commodities and the conclusions reached in the subsequent feedback statement.[20] In summarising the responses to its Call for Evidence on the review of commodity derivatives (published on 14 August 2007), the Commission noted that there was no enthusiasm for extending the type of pre- and post-trade transparency arrangements for shares in MiFID to commodity derivatives. To the extent that respondents thought there was a role for regulatory intervention in this area, it was mainly to suggest the disclosure of aggregate data by trading venues.

102. CESR and ERGEG were asked by the Commission in the mandate to consider the advice on commodities markets and trading given separately by CESR and CEBS in the context of the Commission's ongoing review under Article 65(3) of MiFID, and Articles 48(2) and (3) of Directive 2006/49/EC on Capital Adequacy of Investment Firms and Credit Institutions. CESR and CEBS delivered separately initial advice to the Commission during 2007 and joint advice in October 2008 (Ref. CESR/08-752). CESR and CEBS conclude, but not unanimously, that they do not believe that there is much benefit to be gained by mandating through legislation greater pre- and post-trade transparency in commodity derivatives markets, whether of the sort which applies to equities under MiFID or aggregate information about transactions or positions. They continue by stating that it is of course open to market participants to build on existing market-driven transparency. CESR and CEBS' advice covers other commodity derivatives covered by MiFID except electricity and gas derivatives.

EU energy legislation and ERGEG's prior work

103. In the European energy regulation, transparency is covered by Regulation 1228/2003 for electricity and Regulation 1775/2005 for gas. These regulations focus on fundamental data transparency (infrastructures and to some extent demand/supply). No obligations exist regarding energy trading.

104. In the public position paper "[Third] legislative package input – transparency requirements for electricity and gas – a coordinated approach", ERGEG advises that "a good level of transparency is usually provided" by platforms "but bilateral trade is still not sufficiently covered. Therefore wholesale markets shall be included in the new transparency legislation as well".

105. ERGEG has also defined guidelines regarding transparency. In electricity, these guidelines (ERGEG "Guidelines for Good Practice on Information Management and Transparency in Electricity Markets" (Ref: E05-EMK-06-1)) suggest the disclosure of, at least:

- Aggregated supply and demand curves, prices and volumes on RMs, MTFs (except brokers that operate MTFs) and spot exchanges;
- Prices and volumes on OTC markets.

106. In these Guidelines, ERGEG wrote concerning transparency of trading that "Information transparency in the wholesale market is crucial for fostering effective competition in the liberalised electricity market (both nationally and across borders). Information on the

wholesale market will be of importance to suppliers, generators, energy traders and (large) customers".

107. These guidelines have also been discussed and further developed within the framework of the so called Transparency Reports in Central Western[21], Central Eastern[22] and Northern[23] Electricity Regional Initiatives. While most of the recommendations tackle transparency of infrastructures, some apply to transparency of trading in electricity and gas markets.

Question E.11: What guidelines and arrangements do energy regulators propose for the making available of aggregate market data by them under paragraph 3 of Articles 22f/24f?

108. Question E.11 specifically asks energy regulators what guidelines they would propose for the making available of aggregate market data by them (under paragraph 3 of Articles 22f/24f). Therefore, throughout this section only the view of ERGEG is expressed.

109. To answer to question E.11, firstly the current level of transparency on electricity and gas wholesale markets in Europe will be presented. Secondly, the aim of transparency of aggregate data, and the costs and benefits that can arise from it are explained. Thirdly, the recommendations from ERGEG after analysing several options for the publication of aggregate data on trading are presented.

Current level of transparency on electricity and gas wholesale markets

110. Currently, a partial transparency of aggregate data exists on European electricity and gas wholesale markets because MiFID sets general obligations on RMs and MTFs for fair and orderly trading and some platforms publish data on trading (under national obligations or on a voluntary basis).

111. As mentioned before, applicable Electricity and Gas Directives currently do not include any mandatory transparency provisions for trading. The only legislation covering general transparency obligations for some of the trading on energy markets is MiFID.

112. As described in paragraph 100 above, MiFID created a new comprehensive harmonised pre- and post-trade transparency regime for shares admitted to trading on an EEA regulated market which covers trades in these shares executed on regulated markets, MTFs or OTC. Regarding other financial instruments including MiFID energy derivatives, MiFID contains generic obligations that can be interpreted to cover trade transparency. Both regulated markets and MTFs are required to have rules and procedures for 'fair and orderly' trading according to Articles 39(d) and 14(1) of MiFID, whilst MTFs have to make available, or be satisfied that their users have access to sufficient information to make investment judgements (Article 14(2) of MiFID). There are no transparency obligations for investment firms (dealing on own account or acting in a brokerage capacity) in respect of MiFID energy derivatives.

113. Thus, the coverage of MiFID in relation to energy markets is the following:

- Some energy derivatives: Day-ahead and intraday products are not in the scope of MiFID. Moreover, not all forward contracts are financial instruments under MiFID.

- Regulated markets and MTFs: No transparency obligations apply for investment firms not operating an MTF.

- General rules relating to 'fair and orderly' trading: There is no minimum set of pre- or post-trade information to be disclosed.

114. As a consequence, the current MiFID framework does not establish a global and harmonised level of market transparency for energy trading in Europe.

Current level of transparency observed on European electricity and gas wholesale markets

115. Although MiFID's obligations relating to fair and orderly trading do not cover all trading methods and products, most platforms publish information on transactions executed via their systems. This is either voluntary, for example to attract liquidity to their respective platforms, or imposed by national legislation.

116. The level of information about a market thus depends on the distribution of trading between the different trading venues (e.g. on exchanges or bilaterally). Indeed, trading via platforms is generally more transparent than direct bilateral trades. On national markets where all trading goes through a mandatory pool, trading is totally transparent. On markets where trading is mostly brokered, a significant amount of information is available to brokers' customers. For some national markets where most of trading takes place on a direct bilateral basis, hardly any data is available (this is however not always the case since in some markets like the Romanian ones, direct bilateral trades are transparent).

117. This is confirmed in Platts' reply to the Call for Evidence "*a large portion of trade is still conducted over-the-counter and many of these trades are confidential and/or non-standard.*" That is why "*Platts cannot give an indication of total volumes traded for many European electricity and gas markets, nor do we believe can any information provider at this point in time.*"

118. The table below describes the general level of transparency of each method of trading in energy markets.

Trading methods	**RM or MTF (including brokers operating an MTF)**		**Spot exchanges (not qualifying as an RM or MTF)**		**OTC via brokers not operating an MTF**		**OTC : Direct bilateral** **No intermediary**	
Settlement **Maturity**	**Physical**	**Cash**	**Physical**	**Cash**	**Physical**	**Cash**	**Physical**	**Cash**
Day-ahead + intraday	High for venues that are not brokers' platforms Medium for brokers (depends on the broker)		High		Depends on the broker		Less uniform. Depends on the circumstances	
Energy derivatives	High for venues that are not brokers' platforms Medium for brokers (depends on the broker)		n.a.		Depends on the broker		Less uniform. Depends on the circumstances	

119. This table shows that the level of transparency depends mainly on the trading methods or venues. It also reflects that the level of transparency currently observed due to voluntary publications or national laws covers more than what MiFID requires under transparency obligations. Transparency is high for trading on RMs, MTFs and spot exchanges. Yet, this may not give a complete picture since data disclosed by brokers may be limited, and direct bilateral trading is generally less transparent.

Benefits of publication of aggregate information on trading

Aim of aggregate market transparency and market failures that can derive from lack of such transparency

120. As stated in the document published by the Commission simultaneously to the Sector Inquiry report (Memo 07/01 - FAQ), "*The final report […] identified serious shortcomings in the electricity and gas markets. There is: too much market concentration in most national markets; a lack of liquidity, preventing new entry; too little integration between Member States' markets; and an absence of transparently available information, leading to distrust in the price formation*".

121. Lack of transparency may constitute a barrier to entry. A potential entrant who considers entering a market is likely to look for:

- the size of the market and the evolution of this size: to assess whether it will be possible to make a number of transactions high enough to cover the cost of entry and the fixed cost of being active on the market;

- the type of products actively traded. Traders may be specialised in day-ahead or forward trading, physical or financial trading. Moreover, the different products traded in the market are not substitutes and have different purposes in terms of hedging;

- the level of concentration of the buy and sell sides of the market: to assess if prices can be influenced by some market participants' behaviour, and thus, to assess the risk of price manipulation or market power abuse; and

- the characteristics of the price signals (volatility, bid/ask spreads etc.): to assess the price risk and the feasibility of making reliable forecasts of price evolutions and trading for hedging and/or speculative purposes.

122. A new entrant may not risk entering a market for which he does not have this elementary information. As a consequence, lack of transparency may limit competition, and hence liquidity, and the accuracy of price formation and trust in the market. Indeed, as stated in the communication from the Commission for the release of the Sector Inquiry (COM (2006) 851 final), "*Low levels of liquidity are a barrier to entry to both gas and electricity markets*". It is stressed in the case of the gas market that "*ensuring liquidity is crucial to improving confidence in price formation on gas hubs*". In the same document, the Commission exposes "*a chronic lack of transparency, both in electricity and gas wholesale markets*".

123. Moreover, low liquidity of the wholesale market is a direct obstacle to the development of the retail market. Indeed, market participants have two ways to source energy for the delivery to final customers. Either they have generation assets or long-term import contracts and associated transportation capacities respectively for electricity and gas, or they have to buy energy on the wholesale market. As new entrants do not own generation assets or long-term import contracts, they rely on the wholesale market to source their sale. If the wholesale market is illiquid, suppliers would have difficulties to source their sales, and will not take the risk to enter the retail market.

124. Moreover, discrepancy between the levels of transparency between national markets may lead participants to exploit opportunities for regulatory arbitrage and trade more actively on some markets. This may lead to differences in the development of liquidity in markets within the EU, and hence, limit the development of a single integrated European market.

Costs and benefits generally implied by more aggregate market transparency

125. Energy regulators that would publish the information referred to in question E.11 would incur costs for aggregating and publishing the data.

126. Any supply undertaking that would have to communicate data on transactions to the regulator would incur costs aggregating the data and transmitting it.

127. Higher aggregate market transparency may encourage market entry, boosting competition and liquidity in the market and thereby fostering market confidence.

128. The Commission publicly considers that the extent to which markets should be transparent should be as large as possible. The document published when the Sector Inquiry was released (Memo 07/01 - FAQ) mentioned that:

"There is general recognition that access to market information should be further enhanced. All relevant market information should be published on a rolling basis in a timely manner. Any exceptions should be very strictly limited to what is required to reduce the risk of collusion. Guidelines, as well as monitoring and eventually adaptation of existing regulation, should serve to further enhance transparency in the gas and electricity sector."

129. The Commission also publicly stated in this document that benefits of more transparency will outweigh the risk of collusion:

"Does transparency not endanger business secrets or facilitate collusion?
While such concerns have to be taken very seriously, we consider that in the current situation, the need for transparency outweighs the fear of collusion. A balance must certainly be found as to what data is published and how it is published, in order to improve transparency without endangering business secrets or facilitating collusion. Transparency is needed to enable market players to take sound commercial decisions. Reliable and publicly available information creates a level playing field and plays an important role in building confidence in the market."

Transmission of data and publication

130. The current draft of the Third Energy Package does not consider how energy regulators would acquire the data needed to compile an aggregate transparency publication. However,

it is clear from the mandate that the power in paragraph 3 of Articles 22f/24f to make available to market participants aggregate information relates to information that supply undertakings are required to keep under the record-keeping obligations according to the Third Energy Package and future supplementing guidelines of the Commission.

131. However, energy regulators would need to be given the necessary legal powers in order for them to request the data needed to produce the aggregate data publication they deem would improve the level of transparency in the markets. They would need to be able to request this data from market participants and intermediaries.

Options considered for publication of aggregate market data

132. The current wording of paragraph 3 of Articles 22f/24f is as follows :

"The regulatory authority may decide to make available to market participants elements of this information provided that commercially sensitive information on individual market players or individual transactions is not released. This paragraph shall not apply to information about financial instruments which fall within the scope of Directive 2004/39/EC."

133. Generally, energy regulators are in favour of a European harmonised framework for aggregate transparency of transactions. Furthermore, the cost of implementing this type of transparency should be proportionate to the benefits expected.

134. In the consultation paper, ERGEG presented different options how information could be made available and in what form (e.g. aggregate data).

135. The three different options for publication presented for consultation were: mandatory publication by the energy regulator (M3), dissemination by energy regulators based on the assessment of the sufficiency of existing information (M2) and keeping the status quo (M1).

136. Half of the respondents to the consultation were not in favour of any new scheme for more transparency on aggregate market data.

137. Among the other half in favour of more transparency of aggregate market data, seven explicitly favoured option M3 and four option M2. However, the majority of them were in favour of the publication by platforms themselves, and not by energy regulators.

Scope of the publication

138. In the consultation paper different options regarding the scope of the publication were presented: publication of aggregate data on the whole market i.e. on all instruments including those covered by MiFID (S2) or only on instruments not covered by MiFID (S1). This differentiation was made as the legal provisions of Articles 22f/24f of the Third Energy Package exclude the publication of information on financial instruments covered by MiFID.

139. Among the nine respondents who expressly addressed the question of MiFID and non-MiFID products, eight stressed that it was meaningless to separate MiFID and non-MiFID

products. Only one raised the question of the overlap between MiFID and the Third Energy Package.

140. Among the seven respondents who expressly addressed the question of direct bilateral trades, only two answered that they should be covered. The other five answered that only standardised products, traded via RMs, MTFs, spot exchanges, or broker platforms should be covered.

Information to be published

141. ERGEG recommended in the consultation paper that aggregate information on transactions to be published under option S1 or S2 would have consisted of two sets of information:

- **Total volume traded**. This information enables market participants and potential new entrants to assess the size and liquidity of the markets.

- **Indicators reflecting the structure of the market**. These indicators enable market participants and potential new entrants to assess the level of concentration of trading and the quality of the price formation mechanism.

142. Several possible indicators reflecting the level of concentration of trading were proposed:

- Detailed market shares of the five biggest market participants (SM1);

- Aggregate market shares of the five biggest market participants (SM2);

- Herfindhal-Hirshman Index (HHI) (SM3);

- Number of active market participants (SM4).

143. Aside from information on trading volumes and indicators of market structure, it was proposed that the following price indices could be published: highest price traded, lowest price traded, average price of trade, weighted average price, deviation from the mean of the price. Respondents to the consultation were in favour of the publication of price and volume information, number of trades and market structure indices. Most respondents were against the publication of detailed market shares, as it could lead to the dissemination of commercially sensible data. Respondents were in favour of the publication of aggregate market shares and number of market participants.

Level of aggregation between products

144. In the consultation ERGEG presented two possible sets of data which could be published :

- Data on the whole market[24] : from all trading methods (platforms and direct bilateral), for all types of settlement (physical and cash), all types of maturity (day-ahead/intra-day and energy derivatives) split by delivery zone and quality (for gas only).

- For contracts with a standardised maturity (e.g. year-ahead baseload contracts), data split between standardised maturities[25] (and still split by delivery zone and quality for the gas).

What is referred to as standardised maturities here are the maturities of the contracts usually traded on RMs, MTFs, and spot exchanges in Europe. The products covered by the publication here would be contracts traded on RMs, MTFs, spot exchanges, brokers' platforms and direct bilaterally, for standardised maturities.

145. Among the ten respondents to the consultation who answered this question, six were in favour of the publication of both levels of aggregation, four favoured the publication split by standard maturities.

Frequency and delay of publication

146. The options for disclosure presented in the consultation paper reached from daily to monthly and quarterly disclosure of information. Daily disclosure would mean that aggregate data would be disclosed once a day, at least one day after the trading day concerned. Monthly and quarterly disclosure could be made with a certain delay for aggregating the data (e.g. two months after the last day of the period concerned).

147. Among the answers received to the consultation three favoured daily publication. Five respondents favoured monthly or quarterly publication, whereas four of them considered it only as a first step and were in favour of a move towards daily publication in the mid to long term.

148. Furthermore, respondents insisted that the day of publication must not be too delayed compared to the end of the period concerned by the publication.

Level of aggregation during the period covered

149. Furthermore, there are different possibilities for the levels of aggregation of data during the period covered (e.g. daily, weekly, monthly or quarterly).

150. Among the answers received to the consultation four respondents favoured daily aggregation. One favoured monthly and three respondents favoured quarterly aggregation for the beginning, but would appreciate moving towards daily aggregation when the process is be well known.

ERGEG`s advice on the publication of aggregate market data

151. Question E.11 addresses the publication of data by energy regulators themselves. ERGEG members see benefits in a publication by energy regulators themselves as it would provide a unique and centralised source of data. However, many respondents to the consultation had a preference for data provided by platforms. Furthermore, a publication by energy regulators would require a frequent, periodic transaction reporting by market participants. This was considered burdensome by the respondents to the consultation.

152. Therefore, ERGEG members recommend a publication of aggregate data by platforms, i.e. regulated markets, MTFs, spot exchanges and broker platforms. Furthermore, ERGEG recommends a daily publication of information on standardised contracts. This should include derivatives irrespective of whether they are financial instruments according to MiFID or not and spot contracts. ERGEG members recommend that all data published should be harmonised between the different platforms active in the Member States, i.e. the format and content of publication should be the same. It should be noted that platform operators can also be located outside Member States and offer services for delivery of

electricity or gas in Member States. This might result in a gap which can not be sufficiently addressed with this proposal and may need further considerations in case it becomes relevant.

153. Besides relevant volume and price information the publication should include the number of trades, and the aggregated market shares of the five biggest buyers and sellers.

154. The data should be split by standard maturities and products.

155. The information should be available to all interested parties on a non-discriminatory and reasonable commercial basis.

Response to question E.11:

E.11: What guidelines and arrangements do energy regulators propose for the making available of aggregate market data by them under paragraph 3 of Articles 22f/24f?

Question E.11 specifically asks energy regulators what guidelines and arrangements they would propose for the making available of aggregate market data by them (under paragraph 3 of Articles 22f/24f). Therefore, only the view of ERGEG is expressed here.

The rationale is to have available useful and reliable data, giving fair information on the liquidity and concentration of trading on European electricity and gas wholesale markets while keeping in mind three constraints:

- limiting the burden put on market participants for providing this information;
- avoiding direct and indirect disclosure of commercially sensitive data; and
- avoiding costs exceeding the benefits of publishing the information by not adding obligations when a sufficient level of transparency already exists.

Question E.11 addresses the publication of data by energy regulators themselves. ERGEG members see benefits in a publication by energy regulators themselves as it would provide a unique and centralised source of data. However, a publication by energy regulators would require a frequent, periodic transaction reporting by market participants. This was considered burdensome by market participants. Furthermore, many respondents to the consultation stated that the data should be provided by platforms. Although pure OTC trades cannot be covered with this solution, at this stage ERGEG recommends a publication of aggregate data by platforms, i.e. regulated markets, MTFs, spot exchanges, and broker platforms.

ERGEG recommends a daily publication of information on standardised contracts. This should include derivatives irrespective of whether they are financial instruments according to MiFID or not and spot contracts. Besides relevant volume and price information the publication should include the number of trades and indices describing the structure of the market (without relieving information about the market shares of the different market participants). The publications should be harmonised between the different platforms existing in Member States: the format and content of publication should be the same.

The information should be available to all interested parties on a non-discriminatory and reasonable commercial basis.

Question E.17: Is access to information on traded volumes and prices equal for all parties active in [the electricity and gas wholesale] market?

156. CESR and ERGEG already provided an answer to this question as part of the response to the fact-finding question of the Commission mandate. However, it was considered useful to cover this question also in this advice because it forms a background to the discussion on question E.18. The earlier answer given by CESR and ERGEG noted the following: CESR and ERGEG provided the following answer to the Commission fact finding question E.17. "As regards question E.17 there is wide variety in the responses regarding the equality of access to information. Some respondents consider that the access to information is equal to all parties. On the other hand, some respondents point to a general lack of information. Some respondents state that the amount of information available depends on the way of trading. In bilateral trading, there is generally no transparency. Information on the brokered contracts might be available in the brokers' platforms but generally only customers have access to the trade information. Receiving the trade information, e.g. from information services, might also require the payment of a fee. In the case of RMs, MTFs and spot exchanges some provide the same post-trade information to the public as to their members, whereas others provide more information to their members."

Pan-European market transparency legislation is not available

157. Currently, there is no pan-European legislation imposing pre- and post-trade transparency requirements relating to transactions in energy related products. The pre- and post-trade transparency requirements imposed by MiFID are only applicable to shares which are admitted to trading on a regulated market. Nevertheless, in practice, operators of regulated markets, multilateral trading facilities and other platforms which do not fall under the scope of MiFID, offer some pre- and post-trade transparency concerning products other than shares as they believe transparency attracts liquidity to their respective platforms.

158. It should be noted that MiFID does require investment firms to report transactions in all financial instruments admitted to trading on a regulated market. However, these transaction reports are to be sent to the relevant competent (securities) authority and are not publicly available.

Question E.18: If not, is unequal access to or general lack of information on trading causing distortion of competition?

159. CESR and ERGEG have not carried out a comprehensive competition inquiry. Merely, CESR and ERGEG base their findings on the responses of the CESR and ERGEG members to the fact finding questionnaire circulated in order to provide the response to the Commission fact finding questions, on the Call for Evidence, on the responses to the consultation and on the Sector Inquiry.

160. From a theoretical perspective, informational shortages and/or imbalances relating to trading information may distort competition if they:

- deter firms from entering the market;
- force firms out of the market; or
- lead to the abuse of market power.

161. Firms considering entering the market may be deterred from doing so because their price discovery process would be hampered as a result of unequal access to trade price and volume information.

162. Firms in the market may be forced to exit it because of insufficient access to trading information resulting in a non-reliable price discovery process and hence an undermined confidence in the functioning of the respective market.

163. The existence of barriers to market entry, for example due to asymmetric information problems, may lead to a situation in which the market is dominated by a relatively small number of incumbent firms. This creates the potential for collusion and the abuse of market power.

164. An uneven distribution of trading information may allow those market participants with an information advantage to manipulate the market (e.g. by manipulating prices and/or trading volumes, affecting volatility), thereby undermining market confidence, discouraging new entry and/or encouraging market exits, and helping maintain their dominant position.

165. Asymmetric information may also lead to a potential for price discrimination, i.e. a firm charges different prices to different groups of consumers for an identical good or service for reasons not associated with the cost of production.

166. The contributions received by CESR and ERGEG to their Call for Evidence did not explicitly mention distortion of competition resulting from unequal access to or lack of information about prices and traded volumes. Two respondents to the consultation noted that trading between generation/trading arms and retail arms within vertically integrated companies might cause distortion of competition. One respondent noted that the incompleteness of transaction information is probably a factor that slows the market opening process.

Response to question E.18:

E.18: If not, is unequal access to or general lack of information on trading causing distortion of competition?

On the basis of the information gathered (mainly from the Call for Evidence and responses to the consultation), there seems to be equal access to information in many electricity and gas wholesale markets with the exception of bilateral trading. In relation to that, CESR and ERGEG have not received any significant evidence of the markets being distorted. However, that is not a proof that it does not happen and further analysis might be necessary.

Question E.19: Pros and cons of pre- and post-trade transparency

In light of the findings in the Commission Sector Inquiry on energy and the subsequent study of the electricity wholesale markets, please consider:

a) whether, pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC, greater EU-wide pre- and/or post-trade transparency rules for electricity and gas supply contracts (physical and spot trading) and electricity and gas derivatives would contribute to a more efficient wholesale price formation process and efficient and secure energy markets;

b) whether such transparency arrangements could be expected to effectively mitigate the concerns identified in the Sector Inquiry above;

c) whether uniform EU-wide pre- and post-trade transparency could have other benefits;

d) whether additional transparency in trading could have negative effects on these markets, for example could liquidity in these markets be expected to decrease? Is there a risk that trading could shift to third countries to escape regulation?

e) **If you believe that there are risks arising from additional pre- and post-trade transparency requirements, how do you believe that these risks can be mitigated (e.g. aggregation, delay in publication, anonymity)?**

167. The questions raised by the Commission in question E.19 of the mandate relate to pre- and post-trade transparency (as described above) for transactions in electricity and gas supply contracts and derivatives.

168. A number of other questions on transparency in the mandate were fact finding ones to consider how transparency was dealt with currently on a national level, rather than policy ones. In order to respond to these questions, CESR and ERGEG conducted a fact-finding among their members. The results of the fact-finding also served the purpose of answering question E.19.

169. The respondents to the consultation were broadly in agreement with the results of CESR and ERGEG's fact-finding, which highlighted differences in transparency requirements in most countries between the transparency requirements in spot trading (where there are fewer requirements) compared to futures/forward trading on regulated markets and MTFs (where there are more requirements). There is a difference between transparency requirements for the trading on platforms compared to OTC trading as there are generally no transparency requirements for OTC trading. Some responses to the fact-finding questionnaire circulated to the members of CESR and ERGEG included detailed information on the data published by platforms. Some respondents mentioned the role played by information services (e.g. Platts) in publishing various price and volume information, either for a fee or for free. A few respondents also referred to the role of brokers in providing trade information (in practice only to their clients).

170. On the basis of the fact-finding, the competences of the (regulatory) authorities are generally determined on the basis of whether the product traded is the commodity itself (i.e. spot contracts for electricity or gas) or a financial instrument (derivative) with electricity or gas as an underlying, as well as whether trading is conducted on a regulated market, an MTF or OTC. In most EU Member States, the trading in electricity and gas derivatives is supervised by the securities regulator whereas trading/transactions in electricity and gas (spot contracts) are supervised by the energy regulator. There are in practice fewer platforms trading gas or gas derivatives, as contrasted with the trading of electricity or electricity derivatives. In many cases, OTC trading in the underlying (electricity or gas spot contracts) is not subject to any supervision. France is an exception as the energy regulator has a power of surveillance on every product (both electricity and gas and related derivatives) for delivery/settlement in France, for every maturity and every venue (including OTC).

171. In addition to the fact-finding among their members, CESR and ERGEG collected other information on the pre- and post-trade transparency data currently disclosed by platforms. It was concluded that the availability of pre-trade information even to market participants largely depends on the trading system for the electricity and gas spot or derivative contracts. Trading systems tend to differentiate according to the products traded (electricity or gas, spot or derivative). There is a great variety of trading systems in place. For example, day-ahead electricity spot trading works with an auction system on most trading venues. In continuous trading systems, best bid/ask offers are available to market participants and real-time data is sometimes also available via data vendors.

172. As regards post-trade information, the publication or dissemination of trading information about energy futures tends to be much more detailed than for spot contracts. On the other hand, if there is a spot auction with a single price, this price and the volumes traded at this price will in most cases be made public as soon as possible after the price is established.

173. Many brokers operate MTFs which they often refer to as electronic broking. As with all MTFs, broker operated MTFs are required to have transparent and non-discretionary rules and procedures for fair and orderly trading. The main difference between electronic broking and voice broking is that, in the latter, the broker is involved as an intermediary and can also provide its clients with market information. Brokers, when using voice broking, act somewhat like other platforms by bringing together selling and buying interests of one client with another client.

174. The fact-finding has also shown that regulated markets and spot exchanges tend to publish, either because of respective requirements in the law or regulations of a Member State or their own rules, post-trade information free of charge – at least with a certain delay of 15 minutes up to the end of the day. In contrast, MTFs and brokers only disclose post-trade data to their clients or for a charge to data vendors or other market participants.

175. However, it seems that, with access to a broker's screen, quotes (bid-ask) pre-trade are shown on screens electronically and details post-trade of prices and volumes are available (if electronic trading is used and mostly if voice broking is used), although a few large trades may not have the same level of transparency. Access to those screens is mainly for a broker's clients and many market participants (e.g. investment banks active in energy derivatives, big energy companies) are their clients. In addition, some of their information can be purchased by a non-client. If a market participant is a client of all the main brokers, then its traders will be able to see the whole broker market. Further, all the main brokers use the same system

which can provide to their clients, for a fee, consolidated data from all their screens. In some, but not all, Member States, the broker market makes up the bulk of the OTC energy market.

176. Some OTC transactions made in some Member States (e.g. the UK and Germany), although not all, can be cleared on a platform and so details of their prices and volumes would be disclosed as a part of that market's data.

Feedback from the Call for Evidence and consultation

177. Generally, from the responses to the Call for Evidence and consultation, most market participants considered that sufficient information on prices and volumes is available for trading on platforms. Some noted that trade transparency for OTC transactions would be very costly. However, they were supportive of harmonisation, to the extent any action is taken. Some market participants were of the view that, through the information produced by platforms and other information providers, they can have knowledge of most of the standard transactions which take place in the energy markets.

178. One of the reasons referred to by some respondents to explain why there would be no need for new trade transparency requirements was that in their opinion, mandating increased trade transparency may reduce liquidity in the market, with a consequential increase in volatility in price. In addition, some were of the view that disclosure of more trading information by a market participant can show to the market its trading positions and strategies which can discourage or impede competition and innovation. Some referred to the costs that would be incurred by market participants for increased trade transparency. Some respondents also noted that bespoke and non-standard trades take place in the OTC energy markets for which increased transparency may not be easy or desirable. CESR and ERGEG have attempted to take these concerns into account when deciding on the content of their advice on pre- and post-trade transparency.

179. As ways to mitigate potential risks associated with increased trade transparency, respondents identified anonymity, aggregation or a delay in publication. They also expressed a preference for implementing any new transparency requirements throughout the EU to avoid regulatory arbitrage and ensure a level playing field.

180. The Commission's mandate asked specifically about whether increased transparency requirements could lead to a migration of trading away from the EU to escape regulation. No major concerns were expressed by market participants in this regard.

CESR and ERGEG's advice

181. On the basis of the responses to the Call for Evidence and consultation, the availability of post-trade transparency information from platforms was considered to be important, whereas few requests were presented for the availability of pre-trade transparency data. Many respondents were of the opinion that in the case of platforms, sufficient level of post-trade transparency seems to already exist in most Member States, but they also expressed a need for harmonisation of the information. On the other hand, the market participants did not express a need for receiving trade transparency data on trading conducted outside those platforms.

182. CESR and ERGEG came to the conclusion that there is no need to take action in relation to purely bilateral trading which often is so bespoke that transparency information would not add materially to the price discovery process. Instead, CESR and ERGEG advise the

Commission to focus on ensuring sufficient post-trade transparency for standardised products traded on or cleared through regulated markets, MTFs, spot exchanges and broker platforms because trading on those platforms is most relevant for price formation purposes. The definition of 'platforms' in the consultation paper and this advice was used for the purposes of developing policy and consideration would be needed on its further use.

183. The platforms would be responsible for the publication of post-trade information which would need to be available on a non-discriminatory and reasonable commercial basis.

184. In order for the information to be made public to contribute to a more efficient wholesale price formation process, CESR and ERGEG consider that post-trade information on standardised electricity and gas supply contracts and derivatives would need to be made public on a trade-by-trade basis with a relatively short delay. Trade-by-trade information is relevant for platforms trading on a continuous (or rolling) basis. Wholesale markets organised as auction sessions determining a market clearing price for each delivery hour of the following day would need to make public aggregated information on hourly volumes and prices shortly after price determination.

185. On the basis of information received from some market participants, 15 minutes was considered to be a suitable maximum delay, although the aim should be to make public post-trade information as close to real-time as possible. After 15 minutes, the value of the data for price formation purposes decreases significantly. On the other hand, sophisticated IT systems are not needed in order to be able to meet this deadline.

Response to question E.19

E.19: In light of the findings in the Commission Sector Inquiry on energy and the subsequent study of the electricity wholesale markets, please consider:

- **a) whether, pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC, greater EU-wide pre- and/or post-trade transparency rules for electricity and gas supply contracts (physical and spot trading) and electricity and gas derivatives would contribute to a more efficient wholesale price formation process and efficient and secure energy markets;**
- **b) whether such transparency arrangements could be expected to effectively mitigate the concerns identified in the Sector Inquiry above;**
- **c) whether uniform EU-wide pre- and post-trade transparency could have other benefits;**
- **d) whether additional transparency in trading could have negative effects on these markets, for example could liquidity in these markets be expected to decrease? Is there a risk that trading could shift to third countries to escape regulation?**
- **e) If you believe that there are risks arising from additional pre- and post-trade transparency requirements, how do you believe that these risks can be mitigated (e.g. aggregation, delay in publication, anonymity)?**

(f) On the basis of the responses to the CESR/ERGEG Call for Evidence and consultation, the availability of post-trade transparency data from platforms was considered to be important, whereas few requests were presented for the availability of pre-trade transparency data. Many

respondents were of the opinion that in the case of platforms, sufficient level of trade transparency seems to already exist in most Member States. On the other hand, the market participants did not express a need for receiving trade transparency data on trading conducted outside platforms.

However, in line with many comments received, CESR and ERGEG are conscious of the fact that the level of post-trade transparency information available from platforms is not necessarily uniform throughout the EU. In order to contribute to a more efficient wholesale price formation process and efficient and secure energy markets, CESR and ERGEG consider that the existence of a reasonable level of post-trade transparency information should be reached on a pan-EU basis. Thus CESR and ERGEG consider that all EU regulated markets, MTFs, spot exchanges and broker platforms should make public harmonised post-trade information on standardised electricity and gas supply contracts and derivatives traded on or cleared through these platforms on a trade-by-trade basis. Trade-by-trade information is relevant for platforms trading on a continuous (or rolling) basis. Wholesale markets organised as auction sessions determining a market clearing price for each delivery hour of the following day would need to make public aggregated information on hourly volumes and prices shortly after price determination. If this data is already available and compliant with standards to be defined, no further measures would need to be taken by the platforms.

Some market participants favoured the publication of post-trade transparency information on aggregated basis only, and by delaying the publication until at least the end of the trading day. However, CESR and ERGEG are of the opinion that publication of data on individual trades with a relatively short delay is more appropriate for the aim of reaching the goal of contributing to a more efficient wholesale price formation process. In practice many platforms already now make available the trades on a real-time basis. Thus CESR and ERGEG consider that the aim should be that all platforms publish post-trade information as close to real-time as possible, but with a maximum delay of 15 minutes. Beyond that time limit, the value of the data for price formation purposes decreases significantly. The data should be available to all interested parties on a non-discriminatory and reasonable commercial basis.

However, CESR and ERGEG note that before deciding on the application of the suggested delay of 15 minutes, further analysis would need to be conducted on whether there would be a need to provide longer delays for certain types of trades, in particular large trades made for own account (cf. delays provided by the MiFID post-trade transparency regime). However, such a possible framework would need to be carefully tailored to the needs of the particular energy and energy derivatives markets. The same applies to how information is accessed. The content of the information to be published should facilitate appropriate identification of the supply contract or derivative as well as include the following information - as appropriately adjusted for the particular needs of each product - for each trade:

- price (including the currency in which the trade was made);
- quantity; and
- trading day and time.

(g) The Sector Inquiry shows that concerns about transparency exist. However, transparency in the sense used in the Sector Inquiry focuses mainly on transparency of fundamental data and less on trade transparency. In any event, no trade transparency initiative alone could be expected effectively to mitigate the concerns identified in the Sector Inquiry.

(h) Other benefits which could arise from uniform EU-wide post-trade transparency include an increase in competition, new entrants and market participation, and general engendering of market confidence.

(i) Additional transparency would not be expected to have negative effects in trading in itself. However, an improperly considered trade transparency initiative could have other negative effects on these markets, e.g. by reducing liquidity in the market with a consequential increase in volatility. Disclosure of more trading information by a market participant could also show to the market its trading positions and strategies. An improperly considered initiative would also be expected to result in unjustified technological, legal and compliance costs on market participants and costs of supervision and regulation on securities and energy regulators. Given the national or regional nature of the energy markets and their emphasis on physical trading, there seems to be little risk that trading could shift to third countries to escape regulation.

CESR and ERGEG have taken the possible negative effects into account when deciding on the coverage of their proposed framework. CESR and ERGEG are of the opinion that the possible negative effects of the proposed framework are outweighed by the positive effects of contributing to a more efficient price formation process and efficient and secure energy markets. The realisation of the negative effects can also be avoided by a careful design of the framework (see also the following answer).

(j) In order to avoid the risks related to disclosing information on the counterparties of a trade, the framework proposed by CESR and ERGEG is based on making public only anonymous post-trade information. In addition, CESR and ERGEG propose to further analyse the need for additional delays for certain types of trades beyond the standard deadline of 15 minutes (see answer to question E.19a).

Section III: Exchange of Information

Questions in Section D of the mandate on exchange of information

186. The questions in Section D of the Commission mandate regarding exchange of information between securities and energy regulators are the following :

D.7. How would securities regulators most efficiently provide information to energy regulators pursuant to paragraph 7 of Article 22f/24f?

D.8. Which securities regulator would most efficiently be responsible for such provision in the case of investment firms with more than one branch?

D.9. Would it be feasible and efficient to employ the Transaction Reporting Exchange Mechanism (TREM) or a similar electronic system to exchange this data?

D.10. Is there a case for data to be forwarded from energy regulators to securities regulators on an automatic basis? If so, what data?

MiFID requirements

Legal provisions on exchange of information between competent authorities and transaction reporting

187. MiFID sets out requirements in order to strengthen the duties of assistance and cooperation between securities regulators and reinforces provisions on exchange of information between them.

188. According to Article 56 of MiFID, the competent authorities of different Member States shall cooperate with each other whenever necessary for the purpose of carrying out their duties. Securities regulators shall render assistance to the competent authorities of other Member States. In particular, they shall exchange information and cooperate in any investigation or supervisory activities.

189. In addition, MiFID also establishes reporting obligations applicable to transactions executed in financial instruments admitted to trading on a regulated market, whether or not such transactions were executed on a regulated market.

190. Article 25(3) MiFID states that: "Member States shall require investment firms which execute transactions in any financial instruments admitted to trading on a regulated market to report details of such transactions to the competent authority as quickly as possible, and no later than the close of the following working day."

191. Article 25(4) also establishes that: "The reports shall, in particular, include details of the names and number of the instruments bought or sold, the quantity, the dates and times of execution and the transaction prices and means of identifying the investment firms concerned."

192. Article 25(5) provides that: "Member States shall provide for the reports to be made to the competent authority either by the investment firm itself, a third party acting on its behalf or by a trade-matching or reporting system approved by the competent authority or by the regulated market or MTF through whose systems the transaction was completed. In cases where transactions are reported directly to the competent authority by a regulated market, an MTF, or a trade-matching or reporting system approved by the competent authority, the obligation on the investment firm laid down in paragraph 3 may be waived."

Transaction reporting

193. The primary use of transaction reports is to detect and investigate suspected market abuse (insider trading and market manipulation). On the basis of transaction reports it is possible to analyse all transactions executed by a given investment firm, in a given financial instrument, for a given client or over a certain time period.

194. The Annex I (Table 1) of the MiFID Implementing Regulation outlines a list of fields for reporting purposes:

- Reporting firm identification
- Trading day
- Trading time
- Buy/sell indicator
- Trading capacity
- Instrument identification (ISIN)
- Unit price
- Price notation
- Quantity
- Counterparty code
- Venue identification
- Client code
- Transaction reference number.

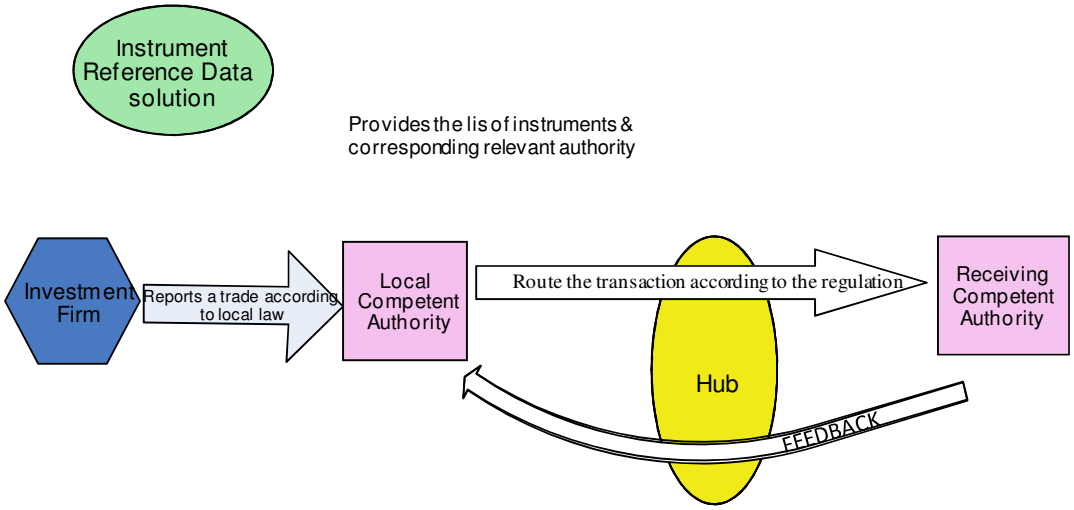
195. Currently, only investment firms have to submit transaction reports to the securities regulators and only transactions in financial instruments admitted to trading on a regulated market are subject to transaction reporting obligations and exchange of those reports between competent authorities.

196. The reporting of non-securities derivatives (commodities, interest rates, exchange rates and other economic variables) required under MiFID will be carried out by the regulated markets where the trade has been made and not by investment firms. The reason for this is the technical difficulties with the establishment and cost implications of such a reporting system. A compromise involving EU securities regulators and the Commission was reached under which, among others, energy and other commodity derivatives were excluded from transaction reporting, apart from those transactions made on a regulated market. For transactions made on a regulated market, each regulated market is responsible for reporting the transactions executed on its market to the regulator for that market[26].

Exchange of information

197. The principle of exchange of information on transaction reports is established in MiFID and is required for the purposes of carrying out the duties of competent authorities. The competent authorities shall, in accordance with Article 14 of the MiFID Implementing Regulation, establish the necessary arrangements in order to ensure that the competent authority of the most relevant market in terms of liquidity (relevant competent authority) for a financial instrument also receives the transaction reports[27]. To achieve this, CESR has established TREM (Transaction Reporting Exchange Mechanism).

198. At this moment, the solution implemented to exchange information between competent authorities can be described by the following diagram:



199. The solution adopted uses a central distribution system (hub), which provides the functionalities needed for distributing the transaction files. The exchange of information between competent authorities is based on the instrument reference data. Each authority identifies the transactions which need to be forwarded to the relevant competent authority (outgoing transactions) and for that the following information is needed:

- The list of instruments admitted to trading on all regulated markets in the EEA; and

- The relevant competent authority for all the instruments.

200. Exchange of information is required in three specific situations:

- Another competent authority is the relevant competent authority for the financial instrument in which the transaction is executed;
- The transaction is reported by or on behalf of a branch of an investment firm; and
- There is a request by one or more competent authority for the information.

Question D.7: How would securities regulators most efficiently provide information to energy regulators pursuant to paragraph 7 of Article 22f/24f?

201. Questions D.7 to D.10 of the Commission's mandate to CESR and ERGEG deal with information exchange between securities and energy regulators.

202. In the Call for Evidence and consultation market participants were asked to submit their views regarding these questions. The respondents' common view was that implementation of such an information exchange should not duplicate the efforts of market participants. While most of the respondents agreed on the benefits of an exchange of information between energy and securities regulators, they also supported that this information should not be exchanged periodically but only for individual cases. In addition, confidentiality should be observed.

203. CESR and ERGEG propose to start information exchange by request - on a case-by-case basis- for fulfilling the legal tasks of energy regulators like monitoring the market. That has been considered appropriate also by most of the respondents to the consultation. The proposal of the Commission in Articles 22f/24f of the Third Energy Package contains new obligations for supply undertakings to keep records relating to their transactions. This data shall be kept at the disposal of the national energy regulator, the national competition authority and the Commission. This transaction data shall enable these entities to oversee the electricity and gas markets (recital 19 of the amended Electricity Directive and recital 21 of the amended Gas Directive). In order for the national energy regulator, the national competition authority and the Commission to have access to the data kept by entities falling within the scope of MiFID, securities regulators are obliged to provide data to the former under Articles 22f(7)/24f(7) of the Third Energy Package.

204. In the view of CESR and ERGEG, the said exchange of information between energy and securities regulators has to be backed by a sound legal basis to include, amongst others, provisions and arrangements to allow for the necessary information exchange and to ensure the confidentiality of information reported to regulators and exchanged among them. This approach is supported by most of the respondents to the consultation. These responses particularly stressed the importance of and adequate treatment of sensitive information.

205. The aforementioned legal basis should be given by European legislation. It is the opinion of CESR and ERGEG that a pragmatic option at this stage would be the establishment of multilateral and bilateral agreements among energy and securities regulators for exchanging information on cross-border and local basis respectively – addressing legal gaps to exchange information between different regulators.

206. Such multilateral and bilateral memoranda of understanding among regulators should take into consideration the obligation included in Articles 22f(7)/24f(7), as well as provisions for appropriate confidentiality with respect to the data supplied by securities regulators to energy regulators, national competition authorities and the Commission.

207. A good and practical example of cross border cooperation between securities regulators in the field of exchange of information is provided by the existing Multilateral Memorandum of Understanding – MMoU – on the Exchange of Information and Surveillance of Securities Activities signed by CESR members - formerly FESCO - in 1999.

208. The MMoU to be established between CESR and ERGEG members would need to include the main provisions to establish cooperation in the field of exchange of information between both energy and securities regulators within the EEA.

209. Ideally this MMoU among CESR and ERGEG members would be supplemented by bilateral MoUs among local energy and securities regulators addressing legal gaps in certain jurisdictions to exchange information between different regulators.

210. With this respect there are already existing examples of cooperation among local energy and securities regulators. In one jurisdiction a formal memorandum of understanding has been already signed between the energy and the securities regulators, while in another jurisdiction formal cooperation between energy and securities regulators should be legally enacted shortly. Formal and informal meetings among local energy and securities regulators appear to be also very common in certain Member States.

Response to question D.7:

D.7:.How would securities regulators most efficiently provide information to energy regulators pursuant to paragraph 7 of Article 22f/24f?

The proposal of the Commission in Articles 22f/24f of the Third Energy Package includes new obligations for supply undertakings to keep records relating to their transactions. This data shall be kept at the disposal of the national energy regulator, the national competition authority and the Commission. This transaction data shall enable these entities to oversee the electricity and gas markets (recital 19 of the amended Electricity Directive and recital 21 of the amended Gas Directive). In order for the national energy regulator, the national competition authority and the Commission to have access to the data kept by entities falling within the scope of MiFID, securities regulators are obliged to provide data to these entities under Articles 22f(7)/24f(7) of the Third Energy Package. CESR and ERGEG propose to start information exchange upon request, on a case-by-case basis for fulfilling the legal tasks of energy regulators. This was considered appropriate by most of the respondents to the public consultation.

Additionally, in the view of CESR and ERGEG, the abovementioned exchange of information between energy and securities regulators should be backed by a sound legal basis, by European legislation. The opinion of CESR and ERGEG is that a pragmatic option at this stage would be the establishment of multilateral and bilateral agreements among energy and securities regulators for exchanging information on cross-border and local basis respectively - addressing legal gaps to exchange information between different regulators.

Such multilateral and bilateral memoranda of understanding among regulators should take into consideration the obligation included in Articles 22f(7)/24f(7), as well as provisions for appropriate confidentiality with respect to the data supplied by securities regulators to energy regulators, national competition authorities and the Commission. Furthermore, the MMoU to be established between CESR and ERGEG members would need to include the main provisions to establish cooperation in the field of exchange of information between both energy and securities regulators within the EEA. Ideally this MMoU would be supplemented by bilateral MoUs among local energy and securities regulators addressing legal gaps in certain jurisdictions to exchange information between different regulators.

Question D.8: Which securities regulator would most efficiently be responsible for such provision in the case of investment firms with more than one branch?

211. Article 32(7) of MiFID regarding the establishment of a branch provides that: "The competent authority of the Member State in which the branch is located shall assume responsibility for ensuring the services provided by the branch within its territory comply with the obligations laid down in Articles 19, 21, 22, 25, 27 and 28 and in measures adopted pursuant thereto. The competent authority of the Member State in which the branch is located shall have the right to examine branch arrangements and to request such changes as are strictly needed to enable the competent authority to enforce the obligations under Articles 19, 21, 22, 25, 27 and 28 and measures adopted pursuant thereto with respect to the services and/or activities provided by the branch within its territory." On the basis of this, securities regulators were required to collect information not only from domestic investment firms but also from branches of EEA investment firms located in their Member State.

212. The exchange of information regarding branches' transaction reports is regulated in Article 25(6) of MiFID, which points out that: "When, in accordance with Article 32(7), reports provided for under this Article are transmitted to the competent authority of the host Member State, it shall transmit this information to the competent authorities of the home Member State of the investment firm, unless they decide that they do not want to receive this information."

213. CESR and ERGEG considered whether a similar approach in case of a necessity to exchange information related to branches would be viable. This would have meant that the securities regulator of the host Member State of the branch should provide the information requested by the energy regulator. However, since also the home Member State securities regulator has direct access to the records of a branch of an investment firm as recognised under Article 13(9) of MiFID, it was noted that it may also be an alternative to follow an approach where energy regulators ask the home competent authority for information.

214. A large number of respondents to the consultation favoured the home Member State principle for information exchange between energy and securities regulators. A reason provided for this was that a single point of contact to the regulator would be preferred by the market participants.

215. However, CESR and ERGEG consider it appropriate to allow for both alternatives. This would mean that the energy regulator may ask both the home and the host Member State securities regulator of the branch of an investment firm to provide the necessary data. For market participants this will not increase administrative burdens as already now according to MiFID both the home Member State and the local securities regulators may ask for the records of the branch.

Response to question D.8:

D.8: Which securities regulator would most efficiently be responsible for such provision in the case of investment firms with more than one branch?

CESR and ERGEG considered whether the securities regulator of the host Member State of the branch should provide the information requested by the energy regulator. This would have been similar to the current MiFID requirements regarding transaction reporting. On the other hand, since also the home Member State securities regulator has direct access to the records of a branch of an investment firm as recognised under Article 13(9) of MiFID, it was noted that it could be an alternative to follow an approach where energy regulators always ask the home competent authority for information.

A large number of respondents to the consultation favoured the home Member State principle for information exchange among energy and securities regulators. A reason provided for this was that a single point of contact to the regulators would be preferred by market participants.

CESR and ERGEG consider it appropriate to allow for both alternatives. This would mean that the energy regulator may ask the home and the host Member State securities regulator of the branch of the investment firm to provide the necessary data. For market participants this will not increase administrative burdens as already now according to MiFID both the home Member State and the local securities regulators may ask for the records of the branch.

Question D.9: Would it be feasible and efficient to employ the Transaction Reporting Exchange Mechanism (TREM) or a similar electronic system to exchange this data?

216. Regarding question D.9 the common view of the vast majority of the responses to the Call for Evidence and consultation is that TREM would not be appropriate for the exchange of information between energy and securities regulators. On one hand, they supported a model where information exchange would happen on the basis of special requests by the relevant authorities, i.e. on a case-by-case basis, whereas TREM is used for a permanent and automatic exchange. On the other hand, the data exchanged under the current design of TREM does not cover transactions in energy derivatives.

217. CESR and ERGEG agree with market participants. Currently, TREM would not be appropriate for the exchange of information between energy and securities regulators. First of all, as there would probably be only a few cases for exchange of information, it would not be efficient to invest in new IT. Secondly, TREM is established to enable securities regulators to exchange information within a very short period of time after the transaction was made. Market surveillance as proposed in the energy Directives, i.e. based on records kept by supply undertakings, would not require such a strict time limit.

Response to question D.9:

D.9: Would it be feasible and efficient to employ the Transaction Reporting Exchange Mechanism (TREM) or a similar electronic system to exchange this data?

CESR and ERGEG are of the view that TREM would not be appropriate for the exchange of information between energy and securities regulators. First of all, as there would probably be only a few cases for exchange of information, it would not be efficient to invest in new IT. Secondly, TREM is established to enable securities regulators to exchange information within a very short period of time after the transaction was made. Market surveillance based on records kept by supply undertakings – not on transaction reports - as proposed in the energy Directives, would not require such a strict time limit.

This view was supported by the respondents to the public consultation.

Question D.10: Is there a case for data to be forwarded from energy regulators to securities regulators on an automatic basis? If so, what data?

218. Given the above, CESR and ERGEG are not proposing at this stage to forward data on an automatic basis. However, the potential Memoranda of Understanding could establish reciprocal cooperation between authorities. Therefore, they could also be used to exchange information from energy to securities regulators; especially the information not covered by MiFID and received only by the energy regulators.

Response to question D.10:

D.10: Is there a case for data to be forwarded from energy regulators to securities regulators on an automatic basis? If so, what data?

As described above CESR and ERGEG are not proposing at this stage to forward data on an automatic basis. However, the potential MoUs could establish reciprocal cooperation between authorities. Therefore, they could also be used to exchange information from energy to securities regulators; in particular the information not covered by MiFID and received only by the energy regulators.

Glossary

Broker	Intermediary who executes orders on behalf of clients.
Cash-settled transaction	A transaction settled in cash form (i.e. by delivering cash and not the underlying).
Energy	Electricity and gas
Energy derivatives	All energy transactions longer than spot contracts. It includes MiFID energy derivatives and energy supply contracts longer than spot contracts (if the market for a specific product is meant, then the product is mentioned).
Energy markets	Markets for all kinds of energy derivatives and all kinds of spot contracts related to energy (if the market for a specific product is meant, then the product is mentioned).
Energy supply contracts	An energy supply contract is "*a contract for the supply of electricity/gas*" that "*does not include an [energy] derivative*" (defined in the Third Energy Package). Given the definition of an energy derivative, energy supply contract thus cover: - spot contracts; - forward contracts which can be physically settled but which are not MiFID derivatives.
Forward	A contract that includes an obligation of at least one of the counterparties that has a due date which is later than for spot contracts in the sense of Article 38(2)(a) of the MiFID Implementing Regulation. Not all forwards are MiFID derivatives.
Futures	Standardised forward contracts that are traded on an RM or an MTF. All futures are MiFID derivatives.
MiFID	Markets in Financial Instruments Directive (2004/39/EC), OJ L 145, 30.4.2004, p.1.
MiFID Implementing Regulation	Commission Regulation (EC) No. 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency , admission of financial instruments to trading, and defined terms for the purpose of that Directive, OJ L 241, 2.9.2006, p.1,

MiFID energy derivatives (equivalent to "MiFID financial instruments" related to energy)	Financial instruments under MiFID which are derivatives related to energy and listed in Annex I, Section C(5) to (7) of MiFID and Article 38 of the MiFID Implementing Regulation. MiFID energy derivatives thus cover: - futures products traded on RMs and MTFs; - forward products traded OTC that are cash-settled; - forward products traded OTC that are physically settled if they are standardised. An analysis of the precise content of MiFID financial instruments is done in paragraphs 33 to 37.
MiFID firms	Investment firms under MiFID that are not eligible for an exemption under MiFID.
MTF	A Multilateral Trading Facility as defined in Article 4 (15) of *MiFID*. It is a multilateral system, operated by an investment firm or market operator, which brings together multiple third-part buying and selling interests in MiFID derivatives. As long as financial instruments are admitted to trading, the trading of spot contracts does not change the qualification as MTF.
Non-MiFID energy derivatives	Derivatives related to energy which are not MiFID derivatives.
NRAs	National regulatory authorities (this term refers only to members of ERGEG, not members of CESR).
Platform	Regulated markets, MTFs, spot exchanges, broker platforms and other electricity and gas venues with a similar function.
OTC	Over the counter (i.e. any transaction conducted outside a regulated market or *MTF*).
Physically-settled contracts	A contract settled in physical form (i.e. by delivering the underlying).
Regulated market or RM	A Regulated Market as defined in Article 4 (14) of *MiFID.* It is a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third party buying and selling interests in MiFID derivatives in a way that results in a contract, in respect of the MiFID derivatives admitted to trading under its rules and/or systems.
Retail market	Direct sale to the "final customers" (*i.e. "customers purchasing electricity/gas for their own use"*; defined in Directive 2003/54/EC and 2003/55/EC).
Sector Inquiry	A competition report of the Commission as described in paragraph 126.
Spot energy contract	Contracts in the sense of Article 38(2)(a) of Commission Regulation 1287/2006.
Spot exchange	Platform where only spot contracts are traded.

Spot market (also called day-ahead and intra-day market)	Within each market for a type of underlying, the *spot market* is limited to spot contracts.
Third Energy Package	Proposals for Directives amending Directive 2003/54/EC and Directive 2003/55/EC.
Wholesale market	Purchases and sales between 'wholesale customers' (i.e. "*any natural or legal persons who purchase electricity/gas for the purpose of resale inside or outside the system where they are established*"; defined in Directive 2003/54/EC and 2003/55/EC).

Annex I: The Mandate

Mandate

to the Committee of European Securities Regulators (CESR) and the Energy Regulators' Group for Electricity and Gas (ERGEG)

for technical advice pursuant to Articles 22f and 24f and Recitals 20 and 22 respectively in the two proposals for Directives amending Directive 2003/54/EC and Directive 2003/55/EC (The Third Energy Package)

This mandate requests joint advice from CESR and ERGEG on issues concerning record keeping and transparency of transactions in electricity and gas supply contracts and derivatives. The mandate is given in order to find out if additional measures are necessary with respect to transparency in energy trading, as announced by Commissioners Piebalgs and McCreevy following the adoption of the legislative proposals for the internal gas and electricity markets. It is also meant to provide to the Commission the adequate technical background to adopt the guidelines under Articles 22f/24f and Recitals 20 and 22 in the two proposals for Directives amending Directive 2003/54/EC and Directive 2003/55/EC.

This is a draft provisional mandate; it will possibly be completed by additional provisional mandates, depending on the development of the negotiation process before the Council and the European Parliament in relation to the proposed amendments to Directive 2003/54/EC and 2003/55/EC.

This mandate does not prejudice in any way the ongoing negotiations on any article in the Council and the European Parliament in the context of the co-decision procedure. A formal mandate may be sent to CESR and ERGEG once the amendments have been adopted in the co-decision procedure by the European Parliament and Council.

Advice is also sought on a possible clarification of the scope of the Market Abuse Directive in relation to trading in commodities and commodity derivatives.

The present mandate takes into full consideration the agreement on implementing the Lamfalussy recommendations reached with the European Parliament on 5 February 2002. In this agreement, the Commission committed itself to a number of important points, including full transparency. For this reason, this request for technical advice will be published on DG Internal Market's and DG Energy and Transport's web site and the European Parliament will be duly informed.

1. BACKGROUND AND LEGAL FRAMEWORK

The European Commission is to adopt guidelines pursuant to the following:

Article 22f of the Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity relevantly states:

Article 22f

Record keeping

1. Member States shall require supply undertakings to keep at the disposal of the national regulatory authority, the national competition authority and the Commission, for at least five years, the relevant data relating to all transactions in electricity supply contracts and electricity derivatives with wholesale customers and transmission system operators.

2. The data shall include details on the characteristics of the relevant transactions such as duration, delivery and settlement rules, the quantity, the dates and times of execution and the transaction prices and means of identifying the wholesale customer concerned, as well as specified details of all unsettled electricity supply contracts and electricity derivatives.

3. The regulatory authority may decide to make available to market participants elements of this information provided that commercially sensitive information on individual market players or individual transactions is not released. This paragraph shall not apply to information about financial instruments which fall within the scope of Directive 2004/39/EC.

4. To ensure the uniform application of this Article, the Commission may adopt guidelines which define the methods and arrangements for record keeping as well as the form and content of the data that shall be kept. These measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27b(3).

5. With respect to transactions in electricity derivatives of supply undertakings with wholesale customers and transmission system operators, this Article shall only apply once the Commission has adopted the guidelines referred to in paragraph 4.

6. The provisions of this Article shall not create additional obligations vis-à-vis the authorities mentioned in paragraph 1 for entities falling within the scope of Directive 2004/39/EC.

7. In case the authorities mentioned in paragraph 1 need access to data kept by entities falling within the scope of Directive 2004/39/EC, the authorities responsible under that Directive shall provide the authorities mentioned in paragraph 1 with the required data.

Recital 20 states:

20. Prior to adoption by the Commission of guidelines defining further the record keeping requirements, the Agency for the Cooperation of Energy Regulators and the Committee of European Securities Regulators (CESR) should cooperate to investigate and advise the Commission on the content of the guidelines. The Agency and the Committee should also cooperate to further investigate and advise on the question whether transactions in electricity supply contracts and electricity derivatives should be subject to pre and/or post-trade transparency requirements and if so what the content of those requirements should be.

The same provisions apply mutatis mutandis in Article 24f and Recital 22 in the proposal to amend Directive 2003/55/EC for gas.

The mandate also asks CESR and ERGEG for their views on possible clarifications to the scope of the Market Abuse Directive in the context of the review of that directive by the Commission to be completed in early 2009.

2. CONSULTATION AND SOURCES OF ADVICE

The Commission is to act 'on the basis of public consultation and in the light of discussions with competent authorities'. The Commission's White Paper on Financial Services Policy 2005-2010 set out our commitment to open and transparent consultation:[28]

> Open consultations (including with stakeholder groups) will continue to play a central role and will be required before any legislation is deemed necessary. The Commission will continue to publish responses received to its consultations, practical summaries and feedback statements.

In its advice CESR and ERGEG are asked to consider the advice on commodities markets and trading given separately by CESR and CEBS, the Committee of European Banking Supervisors, in the context of the Commission's ongoing review under Article 65(3) of Directive 2004/39/EC on Markets in Financial Instruments, and Article 48(2) and (3) of Directives 2006/49/EC on Capital Adequacy of Investment Firms and Credit Institutions. CESR and ERGEG are also asked to consider the views expressed during the Commission's Call for Evidence on commodities and the conclusions reached in the subsequent feedback statement.[29]

3. THE PRINCIPLES TO WHICH CESR AND ERGEG SHOULD HAVE REGARD

As regards its working approach, CESR and ERGEG are invited to take account of the following principles:

- The principles set out in the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001;
- CESR and ERGEG should provide comprehensive advice on the matters described in Annex I;
- CESR and ERGEG should address to the Commission any questions which arise in the course of its work;
- CESR and ERGEG should also have close regard for the respective roles and functions of their members in various EU jurisdictions, as well as the relationship and levels of cooperation there are between energy and securities regulators in each. To the fullest, they should take this into account when issuing their advice.

4. QUESTIONS IN RELATION TO WHICH TECHNICAL ADVICE IS SOUGHT

Please consult **Annex I** for a list of questions in relation to which advice is sought.

5. DUE DATE

The advice from CESR and ERGEG is sought **by the end of May 2008** for questions in Sections C, E and F, and **by the end of December 2008** for questions in Sections D and G.

ANNEX I

A. INTRODUCTION

Well-functioning wholesale energy markets are an essential part of efficient energy markets. As competition develops trading becomes more and more important in the energy market. This means that financial and energy market regulation increasingly intertwine to achieve the goal of an internal energy market.

The Sector Inquiry as performed by DG Competition gave rise to concerns on the trust in and regulatory oversight over trading in energy markets. It concluded that "customers have little trust in the functioning of wholesale markets. They suspect market manipulation on the spot and forward markets by large generators to be the main reason for recent price increases. Concentration is a key factor in the proper analysis of the price developments. Other factors are the developments in fuel prices and the impact of the EU Emission Trading System.

Most wholesale markets have remained national in scope. The level of concentration in generation has remained high in most Member States giving generators scope for market power. The level of concentration in trading markets is less striking than in generation, particularly on forward markets where electricity can be traded several times before delivery. However, all spot and forward markets, even the most developed forward markets, remain dependent on the few players which enjoy a net excess of generation compared to their retail supplies.

Further, an analysis of who determines the clearing price at certain power exchanges indicates that there is scope to directly influence prices by excessive bidding prices for operators in Italy, Spain and Denmark. Possibilities to move prices might also exist in other markets.

In addition to excessive bidding, large operators can push up prices by withdrawing capacity. In that respect, it appears that load factors of generation units have increased over time in Germany and in France suggesting higher efficiency levels and a tighter supply/demand balance. However, significant generation capacity – most of it with low marginal costs – was retired in Germany despite slowly increasing demand. Also, certain plants with rather low marginal costs did not operate fully at all times."

DG Competition then carried out a detailed study of the functioning of the electricity markets in six Member States and the final report was published in April. The first part of the study looks at how many operators are effectively competing on the market on an hourly basis. The second part of the study reports on the difference between what the price of the market was in the period and what it would have been if the markets in DE, ES, NL, and UK had been perfectly competitive. This difference, referred to in the study as the "mark-up", was calculated by stimulating a perfectly competitive market for each hour of the period. The study shows that the mark ups vary over time and between Member States. Mark-ups are generally higher in DE and ES, and lower in GB and NL. The mark-up identified in the study is not the same as the profit of each company.

The third part of the study looks at the relationship between the number of operators competing at a given time and the "mark-ups". This analysis shows that there is a statistically relevant correlation between the numbers of generators who have spare capacity and the mark-ups in each hour: in other words, the more needed generators are, the higher the mark-ups in the market become.

More information on the sector inquiry and the electricity study can be found via http://ec.europa.eu/comm/competition/sectors/energy/inquiry/index.html.

As prices in bilateral contracts with end-customers are increasingly linked to wholesale market prices either directly or indirectly, there will be a growing incentive for the large energy undertakings to use their market power to influence wholesale market prices. The Commission therefore proposed strengthening the transparency requirements on physical information in its legislative proposals of 19 September 2007. It is currently considering the need for additional transparency requirements on trading activities. For example, given the different degrees of transparency between transactions on trading fora, including brokers' screens, and OTC transactions, there is a risk that high priced deals could be directed through transparent fora, thus raising the official wholesale price and having a knock-on effect on end-users.

Commissioners Piebalgs and McCreevy have stated, at the time of the adoption of the legislative proposals for the internal energy market, that transparency of trading in energy markets is a topic that needs further study to see if additional measures are necessary. They have agreed to cooperate with ERGEG and CESR on this topic, and to reach a conclusion by May 2008. Therefore the Commission services have the following mandate for advice to ERGEG and CESR.

B. DEFINITIONS

Market failure: any significant sub-optimality in market functioning. For example, where applicable, evidence of this could take the form of a wide dispersion of market prices, persistent concentrated market shares, persistent excess profits, a high level of investor complaints, significant information asymmetries leading to misallocation of resources, excessive risk-taking leading to a potentially high level of systemic risk, etc.

Regulatory failure: a regulatory state of affairs (including at European or at Member State level) which has the effect of:

(i) creating significant competitive distortions; or

(ii) significantly impairing the free movement of services between Member States; or

(iii) encouraging market participants to engage in a significant degree of regulatory arbitrage.

C. FACT-FINDING

1. How many of the following also fall under the definition of investment firms under Article 4(1)(1) of Directive 2004/39/EC (MiFID):

   (a) undertakings active in 'supply' of electricity within the meaning of Directive 2003/54/EC (Art 2.19)?

   (b) undertakings active in the 'supply' of natural gas within the meaning of the Directive 2003/55/EC (Art 2.7 and 2.8)?

2. What are the existing record-keeping obligations with respect to transactions in electricity and gas derivatives to which investment firms are subject by reason of MiFID? Consider both

the transaction reporting obligation of firms under Article 25 of MiFID as well as the record-keeping obligations under Article 13(6) of MiFID.

3. What (regulatory) authority oversees trading activities in energy markets in EU Member States?

D. RECORD-KEEPING

4. Do regulators believe that there should be a difference between the proposed record-keeping obligations under the proposed amendments to the electricity Directive and gas Directive and the existing record-keeping obligations with respect to transactions in electricity and gas derivatives to which investment firms are subject by reason of MiFID (Articles 25 and 13(6))?

5. Pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC (the Third Energy Package), what methods and arrangements for record keeping do CESR and ERGEG consider the Commission should specify as guidelines under this legislation for:

   (a) transactions in electricity and gas supply (spot) contracts? (To the fullest extent possible this should be a harmonised specification.) If there are any deviations from the obligations relating to commodity derivatives already applicable to investment firms, these should be justified;

   (b) transactions in electricity and gas derivatives contracts? (To the fullest extent possible this should be a harmonised specification.) If there are any deviations from the recommendations in a), these should be justified.

   In answering this question, CESR and energy regulators are asked to consider specifying a single transaction record format based on the content and data to be provided as per Table 1 of Annex I of Regulation EC 1287/2006.

6. How would this information be most efficiently kept at the disposal of authorities as mentioned under paragraph 1 of Article 22f/24f in the case of spot transactions and non-investment firms?

7. How would securities regulators most efficiently provide information to energy regulators pursuant to paragraph 7 of Article 22f/24f?

8. Which securities regulator would most efficiently be responsible for such provision in the case of investment firms with more than one branch?

9. Would it be feasible and efficient to employ the Transaction Reporting Exchange Mechanism (TREM) or a similar electronic system to exchange this data?

10. Is there a case for data to be forwarded from energy regulators to securities regulators on an automatic basis? If so, what data?

E. TRANSPARENCY

In answering the following, CESR and ERGEG are invited, where applicable, to build on the answers provided in CESR's initial advice to the Commission on commodity and exotic derivatives and related business (CESR/07-429, July 2007).

11. What guidelines and arrangements do energy regulators propose for the making available of aggregate market data by them under paragraph 3 of Article 22f/24f?

12. What requirements, deriving from national law, are currently put on energy traders, brokers or exchanges to publish information 'post-trade', for example on publishing traded volumes, prices etc?

13. What requirements, deriving from national law, are currently put on energy traders, brokers or exchanges to publish information 'pre-trade', for example on publishing bids to organised markets?

14. Is there a difference in transparency requirements for spot trading compared to future and forward trading? If so, why?

15. Is there a difference in transparency requirements for exchange trading compared to OTC trading? If so, why?

16. What information, other than required by law or regulation, is made public by energy traders, brokers, information services or exchanges?

17. Is access to information on traded volumes and prices equal for all parties active in that market?

18. If not, is unequal access to or general lack of information on trading causing distortion of competition?

19. In light of the findings in the Commission Sector Inquiry on energy and the subsequent study of the electricity wholesale markets, please consider:

    a) whether, pending the outcome of the legislative process in respect of the proposed Directives amending Directives 2003/54/EC and 2003/55/EC, greater EU-wide pre- and/or post-trade transparency rules for electricity and gas supply contracts (physical and spot trading) and electricity and gas derivatives would contribute to a more efficient wholesale price formation process and efficient and secure energy markets;

    b) whether such transparency arrangements could be expected to effectively mitigate the concerns identified in the Sector Inquiry above;

    c) whether uniform EU-wide pre- and post-trade transparency could have other benefits;

    d) whether additional transparency in trading could have negative effects on these markets, for example could liquidity in these markets be expected to decrease? Is there a risk that trading could shift to third countries to escape regulation?

    e) If you believe that there are risks arising from additional pre- and post-trade transparency requirements, how do you believe that these risks can be mitigated (e.g. aggregation, delay in publication, anonymity)?

F. MARKET ABUSE

20. Is the scope of Directive 2003/6/EC on insider dealing and market manipulation (market abuse) such as to properly address market integrity issues in the electricity and gas markets? Would the assessment be different if greater transparency obligations in line with the analysis above were adopted? What suggestions do regulators have to mitigate any shortcomings?

G. GENERAL

21. What timelines or delays should be built into the implementation of any of the above recommendations?

Impact analysis

CESR and ERGEG should analyse the options that they identify in an initial screening for further study in terms of likely impacts (costs and benefits) on market quality, and on market users including intermediaries and consumers/suppliers of commodities.

To the extent possible, in developing their advice CESR and ERGEG should apply the framework for impact analysis recently drawn up by the 3 Lamfalussy Level 3 Committees.

Wherever possible, quantitative and statistical data and economic analysis should be provided to justify conclusions.

Annex II: Provisions of MiFID on record-keeping of transactions in financial instruments

Article 13(6) of MiFID

6. An investment firm shall arrange for records to be kept of all services and transactions undertaken by it which shall be sufficient to enable the competent authority to monitor compliance with the requirements under this Directive, and in particular to ascertain that the investment firm has complied with all obligations with respect to clients or potential clients.

Article 25(2) of MiFID

2. Member States shall require investment firms to keep at the disposal of the competent authority, for at least five years, the relevant data relating to all transactions in financial instruments which they have carried out, whether on own account or on behalf of a client. In the case of transactions carried out on behalf of clients, the records shall contain all the information and details of the identity of the client, and the information required under Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering.

Article 51(2) and (3) of Directive 2006/73/EC (Implementing Directive)

2. The records shall be retained in a medium that allows the storage of information in a way accessible for future reference by the competent authority, and in such a form and manner that the following conditions are met:

   (a) the competent authority must be able to access them readily and to reconstitute each key stage of the processing of each transaction;

   (b) it must be possible for any corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained;

   (c) it must not be possible for the records otherwise to be manipulated or altered.

3. The competent authority of each Member State shall draw up and maintain a list of the minimum records investment firms are required to keep under Directive 2004/39/EC and its implementing measures.

Article 8 of Regulation (EC) No. 1287/2006

(Record-keeping of transactions)

1. Immediately after executing a client order, or, in the case of investment firms that transmit orders to another person for execution, immediately after receiving confirmation that an order has been executed, investment firms shall record the following details of the transaction in question:

   (a) the name or other designation of the client;

   (b) the details specified in points 2, 3, 4, 6 and 16 to 21, of Table 1 of Annex I;

   (c) the total price, being the product of the unit price and the quantity;

   (d) the nature of the transaction if other than buy or sell;

(e) the natural person who executed the transaction or who is responsible for the execution.

2. If an investment firm transmits an order to another person for execution, the investment firm shall immediately record the following details after making the transmission:

(a) the name or other designation of the client whose order has been transmitted;

(b) the name or other designation of the person to whom the order was transmitted;

(c) the terms of the order transmitted;

(d) the date and exact time of transmission.

Relevant fields of Table 1 of Annex I of Regulation (EC) No. 1287/2006

2. Trading day	The trading day on which the transaction was executed.
3. Trading time	The time at which the transaction was executed, reported in the local time of the competent authority to which the transaction will be reported, and the basis in which the transaction is reported expressed as Coordinated Universal Time (UTC) +/- hours.
4. Buy/sell indicator	Identifies whether the transaction was a buy or sell from the perspective of the reporting investment firm or, in the case of a report to a client, of the client.
6. Instrument identification	This shall consist of: — a unique code, to be decided by the competent authority (if any) to which the report is made identifying the financial instrument which is the subject of the transaction, — if the financial instrument in question does not have a unique identification code, the report must include the name of the instrument or, in the case of a derivative contract, the characteristics of the contract.
16. Unit price	The price per security or derivative contract excluding commission and (where relevant) accrued interest. In the case of a debt instrument, the price may be expressed either in terms of currency or as a percentage.
17. Price notation	The currency in which the price is expressed. If, in the case of a bond or other form of securitised debt, the price is expressed as a percentage, that percentage shall be included.
18. Quantity	The number of units of the financial instruments, the nominal value of bonds, or

	the number of derivative contracts included in the transaction.
19. Quantity notation	An indication as to whether the quantity is the number of units of financial instruments, the nominal value of bonds or the number of derivative contracts.
20. Counterparty Identification of the counterparty to the transaction.	
	That identification shall consist of: — where the counterparty is an investment firm, a unique code for that firm, to be determined by the competent authority (if any) to which the report is made, — where the counterparty is a regulated market or MTF or an entity acting as its central counterparty, the unique harmonised identification code for that market, MTF or entity acting as central counterparty, as specified in the list published by the competent authority of the home Member State of that entity in accordance with Article 13(2), — where the counterparty is not an investment firm, a regulated market, an MTF or an entity acting as central counterparty, it should be identified as 'customer/client' of the investment firm which executed the transaction.
21. Venue identification	Identification of the venue where the transaction was executed. That identification shall consist in: — where the venue is a trading venue: its unique harmonised identification code, — otherwise: the code 'OTC'.

CESR Level 3 Recommendations on the List of minimum records in article 51(3) of the MiFID Implementing Directive (Ref.: CESR/06-552c, February 2007)

'*Article 13 (6) of the Directive 2004/39/EC (hereinafter 'Level 1') establishes that investment firms shall arrange for records to be kept of all services and transactions undertaken by it which shall be sufficient to enable the competent authority to monitor compliance with the requirements under the Directive, and in particular to ascertain that the investment firm has complied with all obligations with respect to clients or potential clients.*

Article 51(3) of the Directive 2006/73/EC (hereinafter 'Level 2') establishes that competent authorities shall draw up and maintain a list of the minimum records investment firms are required to keep under MiFID and its implementing measures.

CESR is hereby issuing a recommendation to its members with the content of the list of minimum records that competent authorities need to draw up according to article 51(3) of Level 2.'

Regarding orders received or arising or decision to deal taken in providing the service of portfolio management, the records provided for under Art. 7 of the Regulation (EC) 1287/2006 should be kept. Firms may wish to consider also include in the records the date and hour when the order was sent by the investment firm for execution. The record should be created immediately after receipt of the order or after taking the decision.

Regarding orders executed on behalf of clients the records provided for under Art. 8(1) of the Regulation 1287/2006 should be kept. The record should be created at the time of the execution of the order.

Regarding transactions effected for own account, the records provided for under Art. 8(1) of the Regulation (EC) 1287/2006 should be kept. The records should be created immediately after the transaction is carried out.

As regards the transmission of orders received by the investment firm, the records provided for under Article 8(2) of the Regulation (EC) 1287/2006 should be kept. The records should be created immediately after [receipt and] transmission of the order and immediately after receiving the confirmation that an order has been executed.

Annex III: Policy objectives of energy regulators

Article22b (electricity)
Policy objectives of the regulatory authority

In carrying out the regulatory tasks specified in this Directive, the regulatory authority shall take all reasonable measures to achieve the following objectives:

(a) the promotion, in close cooperation with the Agency, regulatory authorities of other Member States and the Commission, of a competitive, secure and environmentally sustainable internal electricity market within the Community, and effective market opening for all consumers and suppliers in the Community;

(b) the development of competitive and properly functioning regional markets within the Community in view of the achievement of the objective mentioned in point (a);

(c) the suppression of restrictions to electricity trade between Member States, including the development of appropriate cross border transmission capacities to meet demand, enhance integration of national markets and to enable unrestrained electricity flow across the Community;

(d) ensuring the development of secure, reliable and efficient systems, promoting energy efficiency, system adequacy, and research and innovation to meet demand and the development of innovative renewable and low carbon technologies, in both short and long term; (e) ensuring that network operators are granted adequate incentives, in both the short and the long term, to increase efficiencies in network performance and foster market integration;

(f) ensuring the efficient functioning of their national market, and to promote effective competition in cooperation with competition authorities.

Article24b (gas)
Policy objectives of the regulatory authority

In carrying out the regulatory tasks specified in this Directive, the regulatory authority shall take all reasonable measures to achieve the following objectives:

(a) the promotion, in close cooperation with the Agency, regulatory authorities of other Member States and the Commission, of a competitive, secure and environmentally sustainable internal gas market within the Community, and effective market opening for all consumers and suppliers in the Community;

(b) the development of competitive and properly functioning regional markets within the Community in view of the achievement of the objective mentioned in point (a);

(c) the suppression of restrictions to natural gas trade between Member States, including the development of appropriate cross border transmission capacities to meet demand, enhance integration of national markets and to enable unrestrained natural gas flow across the Community;

(d) ensuring the development of secure, reliable and efficient systems, promoting energy efficiency, system adequacy and research and innovation to meet demand and the development of innovative renewable and low carbon technologies, in both short and long term;

(e) ensuring that network operators are granted adequate incentives, in both the short and the long term, to increase efficiencies in network performance and foster market integration;

(f) ensuring the efficient functioning of their national market

Relevant parts of Article 22c (electricity) in connexion with record-keeping
Duties and powers of the regulatory authority

1. The regulatory authority shall have the following duties:

(a) ensuring compliance of transmission and distribution system operators, and where relevant system owners, as well as of any electricity undertakings, with their obligations under this Directive and other relevant Community legislation, including as regards cross border issues;

(i) monitoring the level of market opening and competition at wholesale and retail levels, including on electricity exchanges, household prices, switching rates, disconnection rates and household complaints in an agreed format, as well as any distortion or restriction of competition in cooperation with competition authorities, including providing any relevant information, bringing any relevant cases to the attention of the relevant competition authorities;

3. Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties referred to in paragraph 1 and 2 in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the following powers:

(a) to issue binding decisions on electricity undertakings;

(b) to carry out in cooperation with the national competition authority investigations of the functioning of electricity markets, and to decide, in the absence of violations of competition rules, of any appropriate measures necessary and proportionate to promote effective competition and ensure the proper functioning of the market, including virtual power plants;

(c) to request any information from electricity undertakings relevant for the fulfilment of its tasks;

(d) to impose effective, appropriate and dissuasive sanctions to electricity undertakings not complying with their obligations under this Directive or any decisions of the regulatory authority or of the Agency;

(e) to have appropriate rights of investigations, and relevant powers of instructions for dispute settlement under paragraphs 7 and 8;

(f) to approve safeguards measures as referred to in Article 24.

9. Member States shall create appropriate and efficient mechanisms for regulation, control and transparency so as to avoid any abuse of a dominant position, in particular to the detriment of consumers, and any predatory behaviour. These mechanisms shall take account of the provisions of the Treaty, and in particular Article 82 thereof.

Relevant parts of Article 24c (gas) in connexion with record-keeping
Duties and powers of the regulatory authority

1. The regulatory authority shall have the following duties:

(a) ensuring compliance of transmission and distribution system operators, and where relevant system owners, as well as of any natural gas undertakings, with their obligations under this Directive and other relevant Community legislation, including as regards cross border issues;

(i) monitoring the level of market opening and competition at wholesale and retail levels, including on natural gas exchanges, household prices, switching rates, disconnection rates and household complaints in an agreed format, as well as any distortion or restriction of competition in cooperation with competition authorities, including providing any relevant information, bringing any relevant cases to the attention of the relevant competition authorities;

3. Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties referred to in paragraph 1 and 2 in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the following powers:

(a) to issue binding decisions on gas undertakings;

(b) to carry out in cooperation with the national competition authority investigations of the functioning of gas markets, and to decide, in the absence of violations of competition rules,, of any appropriate measures necessary and proportionate to promote effective competition and ensure the proper functioning of the market, including gas release programs;

(c) to request any information from natural gas undertakings relevant for the fulfilment of its tasks;

(d) to impose effective, appropriate and dissuasive sanctions to natural gas undertakings not complying with their obligations under this Directive or any decisions of the regulatory authority or of the Agency;

(e) to have appropriate rights of investigations, and relevant powers of instructions for dispute settlement under paragraphs 7 and 8;

(f) to approve safeguards measures as referred to in Article 26.

9. Member States shall create appropriate and efficient mechanisms for regulation, control and transparency so as to avoid any abuse of a dominant position, in particular to the detriment of consumers, and any predatory behaviour. These mechanisms shall take account of the provisions of the Treaty, and in particular Article 82 thereof.

Annex IV: standard products traded on electricity and gas markets

Electricity	*Gas*
Split between the products below - *Intraday* - *Day-ahead* - *Week (including 2/3/4 days-ahead, Week-ends, working days, weeks-ahead, etc.)* - *M+1* - *M+2* - *M+3* - *Q+1* - *Q+2* - *Q+3* - *Q+4* - *Calendar year : Y+1* - *Calendar year : Y+2* - *Calendar year : Y+3*	*Split between the products below* - *Within-day* - *Day-ahead* - *Week (including 2/3/4 days-ahead, Week-ends, working days, weeks-ahead, etc.)* - *M+1* - *M+2* - *M+3* - *Q+1* - *Q+2* - *Q+3* - *Q+4* - *Seasons* - *Gas or calendar year : Y+1* - *Gas year or calendar: Y+2* - *Gas year or calendar: Y+3*