

Mr. András HUIJBER
European Commission
DG Energy
Unit C2 - Electricity and Gas
Rue De Mot 24-26
1049 Brussels

Brussels, 11 March 2010

Re: Draft Discussion Paper on Transparency and Integrity of traded Wholesale Markets in Electricity and Gas

Dear Mr. Hujber,

EURELECTRIC would like to thank DG Energy for the opportunity to respond on the draft Discussion Paper on Transparency and Integrity of traded Wholesale Markets in Electricity and Gas.

1. The Policy Case for a Regulatory Initiative

EURELECTRIC shares the view with the European Commission that wholesale energy markets have become increasingly complex and increasingly relevant for market players as well as for households and industrial customers. At the same time we observe a continued improvement in liquidity and transparency, which is producing a greater trust in price formation mechanisms. While we agree that regulatory oversight is needed to ensure market integrity, we believe that the comments sometimes made on market outcomes do not take into account all the EU and global drivers and their interrelations that influence the supply/demand balance. For instance, the increased spot price volatility seen in recent months in some EU wholesale markets (more frequent price spikes as well as very low negative prices) clearly arises from the increased intermittency of the generation mix (due to wind power) rather than being caused by market participant behaviour.

EURELECTRIC also agrees on the importance of price signals for future investments as well as on the need to encourage active demand side participation. For this reason, it is particularly important not to introduce any potential distortion to the formation or level of market prices. An appropriate market monitoring regime must be based on a robust regulatory framework, consistent across the EU and should not interfere with market functioning.

While EURELECTRIC understands that the intent of the Commission is to prevent systemic risk or contagion in traditional financial markets, we believe that energy companies trading in physical and financial markets pose little or no systemic risk to any part of the financial system. The collapse of Enron, for instance, did not cause any systemic spill-over effects on energy or financial markets¹.

¹ Enron was a major commodity player in Europe prior to its demise; the firm controlled about one fifth of the European electricity trading market, including 40% of the German market. Yet, the collapse of Enron did not trigger a failure by a financial institution, or an energy firm.

Moreover, products traded in financial markets are fundamentally different from products traded by non-financial institutions. Whereas in financial markets one trades securities and other financial instruments such as options and futures often with cash settlement, commodity markets are mostly based on ‘physical and real’ commodities which determine the price. Prices for such commodities are based on fundamental factors such as power plant capacities, weather, consumer behaviour, prices and supply of underlying commodities, which are totally different from those used in financial markets. Furthermore, commodity based derivatives are settled when the underlying commodity goes into delivery and, consequently, the exposure under commodity derivatives is often shorter than the exposure under more traditional financial instruments such as stocks and bonds with an ongoing price mechanism.

Therefore, EURELECTRIC emphasises that a case needs to be made and practical evidence should be presented when setting up a framework to tackle market abuse. Moreover, such framework should duly take into account the already existing provisions and monitoring tasks defined by competition law.

2. Analysis of the Current Legal Situation

Assuming that adequate justification can be provided, EURELECTRIC could support the intention of the Commission to create a tailor-made market integrity and transparency regime for energy wholesale trading. However, regulation should be proportionate and should in particular avoid putting EU-based energy trading companies at a disadvantage compared to non-EU players. While we agree with the Commission that the scope of market abuse regulation does not fully cover all products and market places, it should be noted that energy companies’ trading behaviour is monitored (and can be sanctioned) at 3 different levels: DG Competition, National Competition Authorities and National Energy Regulators. As in any market, EURELECTRIC takes the view that competition law should be the main mechanism to control and prevent market abuse. As such, energy sector market conduct rules relating to market behaviour should be coherent with, and should not supersede or replace, existing competition law. Unintended overlaps between different supervisory bodies should be avoided. EURELECTRIC is open to participate in further discussions on how to design a balanced and coherent regime.

EURELECTRIC agrees that there is currently an “absence of a clear definition of the information that users of commodity markets can expect to receive in accordance with accepted market practices”. For this reason, “accepted market practices” should be well assessed and understood, and a thorough consultation with market parties should be launched to agree an appropriate definition of “market abuse” before any framework is designed. EURELECTRIC will be pleased to participate in and support such a consultation process.

3. Options for an EU Regulatory Initiative

3.1 Definition of insider dealing and market manipulation

If a tailor-made EU framework is established, it should be based on clear definitions of insider dealing and market manipulation, taking into account accepted market practices and operational arrangements, as mentioned above. For this purpose, an impact assessment with proper consultation process should be carried out.

Although we agree that the general principles should be the same as in the MAD, the definitions should reflect the reality and specificities of the EU energy markets: a simple extension of the existing definitions would create adverse effects.

3.2 *Commodity scope*

We believe that the most realistic approach for the Commodity Scope of a new framework is to include Electricity, Gas and CO₂. Due to the global nature of Oil and Coal markets (and the consequent lack of EU “jurisdiction”) we believe that the it would not be appropriate to include them in a EU framework.

3.3 *Transactional data*

EURELECTRIC supports the principle of regulators having access to transactional data, and believes that the record-keeping obligations of the Third Energy Package already provide the basis for an adequate level of harmonised regulatory oversight at European level. EURELECTRIC is concerned that regulatory requirements in this context could become extremely burdensome: a multitude of detailed reporting requirements, especially if non-harmonised and imposed by different national regulators, could involve considerable IT and operational expenditure. In EURELECTRIC’s view, such transaction reporting by market players should be avoided. In the energy trading sector, exchanges, MTFs and brokers already offer trade data publication on a commercial basis and Regulators should make the maximum use of these existing sources of information. If this were viewed as insufficient, EURELECTRIC could support an obligation on exchanges, MTFs and brokers to provide such data systematically².

We believe that the Commission’s idea of setting up an obligation for reporting transactions to a trade repository should be carefully assessed. In addition to data available through Power Exchanges and MTFs, a trade repository could perhaps be a useful tool for regulators in order to easily store transactions information simplifying the tasks of market supervision. Also, this kind of arrangement could be useful to avoid market participants having to prepare the different set of data requested by the different regulators in different formats. Nevertheless EURELECTRIC considers that this should not be a tool directly applicable to increase market transparency. Finally, we believe that transparency regarding bespoke commodity derivative transactions, whether originating from a trade repository or elsewhere, would be of no value to the wider market. Transaction data on non-standardised products which cannot be aggregated should not be publicly available as it would reveal commercially confidential information.

² See also *EURELECTRIC Response to ERGEG/CESR Call for Evidence on Record-Keeping, Transparency, Supply Contracts & Derivatives for Electricity & Gas* - March 2008 and *EURELECTRIC Position Paper on market transparency (as further to the request of the 12th Florence Forum)* – February 2006

3.4 Fundamental data

EURELECTRIC agrees on the need for a European-level harmonised list of 'fundamental' data. As energy wholesale markets are becoming increasingly European in nature, we feel that purely individual approaches on the national-level would not provide for a level playing field, would increase costs and encourage regulatory arbitrage.

With regard to the information to be included in the list of fundamental data, EURELECTRIC supports the views recently presented by ERGEG at the Commission transparency workshop of last November which we consider in line with our Position Paper on market transparency (February 2006).

3.5 Monitoring models

With regard to Monitoring Models, EURELECTRIC emphasises the need for EU wide harmonisation and coordination. It is important that existing legislation and competences are taken into account, so as to avoid overlaps or duplications (e.g. Competition Authorities already have far-reaching powers also in the energy markets). While there is some merit in giving monitoring powers for asset-backed trading carried out by non-MiFID-firms to a single European authority such as ACER, we believe at this moment it would be too lengthy and complex to adapt EU legislation to provide the necessary competencies, resources and operational structure. Full harmonisation of the information to provide to Member States' competent authorities would be an easier and more effective solution for the time being. Obviously this should be compulsory in all Member States.

Please do not hesitate to contact Marco FORESTI (mforesti@eurelectric.org, phone: +32 2 515 10 22) should you have any queries regarding the above questions.

With best regards,



Bernhard WALTER
Chairman, SG Financial Regulation and
Market Integrity



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