ISDA® International Swaps and Derivatives Association

EFET European Federation of Energy Traders

EFET/ISDA position on transparency requirements on platforms and supply undertakings concerning electricity and gas derivatives transactions – Morgan report/3rd Energy Package (Electricity Directive)

16 March 2009

Executive Summary

The European Parliament, Council of Ministers and European Commission are currently involved in trilogue discussions regarding the 3rd Energy Package, including with regard to the proposal amending the Electricity Directive (Directive 2003/54 – Morgan report).

We support the European Commission objective of improving trading transparency, including by requiring trading platforms to publish post-trade aggregated trade information on standardized electricity and gas derivatives. We also support the requirement to keep records at the disposal of regulators for 5 years.

However, we understand that an amendment may have been tabled in the ITRE Committee of the European Parliament, and raised in Trilogue discussions, requiring both platforms *and* supply undertakings to publish data on transactions in electricity supply contracts and electricity derivatives.

We have concerns about this suggestion, and suggest that inclusion of this amendment in the Directive *at this stage* could have negative unintended consequences for the wholesale electricity and gas markets, and would have few material benefits for transparency or regulators' ability to police market integrity in electricity and gas whole sale markets. We in particular question the benefits, and are concerned about the potential costs, of imposing such requirements on supply undertakings. Our concerns are detailed below.

Detailed concerns about imposition of transparency requirements on supply undertakings on electricity and gas derivative markets

The Council common position for the Electricity Directive provides for transparency rules. According to Article 39 ("Record keeping"), supply undertakings have the obligation to keep transaction data relating to electricity supply contracts and electricity derivatives at the disposal of the national authorities. The draft, however, does not provide for reporting obligations for the time being. We welcome the requirement for supply undertakings to keep transaction data at the disposal of regulators.

- We support appropriate transparency levels in trading of electricity and gas derivatives. As such we welcome timely adoption of requirements for trading platforms to publish post-trade aggregated trade information on standardized electricity and gas derivatives, as suggested in the recent CESR-ERGEG advice to the European Commission.

- However, we have concerns about the adoption of these additional rules as part of the Third Energy Package. We believe such rules should be framed in coherence with the bespoke *market abuse regime* which is currently prepared by DG TREN. Any transparency rules adopted before the market abuse proposals have been prepared may undermine the quality of the subsequent regulatory regime. It makes no sense to have different sets of reporting rules under the electricity directive and the future market abuse directive. This would mean duplication and overlapping of reporting obligations.

- Energy and Financial regulators – after lengthy discussions – decide*d not* to propose reporting obligations in the framework of the Third Energy Package for this reason. The CESR/ERGEG advice of January 2009 suggested that such a step would be premature*, as* drafting of reporting rules would require:

  "*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"*

  We share this concern.

- We also maintain specific concerns with the *further* transparency proposals adding to those suggested by CESR and ERGEG which may now have been proposed - to also require *supply undertakings* to publish transaction data. These concerns are based on several considerations:
  - **Commercial confidentiality**: This recent tabled amendment provides that each supply undertaking individually would have to make public individual transactions. The supply undertaking publishing its transactions could be identified (assuming it has to publish transactions on its website). The identity of the supply undertaking would even be disclosed if the reporting is performed by the platform operator on behalf of the supply undertaking. Commercially sensitive data would be published in detail, and the mechanisms to protect trade secrets stipulated in Art. 39 (2) would not be applicable. With this kind of information, the trading situation of the supply undertaking (being "short" or "long") is easily inferable.
  - **Duplicative requirements at significant cost**: Requiring platforms *and* supply undertakings to publish data would result in duplicative reporting requirements, with (hence) limited extra benefits, implying considerable cost to supply undertakings.
  - **Better regulation**: CESR and ERGEG proposed transparency requirements for trading platforms *only*, after lengthy consideration. This lengthy consideration resulted in a conclusion that there were insufficient benefits in applying transparency requirements *additionally* to supply undertakings. Adoption of such additional transparency requirements on supply undertakings at this late stage would be contrary to to this considered assessment, and would be undertaken without cost-benefit or impact assessment justifying these changes.

Suggested action

- We suggest that the amendment which we understand may have been tabled to Article 39 should *not* be adopted. We believe that reporting obligations would be most effectively drawn up in coherence with, and contemporaneous to, the the draft market abuse directive for electricity and gas markets that DG TREN is working on.

- If the European Parliament, European Commission and Council of Ministers nevertheless believe it necessary to modify the record keeping rules at this stage, we certainly do not believe the Proposal should include duplicative, burdensome transparency requirements undermining the commercial confidentiality of supply undertakings. We do not believe there would be *any* benefit in a reporting obligation for supply undertakings, in particular if such requirements are to be imposed on platforms.