

# **Bord Gáis Energy Response Market Monitoring in the Electricity and Gas Retail Markets Consultation Paper/11/221**

## **1.0 Introduction**

### General Monitoring Concepts:

Bord Gáis Energy (BG Energy) has reviewed CER Consultation Paper 11/221 on Market Monitoring in the Electricity and Gas Retail Markets. At the outset it is important to say that we understand the legislative drivers behind the need for monitoring. We accept that this general principle will have to be implemented, but only as envisaged by legalisation. We look forward to working with CER to establish:

- a reasonable basis,
- an allowable scope, and
- a workable timeline in respect monitoring activities.

Unfortunately, the consultation as drafted, fails to address or adequately address the aforementioned headings.

### Serious High Level Concerns:

While, we have no issue with some of the proposals in the paper, we have serious concerns with the proposals to request retail margin and arrears information from Suppliers. Indeed in this response, we query the CER's legal basis and justification for requesting such information. We believe publication of such information is not conducive towards promoting stability in an emerging competitive market and is damaging to the commercial interests of Suppliers. We also have issues in relation to the levels of granularity sought and rationale put forward by the CER in relation to the some of the other proposals in the paper.

### Process Related Concerns:

We also have serious concerns about the process being followed by the CER for this consultation. We note the CER proposes moving straight to a Decision following this paper and has ambitious timelines for the publication of the first report, This is completely unreasonable and is without cognisance of the system and operational changes that would be required by industry participants. There is undoubtedly need for a series of consultations/further detailed workshops due to the volume and granularity of information requests being put forward in this paper. The CER is seeking extensive and commercially sensitive information from Suppliers and there is very little detailed information on how this will be presented and used in the Consultation Paper. Indeed, we do not believe that the CER has set out a legitimate case for requesting all such information in the first place and no proportionality demonstrated. *Market Participants must be afforded the right to have further consultation on this matter.*

## **2.0 Detailed Comments on Retail Market Monitoring Consultation Paper**

### ***Section 6.0 Market Monitoring Indicators – Market Structures***

#### ***Section 6.4 Retail Margin***

We note that the CER “may publish amalgamated information by customer category or by Supplier, showing retail margins”.

Bord Gáis Energy completely disagrees that Suppliers should be required to provide retail margin information or cost base to the CER in respect of non regulated activities and we would dispute the CER’s legal basis for requesting such information. We do not believe it is reasonable or proportionate to request such information from Gas and Electricity Suppliers in general for the following reasons:-

## **Ofgem “Supply Probe” Comparisons**

The CER cites the example of Ofgem’s reporting of Supplier retail margins in the GB market. We do not believe that the comparison is fair or reasonable for the following reasons:-

### Due Cause:

- We would ask CER to note that Ofgem conducted a “Supply Probe” in response to competition concerns that the retail market in GB was not working effectively and excess profits were being taken by Suppliers. This Supply Probe took over two years to complete and went through many stages of development with market participants being afforded extensive consultation. The CER has cited no grounds for suspecting that competition is not working effectively in the gas and electricity retail markets in Ireland. As noted, the Ofgem probe was conducted in response to mounting consumer and public concern over the competitiveness of the retail market for gas and electricity. The Irish retail market has not seen such a mounting consumer and public concern over the competitiveness of the market. In fact, in 2009, VaasaETT Utility Customer Switching Research Project (UCSRP)<sup>1</sup> stated the following:

*“In 2009, nearly 21% of all electricity customers in the Republic of Ireland switched Supplier.” In world rankings, Ireland came second only to Victoria in Australia out of 36 markets that were examined in relation to “World Switching Rankings in 2009”.*

It was at this point that Ireland was identified as being in what they term a “Hot Market” where “annual switching is approximately 15% or higher. Typically, switching activity is so intensive that competitive positioning becomes one of the utility’s most strategic issues. Switching momentum is usually high, constant, needs little encouragement and easily flares up”. Ofgem’s findings under the Supply Probe were against a backdrop of years of retail competition

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<sup>1</sup> World Energy Retail Rankings Report 2010

and six years since price controls were removed. Ireland is simply not comparable in this respect with Bord Gáis Energy still the subject of regulatory price controls by the CER and the electricity market only recently declared competitive.

#### Divergent Market Maturity Vs GB

- In summary, the CER has announced what information it wants from suppliers without first investigating what is appropriate for Ireland's competitive energy market at this particular moment in its development (or if it has been investigated it not been made known to Suppliers). The CER seems keener to follow blindly the information Ofgem seeks in the GB rather than examining with all stakeholders the intricacies of the Irish market in order to assess what is most suitable. The GB market was fully competitive and had been for c.10 years in 2008. The electricity market in Ireland has only been declared competitive since April 2010. Moreover, the retail gas market has *not even been fully deregulated* and is only in its infancy.

#### Sourcing of Information & Hampering of Competition:

- We would ask the CER to note that Ofgem *assumes* Supplier retail margins from the regulated accounts – it does not seek these directly from Suppliers. Clearly, Irish retail energy markets are at a far lower stage of development than in GB. Seeking and publishing retail margin information for all Suppliers will inevitably hamper the development of a competitive market. The CER is trying to encourage new entrants to the Gas and Electricity retail market – *monitoring and publishing independent Suppliers' retail margins at such an early stage of market development will hamper the development of the market and will not encourage new entrants. In addition, the volume, nature and sensitivity of information being requested in this consultation could impose such a heavy regulatory burden on a potential new entrant to make them reconsider their entry into the Irish Energy market altogether.*

Cost “Build-Up” Information is already available in Ireland:

- The GB wholesale market is a bilateral market while the Irish market is a pool with a transparent, published pool price. There is far greater obfuscation in the GB market with regards to wholesale prices especially given that all of the “Big 6” Suppliers also self-supply to a significant extent. It is absolutely clear what the wholesale cost for power is in the Irish market with the published pool price and the fact that the level of vertical integration is far less.

Reasonableness & Consistency is Required in Regulatory Policy:

In its Electricity Roadmap for De-regulation Decision Paper (CER 10/058 – Decision 21), the CER also stated that: *“Should the Commission find that the market is in danger of suffering from anti-competitive behaviour and that the voluntary solutions to the problem offered by the relevant supplier(s) are inadequate, the Commission will act to ensure consumers and competition are protected.”* The CER has forwarded absolutely no evidence that the market is in such danger or indeed sought “voluntary solutions to the problem” from Suppliers. Suppliers need to know why the CER is moving to far more stringent requirements now only 1.5 years after its electricity deregulation decision and prior to the CER even announcing a final decision on the deregulation of residential gas customers. Such behaviour cannot be considered reasonable or consistent in light of what the CER’s previously stated position has been in the Electricity Roadmap for De-regulation.

## **Legal Basis**

While Bord Gais Energy agrees that the CER is obliged to implement a monitoring programme under the Third Directives, we believe the powers granted do not extend to the monitoring of retail margins or arrears reporting for the following reasons:-

Monitoring Must First Provide Cause to seek Margin/Cost Information & Thereafter, the CER can only examine the costs of the “Board” i.e. ESB.

- In SI 450 of 2010, the CER has powers to monitor the effectiveness of electricity market opening and the development of competition. On foot of this, the CER may take action in order to prevent a distortion or restriction of competition in the supply of electricity to final customers or to ensure that final customers are benefiting from competition in the supply of electricity. Where these objectives have been determined, it is only then that the CER can proceed to examine costs. Section 3 (dc) of SI 450 states that the CER can examine the underlying cost of the electricity supply charges of “the Board” i.e. ESB. The key points to note here are that the CER must have due cause to investigate costs to prevent a distortion in competition or ensure customers are benefiting from competition and that this only extends to ESB under SI 450.

Proportionate Behaviour by an Regulatory Authority:

- The CER states that it can seek information from Suppliers via their Supply Licence Conditions (Provision of Information to the Commission). The CER must surely have to act reasonably and proportionately when seeking information and have legitimate grounds for doing so. These sentiments are contained in the 3rd Directive<sup>2</sup>

*“ the regulatory authority shall have at least the following powers:*

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<sup>2</sup> Directive 2009/72/EC 13<sup>th</sup> July 2009

*(b) to carry out investigations into the functioning of the electricity markets, and to decide upon and impose any necessary and **proportionate measures** to promote effective competition and ensure the proper functioning of the market.”*

Confidentiality & Proposed Electricity Supply License Condition 12

- As noted above, the CER has not forwarded any specific legal basis or in our view legitimate reasoning for requesting retail margin information. Moreover, CER does not have the powers to publish information that it receives under the Licence which is confidential or commercially sensitive. In determining what constitutes confidential information or Commercially Sensitive information, the CER must consult with the Licensee [Current Gas Supply Licence wording]. *Bord Gáis Energy considers its retail margins to be completely confidential to us and highly commercially sensitive and does not want these in the public domain.*

The CER has previously stated that it defines what is deemed confidential by reference to Section 13 of the Electricity Regulation Act. Section 13 cannot be relied upon to define what is “confidential”. Section 13 is legally only intended to set out the criminal parameters that would apply to individuals working for the Commission who revealed “confidential information” obtained via the role in the Commission. The definition of Confidential Information stated in this section cannot be interpreted more widely than the purposes of this Section 13.

Certainty is a prerequisite in respect of use of Information provided

- Moreover, it is completely unclear from the Consultation Paper what information the CER intends to publish and what information it deems confidential or commercially sensitive. This must be made clear to Suppliers as such information is business critical and commercially sensitive.

Suppliers Interests must be Regarded in Respect of Information Published.

- BG Energy notes that the CER has legislative responsibilities in relation to commercially sensitive information (S.I. No. 60/2005)<sup>3</sup> where:

*“In arranging for the publication of any such information or advice the Commission shall have regard to the need for excluding from publication, insofar as that is practicable, any matter which relates to the affairs of a person where publication could adversely affect the person's interests.”*

Commercially Sensitive is Exempt from Publication:

- In addition, The Freedom of Information Act 1997 (FOI Act) provides valuable guidance in this regard. Section 27 of the FOI Act stipulates that commercially sensitive information is exempt from release if it contains trade secrets or financial or commercial information whose disclosure “could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation” or “could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates”.

Trade secrets may be confidential information of a commercial character such that it constitutes an economic asset of the business concerned. Furthermore, financial and commercial information includes: “...information in the nature of operating and financial information.”<sup>4</sup> A company has reasonable grounds to be concerned about the disclosure/ publication of confidential information if such disclosures will give a company’s competitors an advantage in the market or could be used to prejudice a company’s commercial standing or contractual negotiating position. We believe that information in relation to arrears and

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<sup>3</sup> **S.I. No. 60/2005 — European Communities (Internal Market in Electricity) Regulations 2005**

<sup>4</sup> Guidance is provided pursuant to the FOI Acts on what constitutes trade secrets. This guidance is made with reference to court decisions and is available at [http://foi.gov.ie/12-10-commercially-sensitive-information/#limitations\\_on\\_the\\_exemption](http://foi.gov.ie/12-10-commercially-sensitive-information/#limitations_on_the_exemption)

retail margins fall into this category and are commercially sensitive due to the fact they would give information on a company's "competitive edge". This is something that has been acknowledged as constituting a "trade secret"<sup>5</sup> as set out above.

- Guidance from the UK in their "Freedom of Information Awareness Guidance No. 5" where the test of Prejudice decides whether the release of information would, or would likely to, harm someone's commercial interests touches on the issues we have raised above perfectly where it sets out clearly what Commercially sensitive information is:

***5. Is the information commercially sensitive?***

*Companies compete by offering something different from their rivals. That difference will often be the price at which the goods or services can be delivered but that difference may also relate to quality or specification. Information which identifies how a company has developed that unique element is more likely to be commercially sensitive. For example where a company competes on price, it may be that the final price charged is readily available, however information disclosing how the company is able to offer the product at that price may not be. That is information revealing profit margins is more likely to be commercially sensitive. This argument can extend to working practices etc that allow a quality of service to be more efficiently delivered.*

**ERGEG 18 Market Indicators**

- We note that the CER sets out ERGEG's 18 Indicators (p.23) and that it states it intends to use these as a basis to develop a retail market monitoring framework. *ERGEG does not propose that retail margins (or arrears*

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<sup>5</sup>[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_5\\_-\\_commercial\\_interests.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_5_-_commercial_interests.pdf)

*reporting) are one of these indicators. We are assuming that it is ERGEG's view that collecting retail margin information is not necessary in the ordinary course of events for market monitoring. We would propose that ERGEG's 18 market indicators provide a sensible and reasonable approach to retail market monitoring under the Third Directive and should be used by the CER as a basis for its monitoring.*

### **Corporate Governance**

- We would ask the CER to note that the reporting and publishing (at CER's discretion) of certain aspects of our business such as retail margins and arrears are contrary to existing restrictions that apply to Suppliers in law or within the confines of normal corporate governance. The publication of such information by CER may contravene our existing obligations in respect of Bondholders, Credit Rating Agencies.

### ***Section 7.0 Market Monitoring Indicators – Retail Market Outcomes***

#### ***Section 7.4 - Price Spread for Comparable Products***

- This section implies that if customers do not switch to the cheapest supplier then they are being disadvantaged. The customer could choose to be inactive or could be choosing to remain with a more expensive supplier for better customer service.

#### ***Section 7.5 – Arrears***

- BG Energy can see no reason why arrears information provides a useful indicator of retail market outcomes which surely must be focused on prices and contracts and service available to customers. We also note that ERGEG does

not state this as one of their 18 indicators for a retail market monitoring framework.

- Arrears information is highly sensitive for Suppliers and if made public could be seriously detrimental to our business interests and potentially de-stabilise the business.
- The CER seeks a detailed breakdown of the precise number of customers in arrears for more than 30, 60 and 90 days and the number of customers on payment plans.
- The CER notes that using this indicator, the CER “will be able to monitor the situation with regards to the number of customers having difficulty paying their bills and whether action is required on the part of the CER and/or Suppliers” and that this will “inform consumer protection policy”.
- As stated above, this is highly commercially sensitive information and should only be provided to CER (and/or published) if there is a sound and legally justifiable basis for doing so. Simply to state that this will “inform consumer protection policy” is insufficient.
- Clearly, there will always be a number of customers who will have difficulty paying their bill. The CER should only have concern with setting rules for Suppliers as to how to deal with such customers and indeed currently does so via our Code of Practice on Disconnection. It is of little relevance to the CER to detail and publish numbers of customers in arrears when this could de-stabilise a business. This is particularly important for smaller, new entrants to the market and could act as a barrier to entry.

### *Section 7.6 - Penalty Clauses*

- Penalty clauses are put in place for a reason and it is a customer’s obligation to understand the details of the contract that they are signing. BG Energy is not

sure how publishing penalties data is beneficial to the monitoring of retail market outcomes.

## ***Section 8.0 Market Monitoring Indicators – Customer Satisfaction***

### ***8.2 Customer Complaints***

We note that the CER is proposing that Suppliers report on complaint numbers and by the categories shown in the reporting form. While BG Energy has no issue with reporting on complaint numbers, we would like to understand how the CER will ensure that all Suppliers are reporting accurately, fairly and to the same standards. CER must actively ensure compliance with this in order that more honest Suppliers are not disadvantaged by their accurate reporting of complaints. CER must explain how it proposes to ensure compliance with this before BG Energy agrees to provide detailed complaint information.

### ***8.3 Customer Enquiries***

We note that the CER states that “customer enquiries” are evidence of active behaviour. A customer enquiry is defined as a “*request for information and advice*” and this is broken down into different categories of “*enquiry*”. BG Energy handles more than 1,500,000 inbound phone calls per year and deals with a significant number of online and e-mail based enquiries from customers. The definition of enquiry is so wide and the categories proposed so extensive that this could encompass every one of those 1.5 million calls and every e-mail received from a customer. It is absolutely disproportionate that all of these enquiries be recorded and reported on just to assess evidence of “*active behaviour*”. This is onerous in the extreme and we cannot see what purpose or insight it would bring that could not be similarly achieved by more proportionate measures.

### **3.0 Response to Consultation Questions**

We have not responded to each of the questions here and have instead provided general comment in this response. We would ask the CER to note that the questions in the consultation paper convey a tone of acceptance of the information sought/reporting requirements and then simply ask if more was required. This is not acceptable as a consultation exercise when Suppliers should have been asked if these reports were reasonable in the first place before it was assumed they were being implemented by CER.

#### ***Section 4.0 Market Segmentation in Electricity and Gas***

*Question 1: Respondents are invited to comment on the three options presented for electricity market segments. Respondents are also invited to suggest alternative market categories.*

Using the DUoS Groups (option 1) to define market segment is the most appropriate for our purposes as DUoS Groups can be mapped to tariffs.

*Question 2: Respondents are invited to comment on the three options presented for gas market segments. Respondents are also invited to suggest alternative market categories.*

For our purposes we would be happy for the market segments to continue to be defined as they currently are (Option 1).

***Section 5.0 Market Monitoring Indicators – Market Condition and DSO Services***

*Question 3: Respondents are invited to comment on whether the indicators outlined for measuring switching rates are sufficient and if not, what other methodology could be used.*

It is positive that the CER is proposing to continue publishing the monthly Change of Supplier report. From BG Energy's perspective and in the absence of more frequent market share information, the more detailed the switching information that is provided the better in terms of producing market share forecasts (e.g. switching by market segment rather than for the market as a whole).

***Section 6.0 Market Monitoring Indicators – Market Structures***

*Question 11: Respondents are invited to comment on whether the level of detail on market share currently shown in the CER's quarterly reports is sufficient. If not, please state what additional information should be provided.*

BG Energy is happy with the current level of detail on market share. However, we believe that there is a lag between the market share by customer number and the market share by volume. For example, if a customer switches supplier at the end of a quarter, that customer will be included under the new supplier for customer number but the majority of its consumption for that quarter will be included under the old supplier thus distorting the figures. One alternative would be to use AQs instead of actual volumes. These figures would be estimated but would remove the lag and be more reflective of the point in time. This point is backed up in CER/11/071 Roadmap for Deregulation in the Non-Daily Metered Retail Gas Market Decision where it states on P28 that:

*“The threshold measure in the NDM residential sector will be by reference to customer numbers rather than volumes (as is the case for the FVT and I&C sectors) in the year to date. This is essentially on the ground that gas consumption is far more seasonal and temperature sensitive than, say*

*electricity so that, depending on when during a gas year a customer has switched supplier, data on consumption over a given period can be quite misleading on the state of play on competition at the date of regulation.”*

## **4.0 General Comments on Retail Market Monitoring Consultation**

### **Better Regulation**

Bord Gáis Energy does not believe the principles of Better Regulation are being followed in this consultation with respect to certain aspects of the proposals. Better Regulation should follow the principles of Necessity, Effectiveness, Proportionality, Transparency, Accountability and Consistency. We do not believe the proposals follow these principles for the following reasons:-

- **NECESSITY** – the CER has not demonstrated that the reporting of retail margins is necessary or valid. Ofgem sought financial data from GB Suppliers in response to concerns about the competitiveness of the market. There have been no such concerns raised about the Irish market. Similarly, why is it necessary for Suppliers to report on customer arrears when this is highly confidential? CER says that understanding arrears levels/amounts will help inform consumer protection policy. Surely this is not enough – a certain number of customers will always be in arrears – knowing the amount of the arrears should not affect the policy decision.
- **EFFECTIVENESS** – the CER has not targeted the proposals effectively and explained in detail why information is required and what it is going to be used for. The CER has simply opted for the scatter-gun approach and asked for reams of information from Suppliers without explanation as to how it is going to be used.

- **PROPORTIONALITY** – the CER has not employed proportionality when seeking retail margin information from Suppliers. Suppliers already provide regulated accounts to the CER. Surely this information should be enough when the CER has demonstrated no concerns about the competitiveness of the Irish energy retail markets.
- **TRANSPARENCY** – the consultation process has a distinct lack of transparency at best. The consultation itself is light on detail given the granularity of information sought in explaining why such information is required and how it is going to be used and reported. Moreover, following this consultation, CER proposes to move straight to Final Decision. This is simply unacceptable given the significance of the consultation and the scant reasoning in respect of detail provided/sought in the paper.
- **ACCOUNTABILITY** – it is unclear in the paper who is responsible for the information provided, who will make decisions about publication and what Suppliers can do if they are not satisfied that due process has been followed.
- **CONSISTENCY** – we believe the proposal to provide retail margin information is inconsistent with the Licence Conditions already in place to provide regulated accounts. What status will these accounts now have?

### **Due Process for Consulting on Retail Market Monitoring**

We note in the “next steps” for the consultation, that the CER is **not** publishing a Proposed Decision between this Consultation and its Final Decision. Therefore, the CER is not going to set out a proposed template of the exact information that they will expect from Suppliers and a proposed template of how they will present this information publicly. Suppliers simply do not know how the information they provide

will be represented in market reports. Market Participants have not received commitments that they will have an opportunity to provide any comment on this whatsoever. *BG Energy believes this is unreasonable in the extreme given the significance and sensitivity of the information the CER is seeking.* Throughout the Consultation Paper, CER makes reference to Ofgem's market monitoring and reporting. However, we would ask the CER to note that there is a stark contrast between the proposed CER consultation process and Ofgem's consultation which went through a 2 year energy "market probe" whereby opinion was canvassed thoroughly from all concerned parties and there were many stages of development of the investigation.

The scope of the document is so wide-ranging that it is simply not possible to deal with such an array of parameters within the CER proposed timelines. If this process is to proceed in a reasonable and efficient manner then we propose that we need an extension of at least 4 months to the proposed timelines. This would allow work segments to be batched and progressed within a process which provides for examination of each issue at the required granularity. Each batch of work should then be accompanied by its own workshop of sufficiently long duration to discuss matters comprehensively. Subject to the outcomes and clarifications arising from the workshops, Suppliers then need to be given sufficient time to estimate, plan for and execute any agreed changes to be delivered. A phased approach to implementation will be necessary with some being able to be implemented more quickly than others.

### **Publication of Market Reports**

The CER states "*that they currently publish Quarterly market reports for electricity and gas*" and that they will move this forward with the publication of quarterly market monitoring reports. We would request that the CER abides by its current commitments with respect to publishing market information reports before it makes further commitments with respect to market metrics. There was a 7 month gap between the publication of Q1 2011 electricity retail report and the publication of Q2 and Q3 2011

on 19<sup>th</sup> January 2012. Please note that this information is now so out of date, it is of little use to market participants. The erratic nature of the timing of publication of the electricity retail report is a major issue for market participants as they cannot rely on the dependability of publication. The CER has advised that publication of the Q4 2011 electricity retail market report will follow in April 2012. This would be a welcome development but precedence suggests market participants cannot rely on an April publication. We would seek clarity on whether the CER will continue to publish the current versions of the retail market reports for gas and electricity in the interim (until the reports proposed under this consultation are developed). We note that the last reports were Q1 2011 for electricity and Q3 2011 for gas. Furthermore, BG Energy would favour a synergy between the publication of gas and electricity retail markets. The gas and electricity markets should be treated exactly the same in each report. The same information should be published for each market and in the same format for both. For example, in the current gas retail market reports quarterly volumes are provided on a cumulative basis over a year whereas in the current electricity retail market report quarterly volumes are provided for that quarter only.

**Conclusion:**

Bord Gais Energy accepts that a system of monitoring will be need to be put in place. We believe that current proposals are premature and, in many respects possibly exceed the boundaries permissible by enabling legislation. In order to progress the issue of monitoring, we believe the consultation process should be extended to allow for adequate discussion of high level monitoring parameters and the level of granularity involved. We would suggest the ERGEG guidelines be used to form both the basis and boundary of this discussion and a series of workshops be convened to arrive at the required level of granularity.