



**Response by Energia to Commission for  
Energy Regulation Consultation Paper  
CER/11/221**

***Market Monitoring in the Electricity and Gas Retail  
Markets***

**10 February 2012**

## **1. Introduction**

Energia welcomes the opportunity to respond to this Commission for Energy Regulation (CER) consultation paper on market monitoring in the electricity and gas retail markets. This is an important consultation paper, one which must ensure an appropriate balance is struck between the regulatory burden imposed on businesses by new measures, and the continued ability of CER to undertake their statutory duty with respect to the electricity and gas retail markets.

This response begins with some general comments on retail market monitoring in Ireland and elsewhere in Europe as a result of the Third Package of legislative measures in Energy Markets, as well as the CER's market monitoring role in this new context. A review of current Government policy on regulation is also included. Section 3 includes Energia's responses to the specific consultation questions, subdivided into relevant categories.

Importantly this response does not address relevant legal questions with respect to the proposals contained in the consultation paper and comments contained herein are without prejudice to formal legal argument that may be forwarded in the future.

## **2. General Comments**

Despite the consultation paper issued by the CER containing a substantial list of 25 questions, respondents' views on the general approach or appropriateness of the general framework proposed are not asked for. While the questions posed are ultimately to be of importance to the overall process, we consider it first to be necessary for the CER to engage with market participants on the general approach, principles and requirements this workstream is seeking to address. This section provides a general overview of the paper, the context within which it has been brought about and the binding principles governing the introduction of such regulation in Ireland.

It is important to note that as far as we are aware, no regulator in any jurisdiction has ever conferred, or been conferred with, the powers being sought by CER in this consultation paper. For both the GB energy market probe and the EU energy sector inquiry, both were initiated under the respective powers derived from competition law legislation; both were also initiated in response to perceived market abuse; and both required market participants to submit a substantial amount of data on a one-off basis in order to allow for a full and thorough investigation of perceived problems in the respective markets.

In the case of the CER proposals, there is no perceived problem in retail markets, competition law therefore is not and arguably cannot be used to acquire such detailed data. Despite there being no perceived problem, CER are proposing to collect an equally detailed set of data from market participants but additionally, this would be done on a recurring basis, thus exponentially increasing the potential cost of regulatory compliance and the regulatory burden on this sector in Ireland. Noting the absence of a perceived competition issue, the additional burden and cost of compliance is likely to act as a barrier to entry in the retail markets. Furthermore,

and pursuant to EU requirements, the Competition Act (2002) prohibits anticompetitive activity and, similar to the examples referenced in other jurisdictions, provides the power of investigation to the Competition Authority to undertake a full assessment. It would appear as though the CER are seeking to largely usurp the Competition Authority's role with respect to this market and we submit that the approach proposed is both unprecedented in other jurisdictions and contrary to the Government's stated policy on regulation.

As part of this response we have not addressed a number of identified legal issues that are considered relevant with respect to the basis and legitimacy of the proposed approach and powers CER are seeking to confer upon themselves, including a number of other issues. Where necessary, these issues will be advanced in future correspondence with CER.

The rest of this section provides some further details around this general discussion before we address a number of the specific questions contained in the consultation paper in the next section of the response. It is important to note that in addressing these questions, it is without prejudice to view around the legitimacy or otherwise of the proposals or other views to be forwarded as part of the further development of this workstream.

### ***What is the paper's objective?***

The stated purpose of this consultation paper is to elicit the views of interested parties on CER's proposed framework for retail market monitoring, the legislative basis for which is provided in the European Commission's 3<sup>rd</sup> Energy Package and transposed nationally through Statutory Instruments (S.I. 450 of 2010 and S.I. 463 of 2011). The proposed new more detailed framework is to ensure Ireland complies with the legislative requirement, while also looking to address information deficits arising from the liberalisation of the retail electricity and gas market, with further liberalisation (domestic) of the gas market planned. Such information is considered necessary to help the CER answer a set of basic questions, identified as;

- Is the market working?
- Is the market working for consumers?
- Is competition supported?

### ***EU 3<sup>rd</sup> Energy Package & ERGEG Guidelines***

The liberalisation of energy markets across Europe is an advancing objective of the European Commission with successive legislative packages seeking to open up markets and most recently (3<sup>rd</sup> Package) to safeguard the rights of consumers in such markets. Noting the binding requirements on all Member States, relating largely to household customers, the European Regulators' Group for Electricity and Gas (ERGEG) published Guidelines of Good Practice on Indicators for Retail Market Monitoring for Electricity and Gas (GGP). It is appropriate that this "one-size-fits-all" legislative approach, and responses to it (i.e. GGP), is considered collectively by all National Regulatory Authorities (NRAs). Despite differences across markets, the legislative requirements are common and a common approach to satisfying them

facilitates the overall European objective of a common market in energy across Europe.

Notwithstanding this point, where the characteristics of individual Member States' markets necessitate an approach and measure beyond that of the common approach, this is allowed. However, in accordance with good regulatory practice, where this set of common measures is to be exceeded, it is expected that the regulator would provide market participants with a reasoned opinion as to why the market characteristics are sufficiently different from other countries, such that a different approach is required to ensure common legislative requirements are met. It is important to note that exceeding these requirements may place barriers as opposed to benefits for the future development of the market.

The ERGEG GGP identifies four categories and eighteen indicators for effective retail market monitoring in domestic markets. The approach is broadly consistent with a classic Structure – Conduct - Performance (SCP) paradigm, with a specific focus on customer satisfaction. The ERGEG approach appears to be specifically designed to minimise the burden of regulation on market participants while similarly ensuring compliance in an efficient and effective manner. With respect to two of the four categories, (Retail Market Outcomes and Market Structure), information may be provided by suppliers but this is not necessary as the level of information foreseen by ERGEG could similarly be gathered through research by the NRA or from the DSO.

It is important to reiterate that all of these indicators relate only to household customers and are not designed or intended to apply to non-domestic customers.

### ***Better Regulation in Ireland***

In January 2004 the Government published a White Paper on Regulation, entitled "Regulating Better". The objectives and principles of this White Paper remain part of current Government policy as part of the Better Regulation programme. The CER is required to uphold the principles of Better Regulation which are not just applicable to primary and secondary legislation but also to sectoral regulators. The following is an extract from the White Paper which provides an overview of the principles and the relevant questions to guide the regulators actions.

- NECESSITY - is the regulation necessary? Can we reduce red tape in this area? Are the rules and the structures that govern this area still valid?*
- EFFECTIVENESS - is the regulation properly targeted? Is it going to be properly complied with and enforced?*
- PROPORTIONALITY - are we satisfied that the advantages outweigh the disadvantages of the regulation? Is there a smarter way of achieving the same goal?*
- TRANSPARENCY - have we consulted with stakeholders prior to regulating? Is the regulation in this area clear and accessible to all? Is there good back-up explanatory material?*
- ACCOUNTABILITY - is it clear under the regulation precisely who is responsible to whom and for what? Is there an effective appeals process?*
- CONSISTENCY - will the regulation give rise to anomalies and inconsistencies, given the other regulations that are already in place in this area? Are we applying best practice developed in one area when regulating other areas?*

Further to the view expressed previously, that Member States should provide reasoned opinion as to why their approach and indicators differ from those agreed by ERGEG, the binding principles of Better Regulation similarly impose arguably a more definitive requirement on regulators to ensure their actions are compliant with Government policy.

With respect to the proposals forwarded by CER in this consultation paper it is not apparent that due consideration has been given to the principles of Better Regulation as both the approach and indicators proposed fall considerably short of satisfying at least half of the outlined principles.

### **Market Monitoring and CER**

CER already engage in market monitoring and have regularly published and communicated views consistent with the general message that the retail market and competition is working well. In fact, the CER's decisions to liberalise different markets have all been based on an evidence-based, albeit subjective, view that the competitive conditions in the market could support such a change. It is therefore unclear how parallels drawn in the consultation paper with the Great Britain market are appropriate in this context, (where problems have been identified), and we contend that this market should more appropriately be seen as the exception rather than the rule in such matters as retail market monitoring in response to common EU-wide requirements and changes.

The previous discussion is not intended to address the necessity, in general, of proposals around retail market monitoring. This review of retail market monitoring is considered to be largely driven by compliance with the EU requirements which introduce new monitoring measures to complement many of those already undertaken by CER. In general, therefore, this review and certain new proposals are necessary to ensure compliance with the new European requirements under the Third Legislative Package. The issue of retail monitoring *per se* is therefore not a contention, the level and appropriateness of the monitoring activity proposed is the key issue. Specific examples include;

- the extension of ERGEG GGP indicators to non-domestic markets;
- the inclusion of detailed and commercially sensitive indicators not included in the ERGEG indicators (e.g. margin and arrears data);
- the granularity of reporting proposed (e.g. by customer category and/or by product) that exceeds both the ERGEG indicators and indicators used in GB.

From the consultation paper it is unclear how some of the measures proposed are derived from the EU requirements, and where they are not, the rationale for requesting them. It is also unclear how indicators not contained in the ERGEG guidelines, or where the ERGEG guidelines have been exceeded in terms of details, are consistent with Government policy on regulation.

Although not considered in this response, this matter also gives rise to significant legal questions with respect to whether certain proposals are *ultra vires*.

### 3. Specific Comments on Consultation Questions

Within this section we have provided responses to relevant questions contained in the consultation paper. In the interest of clarity, and reflecting the views already expressed in this response, the consultation questions have been separated into four main categories;

- Market Segmentation;
- Measures Consistent with ERGEG Guidelines;
- Additional Questions; and
- Other Questions.

For the avoidance of doubt the response provided with respect to the “Additional Questions” address measures not contained in the ERGEG Guidelines, are considered to have an unclear legal basis, an unclear rationale forwarded for requesting this information, may be barrier to entry, and are considered inconsistent with Government policy on regulation (Better Regulation). It is these questions, along with the granularity of the data requested, that seeks to impose a stronger reporting/data collection regime than could be expected as part of a full assessment by the relevant Competition Authority in response to what is typically an evidence based concern of anticompetitive behaviour in the market.

Furthermore, it is important to reiterate that in addressing all of these questions, it is without prejudice to view around the legitimacy or otherwise of the proposals or other views to be forwarded as part of the further development of this workstream.

#### ***Market segmentation***

##### **Question 1**

Of the three options forwarded, Energia has a clear preference for Option 1 as this approach is already the basis for reporting in the market and would minimise cost and systems change in producing the required output.

Option 2 is considered to have a high impact on suppliers with required changes to all IT systems. Such change would also have to be MRSO driven and likely require schema change. Option 3 is not recommended as it would likely introduce undue duplication and increased system maintenance to keep both sets of information. Such a solution would be overly complex.

##### **Question 2**

As with above, Option 1 is preferred for similar reasons.

#### ***Measures consistent with ERGEG Guidelines***

##### **Question 3**

Energia has no comment on these proposals at this time other than to express interest in the development of the unique switcher indicator, how this will be calculated and importantly whether the MRSO systems currently have the capacity to record this information or whether further changes/costs are to be incurred.

**Question 4/5**

Energia does not wish to comment on these questions at this point in time.

**Question 6**

The introduction of these indicators is foreseen to introduce costs on suppliers in order to ensure the systemisation of this information. With respect to the “Defaulting on Standard Tariff” metric, it will first be important for the CER to define what a “Standard Tariff” is. Additionally, within these metrics there should an ability to capture where customers go at the end of a contract (e.g. switch to a new supplier, move out of house/vacant premises, etc).

**Question 7/8**

Energia does not wish to comment on these questions at this point in time.

**Question 9**

Within this group of metrics it may be useful to include provision to collect information on “Long-Term No Access” sites. This should be done by both network providers as this is an important contributing factor to debt and disconnection issues

**Question 11/12**

Energia does not wish to comment on these questions at this point in time.

**Question 15**

As with all other ERGEG indicators, and pursuant to the relevant European Directives (2009/72/EC and 2009/73/EC) and domestic legislation (SI 450 of 2010), comparison of tariffs offered to final customers is to be for domestic customers. It is not intended, nor are the relevant authorities empowered, to systematically obtain and assess data on tariffs offered to business customers.

Tariff information for domestic customers is already available to CER via company websites and it is foreseen that a price comparison website tool will be introduced. Vulnerable customer and FEA issues only relate to the domestic sector but relevant customer numbers should already be recorded elsewhere, as such these proposals may lead to duplication.

Business tariffs/contracts change on a weekly basis to reflect changes in commodity markets. The tracking of all these different tariffs/contracts would take considerable time and effort and ultimately would be considered to be largely meaningless unless significant resources were afforded by the CER to the assessment of such information. As well as changes in commodity markets, many contracts are bespoke to customers needs thus rendering any comparisons irrelevant and potentially misleading.

**Question 16**

Before the institution of duplication into the compliance and reporting requirement of energy suppliers, a full and through assessment of the reporting requirements already in place on this matter should be reviewed and where necessary



consolidated. For example, similar information is already provided to the CSO and SEAI.

**Question 17**

Following on from the comments provided to Q.15, this proposal should only apply to domestic customers. Prior to implementation, a definition of “Average Customer” will have to be provided by CER for each category.

**Question 20**

The definition of a complaint is considered to be too wide such that it is impractical and likely to lead to under/over reporting of complaints, due to which the associated metrics will be meaningless. It is also important to note that a complaint can be valid or invalid. For example, a customer could call our customer care team complaining about a justified tariff increase and requesting that the increase be reviewed and that he be contacted again with a resolution. Such a situation would satisfy the definition of “complaint” but is not reasonably considered to be a valid complaint. At the very least, the CER should provide practical guidance to suppliers offering a working definition to ensure its reasonable and robust application.

**Question 21**

This requirement is considered to be far too onerous and impractical to implement across the entire business. Notwithstanding this, it is difficult to conceive of the benefit such granular information would provide, against the cost to implement. This view is reinforced when considering the information that is already to be provided through other indicators, (e.g. switching, complaints) of behavioural patterns. Additionally, with respect to specific perceived problems in the market, the CER can from time-to-time request additional information from suppliers. This is an important tool of the CER and one that balances the burden of regulation with the fulfilment of the CER’s role in the market. The current suite of proposals risk rendering the power to request additional information effectively redundant and neglects the need for balance.

***Additional measures***

**Question 10**

While noting the general comments provided in the previous section on the legitimacy, or otherwise, of these “additional measures”, Energia does not wish to make further specific comments in respect of this proposal. However, we do wish to draw attention to the current parameters for debt flagging and the need to review these to ensure the objectives of the flag can be appropriately achieved.

**Question 13**

Although these metrics are not included in the eighteen identified ERGEG indicators, we note their calculation is dependent on the information supplied under Indicator 9. Nevertheless, Energia’s comments on the market concentration indices in the retail market have typically not focussed on the metrics themselves, as these are widely accepted metrics of competition assessment, but rather on the CER’s selection of



thresholds to be applied, particularly with respect to the decision on the respective Deregulation Roadmaps. In summary, it has been Energia's consistent view that while the measures themselves are appropriate, the application of them, principally through the selection of arbitrary and subjective thresholds, has not been.

#### **Question 14**

It is Energia's view that the proposal in relation to retail margin indicators is unnecessary, ineffective and disproportionate. Overall, the proposal also exposes a lack of understanding for the retail electricity and gas markets the CER is tasked with regulating. The rationale forwarded in support of the proposal is also unclear and contradictory, and fails to explain the deficiencies in the current approach, bearing in mind the new measures to be introduced to ensure European compliance, including the information already submitted in the form of regulated accounts.

The comments made previously in response to Q.15, similarly apply herein where these proposals can only apply to domestic customers. Notwithstanding the legitimacy or otherwise of proposals to extend this metric across all customers, the following comments highlight fatal issues in respect of the general approach forwarded under this proposal.

Firstly, it is important to note that the ERGEG guidelines on retail market monitoring indicators do not include any margin, profitability or even cost based metrics. Somewhat uniquely in a European context, OFGEM imposes a high level metric on suppliers in GB to report annually on the overall retail margin of their business. This requirement is a legacy of and an enduring check on the retail market in GB, where significant problems were initially suspected and, following a thorough investigation under the competition law powers of the Enterprise Act (2002), were ultimately identified. Therefore, at the very least this proposal arbitrarily extends beyond the ERGEG guidelines and looks to afford power to the CER concomitant with those of OFGEM, despite the extensive difference between two markets.

However, the proposal does not seek to stop just at the level of OFGEM's burden on suppliers, this proposal seeks to extend the powers of the CER exponentially beyond those of any other regulator in a liberalised market by requiring detailed cost and revenue line items to be reported on quarterly by customer category. It is difficult to conceive of a context within which this general proposal could be considered to be anything but absurd. In a specific case the enabling legislation (SI 450 of 2010) has made explicit provisions relating to the powers of CER to examine the costs of one participant (ESB). Where such explicit provisions are included, it should be read that such provisions apply only to those parties and no generality of these provisions or related provisions can correctly be inferred.

Having considered the proposal to be neither necessary nor proportionate, it is also worthwhile highlighting the ineffective and contradictory nature of it and the rationale advanced in support of it. Within the consultation paper, the CER acknowledge the significant share of costs for energy suppliers that are fixed, while reference is also made to the usefulness of examining profitability across different market segment. Not only does the former render the latter ineffective, it is also somewhat

contradictory and amounts to requesting precise information that cannot be determined precisely. It is also unexpected that all suppliers would report internally at such a micro level. Overall, such a proposal would result in a significant increase in the burden of compliance on suppliers to submit information that is highly likely to be meaningless. It would be a significant concern if policy was to be informed by what could be properly characterised as largely useless and potentially misleading information.

#### **Question 18**

As with many of the “additional measures” contained in this section of the response, the basis for this proposal is largely unclear and the objective CER are looking to achieve is similarly uncertain. This metric is not part of the ERGEG set of indicators, it is not included in the relevant European Directives nor is it a general or specific provision in the domestic legislation. It is also unclear as to why such a metric is necessary, proportionate or how it could be effective. Furthermore it is unclear that such a matter, as it may relate to policy on fuel poverty or economic hardship, is properly within the remit of CER’s statutory duties or powers.

Furthermore, the proposal deals with extremely sensitive commercial information that would likely have wider implications for suppliers with respect to partners, banks, creditors, as well as implications in a general business environment, upon the publication of individual supplier positions.

Arrears have always been a feature of the retail electricity and gas markets, and although relatively recent economic circumstances have increased the number of people affected, suppliers have similarly increased engagement with customers in difficult and the options available to them. The recent decision by CER to belatedly introduce a debt flag into the market is expected to further help customers manage their arrears along with their supplier, however, it is too early to assess the impact of this change. Notwithstanding the uncertainty surrounding the applicability this proposed metric to business customers, it is clear for certain categories in the business sector that the thresholds set for a flag are too high.

#### **Question 19**

The proposed metric on penalty clauses is poorly designed, and as with other metrics within this section is not clear that such a metric is necessary, proportionate or effective. Furthermore the publication of such information could be misleading to customers and damaging to continued businesses of individual suppliers.

Importantly this metric fails to account for economically rational decisions, wherein it is reasonable that a customer may break a contract with a supplier in order to avail of an alternative offers such that they are better off, even with the break penalty applied. In such a situation, it would be misleading to infer from merely the number of customers that those customers were sold unsuitable contracts.

As with a number of the proposed metrics in this paper, there is a distinct lack of objectivity, balance and proportionality in what is being proposed relative to the perceived pervasiveness of anticompetitive behaviour in the retail gas and electricity

markets in Ireland. The proposals and the partial rationale forwarded in support of them, which in parts is considered to lack legislative or legal basis, also appear contradictory to regular and recent comments from the CER on the level of competition in the markets and the recent decisions taken to liberalise the markets. It appears clear that substantial review of this paper and the proposals contained herein is required, and that a process for implementation of certain metrics is agreed in a timely manner with supplier and relevant market participants.

## **Other questions**

### **Question 22**

With respect to barriers to entry, we submit that the proposals contained in this paper be evaluated as a potential barrier to entry. Furthermore, this could be contained in a more general Regulatory Impact Assessment of the proposals.

We similarly submit that the proposals contained in this paper be evaluated as potential restrictions to innovation.

Furthermore, a potentially relevant indicator to be introduced alongside barriers to entry is barriers to expansion. This would incorporate an examination of certain liquidity issues, along with brand advantages conferred on previous monopoly incumbents and the continued influence in a liberalised market.

### **Question 23**

The timelines proposed in the consultation paper again expose an ignorance of the retail electricity and gas businesses of suppliers. At an absolute minimum, Energia submits that the first submission to CER could not be made available until approximately nine months following the final decision and guidance from the CER on this matter. For submissions on a regular basis, it is expected that two months would be required following the last day of the period being reported on.

Unless specified elsewhere, we would also submit that reporting on relevant indicators should occur quarterly or annually, with monthly splits provided only where necessary.

### **Question 24**

Energia does not wish to comment on this question at this point in time.

### **Question 25**

Further to the comments contained in this response, no consideration has been given to the reporting form accompanying the consultation paper.

With respect to collecting external data, CER should coordinate with other bodies (e.g. SEAI and CSO) to ensure that suppliers are not required to produce identical information in differing formats to multiple agencies. Upon revision of these proposals, this should be captured through adherence to the principles of regulation contained in the Government's Better Regulation programme.

## **Publication**

Despite the intentions of the CER expressed in the consultation paper with respect to publication of information, there are a number of issues that first need to be resolved before it is worthwhile commenting on the specifics of proposals to publish such information. As part of a non-exhaustive list, these include;

- the information to be published, arising from the final market monitoring metrics, is yet to be agreed. It is apparent that the proposals contained in this paper should undergo a comprehensive review;
- the legal basis, including the rights and duties of CER and supplier, surrounding the publication of all or some of the information;
- the rights and process for parties in the determination of commercially sensitive/confidential information; and
- the form, structure and content of any report to be published.

Each of these are important issues and serve to highlight the necessary further engagement needed on this matter between suppliers and the CER.

## **4. Conclusions & Next Steps**

In summary, it is Energia's view that a full and comprehensive review of the approach and indicators proposed in this paper are required. It is important to ensure timely compliance with new EU and domestic requirements around market monitoring of domestic customers and this should be introduced in accordance with the Government's general policy on regulation, Better Regulation. The approach should also, apart from where there is good reason not to, reflect the common indicators developed by ERGEG.

Following a comprehensive review of the approach and indicators not specified in respect of European or domestic compliance by the CER, further engagement with suppliers should be initiated to discuss and agree a workable and appropriate framework for retail market monitoring, should additional requirements to the ERGEG indicators be deemed to be required. As part of this process, full consideration will have to be given to the principles contained in the Government's policy on regulation, the legal basis of any proposed approach or indicator, as well as the use of any information provided by suppliers to the CER within the overall monitoring framework. Energia is committed to engaging with the CER on this process and we are keen to see the introduction of an appropriate market monitoring framework in Ireland that is consistent with the needs of our market and the approaches adopted in similar markets elsewhere in Europe.