



Consultation on Market Monitoring in the Electricity and Gas Markets

CER/11/221

NEAI Response

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NEAI

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1 EXECUTIVE SUMMARY

NEAI represents the electricity industry on the island of Ireland. Its members include all the major electricity generators and suppliers on the island of Ireland, all of whom operate within the Single Electricity Market (SEM). NEAI engages with stakeholders to promote the improved operation of the electricity market to lower risk, ensure adequate generation for the needs of the island and to maintain electricity prices at competitive levels.

NEAI welcomes the opportunity to respond to CER proposals contained in the Consultation paper on market monitoring in the electricity and gas retail markets.

NEAI does not contest the fact that the CER is obliged to implement a monitoring programme in respect of retail supply activities, as per the Third Package in Electricity & Gas and subsequent transposition into Irish Law via SI 450 2010 and SI 463 2011. Notwithstanding this, NEAI has serious concerns about the proposal in its current form and considers that the proposals made are disproportionately far-reaching. Before making a decision on the current consultation, we strongly urge the Commission to engage in detailed two way discussions with energy suppliers and the DSO over an adequate timescale to set out the Commission's underlying legislative requirements that are to be addressed and to establish appropriate measures to address these needs.

In the white paper on Better Regulation published by the Department of the Taoiseach, six principles are set out: necessity, effectiveness, proportionality, transparency, accountability and consistency. We believe that the consultation document contains large gaps under all of these headings. An engagement process to address these principles is essential and would be welcomed. We look forward to a favourable response to this request.

2 Legislative Background

2.1 Scope of Monitoring Activities Intended by the Third Directives

The monitoring provision outlined in Article 37 (Electricity – 2009/72/EC) and Article 41 (Gas – 2009/73/EC) states that that a Regulatory Authority's duty includes:

(j) monitoring the level and effectiveness of market opening and competition at wholesale and retail levels, including on electricity exchanges, prices for household customers including prepayment systems, switching rates, disconnection rates, charges for and the execution of maintenance services, and complaints by household customers, as well as any distortion or restriction of competition, including providing any relevant information, and bringing any relevant cases to the relevant competition authorities;

We note that specific mention is made in respect of a number of explicit parameters. We agree that these should form the primary or central basis of a monitoring programme (following further consideration of the appropriateness of some of the parameters and / or the difficulties and costs of developing processes and software to deliver them.) In addition, wider remit exists with use of the wording “as well as any distortion or restriction of competition, including providing any relevant information...”. and that some wider context needs to be put in place by way of interpretation of this and para (da)(vi) of SI 450 (2010).

The Commission reference the ERGEG guidelines (E10-RMF-27-03) as a document that could be used as an assist in developing the specific monitoring parameters to be employed. ERGEG developed these indicators in order to give comprehensive guidance to regulators on how to fulfil their duties under the 3rd Package. These Guidelines were stated to establish ‘areas for retail market monitoring and suggested indicators, which include but are not restricted to requirements under the 3rd Package’. If the ERGEG suggested indicators are above the standard set in the 3rd package, by going beyond the indicators suggested in the GGP, the CER is going much further than European Regulators’ joint position on the degree of monitoring required and supported by the 3rd Package.

On this basis, the NEAI propose monitoring should go no further than the 18 “Indicators” outlined by ERGEG as this ensures that requirements under the 3rd package are met and as it would ensure that Ireland’s monitoring regime is in line with that of other EU Member States.

2.2 Legislative Powers

While recognising the general remit derived from the Third Package in Electricity & Gas, as transposed into Irish Legislation, we believe that specific aspects of the Commission's proposals, particularly the call for monitoring of Retail Margins (EBIT) and the reporting of arrears may be beyond those powers granted to the CER under legislation or may be based on powers that are taken out of their intended context.

There is no explicit reference to either of these parameters in section (da) of SI 450 (2010). That SI states that where the CER determines it necessary to take action under section (db) the legislation states that it may

- (i) examine the charges and the costs underlying such charges for electricity which has been supplied by the Board,

NEAI believes that the specific reference to the Board – and this company only - clearly demonstrates that the CER is only empowered to examine charges and costs related to the Board.

Further, the drafting of the legislation clearly intended that examining the Board's costs and charges would occur only after the CER has formed a view, based on monitoring under paragraph (da) and "where the Commission determines it to be necessary under paragraph (db)".

For this reason, and as it is not included in the ERGEG indicators, the NEAI argues that the proposed requirement for submission of information on supplier margins and arrears falls outside the scope of SI 450.

In addition, the NEAI membership believe that some of the proposed measures are contrary to existing restrictions that apply to supplier either by law or within the confines of normal corporate governance. E.g. Supplying retail margin and arrears information which could be published at the discretion of the Commission would/may contravene Suppliers existing rights & obligations (where applicable) in respect of:

- Bondholders
- Credit Rating Agencies
- The Stock Exchange rules on disclosure & timing

2.3 Confidentiality

As recognised by the CER in the consultation paper, elements of the information it proposes to collect are commercially sensitive. Publication of such information could prove damaging to suppliers, and potentially customers.

As set out above, the NEAI does not consider it proportionate, or required by the 3rd package, for the CER to collect information not included in ERGEG's 18 indicators. In this regard, the NEAI is concerned by the changes the CER proposes to make to Condition 12 of the Electricity Supply Licence and Condition 4 of the Gas Supply Licence. Condition 12(5) would oblige a supplier to publish information in the form and manner specified by the CER. Condition 12 (6) proposes to empower the Commission to define at its discretion what is and what is not confidential in the context of 12 (5).

The NEAI considers that this proposed amendment to the Supply Licences is unreasonable and is not supported by Section 13 of the 1999 Act, as argued by the Commission.¹ An immediate statement from the CER to this effect would be conducive to progressing the monitoring proposals in a general sense, and would signal a positive start to discussions with suppliers on the monitoring regime, as requested above.

2.4 Timing

It is agreed that the scope of the document is particularly wide ranging and that it is not possible to deal with such an array of parameters within the CER proposed timelines. As stated above, the NEAI requests that the CER meet with market participants in a series of stakeholder group meetings to discuss the appropriate level of information to be included in the monitoring regime, format for submitting this information (including batching of information where efficiencies exist), and timetable for the rollout of the monitoring regime so that suppliers and other participants can manage the process.

¹ Section 13 of the Act exists to deal with the prohibition on the unauthorised disclosure of information. It lays out penalties including fines or imprisonment for members of CER staff, consultants and advisers who disclose information in an unauthorised manner. The ability of the CER to define confidential information is prefaced by "In this section "confidential information" means..." i.e. a duty has been placed on the CER to define up front for employees/consultants etc. what is and what is not confidential in order to bring certainty to a potential prosecution. In our view, it does not convey rights in respect of defining confidentiality outside of section 13 nor in a universal sense. At the least the intention of the law was clearly not to confer these rights.

A phased approach to implementation is necessary. Some of the changes required may be 'low hanging fruit' and can be delivered quickly, others will require more detailed assessment and possibly more extensive time for delivery over the medium to longer term. In a regulatory sense alone, suppliers are already dealing with things like Harmonisation, Global Aggregation, Intra-day Trading etc. All internal business deliverables necessary for ongoing operations must continue in a stable manner during a monitoring implementation programme.

2.5 Unnecessary Burden

The paper proposes that suppliers provide information to the CER which in many instances is already in the public domain. E.g. Tariffs and Contracts are already on Suppliers' websites for all household customers as are End User prices and penalty clauses. From this information it is possible to calculate price spreads. There is no reference for price/contractual information on non-household contracts to be provided in either the Directives, SI 450 or the ERGEG guidelines. In fact the ERGEG guidelines carve out non household customers in this respect. NEAI members concluded that a principle of "If information is accessible elsewhere, then take that route." be applied to all information requirements.

2.6 Resource potentially disproportionate to Benefit

Our members believe that it would not be possible within the current consultation timeframe to obtain the potential costs of implementation. However that these would likely be material and will probably result in higher prices to customers. Further assessment could follow proposed workshops when more detailed information is available.

2.7 Complaints Definition

The proposed definition of customer complaint is so wide that it encompasses many routine enquiries or general commentary from customers. (i.e. "The expression, of a customer's dissatisfaction and his/her explicit expectation for a response or resolution."). If adopted, it will prove meaningless in establishing the level of actual complaints within the industry.

The sub categories defined, if applied across the proposed customer categories included in Annex 2 in the consultation, will require material changes to current processes and systems and, at the detailed levels proposed, will likely render the output next to meaningless.

3 CUSTOMER CATEGORIES

We note that the Commission is considering altering the customer categories by which technical performance data such as outages are reported. We would request that the Commission do not adopt any changes in this respect. The important concern about technical performance issues such as outage incidents is that they are progressively reduced. Outages are correlated to network type, not customer consumptions. Subdividing these rates by category will deliver no gains. Further the disruption caused by these changes to market systems would effectively block and delay necessary changes to the market systems that are 'already in the queue'.

The Commission has pointed out that the Eurostat categories do not provide useful granularity for the customer base in Ireland. This means that a mapping of the Eurostat categories onto most likely DUoS groups will approximate the same results to within a manageably low error level and at far less cost.

We urge the Commission to seriously consider such a route rather than further complicate the set of market changes in addition to the current retail harmonisation work.

4 CONCLUSION

In order to move to move the monitoring process forward in a meaningful we recommend that the CER meet with suppliers and any other interested parties before issuing a proposed decision to this consultation to discuss:

- i. The provision of a consultation timeline consistent with projected work volumes. We consider that this should be at least 4 months.
- ii. Addressing as early as possible within this extended timeline:
 - a. the basis for request for information around disclosure of retail margins / arrears and ;
 - b. the level of granularity sought and proportionality in this regard;
 - c. specific workshops to explore the requirements in more detail and to ensure a common understanding across the industry;
 - d. to ensure a feasible timetable for implementation
- iii. It should be noted that while NEAI members accept that monitoring is necessary in order to fulfil legislative provisions currently in place, we will only accept those monitoring provisions where they fall within the CER's legislative remit. We look forward to working with CER in developing matters further within this context.