Response by Energia to Commission for Energy Regulation Consultation Paper CER/13/302

Market Monitoring in the Electricity & Gas Retail Markets

28 February 2014

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 consultation is presented as a follow-up to the 2011 consultation (CER/11/221) and herein we note both the points of overlap between the consultations and the attempt, albeit insufficient, to reduce the regulatory burden sought to be imposed by the proposed framework.

In light of the overlap between the 2011 consultation and that currently before us, this response first presents a summary of some of the general comments made in response to the 2011 consultation that are considered to still be relevant to this consultation. Section 3 presents comments that address the attempt by CER to respond to some of the general issues highlighted by respondents to the 2011 consultation. Section 4 contains Energia's response to the specific questions contained in the current consultation paper. Finally, some conclusions on the foregoing are presented.

2. Summary of response to CER/11/221

Energia's response to the 2011 consultation made a number of general comments in response to that consultation paper which are deemed to remain relevant to the current consultation and worth restating.

First, the CER is proposing to implement a market monitoring regime that is to impose a regulatory burden far beyond that which has existed previously in the market. Furthermore, these proposals appear to go beyond what is either in place or proposed in other European countries. Even in Great Britain, where OFGEM have had longstanding concerns with regard to the retail market, such powers or proposals are not being proposed.

Second, the CER's proposals are forwarded on the basis that they are obliged to implement such a regime pursuant to the Energy Third Package and domestic legislative provisions. However, it is clear that the CER proposals go beyond these provisions, yet no reasons are given as to why such an approach is required and what perceived problem such measures are to address.

Third, competition law and competition investigations by the Competition Authority are the appropriate investigative tools into any perceived competition issues across markets in Ireland, as is the approach taken elsewhere in Europe. It is unclear as to why the electricity market should be treated differently from other markets in Ireland, where competition is overseen by the Competition Authority, and also what role the CER and Competition Authority are to have in this market.

Fourth, the ERGEG guidelines are expressly limited to apply to domestic markets only, yet the CER have sought to expand their application to business categories. To the extent that the ERGEG guidelines are considered by CER to be best practice guidelines, it is somewhat inconsistent with this view to seek to amend and expand

on ERGEG metrics or their scope. Nevertheless, the ERGEG guidelines are merely guidelines and are not binding on any Member States to implement.

Fifth, no Better Regulation assessment was undertaken in respect of the proposals. While the CER has attempted to address this in the current consultation, this attempt will be discussed in the following section.

Sixth, the 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. It is difficult to reconcile the CER's approach in this regard, with continued price deregulation on the basis of competition assessments coupled with proposals relating to concerns for the level of competition in the market and how it is working for customers. Presumably this was a central issue for the CER in considering the price deregulation of respective markets over the last number of years.

Seventh, it is accepted that retail market monitoring is an important part of our market, and monitoring *per se* isn't a contentious issue. However, the number of measures and the detail of those proposed measures bring into question, on a number of levels including the CER's *vires*, the appropriateness of the proposals.

Finally, the issue of publication and confidentiality of data is significant and genuine engagement between suppliers and the CER will be required to resolve a number of issues inherent in the CER's proposals.

As stated at the beginning of this section, the concerns expressed herein in response to the 2011 consultation remain valid for this updated consultation. While it is acknowledged that the CER have sought to address a number of concerns raised by suppliers in response to the 2011 consultation by primarily reducing the scale of the reporting requirement, a number of these fundamental issues remain outstanding. Where explanations have been provided, such explanations were either irrelevant or insufficient, such that these concerns should be read as applying equally to this consultation as they did to the 2011 consultation. The following section expands on this point and advances additional general comments on the current consultation paper to be read alongside those restated herein.

3. General comments on CER/13/302

3.1 Legislation and ERGEG Guidelines

The functions and duties of the CER are provided for and limited by legislation. The CER have correctly sough to justify the introduction of this new market monitoring regime by reference to the relevant legislation but there are a number of obvious shortcomings to the arguments advanced, in respect of both the approach and the full suite of metrics proposed, that undermine these areas of the consultation and ultimately the proposals contained therein.

The CER have identified their function to monitor the retail market in Section 9(1)(da-db) of the Electricity Regulation Act, 1999, as amended, (hereafter the "1999 Act") specifically by Statutory Instrument (SI 450/2010 and 630/2011) giving effect to the

relevant European Union's legislative measures contained in the energy 3rd Package. Therefore, any new market monitoring requirements on the CER have been in existence since at least 2011. As these new requirements did not prompt or require a change in the market monitoring framework at the time, it is difficult to see how this is now required, unless it is the CER's argument that they have not been complying with the new requirements introduced by Statutory Instrument in both 2010 and 2011.

If one is to assume that CER have been in compliance, the rationale for this new proposed monitoring framework is not legislative requirement but rather market developments that are inhibiting the CER from carrying out their monitoring function in a manner which they had previously considered to comply with the relevant legislation. It is unclear from the consultation paper what these changes are but we note that the decisions to deregulate the gas and electricity markets were taken by CER only after they were satisfied that the market was suitably competitive such that final customers would benefit. As the CER's deregulation roadmap metrics continue to be satisfied, it is unclear what competition concerns the CER could have that were not also in existence at the time they decided to deregulate the relevant markets in both gas and electricity.

In terms of the interpretation of Section 9(1)(da) of the 1999 Act, as amended, there should be no issue with the interpretation of specific metrics listed and it is also noted that (da) is not an exhaustive list. Therefore, it would appear open to the CER to include additional metrics, where these metrics are consistent with the requirement on CER and provided for in the relevant 3rd Package legislation. Following on from the previous point, it must be the case, given the primary duty of the CER, that s.9(1)(da)(xiv) "whether the development and operation of competition in the supply of electricity and gas is benefitting final customers", has at all times been complied with and that the proposed monitoring regime is not being proposed for the purposes of compliance. This point can also be made in respect of s.9(1)(da)(xiii) pertaining to the monitoring of any distortion or restriction in competition affecting final customers. It must be the case that such distortions or restrictions must have come about after price deregulation of the relevant markets, otherwise one would be forced to question the basis upon which the market was price deregulated in the first place.

Following on to s.9(1)(db) of the 1999 Act, as amended, the CER have stated that this provision places "a much broader requirement in terms of monitoring on the CER", however, this plainly either misunderstands or misrepresents the provision as laid out in the relevant section. It is not argued that s.9(1)(db) does not confer an additional requirement on the CER, however this requirement and its associated powers, properly interpreted, are very narrow in their application and can only be utilised following a determination by the CER, on foot of monitoring under (da), that specific action is necessary to either; (i) prevent a distortion or restriction in competition; or (ii) ensure final customers are benefitting from competition. It is clear from the wording and construction of this section that CER do not have a general requirement to take any actions they consider appropriate in terms of monitoring, but rather can only avail of the additional powers contained in (db), "on foot of the monitoring" and where necessary to achieve the specified objectives of the provision.

While the 1999 Act, as amended, places duties and requirements on the CER in respect of monitoring, the ERGEG Guidelines are merely guidelines and importantly the CER are not bound to apply these guidelines and as such no formal legitimacy for the measures proposed can be drawn from these, notwithstanding they may represent good practice. To the extent that the ERGEG Guidelines do represent good regulatory practice, and considering that they were developed in response to the 3rd Package, it is unclear why the CER are proposing to go beyond these guidelines and stray from the standard of best practice for all Member State regulators, as drafted by ERGEG.

The CER have argued that additional metrics to those specified in legislation and in the ERGEG Guidelines are necessary, "in order to comply fully with the requirements of legislation" and "provide CER with the necessary information to effectively ensure customer protection". It is difficult to reconcile these statements with the CER's legislative requirements which have been in place since at least 2011, unless it is the case that the CER have been ignoring these requirements. Given that once expects the CER to be at all times compliant with its statutory obligations, it must be the case that the CER have been compliant with these new provisions and that further changes are not required but are merely being proposed by CER for reasons not contained in this consultation paper. Furthermore, it is unclear from the paper what developments in the gas and electricity markets have given rise to competition concerns on the part of the CER that were not present at the time of price deregulation of the relevant markets, particularly as the deregulation thresholds set by the CER continue to be satisfied in the relevant markets.

In addition, there is nothing in the legislation or ERGEG guidelines which suggests that the collection of substantial amounts of data from suppliers on an ongoing basis is the appropriate means by which to monitor the development and operation of competition and/or to monitor any distortion or restriction in competition. Other jurisdictions employ alternative approaches, such as customer surveys, as a more appropriate, less burdensome approach to ongoing monitoring and, consistent with s.9(1)(db) only initiate more detailed analysis of such issues on foot of such monitoring. This is particularly relevant to the CER's proposal to expand the suite of monitoring metrics to business customers and to other specific metrics not contained in legislation or ERGEG Guidelines (e.g. margin and arrears metrics) but may also be applied to customer complaint/enquiry metrics. In respect of margin and bad debt information, this is all contained in the regulatory accounts submitted to CER on an annual basis. Furthermore, it is always open to the CER and/or the Competition Authority to initiate a review of the retail electricity or gas markets on an ad hoc basis but we note that, with the exception of the respective deregulation roadmaps, such analysis has not been deemed to be necessary in an Irish context, unlike in Great Britain.

3.2 Confidentiality

This area of the consultation paper remains of significant concern to Energia. It is necessary to separate two distinct issues contained in this section of the paper, information to be published by CER and information subject to Freedom of

Information legislation. In the case of the former, Energia's previously stated concerns over the inappropriate disclosure of commercially sensitive information are not allayed by the CER's interpretation of their statutory requirements under the 1999 Act. Whereas in the case of the latter, while still a concern, the legislation and possible involvement of the Information Commissioner may provide a reasonable safeguard to the publication of commercially sensitive information, although it remains to be seen what approach is to be taken.

The CER have indicated that it, "does not intend to publish any information that it deems as commercially sensitive", and has sought to rely on s.13 of the 1999 Act in this regard. This section of the 1999 Act, contained in Part II of the Act on the establishment of the CER, prohibits the unauthorised disclosure of information by CER employees (s.13(1)) and sets out a number of potential criminal sanctions (s.13(2)) to be applied to the individual disclosing the information in the event that there is found to be breach of the provisions of this section of the 1999 Act. For the purposes of this section of the 1999 Act, that is the criminal disclosure of unauthorised information by a member of staff, advisor, consultant or authorised office of the CER, confidential information is to be, "that which is expressed by the Commission to be confidential either as regards to particular information or as regards information of a particular class or description". This definition contained in the 1999 Act (s.13(3)(a)) is expressly limited to s.13 of the Act and is not of general application. Furthermore, s.13(3)(b) places an onus on the CER to, "have regard to the requirement to protect information of a confidential commercial nature". This sub-section of the 1999 Act does not provide the CER with any powers to determine whether information is of a confidential commercial nature, but rather it places a requirement on them to protect such information from disclosure by its staff or agents. All such information should therefore be determined by CER to be confidential and, save in accordance with law, any disclosure of such information should therefore be viewed as a breach of s.13(1) and criminal sanctions sought to be imposed for a breach of this section of the 1999 Act.

In respect of Freedom of Information (FoI) requests, this is governed by legislation and involves a multi-stage process, incorporating fair procedures and appeal to the Information Commissioner, in the event of disagreement between the parties (i.e. supplier and CER). The Freedom of Information Act, 1997 (as amended) (hereafter the "1997 Act"), contains specific provisions for commercially sensitive information (s.27) that are separate and distinct from the provisions governing confidential information (s.26). For the purposes of this consultation response, it is worthwhile stating s.27(1) of the 1997 Act.

> *27.(1) Subject to subsection (2), a head shall refuse to grant a request under section 7 if the record concerned contains*
>
> *(a) trade secrets of a person other than the requester concerned,*
>
> *(b) financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or 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

(c) information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.

Notwithstanding the requirements of the 1999 Act, it is clear that the 1997 Act would apply to prevent the disclosure of all of the commercially sensitive date proposed to be collected within this consultation. Finally, for the avoidance of doubt, nothing in the consultation paper has been taken to inform Energia, pursuant to s.27(2)(d) of the 1997 Act, that the information that may be submitted under the market monitoring regime "would or might be available to the general public", or that any of the provisions contained in s.27(2) are to apply.

3.3 Better Regulation

Energia completely rejects the CER assertion that the principles of Better Regulation have been given due consideration in developing the market monitoring framework. The exercise contained in Appendix 3 of the consultation paper represents an attempt at justification of the proposed measures as opposed to a meaningful assessment against the principles and is therefore considered to be meaningless.

3.4 Costs, Impact Assessment and Timelines

In light of the foregoing, Energia continues to disagree with the views of the CER in respect of the costs and impact assessment associated with the proposals, and many of the measures cannot genuinely be described as being necessary. In respect of the timelines for implementation, these cannot accurately be determined until such time as CER publish a decision paper on what metrics can legitimately be requested on an ongoing basis under this proposed framework.

3.5 Use of Data

The CER have stated that they intend to use the information collected through the proposed market monitoring framework to compliment the information already collected through the CER's Customer Survey. As is highlighted elsewhere in this paper, many of the metrics CER are proposing to collect under this framework may be of limited interpretative value due to the number of assumptions and different approaches that may be applied both between different suppliers and within a supplier's own business over time.

4. Specific comments on consultation questions

In general the comments contained in this section focus on the proposals that are to directly impact on suppliers, although where appropriate comments are provided on other proposed metrics. The comments contained herein should be read in conjunction with those contained in the preceding sections of this response.

Questions 1 – 3

Energia have no comments on these proposals at this time.

Question 4

It will not be possible for Energia on report on the dual fuel customers who switch in any category other than the domestic category, due to system constraints.

Questions 5 – 7

Energia have no comments on these proposals at this time.

Questions 8 – 9

Energia notes that many of the proposals in relation to disconnections and PAYG meters have been overtaken by the Disconnection Task Force convened by the CER and DCENR and attended by industry. Energia therefore questions the continued relevance of this section of the paper.

On the issue of measuring self-disconnection of PAYG customers, Energia recommends the use of surveys to monitor the presence and prevalence of this phenomenon in the market.

Questions 10 – 12

Energia have no comments on these proposals at this time.

Questions 13 – 15

It is unclear from the CER proposal in the consultation paper why they have proposed deviating from the ERGEG Guidelines in respect of these metrics which focus on domestic customers only and instead have proposed the imposition of these metrics in respect of all customers. In light of the regulatory burden this would impose on suppliers, it is necessary for CER to establish why this change is warranted and what issue it is seeking to address in the context of the Irish retail market.

On the diversity of contracts proposal, the level of information proposed is unworkable, particularly for the small business/IC sectors where multiple different contracts are created on a weekly basis, updating the terms of the contracts. For Energia alone, there are circa 500 new contract types created on a quarterly basis. Other suppliers will have different products and comparison between the two may not be possible.

The CER already has access to end user prices for domestic customers as these are published by all suppliers on their websites and reported by price comparison websites. The CER have not provided adequate supporting reasons for providing this information for other categories of customers, particularly given the onerous and costly regulatory burden it would impose; see diversity of contracts. The usefulness of a price spread comparison for categories of customers other than domestic would also appear to suffer from the diversity of contracts issue.

Notwithstanding the foregoing, information on diversity of contracts may also be regarded as commercially sensitive and therefore should attract additional protections from publication.

Question 16

As the substantive proposal on retail margins remains unchanged from the 2011 consultation (Q.14), Energia's response to that paper remains relevant and should be read in response to this proposal. This information is also highly commercially sensitive and therefore should attract additional protections from publication.

Question 17

As the substantive proposal on arrears remains unchanged from the 2011 consultation (Q.18), Energia's response to that paper remains relevant and should be read in response to this proposal. This information is also highly commercially sensitive and therefore should attract additional protections from publication.

Question 18

Although the CER have indicated that the purpose of the proposed contract breakage penalties metric is "necessary in ensuring that [there] are no issues relating to customer awareness and to support the CER in its customer protection duty", it is unclear how, on the face of it, it can achieve this objective. At a very simple level, an economically rational customer may take the decision to deliberately incur the contract break penalty to avail of a better rate or discount from another supplier. Such a scenario would indicate a highly sophisticated customer, while the proposed CER metric would mistakenly characterise this customer as one potentially lacking awareness and should they be a suitably sized cohort of people, may erroneously lead to additional customer protection provisions in response to an absent problem.

Question 19

The CER have stated that the monitoring of customer complaints is specifically required in legislation, when, in fact, it is more accurate to say that the monitoring of domestic customer complaints is specifically required in legislation. It is therefore unclear why this proposal has been expanded to all customer categories. It is also unclear why CER are interested in complaints made to suppliers that are not valid complaints. Furthermore, the fundamental question of 'what is a complaint?' remains unclear and it is impossible to see how a single approach could be applied objectively across all suppliers. The metric would also not be easy to implement, record or report on and changes to facilitate it would be costly to implement and maintain. Energia consider the most appropriate and proportionate manner in which to comply with legislation and seek to achieve the stated objectives would be through the use of surveys of customers.

Question 20

Somewhat similar to the proposal on complaints but lacking the legislative requirement, the proposal to collect data on customer enquiries is more appropriately and proportionately achieved through surveying customers. It is impossible to conceive of a clear, objective definition of an enquiry and even more impossible to see how this could meaningfully be captured. Currently Energia has no means to capture enquiries, however defined, and such a system would be costly to

implement, this cost would be borne by customers and it is difficult to see the benefit they would derive from such a measure.

Question 21

The issue of wholesale market liquidity is of central importance to both suppliers and to the retail market outcomes that impact directly on customers. Despite the unsubstantiated assertion made in the consultation paper, it is unclear where this is already measured by the CER. Energia considers there to be a significant liquidity issue in the wholesale market at present and considers this to be an area for the CER to prioritise under their principal duty to protect customers. In terms of market outcomes, properly measuring liquidity and adopting measures to enhance liquidity will have a far greater impact on customers than any of the metrics proposed in this paper.

Energia proposes that CER also consider proposed framework as a barrier to entry, given the extent to which it seeks to impose on suppliers a regulatory burden far in excess of other European countries and required by domestic legislation.

Question 22

On the face of it the *de minimis* threshold proposed appears to be quite low and given the regulatory burden this framework is seeking to impose, it may be a substantial barrier to entry for any new entrant. Notwithstanding this point, the framework is likely to operate as a barrier to entry. Nevertheless, a final view on this proposed threshold is not possible without having access to the CER's rationale for setting such a threshold.

5. Conclusions and Next Steps

There are a number of significant and fundamental differences between the views and approach outlined by CER with regard to the proposed framework for market monitoring and those considered by Energia to be necessary and proportionate. It is a bizarre situation that, as an independent energy supplier, we would be subjected to a greater degree of regulatory scrutiny, a level similar to that of the previously price regulated entity, following CER's decision to remove price regulation from the market on the basis that the market met certain competition thresholds. Under this proposed framework, Energia would be required to go beyond legislative and best practice guidelines (ERGEG), incur significant costs to implements the necessary changes and would be forced to pass through these costs to customers who may receive no discernible benefit from the overall activity. Furthermore, due to the nature and granularity of the data proposed by the CER, meaningful comparisons of outcomes across suppliers, as well as within any one supplier over time will not be possible and the risk of erroneous conclusions and inappropriate policy responses are heightened.

On the publication of information, it would appear as though CER are, contrary to the view expressed in this consultation paper, prohibited from publishing commercially sensitive information. This is an important aspect of this response that requires careful legal consideration.

Finally, Energia calls on the CER to implement only the legislatively necessary provisions of the European Commission's 3rd Energy Package, as soon as possible, and considers it beholden upon the CER, as a relevant public body, to undertake a proper Better Regulation assessment on the remaining proposals that are contained in the ERGEG guidelines and referred to in the consultation paper. Energia will continue to engage with the CER on this issue and would welcome the opportunity to discuss any aspect of this response further with CER and/or to engage in further industry workshops on a sustainable, appropriate and proportionate retail market monitoring framework.