



EAI Response to Market Monitoring in the Electricity &
Gas Retail Markets consultation paper

Electricity Association of Ireland
Retail Working Group



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The Electricity Association of Ireland (EAI) is the trade association for the electricity industry on the island of Ireland, including generation, supply and distribution system operators. It is the local member of Eurelectric, the sector association representing the electricity industry at European level.

EAI aims to contribute to the development of a sustainable and competitive electricity market on the island of Ireland. We believe this will be achieved through cost-reflective pricing and a stable investment environment within a framework of best-practice regulatory governance.



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Introduction

The EAI Retail WG welcomes the opportunity to respond to the CER's Market Monitoring in the Electricity & Gas Retail Markets consultation paper. It is clear from the consultation paper that CER have sought to address a number of concerns previously expressed by suppliers in response to the 2011 consultation paper (CER/11/221), however the updated monitoring framework is still considered to be unnecessary, deficient and overly burdensome on retail suppliers.

Suppliers are in agreement that there are serious concerns over the CER's legal powers to examine retail margins and arrears in the manner proposed in the consultation paper. There is also consensus that the reporting provisions as outlined are extremely onerous on suppliers and that the benefit to customers and return to the industry from this additional regulatory burden is very low. We believe that the reporting measures go beyond what have been implemented in other jurisdictions and go to a level of detail that is not justified. The information reporting requirements on suppliers will be open to different interpretation, will not provide a full picture of the risks inherent in each business and will be difficult to compare across different market participants and across different comparison categories.

Finally, while the CER have attempted to address a significant criticism made by suppliers in the last consultation, namely the failure to examine the proposals under the Principles of Good Regulation framework, it cannot be said that the inclusion of this assessment either satisfies the framework or represents a reasonable assessment of the applicability of the relevant criteria.

The EAI is not providing a response to the questions within the consultation document as individual supplier members will be providing individual responses. The EAI response has instead summarised the key concerns of members as outlined below.

Key concerns of suppliers

1. Legal basis of proposals to monitor retail margins and arrears

The EAI agrees that the CER is obliged to implement a monitoring programme in respect of retail supply activities which includes specified parameters. This requirement stems from the Third Package Directives in Electricity & Gas and subsequent transposition into Irish Law via S.I 450 2010, and S.I 630 2011. However, the imposition of detailed monitoring and reporting requirements of supply margins and arrears as proposed do not have a sound legal premise.

The legislation requires CER to monitor end-user prices in the domestic market, this duty is effectively already discharged through the requirement on suppliers to publish such information and through the price comparison websites accredited by CER. A legal basis for the CER to monitor retail margins, in the manner described in the paper, cannot be located in the relevant Directives, the interpretive note of the Directives from the EU

Commission, or in the instruments used to transpose the Directives' transposition into Irish law. Similarly such provisions are absent from the provisions of competition law in Ireland. Justification by reference to the related ERGEG guidelines is incomplete as not only is such guidance non-binding, it also merely suggest an ad-hoc assessment based on the wholesale and end-user prices could be insightful as opposed to the detailed declarations proposed.

The section from where CER gain this new function allows for the monitoring of "the level and effectiveness of market opening" and lays out eight subsections as to how this monitoring is to be conducted. It further allows that the CER, on foot of this monitoring, to take "any action" to conduct the monitoring. Although this function as stated in Reg.40(2)(a) "is not limited" to these eight subsections, it does not create new functions. It is sufficiently clear to indicate what general areas the monitoring is to be conducted within. The broad manner of interpretation given by the Regulator is beyond, we believe, the powers outlined by the legislature in this amendment. Also, as the 1999 Act (as amended) only gives CER additional powers to act to "(i) prevent a distortion or restriction of competition" or to "(ii) ensure that final customers are benefitting from competition" (s.9(1)(db)), having monitored "final tariffs charges to domestic customers including those on prepayment systems", (s.9(1)(db)(i)), it cannot be said that other provisions can readily be relied upon in relation to retail margins, where the CER have not demonstrated the need for further action by reference to the specified metric of assessment as set out in the legislation.

Furthermore, the Consultation argues that detailed data on margins is required given that:

The publication of retail margin data, even at aggregate level, will allow for comparison with the margins of companies in other jurisdictions and markets. Information on the retail margin is also of significant importance to ensure that the prices charged are fair and that customers are protected and benefitting from competition (in line with the CER's legislative duties).

In relation to the first point, "*comparison with other jurisdictions and markets*", this can only arise in a meaningful manner if one or more member states adopt the same specific requirement and apply it in the same manner. There is no indication that this will arise. What may result is increased confusion for customers as, for those member states that choose to follow the ERGEG guidelines, a different metric will be applied resulting in meaningless inter-comparisons.

In relation to the second point, "*ensure that the prices charged are fair and that customers are protected and benefitting from competition*", EAI members are at a loss to understand the argument. Retail competition results in a reduction in margins (and/or new innovations) and elimination of the least efficient competitors. In the context of retail activities, competition is best measured in terms of the numbers of competitors and their market share, not the margin

these earn individually or in aggregate. The issue of fairness is entirely subjective and open to political direction. In a competitive market, high margins induce new entry. Fixed or regulated margins induce inefficiency and market exit. One inference that could be drawn from this statement is that CER considers it appropriate to fix end-user prices, which is the antithesis of competition and the intent of the Directive.

2. Best regulatory practice

Notwithstanding the introduction of the specific metrics outlined in the electricity and gas Directives, namely; (Article 36(j) of Directive 2009/72/EC) *“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”*, suppliers are of the view that the current monitoring tools are adequate to monitor the market. Regulatory accounts are provided by suppliers and full market share data is monitored adequately. This information can be utilised to achieve the monitoring objectives stated. Furthermore, it is unusual for the CER to appear to suggest that the requisite metrics for the deregulation of both the domestic gas and electricity markets were deficient for the purposes of market monitoring. It must surely be the case that where the CER were/are prepared to deregulate domestic retail markets primarily on the basis of market share, number of competitors and switching rates, that these same metrics should be insufficient to monitor competition in a deregulated market.

The supplier retail margin indicators are particularly problematic as they require detailed allocations across a large number of line items broken down by tariff group. Suppliers costs are not incurred on this basis so detailed cost allocation methodologies will need to be developed. Different methodologies adopted across the industry are likely to render a comparison of categories across the industry or in aggregate as meaningless. EAI is of the view that the Consultation paper has not demonstrated that there is a problem in the operation of the market nor the significance of any such potential problem. Nor does it justify the necessity to adopt an approach that goes significantly beyond legal obligations, will prove costly and presents significant risk – basic requirements of Government policy in respect of economic regulation.

On the assessment of adherence to the Principles of Better Regulation, it would appear as though the CER have utilised this framework to justify the metrics proposed as opposed to undertaking the requisite assessment against the recognised criteria. Once again on the issue of retail margins, the CER have stated, under the ‘necessity’ criterion, that such a metric is, *“[n]ecessary for CER to understand the composition of final prices and the reasons for price changes which impact on final customers”*. It is not only difficult to see where the basis for such a requirement comes from, as discussed elsewhere, but it cannot be said, pursuant to the guidelines, that such a metric is necessary as the specific requirement is already complied with, namely the monitoring of domestic end user tariffs. Subsequent to this finding, it must be

the case that such a measure therefore introduces unnecessary red tape (i.e. regulatory burden) that is unjustified.

3. Measures go beyond those employed in other markets

Other jurisdictions have not imposed similar reporting burdens on their energy supply sectors. Ofgem in GB has imposed a requirement for vertically integrated energy companies to produce segmental reports reconciling supply company financial results to the group consolidated accounts. This measure is less onerous and more robust than the proposals outlined by CER.

Imposition of the reporting requirements proposed in the consultation paper is not in line with the more mature and larger market in GB. Moreover the power of Ofgem in this respect is not gained by any EU legislative authority. It is specific to GB legal jurisdiction. The additional monitoring, reporting and verification costs imposed will in part undermine the benefits of competition for customers in terms of reduced prices.

4. Implementation phase

Suppliers are of the view that CER should undertake further consultation with the industry once a final decision paper on retail market monitoring has been published by the CER. This consultation process should focus on measures to introduce the changes required in the market reporting obligations of suppliers in an efficient and effective manner.

7th March 2014