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European Commission

Internal Market and Services DG

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FW

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Directive 1997/9/EC on Investor-Compensation Schemes - Call for Evidence

Dear Sir/Madam,

The German Association of Energy and Water Industries (BDEW) represents more than 1,800 members of the electricity, gas and water industry. In the energy sector, we represent companies active in generation, trading, transmission, distribution and retail.

We are grateful for the opportunity to comment on the Commission's Call for Evidence on the Directive 1997/9/EC on Investor Compensation Schemes (ICSD). A revision of the ICSD also affects energy companies, which have a licence under the MiFID regime and are required to comply, among other conditions, with the obligations under the ICSD. We would therefore like to point out that it is essential that the specific case of energy related commodities needs to be taken into account when considering revisions of the ICSD regime. This is of particular importance in light of the review of the exemptions under MiFID, which might result in more MiFID regulated energy companies.

We would like to focus our comments on the following two issues taking into account the specific features of the energy market:

Question 3) Would it be appropriate to include in the scope of the ICSD all investment firms seeking authorisation to the provision of investment services, although they provide their services only to non-retail clients?

In question 3, the Commission asks whether it is appropriate to extend the scope of the ICSD to all investment firms, even if they provide their services only to non-retail clients.

In our opinion, we see a clear case that investment firms, which are only active in the energy trading markets and provide services only to non-retail clients, should be excluded from ICSD duties.

Particularly for the energy trading sector investor protection is less applicable as it is purely a professional market without involvement of retail clients.

Furthermore, we think that non-retail clients do not need the same high level of investor protection. The relevant risks presented by energy wholesale markets (security of supply and robust prices for end-customers) are significantly different to those present in financial markets (systemic risk and investor protection). Furthermore, in energy markets generation and transmission assets generally serve as an underpinning for possible remaining risks and there is no necessity to provide additional cover.

In addition, only a limited portion of the activities of energy investment firms requires a license under MiFID, i. e. the provision of financial services to third parties. In fact, trading by energy companies is mostly done on own account for risk management and hedging purposes. While the production of the generation companies is sold to the market, supply companies without generation facilities need to purchase electricity on the market to supply their customers. To mitigate the arising price and volume risks, trading of energy on own account on energy wholesale markets is, most commonly, used as risk management and hedging tool.

Energy trading does not regularly lead to increased risks for third parties, particularly when exchange based trading is cleared through a central counterparty. Also master agreements, which are the basis for most bilateral trades set out clear rules for reducing credit risks.

We therefore recommend excluding investment firms active in energy trading that provide their services exclusively for non-retail clients from the scope of the Investor-Compensation Schemes.

Question 7) The ICSD does not harmonize the funding systems of the schemes. Should the ICSD provide for some general principles concerning the funding of the schemes?

If member-firms only trade with professionals and should not benefit from a compensation scheme they equally should not be obliged to contribute to the funding system of such a scheme. This aspect relates directly to question 7.

We would like to point out that as a result of MiFID, many commodity firms have become subject to licence requirements and a mandatory membership in national compensation schemes.

In our view it is not appropriate to be required to fund compensation cases that were caused by firms acting with private investors. The risk of being possibly exposed to another compensation that amounts to multi-hundreds of million Euros like the Phoenix-case in Germany deters many firms from business. As a consequence liquidity decreases considerably in the respective markets.

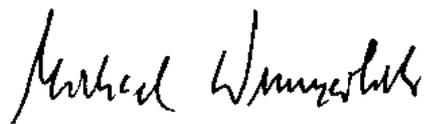
In order to create a level-playing-field in Europe, we would propose to exclude firms from the ICSD that only trade among professionals.

If such a regulation is not considered appropriate we would like to point out that it is crucial that as far as the funding system is concerned there should be limitations regarding special-contributions:

In cases, where a compensation case overstrains the financial resources of the fund and special contributions are considered necessary it should clearly be regulated that a special contribution must never jeopardize the economical stability of the member firm. For the sake of unambiguousness the economical stability should only be applied to the single entity and not a parent company if a firm is part of a bigger group.

For any further questions, please do not hesitate to contact my colleague Marcel Steinbach (marcel.steinbach@bdew.de, +49/30 300199 1560) or myself in Brussels.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Michael Wunnerlich". The signature is written in a cursive, slightly slanted style.

Dr. Michael Wunnerlich