

STAKEHOLDER CONSULTATION ON THE IMPLEMENTATION OF A DATA AND TRANSACTION REPORTING FRAMEWORK FOR WHOLESALE ENERGY MARKETS

The purpose of this consultation is to assist the Commission in the preparation of implementing acts to be adopted in accordance with Articles 8(2), 8(5) and 21(2) of Regulation (EU) No. 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency.

Please, submit your response to this public consultation **by 7 December 2012** at the latest to the following e-mail address: ener-wholesale-markets@ec.europa.eu.

The Commission will make the responses it receives public. If you do not want your submission to be made public, please indicate it accordingly in your submission.

1. INTRODUCTION AND BACKGROUND

Regulation (EU) No. 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency (REMIT)¹ aims to create an efficient and effective oversight framework for Europe's wholesale electricity and gas markets (together wholesale energy markets). This will help wholesale energy markets function properly, reflecting market fundamentals, and help ensure market outcomes are not distorted by abusive market behaviour.

Wholesale energy markets are interrelated across the European Union. Therefore the concern to ensure the integrity of markets is not confined to individual Member States. Wholesale energy markets encompass both commodity markets and derivative markets, and price formation in both sectors is interlinked. Trading takes place on regulated markets, multilateral trading facilities, organised spot markets and using over-the-counter (OTC) transactions and bilateral contracts, directly and intermediated through brokers. Prior to REMIT, energy market monitoring practices were different in Member States and sector-specific. REMIT implements consistent prohibitions on market abuse and ensures a holistic approach to the oversight of wholesale energy markets.

There are important interactions between REMIT and financial regulation, notably Directive 2003/6/EC on insider dealing and market manipulation (market abuse) (the Market Abuse Directive or MAD)², Directive 2004/39/EC on Markets in Financial Instruments (MiFID)³ which are both currently under review and the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR)⁴.

¹ OJ L L326, 8.12.2011, p. 1

² OJ L L96, 12.4.2003 p. 16.

³ OJ L L145, 30.4.2004 p. 1

⁴ OJ L 201, 27.7.2012, p. 1.

REMIT consists of three pillars: first the prohibition of market abuse and related disclosure obligations on market participants; second the implementation of a transaction and data reporting framework to allow for effective EU wide market monitoring by the Agency for the Cooperation of Energy Regulators (ACER) and finally provisions to ensure that where market monitoring indicates a potential market abuse, the incidents are investigated and enforcement action is taken. The pillars are explained in more detail in Box 1.

This consultation is focused on the second of these pillars and specifically the implementation of a European transaction and data reporting framework using the implementing powers conferred on the Commission by Articles 8(2) and 8(5) of REMIT. In particular, this consultation aims to help the Commission to collect the necessary information to ensure it can meet the objectives of REMIT in keeping reporting obligations to a minimum and not creating unnecessary costs or administrative burdens for market participants. The information which this consultation collects will form an important input into the development of the impact assessment, including cost-benefit analysis, supporting the implementing acts.

The Commission has also engaged consultants to provide for an expert opinion on the framework for an effective data and transaction reporting scheme required by REMIT, as part of its preparatory work for the development of implementing acts. In preparing their report, the consultants engaged closely with stakeholders and have made detailed recommendations on the subject of this consultation. The final report⁵ is annexed to this consultation in order to allow stakeholders effectively respond and, where appropriate, highlight any areas where they disagree with this report. We would particularly welcome stakeholders views on the individual recommendations made by the consultants in the final report.

In parallel, ACER is preparing recommendations as to the data and transaction reporting framework which it considers necessary for it to be able to effectively and efficiently monitor wholesale energy markets pursuant to Article 7(3) of REMIT. ACER ran a public consultation on its draft Recommendations from 21 June to 6 August 2012 (ACER PC_2012_R_10). As ACER will be the primary user of the data collected and will be responsible for managing the reporting framework, we will take particular account of the Recommendations when developing the implementing acts. ACER is likely to formally adopt its Recommendations during this consultation period. Respondents may wish to reflect their views on the ACER Recommendations in their response to this consultation.

Box 1

⁵ REMIT - Technical Advice for setting up a data reporting framework, Final Report, PWC-Ponton Consulting, June 2012

Pillar I: Prohibitions and disclosure obligations

REMIT prohibits market manipulation and trading on inside information on wholesale energy markets. The definitions of these prohibited acts are in line with those applying under the MAD, though adapted for wholesale energy markets. Where wholesale energy products structured as financial derivatives are already covered by MAD, it continues to apply. REMIT obliges market participants to publicly disclose inside information.

REMIT allows the Commission to update the definitions of market manipulation and inside information through delegated acts.

Pillar II: Reporting framework and market monitoring

Efficient market monitoring at EU level is vital for detecting and deterring market abuse on wholesale energy markets. REMIT tasks ACER with carrying out this monitoring as it has both a Union-wide view of electricity and gas markets, and the necessary expertise on the operation of electricity and gas markets and systems in the Union. Market participants are required to provide records of transactions, including orders to trade, in wholesale energy markets as well as fundamental data to ACER, however there should be no double reporting in cases where the required information has already been reported in accordance with financial regulation. Powers are conferred on the Commission to adopt implementing acts to establish the legally binding framework for the implementation of the provisions on data collection by ACER.

National regulatory authorities, which have a comprehensive understanding of developments on energy markets in their Member State, cooperate with ACER in monitoring and therefore also will have access to the data which ACER collects. Access may also be provided to other authorities such as competition authorities and financial supervisory authorities.

Pillar III: Investigation and enforcement

National regulatory authorities are responsible for ensuring that REMIT is enforced. To this end Member States must ensure they have the necessary investigatory powers to allow them to carry out this task efficiently. These investigatory powers include powers of access to documents and information, powers to carry out on-site inspections and require telephone records. Member States must also implement an appropriate penalty regime. Recognising the interactions between trading in derivative products and trading in commodity products, the penalties for breaches of REMIT should be in line with the penalties adopted under MAD.

ACER has an important role in ensuring that investigations are carried out in an efficient and coherent manner, requesting cooperation between national regulatory authorities and coordinating the operation of investigatory groups comprised of representatives of concerned national regulatory authorities and, where appropriate, other authorities including financial supervisory authorities.

2. GENERAL APPROACH

Article 8(2) of REMIT states that the Commission shall, by means of implementing acts, draw up a list of the contracts and derivatives, including orders to trade, which are to be reported and appropriate *de minimis* thresholds; adopt uniform rules on the reporting of information; and lay down the timing and form in which that information is to be reported. The Commission wants to ensure that the implementation of REMIT does not impose unnecessary burdens on market participants. Consequently, transaction and data reporting should be made as smooth as possible, making use of the existing market architecture and the related data and information flows, to the extent possible. The purpose of requiring market participants to report transactional data⁶, including orders to trade, is to allow ACER to effectively monitor wholesale energy markets and to detect and deter market abuse. This should support the development of deep and liquid markets by increasing the confidence of market participants.

2.1. Transaction reporting and reporting by third parties

Article 8(1) of REMIT requires market participants to report information to ACER, but also provides for this obligation to be fulfilled by third parties on their behalf. These third parties could include organised markets or other persons, such as brokers or trade matching systems, which professionally organise transactions. This possibility for transactions to be reported via third parties is very important in minimising the potential burden on market participants. Therefore, we consider that use should be made of this provision to the extent possible, and that barriers should not be put in the way of undertakings that have the capacity to offer this reporting service to market participants.

However, it is also important that ACER can have confidence in the entities providing the data to it – at the most basic, it must be confident that the transactions being reported are real and not the result of a hacking or spamming attempt. The consultants propose that all reporting parties and service providers should be required to pass a predefined certification scheme to become a so-called "Registered Reporting Mechanism".

QUESTION

1. What, if any, verification of their capacity to effectively interact with ACER for the purposes of data transfer should be required of
 - a. market participants reporting transactions or
 - b. of third parties who report transactions on behalf of market participants?

⁶ Article 8(1) of REMIT refers to "products bought and sold, the price and quantity agreed, the dates and times of execution, the parties to the transaction and the beneficiaries of the transaction and any other relevant information".."

2.2. Interaction with Financial regulation

As already noted above, where a market participant or a third party acting on its behalf has fulfilled its reporting obligations under MiFID or EMIR, its reporting obligation should be considered fulfilled also under REMIT to the extent that all the information required has been reported.

ESMA has begun the process of developing the draft regulatory technical standards and implementing technical standards regarding trade repositories to be implemented in accordance with EMIR. On 25 June 2012, ESMA published a discussion document for these technical standards (ESMA/2012/379)⁷ in which it consulted with stakeholders on these matters. In relation to trade repositories, in line with the aims of EMIR, ESMA considers the purposes of reporting to a trade repository to include improving transparency in the derivative markets and protection against market abuse (paragraph 253). These purposes are in line with the rationale for transaction reporting under REMIT. ESMA and ACER have worked closely together on the information that should be specifically reported for energy commodity derivatives and will continue to do so.

We therefore envisage that the implementing legislation under REMIT and the regulatory and implementing standards adopted under EMIR should be complementary, minimise the complexity for market participants and ensure that ACER receives the necessary information regarding trading in wholesale energy products classified as OTC derivatives.

In relation to wholesale energy products which are reportable under MiFID, currently these are frequently not actively reported to financial supervisory authorities. In such a case, these transactions, including orders to trade, would need to be reported to ACER directly, which could be done by the relevant regulated market or MTF. We would therefore envisage allowing for organised market places to directly provide ACER with the transaction records, in line with the second subparagraph of Article 8(3) of REMIT.

QUESTION

2. What, if any, additional steps do you consider the Commission should take to ensure an effective interaction between transaction reporting under financial regulation and under REMIT?

2.3. *De minimis* reporting obligation

Article 8(2)(a) of REMIT provides for the setting of appropriate *de minimis* thresholds for the reporting of transactions where appropriate. *De minimis* rules such as these can

⁷ Available at: <http://www.esma.europa.eu/system/files/2012-379.pdf>.

help ensure that actors who by the nature of the size and or frequency of their actions are not likely to be able to have an impact on the market are not subject to burdensome requirements. They can therefore help ensure the proportionality of obligations placed on market participants.

Market abuse is most likely to take place involving standard transactions, i.e. transactions on organised market places including brokered and/or cleared or matched deals. We consider that conducting standard transactions require a level of organisational complexity and execution of business processes which also enable market participants to duly process and report such transactions. In addition reporting of standard transactions to ACER via the organised market place, broker or clearer will be facilitated. Consequently, the burden associated with reporting should be limited. We are therefore minded not to include any *de minimis* provisions for such transactions. Non-standard transactions and transactions not carried out via organised market places, brokers or trade matching facilities are addressed below. The effect of this approach would be that transactions in standard contracts would be reportable on the same basis irrespective of the size of the market participant or the frequency of trading.

QUESTION

3. Do you agree that it is not appropriate to include a *de minimis* threshold for reporting standard transactions carried out using organised market places, brokers or trade matching facilities or which are cleared?

3. PRODUCT SCOPE

3.1. Contract type: trading place – standard and non-standard transactions

The aim of REMIT is to ensure the integrity and transparency of wholesale energy markets by detecting and deterring market abuse on wholesale energy markets. Our view is that ACER should focus its market monitoring on those markets where the risk of market abuse is highest and the cost of market abuse to market participants and consumers greatest. Market abuse is most likely where standard contracts are used and there is easy access to trading platforms. Consequently, ACER should focus its resources on ensuring that it has access to standard transactions.

The consultants have proposed that a “standard commodity transaction” be considered a transaction where the offer and contract transaction stage can be transformed into the generic REMIT standard reporting format (see section *Identification conventions*) without losing their resemblance to the key economic terms of the original transaction. Further a "white list" should be established by the Agency. The white list would cover transactions carried out on brokerage platforms, organised market places and trade matching facilities or which are electronically cleared. All transactions on the white list would be fully reportable⁸. The white list would include all widely used organised market places, brokers or trade matching facilities and would be subject to periodic update. All other transactions, at least in the initial phase, would be subject to a "short

⁸ See section 5.1.3 of the consultant's report annexed to this consultation.

form" reporting requirement. This would include non-standard transactions. "Short form" reporting would be less frequent.

Our initial view is that this is a suitable approach towards the specification of the contracts and transactions to be reported.

QUESTION

4. Do you agree that the definition of "standard commodity transactions" and the creation of a white list for fully reportable transactions, as set out in the consultant's report, represents a suitable approach?
5. In relation to transactions not covered by the "white list",
 - a. Do you agree that these transactions should be subject to reduced "short form" reporting requirements?
 - b. Should these transactions be reported at a defined interval or only upon request of ACER?
 - c. Should the frequency of "short form" reporting be related to the size of the market participant or the overall frequency or volume of trading in which it is engaged?

3.2. Commodity type, including treatment of transportation, LNG, storage etc.

Article 2(4) of REMIT defines as wholesale energy products, irrespective of where and how they are traded, contracts for the supply of electricity or natural gas where delivery is in the Union; derivatives relating to electricity or natural gas produced, traded or delivered in the Union; contracts relating to the transportation of electricity or natural gas in the Union; and derivatives relating to the transportation of electricity or natural gas in the Union. Additionally, supply contracts for large energy users are treated as wholesale energy products.

It is clear that REMIT was intended to ensure comprehensive coverage of wholesale electricity and gas markets. This includes transactions across all timeframes. The definitions of inside information and market manipulation in Article 2(1) (3) of REMIT cover actions related to wholesale energy products. Inside information is specifically also related to both LNG and storage. Contracts relating to LNG, including LNG capacity, are related to the transportation and delivery of gas in the EU. Similarly storage contracts are related to the delivery of gas in the EU. In cases where only LNG landing or storage capacity is traded, the value of that capacity itself derives from the value of gas delivered in the Union. We are therefore of the view that transactions related to LNG and storage should be considered to be wholesale energy market transactions and, therefore, be covered by the reporting obligation in Article 8(1) of REMIT.

Physical or financial rights for cross-border or inter-zonal transmission capacity are covered by the definition of wholesale energy products. Where such contracts exist, all transportation contracts which specify delivery points are likewise covered by reporting obligations. Connection agreements which define how much electricity a generator can inject into the system could be considered to either be transmission contracts or a

fundamental data item. Our initial view is that they should be considered to be a fundamental data item and reportable as such, but not as a transmission contract, i.e. a wholesale energy market transaction.

QUESTION

6. Do you agree that the definition of wholesale energy products extends to contracts relating to LNG and storage, including landing and storage capacity?
7. Do you agree that generator connection agreements are normally a fundamental data item and not a contract relating to transmission?

3.3. Who should report transactions?

Each transaction has two counterparties, i.e. the buyer and the seller, both of whom are subject to reporting obligations. Therefore, the question arises whether it is appropriate for both entities to report the transaction.

In the case of exchanges, which act as the counterparty to all transactions, our initial view is that the exchange should report the transaction for both parties. Similarly, when transmission system operators operate balancing markets or other markets where they procure or sell wholesale energy products they could have the sole responsibility for reporting on behalf of both parties to the transaction.

For other transactions, where there is no central or common counterparty, e.g. for brokered transactions, it is probably not desirable to specify which counterparty is responsible for the transaction reporting. Therefore, our initial view is that both entities should remain responsible for reporting the transaction, clearly identifying that the trade is only one transaction, e.g. by using a unique identification code.

QUESTION

8. Do you agree that where one of the parties to a transaction organises the market place, that party should have sole responsibility for reporting the transaction?
9. Do you agree that where neither party to a transaction organises the market place,, that both parties should separately remain responsible for reporting the transaction?

4. TIMING AND FREQUENCY

Transactions can be collected at different regularity (immediate, hourly, daily, weekly etc.). At least in theory it is possible to ensure an immediate reporting of data to ACER for electronic transactions as done in some instances for reporting obligations under financial regulation. However, it is not clear that collecting data at such a frequency will bring any advantages to ACER in terms of the effectiveness or efficiency of its monitoring activities. Stakeholders who engaged with the consultants indicated that reporting at this frequency would be difficult for them to achieve.

Daily reporting would seem to be achievable for market participants as this reflects existing processes. It is also sufficient for ACER to be able to establish up to date view of developments on actively traded markets. By contrast, weekly or even monthly

reporting would not allow ACER to actively monitor markets and should only be considered for "short form" reporting for products not traded on liquid markets.

QUESTION

10. Do you agree that daily reporting of standard transactions is the most appropriate frequency to allow ACER to effectively monitor wholesale energy markets?
11. Do you consider it would be possible for market participants to report their transactions on a daily basis?

4.1. Point in lifecycle for reporting

Transactions relating to wholesale energy products have a number of different stages in the life cycle. These can be seen as broadly falling into the following categories: order (bid/offer), contract (matching and/or clearing), and scheduling/nomination.

Bid data can be useful when assessing attempts to manipulate the market. However, such data is particularly difficult to collect with respect to OTC transactions. Our initial view is that we should not collect this data from market participants, with the exception of exchanges or other organised market places. We consider that the obligations of persons professionally arranging transactions, as set out in Article 15 of REMIT, include that they should make such data available to ACER and national regulatory authorities.

QUESTION

12. Do you agree that reporting of orders to trade (bids) should not be collected by ACER from market participants, other than organised market places, at least initially?
13. For which stages in the lifecycle do you consider that it is necessary to collect transaction data?

5. IDENTIFICATION CONVENTIONS

The information reported shall include the "precise identification" of the wholesale energy product. A simple approach to this would be to use existing conventions to achieve this precise identification. Such identification might be exchange based or based on conventions from widely used clearing services. An advantage of this could be that it requires a minimum of change on the part of market participants or third parties reporting on their behalf. However, there are some significant drawbacks. Firstly, economically equivalent transactions are traded on different venues. Moreover, not all parties will use the same clearing services. Therefore, this approach could lead to difficulty in effectively monitoring the market while at the same time posing significant disadvantages to market participants.

The approach recommended by the consultants was to define a standard product taxonomy which is binding for the industry in order to categorize transactions by their product types. This would be done in such a way as to be coherent with EMIR and other conventions. Mapping to this standard would be the responsibility of the market

participant or the third party reporting on their behalf. This approach is described in more detail at section 5.1.2 of the consultant's report.

QUESTION

14. Do you agree that it is appropriate to develop a specific standard product taxonomy for reporting transaction data to ACER?

6. FUNDAMENTAL DATA

Article 8(5) of REMIT requires market participants to provide ACER and the national regulatory authorities with information related to fundamental data⁹ for the purpose of monitoring trading in wholesale energy markets. However, it is specifically stated that the reporting obligations on market participants shall be minimised by collecting the required information from existing sources, where possible, and specific reference is made to reporting obligations under Regulations (EC) No 714/2009 and (EC) No 715/2009.

The Commission intends to propose an enhanced data transparency framework on electricity market fundamentals¹⁰ which should allow ACER to access all the data – apart from inside information - it requires for monitoring purposes in the field of electricity. In relation to gas, there is no equivalent framework in existence or in planning. However, many data items are available through reporting at national level. This would require the establishment of an information sharing framework between national regulatory authorities.

QUESTION

15. Do you consider the items reportable under the draft electricity transparency rules envisaged by the Commission's consultation mentioned above sufficient for monitoring with regard to electricity fundamental data and which reporting channel(s) would you consider appropriate?
16. What gaps do you consider to exist in relation to fundamental data related to gas, and can this be accessed without the creation of a framework for gas equivalent to that envisaged for electricity and which reporting channel(s) would you consider appropriate?

⁹ The text refers to the "capacity and use of facilities for production, storage, consumption or transmission of electricity or natural gas or related to the capacity and use of LNG facilities, including planned or unplanned unavailability of these facilities".

¹⁰ Consultation documents in relation to "Enhanced data transparency on electricity market fundamentals" this can be found at http://ec.europa.eu/energy/gas_electricity/consultations/20110916_electricity_en.htm.

7. RESPONSES

7.1. Summary list of questions

QUESTION

1. What, if any, verification of their capacity to effectively interact with ACER for the purposes of data transfer should be required of
 - a. market participants reporting transactions or
 - b. of third parties who report transactions on behalf of market participants?
2. What, if any, additional steps do you consider the Commission should take to ensure an effective interaction between transaction reporting under financial regulation and under REMIT?
3. Do you agree that it is not appropriate to include a *de minimis* threshold for reporting standard transactions carried out using organised market places, brokers or trade matching facilities or which are cleared?
4. Do you agree that the definition of "standard commodity transactions" and the creation of a white list for fully reportable transactions, as set out in the consultant's report, represents a suitable approach?
5. In relation to transactions not covered by the "white list",
 - a. Do you agree that these transactions should be subject to reduced "short form" reporting requirements?
 - b. Should these transactions be reported at a defined interval or only upon request of ACER?
 - c. Should the frequency of "short form" reporting be related to the size of the market participant or the overall frequency or volume of trading in which it is engaged?
6. Do you agree that the definition of wholesale energy products extends to contracts relating to LNG and storage, including landing and storage capacity?
7. Do you agree that generator connection agreements are normally a fundamental data item and not a contract relating to transmission?
8. Do you agree that where one of the parties to a transaction organises the market place, that party should have sole responsibility for reporting the transaction?
9. Do you agree that where neither party to a transaction organises the market place,, that both parties should separately remain responsible for reporting the transaction?
10. Do you agree that daily reporting of transaction is the most appropriate frequency to allow ACER to effectively monitor wholesale energy markets?

11. Do you consider it would be possible for market participants to report their transactions on a daily basis?
12. Do you agree that reporting of orders to trade (bids) should not be collected by ACER from market participants, other than organised market places, at least initially?
13. For which stages in the lifecycle do you consider that it is necessary to collect transaction data?
14. Do you agree that it is appropriate to develop a specific standard product taxonomy for reporting transaction data to ACER?
15. Do you consider the items reportable under the draft electricity transparency rules envisaged by the Commission's consultation mentioned above sufficient for monitoring with regard to electricity fundamental data and which reporting channel(s) would you consider appropriate?
16. What gaps do you consider to exist in relation to fundamental data related to gas, and can this be accessed without the creation of a framework for gas equivalent to that envisaged for electricity and which reporting channel(s) would you consider appropriate?

Additionally, please provide any comments you may have on the specific recommendations set out in the final report of the consultants engaged by the Commission.

7.2. Deadline and address for responses

Please, submit your response to this public consultation **by 7 December 2012** at the latest to the following e-mail address: ener-wholesale-markets@ec.europa.eu.

The Commission will make the responses it receives public. If you do not want your submission to be made public, please indicate it accordingly in your submission.