ACER

Agency for the Cooperation of Energy Regulators

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ACER Public Consultation on Recommendations to the European Commission as regards the records of wholesale energy market transactions according to REMIT

Evaluation of Responses

Ref: A12-AMIT-04-07a
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Agency for the Cooperation of Energy Regulators
Trg Republike 3
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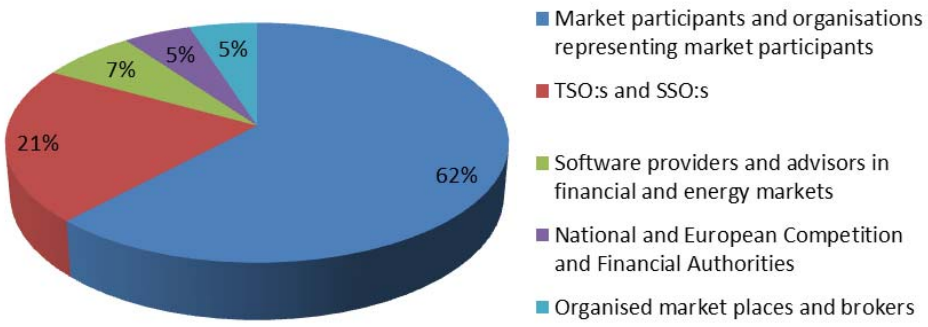
Table of Contents

1 Introduction

On 21 June 2012, the Agency for Cooperation of Energy Regulators (the 'Agency' or 'ACER') launched a public consultation on the Draft Recommendations to the European Commission as regards the records of wholesale energy market transactions and implementing acts. The public consultation document consisted of 10 recommendations and 20 questions on the records of transactions and REMIT implementing acts concerning data collection under Article 8 of REMIT. The purpose of this consultation was to collect the views of the stakeholders in order to develop the Recommendations to the Commission according to Article 7(3) of Regulation (EU) No 1227/2011 (REMIT). ESMA and financial supervisory authorities and competition authorities were consulted separately by letter of 21 June 2012 to ESMA and the European Competition Network in which they were also invited to respond to the public consultation document. A public workshop was held on 19 July 2012 to discuss the public consultation document with stakeholders.

The public consultation launched by the Agency solicited feedback from various stakeholders on the draft Recommendations, published on 21 June 2012 on the Agency's website. The public consultation closed on 6 August 2012.

In total 52 responses were received from 59 stakeholders, 8 of which were provided by European Associations. The following diagram shows the distribution of responses received per stakeholder type.



The table in Annex 2 lists the names of all respondents including their country/area of representation.

2 Responses received and ACER's view

The following sections provide an analysis on the responses received in the consultation and outline, in particular, key issues raised by the respondents.

2.1 Draft Recommendations as regards Article 8(1) of the Regulation

2.1.1 Definitions

Overview

Article 8 of the Regulation contains several terms which are crucial for data collection, they are however not specifically defined. It is advisable that these terms, as well as other terms newly introduced for data collection, are defined in the implementing acts in order to avoid any ambiguity for market participants who have to report information. The public consultation document proposed some draft definitions to be included in the REMIT implementing acts.

In general, respondents welcomed the approach by which definitions are included in the implementing acts, they however proposed several definitions to be more harmonised with the definitions in EU financial market legislation, whilst some other are to be redrafted. In addition to this, some definitions were questioned and proposed to be deleted, as opposed to some additional definitions that were to be added. Some respondents provided concrete examples for alternative wording of notions.

In view of the supportive responses of this proposal, the general approach to include definitions in the implementing acts has been maintained. Some definitions have been further harmonised with the EU financial market legislation while some definitions have been reviewed.

Definitions of "derivative" or "derivative contract" and "energy commodity" or "energy commodity contract"

Respondents welcomed the application of the definition of derivative, but referred to the ongoing MiFID/MiFIR review which may lead to modifications of the definition and which should consequently be taken into account. Whilst some respondents questioned the need for the definition of "energy commodity" or "energy commodity contract", others proposed clarification on physical forward contracts falling under the definition of "energy commodity" or "energy commodity contract".

In its public consultation document the Agency has already applied the aligned definition of "derivative" with the definition of derivative under EMIR. The definition of energy commodity contract has been clarified by defining it as "any wholesale energy contract other than energy derivative". The Agency agrees that physical forward contracts are covered by the definition of energy commodity contract and they have therefore been added to the list of contracts to be reported according to Annex III. The Agency acknowledges the ongoing MiFID review and its potential impact on the definition of financial instrument and therefore on the definition of derivative proposed, but cannot legally refer to a draft version of MiFID II currently still under discussion. The review of MiFID is also a reason why a review of the REMIT implementing acts is foreseen two years after being adopted.

Definitions of "standardised contract" and "non-standardised contract"

In general, respondents welcomed the distinction between standardised and non-standardised contracts and the need to define the concepts in the implementing acts. However, most respondents asked for more clarification concerning the definition of these notions. Respondents emphasised the need for utmost precision in defining these terms as they impact the level of detail of reporting on transactions. In particular, some respondents highlighted the fact that with regard to standardised contracts due attention should be paid to bilateral transactions. One respondent considered it more appropriate to distinguish between the contracts that are traded on regulated markets, and the ones that are not. Even though several respondents agreed that intra-group transactions fall under the scope of REMIT, they highlighted the fact that intra-group transactions should not fall under the reporting obligation and referred to ongoing discussions under EMIR.

The Agency has maintained its approach to distinguish between standardised and non-standardised contracts, the definitions have however been refined. A definition of "standard framework energy trading agreements" has been added to improve the understanding of "standardised contract". Linking the definition of a standardised contract to the admission to trading at regulated markets was not an option as the definition of regulated market according to MiFID applies to financial instruments only. Had this been done, any reference to the definition of regulated market would have automatically turned all energy commodity contracts to non-standard ones. Instead, the Agency elaborated on the concept of the ACER list of standardised contracts. The fact that a contract is or is not listed in the Agency's REMIT database as standardised contract will be decisive for the reporting as standardised or non-standardised contract. The Agency recognises that intra-group transactions fall under the scope of REMIT, but recommends the Commission to exclude OTC intra-group transactions from the list of contracts to be reported as long as the members of the group are registered under REMIT. Such an approach should limit the administrative burden on a group without mitigating the Agency's information needs.

Definition of "organised market place"

A majority of respondents asked for further clarification of the proposed definition of "organised market place". Responding brokers in particular proposed to limit the definition to regulated markets in the meaning of MiFID, whilst other respondents criticised limiting the definition to the MTF brokers as per MiFID and called for the inclusion of all broker platforms in the definition of organised market place.

The Agency considers that any limitation of the definition of "organised market place" to regulated markets in the meaning of MiFID would in effect automatically turn all energy commodity spot market places (e.g. energy spot exchanges) into non-organised markets since it would disregard the fact that the definition of regulated market according to MiFID applies to financial instruments only. In addition, such an approach would not sufficiently reflect the level of organisation of organised spot market places. Accordingly, the reviewed definition of organised market place covers energy exchanges, brokers and balancing market places. The definitions of energy exchange, broker and market operator correspond *mutatis mutandis* to the definitions of regulated market, MTF, systemic internaliser and market operator in Article 4 of MiFID, but are applied to wholesale energy products and market participants instead of financial instruments and investment firms in order to cover the energy commodity market. The concept of OTF of the MiFID review has already been taken into account. Thus, the Agency aims at reflecting the current level of organisation in the wholesale energy market.

Definitions of "transaction", "agreement", "contract", "trade", "tradable instrument", "bid and offer", "execution", "spot market" and "order to trade"

Several respondents questioned the usefulness of the proposed definitions. Some referred to the application of these definitions in the EU financial market legislation without their explicit definitions in the existing legislation, and they therefore either questioned the need to define such terms or proposed alternative definitions. With regard to some of these definitions, respondents referred to ongoing work in the MiFID/MAD review.

The Agency recognises the need for consistency with reporting under the EU financial market legislation and has therefore refrained from recommending definitions for the aforementioned notions in its final recommendations.

Definitions of "supply", "transportation" and "market participant subject to reporting obligations"

Some respondents asked for a removal of distribution from the definition of "transportation". Several respondents from the gas industry questioned the inclusion of storage and LNG in the definitions of "supply" and "transportation" and the inclusion of SSOs and LSOs in the definition of "market participant subject to reporting obligations" in particular. Some respondents questioned the legal basis for defining these terms in the implementing acts.

The Agency has removed the aforementioned definitions from the final recommendations and agrees with the stakeholders that it would be difficult legally to define them in the context of the implementing acts according to Article 8 of REMIT as they relate to the definitions of Article 2 of REMIT, in particular paragraph 4 thereof. The Agency has already provided its understanding of this definition in the 2nd edition of ACER Guidance on the application of REMIT where reference is made to the relevant definitions in Directive 2009/72/EC, Directive 2009/73/EC and Regulations (EC) No 714/2009 and (EC) No 715/2009. The Agency acknowledges that according to Article 2(7) of Directive 2009/73/EC 'supply' means the sale, including resale, of natural gas, including LNG, to customers. The Agency wishes to highlight the inclusion of LNG in this definition of supply and does not see any reasons why a different understanding of supply should apply under Article 2(4) of REMIT. The Agency furthermore assumes that the definition of 'transport contract' meaning a contract which the transmission system operator has concluded with a network user with a view to carrying out transmission according to 2(2) of Regulation (EC) No 715/2009 may be relied on under REMIT, but agrees that the coverage of storage and LNG may need further clarification. The Agency believes that the Commission could use its powers under Article 6(1)(b) of REMIT to specify those definitions if future developments on wholesale energy markets require to do so.

Definitions of newly introduced terms of "RRMs", "RIS", "regulated information" and "transparency information"

Several respondents welcomed the definition of newly introduced terms such as RRM, RIS, regulated information and transparency information. This approach was therefore maintained.

Further definitions

Several respondents asked to add further definitions they considered relevant for the application of Article 8 of REMIT. The Agency acknowledged this by recommending some additional, previously unforeseen definitions (e.g. OTC, standard framework energy trading agreement) and by clarifying the description of fields in Annex II of the recommendations (e.g. beneficiary). However, several definitions requested either relate to general terms or are already defined in REMIT (e.g. TSO). They therefore do not have to be defined in the REMIT implementing acts.

2.1.2 Records of transactions

Overview

According to Article 8(1) of REMIT, market participants, or a person or authority on their behalf, shall provide the Agency with a record of wholesale energy market transactions, including orders to trade. The Agency, according to Article 7(3) of REMIT, may make recommendations to the Commission as to the records of transactions, including orders to trade, which it considers necessary to effectively and efficiently monitor wholesale energy markets. The public consultation document included the Agency's proposals on records of transactions, including orders to trade.

In general, respondents stressed that all data collection must be directly related to the purpose of REMIT, i.e. allowing regulators to monitor potential market abuse. It was emphasised that costs of data reporting for market participants should be minimised. Several respondents requested a further alignment of reporting under REMIT and EMIR and further coordination of ESMA and ACER.

Distinction between records of transactions in standardised and non-standardised contracts

In general, respondents agreed that a distinction should be made between reporting of records of transactions in standardised and non-standardised contracts. However, several respondents emphasised that the current distinction needs to be refined further. One respondent considered distinguishing between the contracts that are traded on regulated markets, and those that are not, to be more appropriate. Given the overall positive feedback, the Agency has maintained its approach, but refined the definition of standardised contract for reasons of clarity and legal certainty.

The tables of fields distinguish between standardised and non-standardised contracts, with reporting of records of transactions in standardised transactions and contracts, including derivatives, being more detailed than reporting of records of transactions in non-standardised contracts. In general, the responses to the public consultation document supported this proposal hence this approach has been maintained.

Reporting of transactions, including orders to trade, in standardised contracts

Purpose of reporting of orders to trade

Although several respondents questioned the need for reporting of orders to trade, also in view of the volume of data, some respondents at least acknowledged that reporting of orders to trade is explicitly stipulated in REMIT. However, most respondents supported the proposal of reporting through organised market places, with some of them requesting to only foresee reporting through organised market places and to relieve market participants from the reporting of orders to trade. Several respondents emphasised the fact that market participants would not store orders to trade.

Pre-trade information, such as orders to trade, is important for detecting insider trading - in particular through the acquisition or disposal of wholesale energy products which that information relates to, according to Article 3(1)(a) of the Regulation, market manipulation, according to Article 2(2) of the Regulation, and attempts to manipulate the market, according to Article 2(3) of the Regulation. One characteristic of the regular monitoring requirement for organised market places is to monitor pre-trade activities. However, as many organised market places are linked and already sufficiently standardised to allow cross-venue comparison of price signals, exclusive reliance on those organised market places to monitor pre-trade activities is not sufficient, since, by their very nature, these venues will not have access to all the relevant data - e.g. information from other organised market places, on relevant OTC transactions or inside information disclosed by market participants according to Article 4(2) of the Regulation - or typically do not take such information into account in their monitoring activities. The storing of voice-brokered orders will enable NRAs investigating suspected breaches of the market abuse prohibitions to access this important information according to Article 13(2)(d) of REMIT. Currently, no obligation to store voice brokered orders applies to non-regulated organised market places.

The reporting of orders to trade should be mandatory for the organised market places. The Agency considers that orders related to products traded on an organised market place and orders which are visible to more persons than the potential buyer and potential seller should be recorded and reported as if they were transactions. In addition, the monitoring of day-ahead auctions would be less relevant without the collection of orders to trade. Currently, contrary to the derivatives markets, no harmonised supervisory framework applies at the European level for the supervision of organised spot market places, which is another reason why such orders to trade should be collected. In line with this, it is proposed that orders to trade are stored by the organised market place concerned in order to be monitored by the market surveillance team and collected by ACER on a continuous basis from these organised market places. Since it will be difficult to separate orders to trade and related transactions, the executed transactions too should be collected from the organised market places.

Content of reporting

REMIT indicates a minimum set of information to be reported and this is included in the records of transactions: the precise identification of the wholesale energy 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.

Some respondents raised comments and requested clarification with regard to the data fields proposed in Annex II of the public consultation document. A number of respondents to the public consultation document urged the Agency to provide for consistency with the various reporting requirements in the EU to avoid duplication and reduce the reporting burden on firms. Some respondents also argued that further distinction should be made between information to be provided for orders to trade and information on executed transactions. Regarding the definition of beneficiary, a clearer definition was requested so that any transaction can be allocated properly.

The Agency has revised the tables of fields included under Annex II taking into account as much as possible the suggestions and amendments provided in the responses to the public consultation document. A distinction has been made between the records of transactions, including orders to trade, from organised market places (Annex II.1) and the reporting of records of transactions in standardised transactions and contracts (Annex II.2).

A comparison has been made between reporting under REMIT, reporting under EMIR for energy commodity derivatives and the transaction reporting mechanisms already in place in the EU under MiFID. Whilst efforts towards the aligned data sets were made, reporting under REMIT, as understood by the Agency, differs in scope than MiFID or EMIR. Information on derivatives must go beyond information to be reported under EMIR as not all information necessary for effectively and efficiently monitoring market abuse will be covered by EMIR (e.g. information necessary for monitoring of market abuse and other information potentially not covered by the Unique Product ID). Apart from minor differences concerning the different terminologies of the two regulations, the order of data fields and their descriptions, due to the specificities of wholesale energy markets, any differences in the relevant Annex II.2 are caused by the different product scope under REMIT and EMIR, with REMIT also covering energy commodity contracts and the lack of a unique product ID for such contracts and the different mandate of ACER and ESMA under REMIT and EMIR, respectively, i.e. monitoring of market abuse versus monitoring of systemic risks.

As regards the data field concerning the beneficiary of the transaction, the Agency has clarified the meaning of beneficiary.

Reporting of records of transactions in non-standardised contracts

Purpose of reporting

Although a few respondents highlighted the importance of reporting non-standardised contracts, many respondents questioned the obligation to report non-standardised contracts and referred to the record keeping obligations under the Third Energy Packages and the possibility for NRAs to request information. However, if transactions in non-standardised contracts have to be reported, several respondents emphasised that the existing reporting arrangements should be taken into consideration.

The Agency considers non-standardised contracts, like other OTC contracts, to lack transparency as they are privately negotiated contracts and since any information in relation to them is usually only available to the contracting parties.

Market participants, particularly in the gas markets, enter into complex long-term bilateral transactions, for which it is often not possible to identify precise quantities or prices at the time of execution. Such mechanisms may envisage different prices for different time periods of delivery within the overall delivery time-range and are based on pre-agreed indices, the nature of which tends to be complex and highly contract-specific. All such terms and optionalities are, however, agreed upon between counterparties before execution. In addition, quantities to be delivered have a high degree of optionality. Therefore, for these complex, non-standardised arrangements which fall outside organised market place's list of standardised instruments, a reporting regime that respects these highly customised contracts is required.

The Agency considers reporting of records of transactions in non-standardised contracts to be crucial for providing a complete picture of the trading activities of market participants. Market abuse practices like ramping or cross-market manipulation could not or only hardly be detected without information on non-standardised contracts.

For instance, a market participant being a seller in a long-term contract with price components depending on developments of spot market prices could influence the spot market prices by buying at artificially high prices to benefit from these higher prices as a seller in the long term contract(s). If no information was available on the long-term contracts, the activity on the spot markets alone would not necessarily be sufficient to identify suspicious instances. Only with the knowledge about the long-term contracts the picture is complete.

The table of fields for the non-standard reporting form are considered decisive to receive a first glance of non-standardised contracts through the electronic reporting of records of transactions for the monitoring of wholesale energy markets.

Where individual transactions under a non-standardised contract fulfil the criteria of a standardised transaction and therefore can be reported as such, these transactions should be reported as standardised transactions according to Annex II.2.

The proposed approach of data collection on non-standardised contracts aims at avoiding reporting discrimination between standardised contracts typically traded at organised markets and non-standardised contracts traded OTC and information asymmetries for regulators between the organised and OTC markets. Similar information asymmetries in the derivatives market led to the introduction of the OTC reporting obligations under EMIR for mitigating those risks and improving the transparency of derivative contracts. The Agency strongly believes that the lessons learned in the derivatives markets should also be considered in energy commodity markets to avoid recurrence.

Accordingly, reporting of transactions in non-standardised contracts to the Agency should be done by filling in the non-standard form for the reporting of records of transactions. Changes should be reported as modifications. It should be sufficient if only one party of the contract reports the non-standard reporting form.

Content of reporting

Many respondents questioned the level of detail for the reporting of non-standardised contracts and requested that only minimum basic information should be reported. Some respondents proposed modifications in the list of fields and either asked for further clarifications or for deletion of fields.

Many respondents strongly opposed to ACER collecting non-standardised contracts in pdf, since this would create unnecessary burden for market participants and disproportionally increase the risks related to confidentiality. A few respondents proposed that market participants should provide ACER with non-standardised contracts on request only.

The Agency has revised the tables of fields included under Annex II taking into account the suggestions and amendments provided in the responses to the public consultation document as much as possible. The table of fields for the non-standard reporting form as proposed in Annex II.3 is decisive in receiving the first glance at non-standardised contracts through the electronic reporting of records of transactions for the monitoring of the wholesale energy markets.

In addition to the transaction reporting, the non-standardised contract as such should be submitted to the Agency. The Agency's view is that the contracts may contain information necessary when assessing possible market abuse under REMIT. This reporting should be done either electronically, e.g. as a pdf file, or physically by registered post. The contracts would be stored safely at the Agency and kept at disposal until needed for the analysis of suspicious cases. By foreseeing the latter possibility, the Agency took into account data security concerns raised by market participants.

Reporting of scheduling/nominations

Purpose of reporting

Although several respondents questioned the need to collect scheduling/nomination data for the market monitoring under REMIT, they proposed that such data collection is done through TSOs or third parties acting on TSOs' behalf. Several respondents proposed a separate Annex for the reporting of such data or a reference to existing standards.

The Agency considers, similar to what is considered in DG ENER's consultancy advice, that information on the physical settlement of the transaction (scheduling/nomination), both for transactions in derivatives and in energy commodity contracts, is important for the monitoring of the wholesale energy markets and to better understand the physical part of a transaction in wholesale energy products. In light of this, the Agency has maintained its approach under which scheduling/nomination is to be reported to the Agency.

As all scheduling/nominations information is placed with TSOs they may be seen as the natural provider of such reporting, thus limiting the burden on market participants.

Content of reporting

Several respondents proposed a reference to existing standards or a separate Annex for the reporting of scheduling/nomination data. The Agency took note of this and recommends that information on scheduling/nominations, including derivatives with physical delivery is reported according to the existing standard formats by TSOs, or third parties delegated by TSOs, on behalf of market participants. This approach was also proposed in DG ENER's consultant advice. The Agency proposes to use the reporting forms provided by DG ENER's consultants as separate Annex for the reporting of such information.

Reporting of lifecycle events

Purpose of reporting

Several respondents criticised the reporting of lifecycle events, both for standardised and non-standardised contracts, and emphasised the fact that a dynamic updating of transaction information would be too burdensome. Some respondents suggested that lifecycle events may be reported on a quarterly or even annual basis.

The Agency believes that monitoring market abuse must be based on accurate information. Starting investigations on non-accurate information should be avoided, both for the benefit of regulatory authorities and of market participants. This means that lifecycle information has to be reported to the extent necessary to enable regulatory authorities to base their monitoring activities and possible investigations on accurate information.

Content of reporting

Some respondents asked for a clarification on what kind of lifecycle information should be reported. The Agency took note of this and has clarified that only modifications of information already reported will have to be reported.

Unique identifier of market participants for reporting

Most respondents suggested further harmonisation with reporting under the EU financial market rules and proposed the use of the LEI. Until the LEI is available, some respondents would prefer the ACER code, others would prefer the EIC arguing that introducing yet another code during a transitional phase would cause substantial cost for market participants.

In light of comments received during the public consultation, the Agency proposes using the LEI. Should the LEI not be applicable when data collection under REMIT starts, market participants could use the BIC, if also active in derivatives markets. Moreover, market participants e.g. if only trading in energy commodity contracts, may rely on the EIC, provided that the market participant has communicated a unique EIC used at the time of registration, or the "ACER code" for registration. Each market participant will be identified through a pair of fields to allow for the interoperability between the different codes in the records of transactions: one field will contain the value of the code and the other field will contain the type of code used.

2.2 Draft Recommendations as regards Article 8(2) to (4) of the Regulation

2.2.1 List of contracts to be reported

Overview

According to Article 8(2) of REMIT, the Commission, by means of implementing acts, shall draw up a list of the contracts and derivatives, including orders to trade, which shall be reported. In general, respondents agreed with the proposed concepts of a generic list of contracts to be defined in the implementing acts on the basis of the list of contracts to be reported from Annex III, and a list of standardised contracts to be maintained on the ACER website, with the proposal for an ACER taxonomy at least for energy commodity contracts and the proposed phased approach. The Agency has therefore maintained its approach.

Generic list of contracts in the implementing acts and detailed ACER list of standardised contracts

The vast majority of respondents supported the proposed concept of a generic list of contracts to be reported in the implementing acts and a detailed list of standardised contracts on the ACER website. Only one respondent highlighted the fact that such a list should under no circumstances lead to product discrimination or "product control". The Agency has therefore maintained its approach. As already emphasised in the public consultation document and in the final recommendations, the ACER list of standardised contracts collected and published by the Agency would not involve the Agency approving contracts admitted to trading on organised market places. The Agency would under no circumstances have a possibility to reject any contract from being introduced by an organised market place. In addition to this, when a new contract is admitted to trading at an organised market place the Agency would not have the competences to refer the organised market place to use an already existing contract. The introduction and design of contracts would remain with the organised market place. The Agency would solely collect and publish information regarding wholesale energy contracts admitted to trading on organised market places.

Phased approach for balancing and transportation contracts and exclusion of contracts at administratively-fixed prices and of intra-group transactions from the list of contracts to be reported

Most respondents agreed with the phased approach for the balancing market contracts, but questioned the exclusions of "markets in which balancing is mandatory for most market participants". Several respondents asked for clarifications with regard to the exclusion of further contracts from the list of contracts to be reported, in particular intra-group transactions, feed-in tariff and other contracts at administratively-fixed prices.

The Agency acknowledges the above issues and has introduced the recommendation to foresee reporting of balancing market contracts and transportation capacity contracts in the second phase. The Agency has proposed a delay of 6 months. In addition to this, the Agency has proposed to exclude OTC intra-group transactions and contracts at administratively-fixed prices from the list of contracts to be reported in the implementing acts. Excluding contracts at administratively-fixed prices (e.g. renewable energy production at feed-in tariffs) would significantly limit the scope of reporting for small market participants. Any such information is considered necessary for detecting market abuse involving such contracts. The exclusion should also apply to OTC intra-group transactions, as the risk of market abuse through such contracts is limited. However, these exemptions should apply under the following circumstances only:

a) for contracts at administratively-fixed prices, only if the reporting of the nomination/scheduling information and reporting of information according to Article 8(5) of REMIT applies, in order to allow the Agency to detect possible market abuse manifested in the form of manipulation through capacity withholding;

b) for OTC intra-group transactions, only if the group companies in an OTC intra-group transaction are registered as market participants under REMIT, in order to identify potential suspicious behaviour of market participants involving OTC intra-group transactions.

The Agency considers that if above conditions are not respected, the exclusion cannot be granted. Furthermore, the implementing acts should foresee these conditions as compulsory for market participants that intend to use the above exemptions for their relevant transactions and contracts.

Content of list of contracts to be reported

In general, respondents agreed with the list of contracts put in Annex III. All respondents agreed that derivative contracts should not be listed and they supported the reference to the EU financial market legislation. However, several respondents proposed further clarification of the listed contracts, in particular as regards the coverage of physical forward contracts under REMIT and the coverage of capacity contracts, as well as clarification with regard to "other commodity contracts". Some respondents proposed a different wording for the contracts listed.

The Agency has taken into account the responses received and amended the content of the list of contracts accordingly, in particular as regards the terminology used and the inclusion of physical forward contracts in the list of contracts to be reported. However, the Agency has maintained its approach of listing the types of contracts to be reported by product category for transparency reasons.

ACER list of standardised contracts and product taxonomy

The majority of respondents supported the idea of a list of standardised contracts and a product taxonomy for energy commodity contracts. Several respondents however referred to the existing taxonomies in the EU financial markets (e.g. ISDA) and would welcome a harmonised usage of such taxonomies under REMIT and EU financial market rules.

The Agency has therefore kept its approach, but clarified the application for derivatives. In addition, the Agency has elucidated that such an ACER list would define a standard product taxonomy, i.e. a grouping of contract categories, for energy commodity contracts (e.g. with the dimensions commodity type (electricity/gas), transaction type (physical/financial), transaction category (commodity/transportation capacity) and country code (ISO-country code 3166-1 of the country of physical delivery or underlying for derivatives) which is binding for the industry in order to categorize transactions by their product types in the context of reporting records of transactions. Whilst for derivatives, the product IDs used for the transaction reporting of financial instruments may be applied (ISIN – International Securities Identification Number (ISIN); Aii – Alternative instrument identifier), the product taxonomy mentioned above could represent a basis to develop a unique product identification for energy commodity contracts.

Phased approach

In general, respondents welcomed the idea of a phased approach to reporting starting with the listing of a standardised contract at the ACER list of contracts, but asked for an adaption to the reporting requirement period of three to six months. Some respondents argued that purely bilateral standard contracts not conducted through an electronic trading venue should not be included in first phase implementation.

The Agency has clarified its recommendation on a phased approach concerning balancing and transportation contracts. In addition to this, it provided an explanation that the ACER list of

standardised contracts would in effect lead to a phased approach to implementation of reporting records of transactions under REMIT by making the level of detail of reporting of records of transactions in wholesale energy contracts dependent on the time of recording in the ACER list (REMIT database). The Agency believes that such phased approach for the reporting of wholesale energy contracts could reflect the current level of standardisation in the market, taking into account the economic impact of the implementation.

2.2.2 *De minimis* exemption for reporting

Overview

The public consultation document indicated three options for a de minimis exemption for reporting. In any case, any de minimis exemption should only apply if the market participant does not trade at organised market places. Most respondents were not against excluding small producers from the reporting obligations. However, their opinions differ in the way this should be done. Nevertheless, most of them were not against excluding the producers selling at administratively-fixed prices, but disliked the fact that it discriminates producers selling at other bonus models, which were not explicitly mentioned. Respondents from the gas market expressed the feeling that the proposed options are tailored for the electricity market and complained for the lack of gas-specific rules.

Option A – Refraining from defining any de minimis exemption

Several respondents favoured Option A, arguing that markets may be manipulated by all market participants, regardless of their size. According to these respondents, a de minimis exemption may be introduced but only for pragmatic reasons, i.e. market participants trading very small amounts bilaterally. Some respondents argued that a threshold for reporting of transactions would lead to unequal treatment of market participants, and that it could also lead to additional administrative burden, meaning additional costs.

Some respondents emphasised the fact that refraining from defining any de minimis threshold appears to pose a disproportional burden upon small market participants.

Option B – Introducing a de minimis exemption for small producers

Several respondents supported the introduction of a de minimis exemption for small and medium-sized producers, arguing that these producers cannot significantly influence the market prices with the volumes generated and traded by them. However, several respondents argued that the proposed threshold of 2 MW is too low to be effective. Some respondents proposed thresholds, ranging from 10 MW to 100 MW.

Option C – Excluding contracts for the sale of renewable energy sources at administratively-fixed prices (feed-in tariffs)

Most of the respondents did not comment on Option C. However, a few respondents opposed excluding contracts for the sale of renewable energy sources at administratively-fixed prices, arguing that any de minimis exemption should apply equally to all producers. A few respondents also pointed out that feed-in tariff regimes are quite different across the EI and loopholes might exist that would undermine the transparency purposes of reporting obligations.

In the light of the responses received, the Agency, in its final recommendations, recommends that the Commission considers introducing a de minimis exemption to exclude from the transaction reporting

obligation under Article 8(1) of the Regulation production contracts traded by small producers having an installed capacity of up to 10 MW, trading only this capacity, and acting individually in the market, unless trading at organised market places. The application of such exemption for all small producers avoids discrimination between electricity and gas producers.

2.2.3 Uniform rules on the reporting of information

Overview

According to Article 8(2)(b) of the Regulation, the Commission shall, by means of implementing acts, adopt uniform rules on the reporting of information which is to be provided in accordance with Article 8(1) of the Regulation. In addition, pursuant to the third sentence of Article 8(2) of the Regulation, the implementing acts shall take account of existing reporting systems. The public consultation document proposed reporting through Registered Reporting Mechanisms (RRMs).

Reporting through RRMs

In general, respondents agreed with the proposal to reporting through RRMs provided that direct reporting capability is available and that information requirements are based on current practice among market participants, exchanges and other trading platforms. Several respondents requested that RRMs take liability for failure to report information correctly or timely and proposed that platform operators are mandated to report transactions in standardised contracts. The Agency has therefore maintained its approach, including mandatory reporting of organised market places, but considers that according to Article 8(1), third sentence, of REMIT, the overall responsibility lies with the market participant and that once the required information is received from a person or authority listed in Article 8(4), points (b) to (f), of REMIT, the reporting obligation on the market participant in question shall be considered to be fulfilled.

Market participants as RRMs

In general, respondents argued that market participants should be eligible to become RRMs themselves. Some respondents argued that the requirements on non-third party RRMs should not be as onerous as on third party RRMs and should be kept to a minimum. A few respondents argued that market participants reporting directly to ACER should not even be required to register as RRMs.
Some respondents argued that direct reporting should be done via a simple standardised spread sheet to be uploaded to the ACER platform without the participant having to be an RRM or even an internet based form. One respondent was concerned that if a large number of participants become RRMs it makes providing an RRM service as a non-market participant unviable. Therefore, the respondent believed that it is essential for the REMIT implementing acts to provide a binding framework stipulating that venues report. Several respondents emphasised that the requirements for RRMs should be open to a public consultation.

The Agency has maintained its approach that also market participants may become RRMs and report directly to the Agency if fulfilling reporting requirements. The Agency will develop relevant RRM guidelines and consult them in the near future and in this context also consider the aforementioned responses received on the public consultation document. The Agency wishes to stress the need for such registration of RRMs for reasons of operational reliability according to Article 10 of REMIT.

Format for reporting

In general, respondents believed that adopting a single standardised format would be of benefit. The process to adopt such a format should be transparent and stakeholders should be consulted. Many respondents stressed that a single data format should be adopted. To minimise induction costs and ensure compatibility, ACER should adopt existing standards, such as EFET's CpML, following consultation with stakeholders. Some respondents argued that adopting a single standard would be undesirable as it may require market participants to change standards already in place. A single format is not essential for pre- and post-trade transparency purposes. Several respondents highlighted that any standard should take into account the requirements of REMIT and EMIR to reduce double reporting processes for market participants. Some respondents argued that a standardised format should not apply to non-standardised contracts. Several respondents emphasised that the decision regarding a standard should be with ACER, not the Commission, in order to allow more flexibility in case of future adjustments.

The Agency welcomes the responses received on the format of reporting and is working on IT-related issues for the implementation of reporting under Article 8 of REMIT, in particular technical standards with regard to the rules, standards and formats of transaction reporting and guidelines for the registration of RRMs and RISs, and will consult relevant stakeholders as appropriate.

2.2.4 Timing and form in which information is to be reported

Overview

According to Article 8(2)(e) of REMIT, the Commission, by means of implementing acts, shall lay down the timing and form in which this information shall be reported. In general, feedback from respondents was rather mixed as regards the timing of reporting. Several respondents suggested a different timing for reporting of non-standardised contracts, whilst others highlighted that the timing of reporting of different information should be harmonised for an effective and efficient monitoring.

Timing and form of reporting of standardised contracts

In general, respondents found "end-of-next-business-day" reporting deadline appropriate for standardised contracts, although some respondents argued that a final deadline of D+2 would be even more suitable. A few respondents thought that weekly, monthly or even quarterly reporting of standardised contracts would be sufficient for ACER's market monitoring purposes.

For reasons of harmonisation with reporting under the EU financial market rules and in order to ensure efficient and effective market monitoring of wholesale energy markets under REMIT, the Agency has maintained its approach of reporting records of transactions, including orders to trade, within one working day following the time of the reported event (the placing of orders at an organised market place, the execution, the modification of information already reported or the cancelation of the transaction).

Timing and form of reporting of non-standardised contracts

Most respondents found the monthly reporting of non-standardised contracts appropriate. However, a few respondents stressed that reporting non-standardised transactions within one month is not always feasible, therefore proposing a longer time window, ranging from two months to one year. Furthermore, a few respondents argued that there should be no difference between the timing of reporting of standardised and non-standardised contracts, and that the reporting of non-standardised contracts should be done on a daily basis as well. Some respondents thought that it needed to be clarified whether "on a monthly basis" means that reporting should be done at the end of each month

for all non-standardised contracts entered into or amended since the previous report, or whether it means that all non-standardised contracts should be reported within a month from being entered into or amended.

In view of the responses received, as well as the proposed approach in the DG ENER's consultancy advice, the Agency recommends that transactions in non-standardised wholesale energy contracts are required to be reported within a maximum period of one month following the execution, modification or cancelation of the transaction. The delay in reporting takes into account the current level of standardisation of such contracts and reduces the administrative burden for market participants to report such information. Any further delay in reporting would undermine effective monitoring of wholesale energy markets.

2.2.5 Avoidance of double reporting obligations for derivatives

Overview

The public consultation paper suggested a close cooperation between ACER and ESMA to ensure avoidance of double reporting under REMIT and EU financial market legislation, in particular under EMIR.

The majority of respondents supported ACER's general approach of avoiding double reporting in view of developments in EU financial markets and encourages a strong coordination among the competent authorities involved in data collection, monitoring and reporting on physical and financial products. Several respondents stated that this will require full alignment between ACER and ESMA technical standards, including the use of same definitions, common format and content of reporting, as well as common ID for market participants. Joint workshops with relevant experts were suggested to further develop a common approach.

In view of the responses received, the general approach indicated in the public consultation document was maintained. The Agency will continue to further cooperate closely with ESMA on data reporting.

Scope of data reporting under REMIT

One respondent stated that data reporting under REMIT should not be more extensive than under EMIR and other relevant financial regulation. The Agency agrees insofar as the burden for market participants should be minimised, as costs will significantly dilute the benefits that REMIT is meant to provide to the market in terms of increased confidence and integrity. However, comprehensive reporting of all relevant information from the on- and off-exchange trading is the only way to effectively trace abusive behaviour and thus to create transparent and fair markets. The scope of REMIT should not be compared with, and is not dependent on, the scope of other regulations such as EMIR, but the Agency has undertaken efforts to align reporting under REMIT and EMIR as much as possible.

Avoidance of double reporting of derivatives contracts

Overview

Some respondents proposed to further develop the ACER paper as regards the avoidance of double reporting, in particular, concerning derivative contracts which have to be reported under REMIT and EMIR. Some respondents stated that the current proposal seems not sufficient to avoid double reporting, as it would request the market participant to filter the information through different

reporting schemes and report each time the part which is lacking. This is considered a source of excessive administrative work.

The Agency believes that the avoidance of the risk of double reporting is sufficiently addressed in the recommendations, but has undertaken further efforts to align the table of fields in Annex II.2 to the table of fields proposed in the ESMA final report on draft technical standards under EMIR. In any case, trade repositories registered by ESMA under EMIR should be required to report derivatives on behalf of market participants to ensure consistency with reporting under EMIR as much as possible, but also to reduce the administrative burden on market participants.

Trade repositories as RRMs

Some respondents recommended qualifying trade repositories under EMIR as RRMs under REMIT. This complies with the approach indicated in the final recommendations pursuant to which trade repositories registered by ESMA under EMIR should be required to become RRMs under REMIT and report derivatives on behalf of market participants to the Agency in order to ensure consistency with reporting under EMIR as much as possible.

Reporting from trade repositories to both ESMA and ACER

Some respondents stated that data exchange from trade repositories to both ESMA and ACER appear to be inconsistent with the avoidance of double reporting. However, the Agency wishes to highlight that the avoidance of double reporting according to Article 8(3) of REMIT only applies to persons referred to in Article 8(4), points (a) to (d) of REMIT. Since trade repositories are referred to in Article 8(e) of REMIT, the avoidance of double reporting does not apply to them and they are required to report to both ESMA, financial market authorities, and the Agency. This is consistent with Article 81(3)(j) of EMIR pursuant to which trade repositories shall make the necessary information available to the Agency to enable it to fulfil its respective responsibilities and mandate under REMIT. Trade repositories are therefore even obliged to report both to ESMA and ACER.

Review of MiFID

Several respondents suggested that ACER, when considering the issue of the avoidance of double reporting, should take into consideration financial legislation. Several respondents also highlighted that it will be necessary to review the reporting obligation under REMIT once the EMIR and MiFID proposals are finalised, in order to minimise duplicative reporting requirements. The Agency acknowledges the potential need for review due to the MiFID review by recommending that the REMIT implementing acts should be reviewed two years following their entry into force. This approach will be maintained.

Avoidance of double reporting of regulated information

Some respondents stated that double reporting should be avoided also as regards regulated information. As TSO/SSO/LNG operators and NRAs already receive most of the regulated information, it would be convenient to use existing sources to feed the ACER database, in line with REMIT provisions.

The avoidance of the risk of double reporting is solely addressed in Article 8(3) of REMIT in the context of transaction reporting under the EU financial market legislation, not in Article 8(6) of REMIT in the context of reporting of fundamental data. However, the Recommendations take account of existing reporting obligations under Regulations (EC) No 714/2009 and (EC) No 715/2009.

Therefore, ACER recommends that transparency information should be reported according to applicable standards through the existing or currently developed sources for the publication or reporting of such information. Inside information should be reported through the service providers disclosing inside information on behalf of market participants or collecting the data through web feeds from company websites, when defined.

Avoidance of double reporting at national level

A few respondents suggested that double reporting should also be avoided at the national level and they encourage ACER to closely follow the implementation of REMIT at that level to ensure the consistency of the regulatory and legal framework.

REMIT aims at avoiding double reporting of information to be reported according to Article 8(1) of REMIT by mandating the Agency with the task to collect this information. Since the Agency will share the data collected with competent national authorities according to Article 10 of REMIT, there should not be a need to collect information already collected by the Agency another time at national level. The Agency will aim at ensuring, on the basis of Article 16(1) of REMIT, that national regulatory authorities carry out their tasks under REMIT in a coordinated and consistent way also in the context of data collection. However, the Agency has no powers to influence national legislation in this respect. In any case, Recital 17 of REMIT clarifies that the collection of data by the Agency is without prejudice to the right of national authorities to collect additional data for national purposes.

2.2.6 Reporting channels

Overview

The public consultation document proposed that at least the entities listed in Article 8(4)(a) to (e) of REMIT, excluding competent financial market authorities, could apply to become RRMs under REMIT to report transactions on behalf of market participants. Most of respondents agreed with the proposed approach concerning reporting channels. However, several respondents requested additional clarification on the organisational requirements for RRMs and on data security standards. Moreover, expectations on the period necessary to implement organisational requirements differed significantly among respondents. The Agency has maintained its proposed approach, but will provide further clarification on reporting channels in the near future.

Eligibility to become a RRM

Several respondents highlighted that market participants should be allowed to report their transactional data directly to ACER. A few respondents argued that ACER should allow the lead company of a company group (or a designated company of the group) to send the information on behalf of the other companies of the group and, by doing so, to exonerate the latter from the reporting obligation. Several respondents highlighted the importance of allowing market participants to choose their reporting channels. Both will be possible as the concept of RRMs includes the possibility for market participants to become RRMs themselves. This also applies to lead or holding companies of a company group. Market participants will have a choice to decide which RRM to use for the reporting of information to the Agency.

Registration of RRMs

In general, respondents stressed that the registration of RRMs, especially third party RRMs, should be mandatory, as a voluntary registration offers no safeguard to market participants and creates two

classes of RRMs. Several respondents proposed to establish requirements for non-third party RRMs less tight than requirements for RRMs working as service providers for third parties. These requirements should mainly be focused on establishing and confirming compliance with ACER's electronic communication protocols and data standards. A few respondents argued that market participants reporting directly to ACER should not be required to register as an RRM. Several respondents supported the establishment of a public register on ACER's website of approved RRMs so that market participants choosing to outsource reporting can be assured that the relevant RRM has been approved by ACER. A few respondents suggested keeping the number of RRMs at a reasonable level and to avoid unnecessary, multiple-channel reporting, as this would lead to an increased risk of inaccuracies in the data. Moreover, this would require more resources on supervising data quality and pose obstacles for carrying out efficient investigations.

The Agency has maintained its approach concerning the registration of RRMs and will develop relevant RRM guidelines and consult them in the near future. In this context, the Agency will consider the aforementioned responses received on the public consultation document.

Requirements for RRMs

Several respondents underlined the importance of organisational requirements both for RRMs and for ACER to guarantee security and confidentiality and to avoid unauthorized access to data and leakages to media. The best certification of system quality available should be adopted by RRMs and ACER, as well as strict internal rules ensuring that confidentiality is guaranteed by any employee. For example, it should be forbidden to ACER ex-employees having dealt with confidential information to carry out some activities linked to the energy business for a reasonable period of time. Several respondents proposed to establish requirements for non-third party RRMs less tight than requirements for RRMs working as service providers for third parties. These requirements should mainly be focused on establishing and confirming compliance with ACER's electronic communication protocols and data standards.

The Agency will develop relevant guidelines on RRM requirements and consult them in the near future. In this context, the Agency will consider the aforementioned responses received on the public consultation document.

Transition period

Several respondents estimated that implementation would take one year or more, provided that ACER publishes sufficiently detailed and finalized process, data and IT-related reporting specifications. A few respondents estimated that it would take up to twelve/eighteen months. Some respondents stated that, on basis of the current information, it is not possible to estimate how much time the implementation of organisational requirements for reporting channels will take. The time for implementation will depend on several factors, e.g. the registration procedures, the policies and procedures obligatory for RRMs, the final definition of data, data format and the de minimis exemption. Some respondents suggested to adopt a phased approach and, at the beginning, to establish a trial period to enable all systems and procedures to be fully tested. One respondent argued that there should be a transition period of three years before the reporting obligation becomes mandatory, in order to allow ACER to ensure cohesion with EMIR reporting requirements and to avoid a situation where firms have to undertake duplicative reporting due to incompatible reporting requirements. Another respondent argued that fines or penalties should not be applied during the trial period. A few respondents suggested that reporting obligation should not be in force until all RRMs are ready and registered. Otherwise, market participants would be obliged to report all their transactions directly to ACER and this would imply large burden in terms of IT adaptation for an interim period.

The Agency has considered the phased approach foreseen in ESMA's final report on Draft technical standards under EMIR following to which there should be a phase in per asset class and reporting should start based on the registration of a trade repository with ESMA, with an ultimate reporting deadline by 1 July 2015 to ESMA if there is no trade repository registered for that particular derivate class. However, whilst EMIR allows for such phased approach, REMIT does not seem to allow for such phased approach and instead Article 22, second subparagraph, of REMIT stipulates that Article 8(1), (3), first subparagraph, (4) and (5) of REMIT applies with effect from 6 months after the date on which the Commission adopts the relevant implementing acts referred to in Article 8(2) and (6) of REMIT. It is therefore assumed that the Commission could only apply a phased approach if it adopts separate implementing acts for different classes of wholesale energy products in a phased approach.

Data exchange between ACER and ESMA

A few respondents argued that data exchange between ACER and ESMA should be regulated clearly, in order to allow the entity which generated the data to know relevant data flows between the two Agencies.

ACER and ESMA will cooperate closely concerning the data collection of derivatives to be reported under REMIT, EMIR and MiFID in order to avoid double reporting. Trade repositories under EMIR should report records of transactions in derivatives collected and maintained under EMIR to ACER. Where any of the REMIT data requirements is not met under EMIR or MiFID, trade repositories or other RRMs acting on behalf of market participants, should be required to report this additional information directly to ACER. A MoU between ACER and ESMA will formalise their cooperation.

2.3 Draft recommendations as regards Article 8(5) and (6) of the Regulation

2.3.1 Information to be reported

Overview

According to Article 8(5) of the Regulation, market participants shall provide the Agency and national regulatory authorities with the following information:

- Information related to the capacity and use of facilities for production of electricity or natural gas;
- Information related to storage of electricity or natural gas;
- Information related to consumption of electricity or natural gas;
- Information related to the transmission of electricity or natural gas; and
- Information related to the capacity and use of LNG facilities, including planned or unplanned availability of these facilities,

for the purpose of monitoring trading in wholesale energy markets. The reporting obligations on market participants shall be minimised by collecting the required information or parts thereof from existing sources where possible.

The wording of the information listed in Article 8(5) of the Regulation is identical to the wording of Article 4(1) of the Regulation concerning the inclusion of inside information to be disclosed, but also relates to fundamental data information according to Regulations (EC) No 714/2009 and (EC) No 715/2009, including applicable guidelines and network codes.

Therefore, the public consultation document understood the definition of "information" according to Article 8(5) and (6) of the Regulation as "regulated information". The concept of "regulated information" is used under the Transparency Directive (Directive 2004/109/EC, currently under review) for information which is required to be disclosed under that Directive, under Article 6 of MAD or under the laws, regulations or administrative provisions of a Member State adopted under Article 3(1) of the Transparency Directive. It was proposed to use a similar concept also under REMIT, so that information to be reported under Article 8(5) and (6) of the Regulation would include information to be disclosed under Article 4(1) of REMIT or under Regulations (EC) No 714/2009 and (EC) No 715/2009, including applicable guidelines and network codes.

Respondents requested further clarification of the definitions of inside / transparency / regulated information and their interaction with transparency guidelines. They considered that fundamental data information and inside information should be dealt with separately. In general, respondents insisted on minimising the reporting obligations and maximising the use of existing sources (no double reporting). They stressed that the Agency should keep in mind the costs for market participants related to these procedures and the overall benefit. For the inside information, there is a general positive sentiment on RISs and platforms, except for some market participants who have already set up their own disclosing system. However, respondents stressed that any such services need to be set up quickly as REMIT is already into force.

The Agency has further clarified its approach concerning the reporting of regulated information in the final recommendations.

Purpose of reporting of both inside information and transparency information

Several respondents argued that the proposed reporting of inside information to ACER goes beyond the scope of REMIT, and did therefore not support the approach of reporting inside information. Reporting of inside information, on top of disclosure, would imply significant additional costs for market participants. Reporting of inside information should only be required once more automated and centralised platforms for publication of inside information are in place.

The Agency believes that reporting of both inside information and transparency information is required under REMIT. It is a prerequisite for the monitoring of insider trading that regulators have all inside information disclosed by market participants according to Article 4(1) of REMIT. This approach is based on the experiences with the reporting of inside information under the EU Financial market legislation according to the Transparency Directive. The main advantages of this approach are the following: regulators would receive not only the delayed inside information (which has to be reported to ACER and NRAs according to Article 4(2) of REMIT) or the information on unplanned outages under the circumstances described in Article 3(4)(b) of REMIT), but all inside information published by market participants and, consequently, regulators would not need to search for the inside information on the market participants' websites in case they choose to proceed by using their own website for information disclosure; ACER and NRAs could orient the way this information is reported, i.e. by the RISs – Regulated Information Services, which can also provide market participants for the inside information publication service.

In addition, for the monitoring of both insider trading and market manipulation, regulators will require all information according to Regulations (EC) No 714/2009 and (EC) No 715/2009.

Inside information and transparency information have to be distinguished for the following reasons: The concept of inside information is defined in Article 4(1) of REMIT. The concept of "transparency information" contains all data that shall be published under the transparency obligation of Regulations (EC) No 714/2009 and (EC) No 715/2009, including applicable guidelines and network codes.

The concept of "inside information" comprises on the one hand only that transparency information that is likely to have a significant effect on the prices of wholesale energy products, but on the other hand goes even beyond and also includes other information that a reasonable market participant would be likely to use as part of the basis of its decision to enter into a transaction relating to, or to issue an order to trade in, a wholesale energy product, insofar as this information is likely to have a significant effect on the prices of wholesale energy products.

This means that transparency information is periodic, structured data subject to Regulations (EC) No 714/2009 and (EC) No 715/2009 including applicable guidelines and network codes.

Inside information can be considered as an ad hoc, structured data that is likely to have a significant effect on price that has not been disclosed to the market. Such a requirement goes beyond the periodic and regular publication of data under the above regulations and may highlight or pre-empt certain transparency data.

Specifically, inside information may relate to any item of information that is within the scope of the above regulations as well as the following further information insofar as this information is likely to have a significant effect on the prices of wholesale energy products:

- Information relating to the capacity and use of facilities for production of electricity or natural gas, including planned and unplanned unavailability of these facilities;
- Information relating to the capacity and use of facilities for storage of electricity or natural gas, including planned and unplanned availability of these facilities;
- Information relating to the capacity and use of facilities for consumption of electricity or natural gas, including planned and unplanned unavailability of these facilities;
- Information relating to the capacity and use of facilities for transmission, including planned or unplanned unavailability of these facilities;
- Information relating to the capacity and use of LNG facilities, including planned and unplanned unavailability of these facilities;
- Information required to be issued in accordance with legal or regulatory provisions at Union, or National level;
- Information required to be issued in accordance with Market Rules;
- Information required to be issued in accordance with Contracts;
- Information required to be issued in accordance with Customs on the market;
- Other information that a reasonable market participant would be likely to use as part of the basis of its decision to enter into a transaction relating to, or to issue an order to trade in, a wholesale energy product.

The notion of "inside information" will likely be subject to interpretation in national and European courts and has to take into account rulings on the definition of inside information under MAD insofar as the same concepts are applied under that Directive and under REMIT.

This is why both inside information and transparency information needs to be reported for monitoring of market abuse under REMIT and is considered to be covered by Article 8(5) of REMIT.

Information needs to be received as individual non-anonymous or non-aggregated data as otherwise any information received may not be linked to the relevant records of transactions of the market participants.

On the basis of experiences from financial regulators on the implementation of Directive 2004/109/EC concerning the disclosure of inside information according to the Market Abuse Directive, it could be an option that inside information is reported to the Agency through Regulated Information Services (RIS) registered by the Agency, in particular transparency platforms that may offer market participants to publish inside information.

The Agency believes that reporting through RIS would significantly reduce costs of reporting for market participants and facilitate data collection by the Agency. At the same time, RIS may serve as platforms for the disclosure of inside information according to Article 4(1) of the Regulation if they fulfil applicable technical preconditions on data security and operational reliability. Thus market participants would only have to report the regulated information once to the RIS platform that would both disclose the information publicly and report it to the Agency. The concept of the disclosure of inside information through RIS platforms is also considered in the 2nd edition of the ACER Guidance on the application of REMIT.

The Agency has therefore maintained its approach presented in the public consultation.

Reporting of inside information through RIS

In general, respondents welcomed the idea of reporting through platforms and RISs, but also highlighted that coordination is needed as reporting channels already exist. Some respondents suggested that ACER initiates and coordinates an integration and simplification project across all current channels, so that every single piece of reportable data gets reported only once by the market participant to a single data receptor. Most respondents agreed with reporting through platforms and RISs but insisted that third parties should not be mandatory and that they should be able to report directly to ACER. Most respondents insisted that ACER should state that the reporting obligation is considered fulfilled as soon as the info has been transmitted and that the market participants are not liable for service failures afterwards.

The Agency believes that inside information should be reported through RISs. Where platforms for the disclosure of inside information already exist, and such platforms would fulfil applicable technical preconditions on data security and operational reliability, the existing platforms, besides disclosing such information to the public on behalf of the market participants concerned, could also be used for reporting inside information to the Agency. In that case, market participants would only have to report the inside information once to the RIS platform that would both disclose the information publicly and report it to the Agency. The Agency has clarified its understanding of an effective disclosure of inside information in its 2nd edition of ACER Guidance on the application of REMIT.

Reporting of transparency information through transparency platforms

In general, respondents highlighted that transparency information is already published on an aggregated basis according to Regulations (EC) No 714/2009 and (EC) No 715/2009, and that ACER should not start a new process in parallel to those requirements. Several respondents therefore proposed that the Agency collect the relevant data from existing sources. An obligation on market participants to forward this information to NRAs and ACER constitutes double reporting. Some respondents also highlighted that many market participants have already spent money and resources to comply with REMIT in their own way since December 2011. Many respondents were in favour of a unique European platform for electricity and another one for gas whilst some would prefer national platforms. Some respondents insisted on coordination with the transparency work (e.g. the future ENTSOE platform EMFIP).

The Agency considers that transparency information should be reported according to applicable standards through the existing or currently developed sources for the publication or reporting of such information, i.e. through ENTSO-E or ENTSO-G platforms as much as possible. The Agency acknowledges that such unique European platforms have their merits. However, setting up and further developing European platforms for electricity and gas will require significant resources and will take time, whilst REMIT obligations already apply as regards disclosure of inside information and possibly may already apply as regards reporting such data. Accordingly, at least at an initial stage, the Agency considers reporting through national or regional platforms more likely.

2.3.2 Uniform rules on the reporting of information

Overview

According to Article 8(6)(a) of the Regulation, the Commission shall, by means of implementing acts, adopt uniform rules on the reporting of information to be provided in accordance with Article 8(5) of the Regulation and on appropriate thresholds for such reporting where appropriate.

De minimis threshold

Many respondents suggested a threshold in line with existing thresholds in transparency rules (e.g. 100 MW in electricity) and many respondents argued that a threshold should be defined in gas as well. Some respondents were of the opinion that there should be no threshold at all. One industrial respondent wanted its sector to be exempt from reporting obligations. One market participant recommended that the NRAs choose the thresholds. A few respondents recommended that thresholds should be different for inside information and for transparency information as the respective aims for disclosing/collecting data are very different.

The Agency had the impression that the responses received on the threshold for reporting sometimes confused this de minimis threshold with a threshold for disclosure of inside information. Concerning the threshold for disclosure of inside information, the Agency indicated in its 2nd edition of ACER Guidance on the application of REMIT that for electricity, an indicative 100 MW threshold may apply, whilst for gas, NRAs may define indicative thresholds for relevant natural gas markets at regional or national level. Concerning transparency information according to Regulations (EC) No 714/2009 and (EC) No 715/2009, the Agency considers that no separate threshold for the reporting of such information needs to be applied.

Format of reporting

Some respondents highlighted ACER's role in setting a single standard format for inside information, while one respondent argued that there should not be a standard format for inside information, as this may exclude certain events.

The Agency has provided best practice examples for disclosure of inside information in its 2nd edition of ACER Guidance on the application of REMIT, which may also be considered as best practice examples for the reporting of such information to the Agency. The format of reporting will be further addressed in the envisaged RIS guidelines.

2.3.3 Timing and form in which information is to be reported

Overview

According to Article 8(6)(b) of the Regulation, the Commission shall, by means of implementing acts, lay down the timing and form in which that information is to be reported. The Agency, in its public consultation document, had proposed that regulated information should be reported to the Agency in electronic form at the same time as it is disclosed to the public.

Form of reporting

All respondents supported an electronic format with high security standards. This approach has therefore been maintained.

In general, respondents stressed that the Agency should collect the information directly from the platforms, as there could be delays if multiple channels are imposed. The Agency's aim to collect information solely through RIS and transparency platforms has therefore been maintained in the final recommendations.

Timing of reporting

Several respondents were in favour of a two-day delay for the reporting of regulated information rather than at the same time as it is disclosed to the public. However, the simultaneous reporting of regulated information and records of transactions will be necessary to ensure an effective and efficient market monitoring of wholesale energy markets. The Agency has therefore harmonised the timing of reporting to a one-day delay instead of reporting of regulated information at the same time as its disclosure. The final recommendations hence propose that the implementing should foresee reporting of regulated information through RISs or transparency platforms within one working day following the event.

Annex 1 – ACER

The Agency for the Cooperation of Energy Regulators (ACER) is a European Union body established in 2010. ACER's mission is to assist National Regulatory Authorities in exercising, at Community level, the regulatory tasks that they perform in the Member States and, where necessary, to coordinate their action.

The work of ACER is structured according to a number of working groups, composed of ACER staff members and staff members of the national energy regulatory authorities. These working groups deal with different topics, according to their members' fields of expertise.

This report was prepared by the ACER Market Monitoring and Governance Task Force (MMG TF) of the ACER Market Integrity and Transparency Working Group (AMIT WG).

Annex 2 – List of Respondents

No.	Respondent	Type	Country
1.	50hertz	TSO	Germany
	Amprion	TSO	Germany
	Tennet	TSO	Germany
	Transnet BW	TSO	Germany
2.	A2A Trading	Market participant	UK
3.	aet	Market participant	Switzerland
4.	AIGET	Industry association	Slovenia
5.	BDEW	Industry association	Germany
6.	ECT-Group (represented by Becker/Büttner/Held)	Market participant	Germany
7.	BG Group	Market participant	UK
8.	BP Gas Marketing Ltd	Market participant	UK
9.	Bryok	Advisor in financial markets and energy markets	UK
10.	Bundeskartellamt	National competition authority	Germany
11.	Centrica Energy Limited	Market participant	UK
12.	Czech Coal	Market participant	Czech Republic
13.	EDF Group	Market participant	France
14.	EFET	Industry association	EU
15.	Electricity Association of Ireland	Industry association	Ireland
16.	ELEXON Ltd	Service provider	UK
17.	EnBW Trading GmbH	Market participant	Germany
18.	Enel	Market participant	Italy
19.	Energy UK	Industry association	UK
20.	ENTSO-G	Industry association	EU
21.	ESMA	Financial Authority	EU
22.	Eurelectric	Industry association	EU
23.	Eurogas	Industry association	EU
24.	Europex	Industry association	EU
25.	Eustream	TSO	Slovakia
26.	EWE AG	Market participant	Germany
	Mainova AG	Market participant	Germany
	Syneco Trading GmbH	Market participant	Germany
	Bayerngas GmbH	Market participant	Germany
	Stadtwerke München GmbH	Market participant	Germany
27.	ExxonMobil International Limited	Market participant	UK
28.	Fortum	Market participant	Finland
29.	FSA	National Financial Regulatory Authority	UK
30.	GDF Suez SA	Market participant	France
31.	GEODE	Industry association	EU
32.	GFMA	Industry association	Global

33.	GIE	Industry association	EU
34.	ICAP	Broker	UK
35.	IWEA Irish Wind Energy Association	Industry association	Ireland
36.	LEBA	Broker association	UK
37.	MAVIR	TSO	Hungary
38.	NAFTA	SSO	Slovakia
39.	National Grid	TSO	UK
40.	NOGEPA	Industry association	Netherlands
41.	Oesterreichs Energie	Industry association	Austria
42.	PGNiG	Market participant	Poland
43.	POZAGAS	SSO	Slovakia
44.	Shell Energy Europe Ltd.	Market participant	UK
45.	SPP Storage	SSO	Czech Republic
46.	Stadtwerke Gütersloh	Market participant	Germany
47.	Statoil	Market participant	Belgium
48.	Sungard	Service provider	UK
49.	swisselectric	Industry association	Switzerland
50.	Trayport	Service provider	UK
51.	Verbundnetz Gas AG	Market participant	Germany
52.	Veriniging Energie-Nederland	Industry association	Netherlands

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