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Response to:
Stakeholder Consultation on the Implementation of Data and Transaction Reporting Framework for Wholesale Energy Markets

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I. Introduction

We welcome the opportunity to take part in the consultation on the *Implementation of Data and Transaction Reporting Framework for Wholesale Energy Markets*. As many of the issues have been already consulted on before, the present response takes explicitly reference to our answers to the ACER consultations on *transaction reporting* as well as on the ACER *Recommendations to the European Commission as regards the records of wholesale energy market transactions according to REMIT.*

EUROPEX - representing the interests of exchange-based wholesale electricity, gas and environmental markets - is adamant about being proactive and cooperative throughout the REMIT implementation process. This also involves the provision of both transaction and fundamental data on behalf of third parties, meaning market participants.

Generally it is important to note that there are different ways and models how „Energy Exchanges" are organized (e.g. as Regulated Markets, Market Trading Facilities or also Market Organisers). The term „Energy Exchange" does not prejudge any specif set-up.

One of our major concerns is that the European Commission seems to be under the impression that Energy Exchanges[1] can be considered as *market participants* under REMIT[2]. We do not agree with this interpretation as it would clearly create a conflict of interest between the role and responsibility of Energy Exchanges as entities that bring together market participants' buying and selling interests. Hence, it is of utmost importance that Energy Exchanges are considered to be organised market places under REMIT only and NOT as market participants. The notion of being a market participant would have considerable and unintended consequences for the status of Energy Exchanges. A EUROPEX position paper on this issue has already been sent to DG ENER. (Please find it attached or here.)

A second important issue for EUROPEX is that we consider it as absolutely necessary that from the start of the full implementation of REMIT all contracts and orders are collected from all market places – be it exchanges or brokers. Otherwise, there is a sincere threat of regulatory arbitrage and infringement with regard to the level playing field between exchanges and brokers.

[2] 1 E.g. Question 8: "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?"

Related EUROPEX Positions / Responses:

1. Position paper: Clarification on the role and responsibilities of organised market places vis-à-vis market participants in general and under REMIT in particular
2. Response to the ACER public consultation on "Recommendations to the Commission as regards the records of wholesale energy market transactions, including orders to trade, and as regards the implementing acts according to Article 8 of Regulation (EU) No 1227/2011"
   &
   Response to the discussion paper by ACER on the "Disclosure of inside information according to Article 4 (1) of Regulation 1227/2011 through platforms"
3. Response to the ACER consultation on the "REMIT Registration Format", 21 May 2012
4. Response to the PwC/Ponton question list on "REMIT - Technical Advice for setting up a data reporting framework", 20 April 2012
5. Response to the DG ENER public consultation on "Enhanced data transparency on electricity market fundamentals", 16 September 2011
6. Response to the ERGEG public consultation on a "Draft advice on the regulatory oversight of Energy Exchanges", 29 July 2011

All responses can be found on the EUROPEX website: http://www.EUROPEX.org/index/pages/id_page-43/lang-en/

II. Answers to Questions

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?

1. Market Participants under Article 8(1) of REMIT have an obligation to report, and can decide to fulfil this reporting obligation via intermediaries or third parties. Yet, we would like to emphasise that the transaction reporting itself is for ACER to efficiently monitor the market at an unprecedented EU-level for the purpose of detecting market abuse on wholesale energy markets.

2. Hence, it is of upmost importance that market participants, who ultimately have the responsibility to report, should develop the appropriate technical capacity to do so. EUROPEX understands that "The Commission wants to ensure that the implementation

of REMIT does not impose unnecessary burdens on market participants". Nevertheless, REMIT's purpose is to promote transparency of wholesale energy markets regardless of the burden it puts on market participants.

3. Furthermore, from a market surveillance perspective and with regard to the third pillar of REMIT - "Investigation and Enforcement", the ability of a market participant to promptly and swiftly provide information to a regulator is based on its technical reporting capacity from the start of the implementation of REMIT. Therefore, the fact that Energy Exchanges or other organised market places / third parties may report on behalf of these entities must be irrespective of the market participant's own capacity to report.

4. The verification mechanisms that are still to be developed should be based on best practices from existing reporting architecture of NRAs that currently collect and analyse data from market participants and intermediaries on wholesale energy markets.

5. EUROPEX welcomes the idea to establish Registered Reporting Mechanisms (RRMs). This is in line with the response we gave to the PWC/Ponton consultation which concluded that "one key element of transaction reporting is that a certain validation scheme is defined which the applying company has to pass in order to be eligible to report, containing e.g. security standards, IT requirements, etc." RRMs, if they are set up in the right way, will ensure the quality of the data reporting.

6. We generally welcome the proposal that market participants themselves may become RRMs as this reflects the principle of article 8(1) of REMIT. In order to obtain a level-playing field, the requirements of becoming a RRM should be the same, not differentiating, e.g., between organised market places and the reporting by market participants themselves.

7. Organised market places, such as Energy Exchanges, may decide to act as third parties that report on behalf of market participants (in the sense of RRMs as proposed in this consultation). Providing this service and becoming a RRM should always be based on a voluntarily commitment, and should not be made mandatory.

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?

8. First and foremost, due to the complexity and possible implications of the inclusion of specific definitions in the implementing acts, EUROPEX deems a separate public consultation indispensable in order to discuss the various definitions necessary and to thereby further clarify Article 8 of REMIT.

   We agree with the "Recommendation No. 1" by ACER to the extent that the mentioned notions should be defined.

9. Besides ACER also ESMA – following the adoption of EMIR by the Council of the EU and the European Parliament – is seeking views by stakeholders on the proposed technical standards. EUROPEX is worried that the two approaches to reporting obligations might negatively interfere with each other. One option in order to ensure both highly efficient and harmonised standards for EMIR and REMIT would be to develop a benchmark scheme. Another approach could be that ACER and ESMA commit joint public consultations in relation to the elements of reporting on wholesale energy products.

10. It has to be clearly defined when the reporting obligation is fulfilled, and how this is confirmed. For the case that the collected data fall both under REMIT and under EMIR reporting obligations, the receiving authority – be it ACER or ESMA - should formally acknowledge upon the market participant that the reported data fulfil the obligations both in relation to EMIR and REMIT. This is necessary to provide legal certainty for the involved parties and to avoid any ambiguity.

11. The issue of IT security should be very high up on the agenda. The planned data bases will contain an enormous amount of highly sensitive trading and fundamental data. The risk that due to security gaps these data could get lost, stolen or published in an unauthorised manner should be under all circumstances excluded. The more interfaces exist the higher is the risk. For this reason, it is necessary to ensure that RRMs are subject to strict operational, record-keeping and data management requirements and IT-standards.

12. We generally welcome the idea by ACER to establish Registered Reporting Mechanisms – RRMs. Though, further clarification is needed. This concerns e.g., the role of trade repositories in relation to RRMs.

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?

13. Yes. Concerning standardised products traded on organised market places there should be no de minimis threshold.

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?

14. Under no circumstances such a list should be used to exercise any form of „product control" (cf. our answer on product taxonomy). Market places should be free to develop new products without reluctance that they are named on a "white list".

    We welcome that ACER clearly states in its recommendations on transaction reporting that "under no circumstances [ACER would] have a possibility to reject any contract from being introduced by an organised market place."

15. We support ACER's recommendation that the notions of "energy commodity contract", "standardised contract" and "non-standardised contract" will be specified in the implementing acts.

5. In relation to transactions not covered by the "white list",

16. See Question 4

a. Do you agree that these transactions should be subject to reduced "short form" reporting requirements?

17. Records of transactions in non-standardised energy commodity contracts should be reported at the confirmation stage. However, if transactions in non-standardised contracts take a standardised form, they should be reported as standardised transactions.

18. In general, non-standardised contracts should be reported in the same way as standardised contracts to avoid regulatory arbitrage.

b. Should these transactions be reported at a defined interval or only upon request of ACER?

19. Also to avoid regulatory arbitrage standardised and non-standardised contracts should fall under the same reporting regime.

20. Sending a report at a defined interval is the best and only suitable option to enable a valuable analysis.

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?

21. No answer

6. Do you agree that the definition of wholesale energy products extends to contracts relating to LNG and storage, including landing and storage capacity?

22. No answer.

7. Do you agree that generator connection agreements are normally a fundamental data item and not a contract relating to transmission?

23. No answer.

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?

24. As stated in our position paper to the Commission and throughout our response to the present public consultation, organised market places cannot be considered as market participants.

25. A reporting obligation for organised market places is in contradiction with the reporting schemes provided by Article 8 under REMIT in which the market participant is ultimately responsible for the transaction reporting. Any deviation of this responsibility would jeopardise the correct implementation of REMIT itself.

26. Nevertheless, from a pragmatic point of view, we recognise that it is in the interest of ACER to have a regular exchange of information with organised market places.

Paragraph 2 of Article 8(3) points in this direction: "*Without prejudice to the first subparagraph of this paragraph, the implementing acts referred to in paragraph 2 may allow organised markets and trade matching or trade reporting systems to provide the Agency with records of wholesale energy transactions*".

EUROPEX would like to emphasise that REMIT via Article 8(3) does not require Energy Exchanges to report data in their possession. This also implies that there is no legal obligation to provide this data to ACER.

Some members of EUROPEX, however, are open to discuss the possibility to provide transactions and orders to trade effectuated on Energy Exchanges to the extent that is legally possible within REMIT.

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?

27. As stated in our position paper to the Commission and throughout the present public consultation, organised market places cannot be considered as market participants.

28. Both parties are responsible to report necessary order and transaction lifecycle information.

29. As mentioned previously the responsibility of reporting transactions shall remain at all times with the market participants according to article 8(1) of REMIT. We therefore are clearly in favour of the proposal that the market participants themselves can also become a RRM and report both standardised and non-standardised contracts ONLY for their own transaction data.

10. Do you agree that daily reporting of transaction is the most appropriate frequency to allow ACER to effectively monitor wholesale energy markets?

30. Yes, daily reporting is the most appropriate frequency to allow ACER to effectively monitor the wholesale energy market.

31. For any substitutable or potentially substitutable product, the reporting frequency should be exactly the same in order to avoid regulatory arbitrage and hence a possible shift in liquidity.

32. Due to the nature of market manipulation and insider trading, all types of transactions are necessary to properly analyse and detect market abuse of the entire wholesale energy market. Moreover, it is essential that all data is obtained at the same time to obtain a complete and comprehensive picture of the respective market.

11. Do you consider it would be possible for market participants to report their transactions on a daily basis?

33. As an association representing Energy Exchanges that have in place market surveillance offices which regularly request information from their members we assert that it is possible for market participants to report their transactions on a daily basis.

34. The reporting of transactions should be the same across the board to effectively monitor the markets and to avoid regulatory arbitrage.

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?

35. As stated in our position paper to the Commission and throughout the present public consultation, organised market places cannot be considered as market participants.

36. We do not agree that only orders from organised market places should be collected, neither initially nor in the long run. We consider it to be absolutely crucial that from the start all contracts as well as orders are collected. There should be no different treatment of contracts/orders – stemming from regulated markets, MTFs or OTFs, may they originate from exchanges or brokers.

In consequence, the different treatment of trading platforms could lead to regulatory arbitrage, and may thus have an effect on the market structure and market practices (e.g. a trading participant, who intends to mislead the market through placing orders is likely to do so through the platform where these orders are not reported). This will definitely not help to achieve more integrity and transparency in the markets.

37. In this context, it should be noted that the market share of brokered platforms in energy derivative markets is estimated to be significantly higher than the ones by exchanges..

13. For which stages in the lifecycle do you consider that it is necessary to collect transaction data?

38. The whole transaction lifecycle is relevant for gaining a comprehensive market understanding, and to effectively trace abusive behaviour. This includes orders to trade, unmatched orders, changed and deleted orders.

39. Hence, the same rules should apply to OTC and organised market places to the extent that it does not create regulatory arbitrage.

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

40. EUROPEX perceives the development of a “product taxonomy” as not suitable because of the potential of a certain “product control”, meaning that the set-up of new products by market places would be under the precondition of fulfilling certain requirements. Hence, we pledge to act very prudently in this context.

41. We welcome the fact that ACER clearly stated in its evaluation of responses to the consultation on transaction reporting that it is not the goal to have any product control.

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?

42. Uniform European platforms may have their merits. However, we agree with ACER – as indicated in its evaluation of responses to the consultation on transaction reporting – that setting up and further developing uniform European platforms for electricity and gas would both require significant resources and investments and would also take considerable time. In so far, we strongly believe that reporting through national or regional platforms is more likely – at an initial stage and beyond.

43. The proposal by ACER of creating Regulated Information Services ("regulated" in this context takes reference to information) – so called RIS – seems to be a pragmatic approach which we clearly support. Platforms which already exist today can fulfil this task.

44. We perceive the obligation of ENTSO-E and the national Transmission System Operators (TSOs) to collect and publish fundamental data by power plant operators under the new transparency regulation very critical. EUROPEX – as already stated many times in the past – disapproves this affirmation and further increase of a great conflict of interest which already exists today. Due to the fact that TSOs are also in some Member States active energy trading participants for, e.g., procuring balancing resources / selling renewable energy, they cannot be considered as information neutral parties with regard to the publication of fundamental data of power plant operators (or gas related information).

45. In order to ensure a level playing field between market participants an exclusive access to fundamental data shall not be granted to any TSO. In this context, regional neutral platform operators – such as Energy Exchanges - are well suited to avoid any conflicts of interest and should therefore play a pivotal role in setting up further transparency infrastructure.

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?

46. The focus should be on already existing infrastructure. Transparency Platforms (e.g. those run by Energy Exchanges) foresee the collection and publication of information in the gas sector, and are well suited to become reporting channels under REMIT.

47. Cf. answer to Question 15